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# “STRIKE TWO, YOU’RE OUT!” THE NEED FOR A MORE STRINGENT DRUG POLICY IN MAJOR LEAGUE BASEBALL

ZACKARY KESSINGER\*

## INTRODUCTION

As the song goes, “for it’s one, two, three strikes, you’re out, at the old ball game.”<sup>1</sup> Major League Baseball (“MLB”), one of the “Big Four” professional sports leagues in the United States and Canada,<sup>2</sup> has experienced significant growth over the years in attendance and annual revenue. For example, total MLB ballpark attendance increased from over forty-six million fans in 1985,<sup>3</sup> to over seventy-three million fans in 2015,<sup>4</sup> with league revenues approaching \$9.5 billion entering the 2016 season.<sup>5</sup> However, as MLB’s popularity has grown, so too has the number of players using performance-enhancing drugs (“PEDs”)<sup>6</sup> like anabolic steroids and human growth hormone (“hGH”). The notorious “Steroid Era” of baseball, which began in the 1980s, resulted in “increased offensive output throughout the game” where “a number of players were believed to have used [PEDs].”<sup>7</sup>

This Note argues that MLB should adopt a more stringent drug policy than the one currently set forth in MLB’s Joint Drug Prevention and Treatment Program<sup>8</sup> for two reasons. First, the increasing prevalence of PED use among MLB players threatens baseball’s integrity. Second, professional players’ PED use may encourage aspiring young athletes to abuse PEDs, which may harm their long-term health.

Part I provides a historical overview of the development of MLB’s

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<sup>1</sup> JACK NORWORTH, *TAKE ME OUT TO THE BALL GAME* (York Music Co. 1908).

<sup>2</sup> The “Big Four” is comprised of Major League Baseball (MLB), the National Football League (NFL), the National Basketball Association (NBA), and the National Hockey League (NHL).

<sup>3</sup> *1980-1989 Ballpark Attendance*, BALLPARKSOFBASEBALL.COM, <http://ballparksofbaseball.com/1980-89attendance.htm> (last visited Oct. 18, 2016).

<sup>4</sup> Maury Brown, *MLB Sees Nearly 73.8 Million in Attendance for 2015, Seventh-Highest All-Time*, FORBES (Dec. 4, 2015, 4:40 PM), <https://www.forbes.com/sites/maurybrown/2015/12/04/mlb-sees-record-revenues-for-2015-up-500-million-and-approaching-9-5-billion/#1afc282e3e0e>.

<sup>5</sup> Maury Brown, *MLB Sees Record Revenues for 2015, Up \$500 Million and Approaching \$9.5 Billion*, FORBES, <http://www.forbes.com/sites/maurybrown/2015/12/04/mlb-sees-record-revenues-for-2015-up-500-million-and-approaching-9-5-billion/#61f90eb52307> (last visited Oct. 18, 2016).

<sup>6</sup> PEDs are also commonly referred to as “performance-enhancing substances,” or “PES.” For the sake of clarity, this Note will refer to such banned substances as “PEDs.”

<sup>7</sup> *The Steroids Era*, ESPN (Dec. 5, 2012, 4:23 PM), [http://www.espn.com/mlb/topics/\\_/page/the-steroids-era](http://www.espn.com/mlb/topics/_/page/the-steroids-era).

<sup>8</sup> *Major League Baseball’s Joint Drug Prevention and Treatment Program*, MLBPLAYERS.COM, <http://www.mlbplayers.com/pdf9/5450924.pdf> (last visited Jan. 11, 2018).

drug policy and discusses the investigative “Mitchell Report” of 2007.<sup>9</sup> Part II discusses examples of notable former and current MLB players who were accused of using PEDs during their professional careers, including references to such players’ court decisions, complaints, indictments, plea bargains, and testimonies before congressional committees. Part III examines statistical information gathered from surveys conducted regarding the prevalence of adolescents’ use of PEDs in the United States. Part IV reviews the retributive and consequentialist theories of punishment and provides a framework for analyzing different philosophical methodologies concerning punishment, including Kantianism and utilitarianism. Part V proposes a “two-strike” solution for developing a more stringent drug policy and applies these philosophical approaches to MLB players’ use of PEDs. Finally, Part VI identifies and addresses potential challenges and issues that may arise from the proposed solution.

#### I. MLB’S DRUG POLICY CONTINUES TO EVOLVE OVER TIME

In 1984, MLB Commissioner Bowie Kuhn responded to the surge in PED abuse by urging “stronger regulation of drug use in baseball.”<sup>10</sup> MLB club owners disagreed over whether to “require mandatory drug testing as part of such a program,”<sup>11</sup> whereas the Major League Baseball Players Association (“MLBPA”) opposed such mandatory testing as “degrading to players and a violation of their privacy.”<sup>12</sup> In June 1984, the owners and the MLBPA agreed to a joint drug program that “provided for treatment of players who were found to use, or who had admitted using, certain drugs of abuse.” However, this program did not include steroids or amphetamines on the list of banned substances.<sup>13</sup>

The 1984 joint drug program tested players who “admitted to drug use, and for players for whom there was ‘reason to believe’ that they were using drugs.”<sup>14</sup> Such “reason to believe” testing was allowed if “a three-member panel unanimously determined that testing was warranted” for a player suspected of using drugs.<sup>15</sup> Although players who failed drug tests were not punished under the drug program, they were subject to discipline if they “failed to cooperate under the program.”<sup>16</sup> However, in October 1985, the

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<sup>9</sup> 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*, MLB.COM (2007), <http://files.mlb.com/mitchrpt.pdf>. This document is hereinafter referred to as the “Mitchell Report.”

<sup>10</sup> *Id.* at 34.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (quoting then-MLBPA Executive Director, Don Fehr).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 34-35.

owners terminated the joint drug program, which was “criticized by some as insufficiently rigorous” and “largely ignored,” since only three players had submitted to the program’s treatment and rehabilitation services.<sup>17</sup>

In 1994, during collective bargaining discussions between MLB and the MLBPA that included a lengthy strike, then-Commissioner Allan “Bud” Selig proposed “to [the MLBPA] a joint drug program that included steroids as prohibited substances.”<sup>18</sup> However, the MLBPA was “fiercely and steadfastly opposed to any form of drug testing,”<sup>19</sup> due to concerns about respecting players’ “legitimate privacy and due process rights.”<sup>20</sup> Consequently, a lack of any drug prevention policy or testing program in MLB contributed to players’ increased use of PEDs leading up to the next round of collective bargaining in 2002.<sup>21</sup>

In August 2002, owners and the MLBPA announced a new collective bargaining agreement that “include[d] a joint drug program for the first time since October 1985.”<sup>22</sup> The program called for “survey urine test[s] for banned steroids in 2003 and 2004, and if more than [five] percent of tests [were] positive [following] [one] year [of testing],”<sup>23</sup> then “tougher testing would be implemented with penalties ranging from counseling for a [first-time] offense, to a [maximum] one-year suspension for a fifth violation.”<sup>24</sup> However, the testing would be dropped if “less than [two and a half] percent [of players] test[ed] positive in two consecutive years.”<sup>25</sup>

In November 2003, MLB revealed that between five and seven percent of 1,438 tests, which were anonymously conducted on a random sample of players from each club’s forty-man roster during the 2003 season, returned

<sup>17</sup> *Id.* at 36.

<sup>18</sup> *The Mitchell Report: The Illegal Use of Steroids in Major League Baseball: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 101 (2008) (Statement of Allan H. Selig, Comm’r, Major League Baseball).

<sup>19</sup> *Id.*

<sup>20</sup> *The Mitchell Report: The Illegal Use of Steroids in Major League Baseball: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 110th Cong. 24 (2008) (Statement of Hon. George J. Mitchell, former U.S. Sen.).

<sup>21</sup> Selig, *supra* note 18, at 101. It is important to note that MLB’s drug policy has “prohibited the use of any prescription medication without a valid prescription” since 1971. See *The Mitchell Report*, *supra* note 9, at SR-10 to -11. Although steroids were included on MLB’s banned substances list since 1971, players were not disciplined for steroid use until the 2002 collective bargaining agreement. Evidence suggested that players were obtaining PEDs through so-called “rejuvenation” or “anti-aging” centers using prescriptions with “doubtful validity” from physicians who failed to have face-to-face interactions with their player customers. See *id.* at SR-2 to -3, -36.

<sup>22</sup> *A Timeline of MLB’s Drug-testing Rules*, USA TODAY (Mar. 28, 2014, 4:55 PM), <http://www.usatoday.com/story/sports/mlb/2014/03/28/a-timeline-of-mlbs-drug-testing-rules/7024351>.

<sup>23</sup> *Id.*

<sup>24</sup> See ESPN, *supra* note 7.

<sup>25</sup> *Id.*

positive results.<sup>26</sup> Because the five percent threshold had been surpassed, Commissioner Selig announced that “mandatory testing for steroids use would begin in the spring of 2004.”<sup>27</sup> Additionally, MLB announced the following penalties for subsequent drug offenders: a first violation would result in treatment; a second violation would result in a fifteen-day suspension without pay or a fine of up to \$10,000; a third violation would result in a twenty-five-day suspension or a fine of up to \$25,000; a fourth violation would result in a fifty-day suspension or a fine of up to \$50,000; and a fifth violation would result in a one-year suspension or a fine of up to \$100,000.<sup>28</sup> Under the 2004 policy, “[a]ll major league players would be subject to two tests (without prior notice)...[consisting of] an initial test, and a follow-up test five to seven days later,”<sup>29</sup> as hGH can remain in one’s body for as little as a few hours, while steroids can remain in the body for up to several weeks.

Faced with congressional pressure to intensify the drug program, in January 2005, MLB and the MLBPA added seventeen new banned substances to the drug program, including hGH.<sup>30</sup> They also announced more stringent punishments for drug offenders: a first violation would result in a ten-day suspension; a second violation would result in a thirty-day suspension; a third violation would result in a sixty-day suspension; a fourth violation would result in a one-year ban; and a fifth violation would be subject to discipline at the Commissioner’s discretion.<sup>31</sup> In November 2005, MLB and the MLBPA further agreed to add stimulants like amphetamines to the banned substances list and to adopt harsher punishments for drug violations, including “a [fifty]-game suspension for first-time offenders, a [one hundred]-game suspension for second-time offenders, and a permanent ban for third-time offenders.”<sup>32</sup>

### A. *The Mitchell Report*

In March 2006, Commissioner Selig appointed former Senator George J. Mitchell to “conduct a comprehensive investigation of the illegal use of

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<sup>26</sup> *Id.* In his statement before the House Committee on Oversight and Government Reform on January 15, 2008, Commissioner Selig stated that ninety-six players, or approximately 6.67%, tested positive during the 2003 survey-testing period. *See* Selig, *supra* note 18, at 92. *See also* *The Mitchell Report*, *supra* note 9, at SR-2.

<sup>27</sup> *See* ESPN, *supra* note 7.

<sup>28</sup> *See* USA TODAY, *supra* note 22.

<sup>29</sup> *See* ESPN, *supra* note 7. A Health Policy and Advisory Committee conducted the testing, which included members from both MLB and the MLBPA. Pursuant to the 2002 collective bargaining agreement, “all anabolic steroids deemed illegal by the [FDA] were subject to testing.” *Id.*

<sup>30</sup> Selig, *supra* note 18, at 93.

<sup>31</sup> *See* USA TODAY, *supra* note 22.

<sup>32</sup> Selig, *supra* note 18, at 93. Penalties where a third violation results in a lifetime ban are commonly referred to as “three strikes and you’re out” penalties.

[PEDs] in [MLB].”<sup>33</sup> Twenty-one months later in December 2007, after reviewing over 135,000 pages of documents collected from both the Commissioner’s Office and all thirty clubs, and interviewing more than 700 witnesses in the United States, Canada, and the Dominican Republic,<sup>34</sup> Mitchell documented his findings and provided recommendations to the Commissioner in what is commonly known as the “Mitchell Report.”<sup>35</sup>

Mitchell concluded that players’ illegal use of PEDs “poses a serious threat to the integrity of the game.”<sup>36</sup> The ubiquitous use of PEDs among players not only “unfairly disadvantages the honest athletes who refuse to use [PEDs],” but also “raises questions about the validity of baseball records.”<sup>37</sup> Additionally, Mitchell stated that the use of PEDs “victimizes the majority of players who do not use [PEDs]...” because these “clean athletes” face three alternatives: “(1) compete without [using PEDs], knowing that they may lose to competitors with fewer scruples; (2) abandon their quest because they are unwilling to use [PEDs] to achieve a decisive competitive advantage; or (3) use [PEDs] to level the playing field.”<sup>38</sup> Furthermore, because such use of PEDs is illegal, PED users are “vulnerable to drug dealers who might seek to exploit [MLB players’] knowledge through threats intended to affect the outcome of baseball games or otherwise.”<sup>39</sup> For instance, drug dealers who have knowledge that certain MLB players are consuming PEDs could attempt to blackmail these players by requiring that they deliberately lose games in exchange for the dealers’ continued silence regarding the players’ illegal conduct.

The Report also highlighted the troubling reality that professional

<sup>33</sup> *Id.* at 91.

<sup>34</sup> *The Mitchell Report*, *supra* note 9, at SR-6.

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

<sup>36</sup> *Id.* at SR-8. Mitchell noted that the use of PEDs among players during the “Steroid Era” was not an “isolated problem involving just a few players or a few clubs,” but rather, “each of the thirty clubs has had players who have been involved with [PEDs] at some time in their careers.” *Id.* at SR-1. For example, former player Ken Caminiti estimated that approximately half of all players in MLB were abusing anabolic steroids in 2002, and former coach Dave McKay estimated that at one point approximately thirty percent of players were using steroids. *See* SR-2. Mitchell ultimately attributed the emergence and proliferation of the “Steroid Era” to the collective failure of the Commissioner’s Office, club officials, the MLBPA, and players to “deal with [the issue of PEDs] early on.” *Id.* at SR-36.

<sup>37</sup> *Id.* at SR-8. Several former players believed that “it was grossly unfair that some players were using [PEDs] to gain an advantage” and commonly complained that players who were using steroids were “taking [their roster spots].” *Id.* at SR-10. Players who used PEDs “violated federal law and baseball policy, and they distorted the fairness of competition by trying to gain an unfair advantage over the majority of players who followed the law and the rules.” *Id.* at SR-36. The implicated federal law is the Controlled Substances Act, 21 U.S.C. § 801 (1970),

which now includes anabolic steroids as a controlled substance. *See id.* at SR-10.

<sup>38</sup> *Id.* at SR-9 to -10.

<sup>39</sup> *Id.* at SR-8.

players' use of PEDs encourages younger athletes to use the substances, placing them at "risk of serious harm."<sup>40</sup> According to a 2006 National Institute on Drug Abuse survey, approximately three to six percent of high school students in the United States, or "hundreds of thousands of [high school students]," were using steroids illegally.<sup>41</sup> Moreover, Mitchell warned that the abuse of PEDs "can have more serious [health] effects on [adolescents] than...on adults" because "adolescents are already subject to significant hormonal changes."<sup>42</sup> For example, steroid users risk developing "psychiatric problems, cardiovascular and liver damage, drastic changes to their reproductive systems, musculoskeletal injury, and other problems."<sup>43</sup> Similarly, hGH users risk developing "cancer, harm to their reproductive health, cardiac and thyroid problems, and overgrowth of bone and connective tissue."<sup>44</sup> To illustrate, Don Hooton, founder of the Taylor Hooton Foundation for Fighting Steroid Abuse and whose seventeen-year-old son committed suicide after abusing anabolic steroids, testified before the House Committee on Government Reform in 2005:

I believe the poor example being set by professional athletes is a major catalyst fueling the high usage of steroids amongst our kids. Our kids look up to these guys. They want to do the things the pros do to be successful...Our youngsters hear the message loud and clear, and it's wrong. "If you would want to achieve your goal, it's OK to use steroids to get you there, because the pros are doing it." It's a real challenge for parents to overpower the strong message that's being sent to our children by [MLB players'] behavior.<sup>45</sup>

Additionally, Mitchell provided information regarding the number of players who tested positive for PEDs from 2003 to 2007. First, Mitchell confirmed that "between [five] and [seven] percent of major league players who participated in anonymous survey testing in 2003 tested positive for [PEDs]."<sup>46</sup> However, Mitchell noted that these figures "understated the actual level of use since players knew they would be tested at some time during the year, the use of [hGH] was not detectable in the [urine] tests that

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at SR-8 to -9.

<sup>42</sup> *Id.* at SR-8.

<sup>43</sup> *Id.* See also Indictment at 3, *United States v. Clemens*, 793 F. Supp. 2d 236 (D.D.C. 2011) (No. CR-10-223) (stating that the negative side effects of using anabolic steroids include "liver damage, heart damage, kidney damage, cancer, circulation problems, and psychiatric conditions such as mania").

<sup>44</sup> *Id.* See also *id.* at 4 (stating that the negative side effects of using hGH include "cancer, circulatory problems, heart enlargement and damage, liver damage, hypothyroidism, acromegaly, impotence in men, and menstrual irregularities in women").

<sup>45</sup> *Id.* at SR-9.

<sup>46</sup> *Id.* at SR-2.

were conducted, and...a negative test does not necessarily mean that a player has not been using [PEDs].”<sup>47</sup> In 2004, following the institution of mandatory drug testing in MLB, there were “[twelve] undisputed positive tests for steroids.”<sup>48</sup> In 2005, when hGH was added to MLB’s list of banned substances, “[twelve] players tested positive for steroids and were suspended for ten days.”<sup>49</sup> In 2006, “two players tested positive for steroids and were suspended for [fifty] games.”<sup>50</sup> Lastly, in 2007, “three players were suspended for [fifty] games each for positive steroid tests.”<sup>51</sup>

Mitchell concluded the Report by providing five key recommendations to Commissioner Selig as to how to effectively combat the widespread use of PEDs in MLB. First, Mitchell advised that in order to “investigate vigorously allegations of [PED] violations,” the Commissioner should “create a Department of Investigations, led by a senior executive who reports directly to the president of [MLB], to respond promptly and aggressively to allegations of the illegal use or possession of [PEDs].”<sup>52</sup> Second, Mitchell recommended that MLB improve its procedures to “keep illegal substances out of major league clubhouses.”<sup>53</sup> For example, because evidence suggested that players were receiving shipments of PEDs to their clubs’ facilities, Mitchell suggested that “packages delivered to players through their clubs should be logged and tracked.”<sup>54</sup> Furthermore, clubs were advised to “adopt policies to ensure that allegations of a player’s possession or use of [PEDs] are reported promptly to the Department of Investigations.”<sup>55</sup> Third, Mitchell called for MLB to improve its educational programs by providing players with educational materials regarding the “side effects of [PED] use and the deleterious health effects of long-term use,” along with “...education on how to achieve the same results [instead of using PEDs] through proper training, nutrition, and supplements that are legal and safe...[and] the risks associated with buying black market

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<sup>47</sup> *Id.* Players transitioned from using steroids to taking hGH not only because hGH was undetectable in urine tests at the time, but also because players believed hGH assisted “their ability to recover from injuries and fatigue during the long baseball season.” *Id.*

<sup>48</sup> *Id.* at SR-13.

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

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at SR-29. Mitchell noted that such investigator’s success “depends in part upon his interaction with law enforcement officials who in the course of their own investigations obtain evidence of athletes’ possession or use of illegal substances that, under appropriate circumstances, can be shared with sports leagues.” *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*



drugs...[due to PEDs'] "unknown nature and origin."<sup>56</sup> Fourth, Mitchell urged MLB and the MLBPA to incorporate a "state-of-the-art drug testing program" into MLB's joint drug program following the next collective bargaining discussions in 2011 that would "continue to respect the legitimate privacy and due process rights of the players."<sup>57</sup> Finally, Mitchell cautioned that "[p]layers also should be reminded of their responsibilities as role models to young athletes, who in emulating major league players' illegal substance use will place themselves at risk."<sup>58</sup>

In January 2008, just weeks following the release of the Mitchell Report, MLB adopted the recommendations set forth in the Mitchell Report and issued written policies that:

- (i) require[d] all Clubs to adopt a uniform, written policy for reporting information about possible substance abuse violations and certify to the Commissioner's Office that such policies have been complied with; (ii) require[d] all Major and Minor League Clubs to establish a system to log every package sent to players at its facilities; (iii) require[d] background checks to be performed on all Clubhouse personnel; and (iv) require[d] all Clubhouse personnel to be randomly drug tested.<sup>59</sup>

Furthermore, MLB "established the Department of Investigations to deal with the investigation of drug use."<sup>60</sup> The department reported directly to both the Commissioner and the President of MLB<sup>61</sup> and established a "hotline for the anonymous reporting of information concerning the use of

<sup>56</sup> *Id.* at SR-30. Expert and former athlete Dr. Jay Hoffman proposed educating players about appropriate training and nutritional methods in order to counter skepticism that "discussions of health risks alone, although important, generally will not deter a player from using [PEDs] because players who consider using [PEDs] do not view them as dangerous if used properly." *Id.* See also Selig, *supra* note 18, at 94 (stating that in 2003, Commissioner Selig hired Dr. Gary Green, former director of UCLA's intercollegiate drug testing program and chairman of the National Collegiate Athletic Association's subcommittee on Drug Testing and Drug Education, to create and incorporate educational programs concerning PEDs in an attempt to make such programs more effective in reaching players).

<sup>57</sup> *The Mitchell Report*, *supra* note 9, at SR-31 to -32. Such "state-of-the-art" program would include administration by "a truly independent authority that holds exclusive authority over its structure and administration," transparency to the public "by allowing for periodic audits of [the program's] operations and providing regular reports of aggregate data on testing and test results...[in addition to] adequate year-round, unannounced testing...[and employment of] best practices as they develop."

<sup>58</sup> *Id.* at SR-30 to -31. According to Mitchell, the most important lesson that he learned from this investigation was that MLB needed to not only develop a "well-conceived, well-executed, and cooperative effort by everyone involved in [MLB]" to address the serious issue of PEDs, but also to "[let] go of the past and [look] to the future." *Id.* at SR-34. See also Selig, *supra* note 18, at 73 (quoting Mitchell that "everyone involved should be trying to bring this troubling chapter in [MLB's] history to a close. The more time you spend in the past, the harder it is to look into the future.").

<sup>59</sup> See Selig, *supra* note 18, at 93.

<sup>60</sup> *Id.* At the time, former New York Police Department deputy chief Dan Mullin, along with the help of former FBI agent George Hanna, headed the Department of Investigations.

<sup>61</sup> The President of MLB at the time was Bob DuPuy. See *id.* at 152.

prohibited substances.”<sup>62</sup> Additionally, MLB developed a program that “require[d] top prospects to the [MLB] draft to submit to drug testing before the draft.”<sup>63</sup> In accordance with Mitchell’s recommendations, MLB also announced that it would coordinate with “the Partnership for a Drug-Free America and the Taylor Hooton Foundation to educate America’s youth and their parents about the dangers of [PEDs]”<sup>64</sup> in order to demonstrate that “the use of [PEDs] is illegal, it is cheating, it does long-term damage to an athlete’s health, and it puts at risk an athlete’s reputation and integrity.”<sup>65</sup> Next, MLB and the NFL funded an effort led by “Dr. Don Catlin, one of the leading drug testing experts in the world, to develop a urine test [that could detect] hGH.”<sup>66</sup> Finally, MLB “joined with the United States Olympic Committee in a new, long-term program of research on [PEDs]” with an initial commitment of “\$3 million in funding.”<sup>67</sup>

In April 2008, MLB and the MLBPA appointed an Independent Program Administrator (“IPA”), who would “be appointed for a multiyear term, be removed only in narrow circumstances, and issue annual public reports.”<sup>68</sup> The new drug program added “600 tests per year (making the total number of tests 3,600), [for] an average of three [tests] per player per year.”<sup>69</sup> Additionally, the program “[expanded] the list of banned substances

<sup>62</sup> *Id.* at 94.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* This program would “warn our youth about the health risks in using steroids and other black market drugs, and teach them how to achieve the same improved results on the field through proper training, nutrition, and methods that are legal and safe.” *Id.* at 106-07.

<sup>65</sup> *Id.* at 107.

<sup>66</sup> *Id.* at 108-09. Commissioner Selig said that MLB would “support the utilization” of a “valid, commercially available and practicable test for hGH...regardless of whether the test is based on blood or urine.” *Id.* at 109.

<sup>67</sup> *Id.* Commissioner Selig stated that the use of PEDs is not only a problem for MLB, but also a “societal problem that extends beyond [MLB] or any sport.” *Id.* at 110. Selig also affirmed MLB’s support of various bills that had been introduced in Congress, such as HR 4911 and Senate Bill 877 that would “make hGH a Schedule III Controlled Substance,” Senate Bill 2470 that would “prohibit the sale of DHEA [dehydroepiandrosterone] to minors,” and Senate Bill 2237 that would “crackdown on the sale of controlled substances over the Internet.” *Id.*

<sup>68</sup> *See* USA TODAY, *supra* note 22. The IPA at the time was Dr. Bryan Smith, who was appointed to a three-year term and could only be removed for engaging in conduct that was inconsistent with MLB’s drug program or would otherwise affect his ability to serve as IPA. *See* Press Release, Donald Fehr and MLBPA, MLBPA, MLB Amend Joint Drug Agreement (May 2008) (on file with author). The IPA’s annual reports would summarize “the number of tests administered, the number of positive tests resulting in discipline, the substances involved in the positives, the number of Therapeutic Use Exemptions granted by category of ailment and the number of non-analytical positives.” *Id.* Furthermore, “records of negative test results [would] be maintained for two years” and the IPA was required “annually to audit test results and to review the performance of the collection company and the laboratory.” *Id.*

<sup>69</sup> *Id.* In addition, the IPA was “authorized to conduct up to 375 off-season tests over his three-year initial term, which [would], on average, more than double the amount of off-season testing.” *Id.*

to include insulin-like growth factor (IGF-1), gonadotropins, aromatase inhibitors, selective estrogen receptor modulators and antiestrogens, including clomid.”<sup>70</sup> Moreover, the program required the IPA to “develop, in consultation with the Commissioner’s Office and the [MLBPA], an annual, mandatory educational program,”<sup>71</sup> and players who were named in the Mitchell Report were required to “join MLB in participating in efforts designed to educate youth and their parents regarding the dangers of [PEDs] and regarding appropriate and safe training methods.”<sup>72</sup> In 2009, MLB began to “impose uniform certification requirements on fulltime strength and conditioning coaches employed by each [c]lub,”<sup>73</sup> and in 2010, the Commissioner issued “guidelines designed to ensure that qualified strength and conditioning coaches are available to players at all levels of each organization.”<sup>74</sup> Finally, MLB “announced that its testing program would be expanded to cover the top 200 prospects in the Amateur Draft.”<sup>75</sup>

In November 2011, MLB and the MLBPA announced “an agreement to have blood testing for [hGH] during spring training in 2012.”<sup>76</sup> In June 2012, blood testing for hGH was expanded to also include the off-season and “for reasonable cause.”<sup>77</sup> In January 2013, blood testing for hGH was further extended to include the regular season, and the “World Anti-Doping Agency Laboratory in Laval, Quebec, [began to] keep records of each player, including his baseline ratio of testosterone to epitestosterone.”<sup>78</sup> Finally, in March 2014, MLB and the MLBPA announced more severe penalties for first and second-time drug offenders: first-time offenders would be suspended eighty games, and second-time offenders would be

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* The agreement called for input from MLB’s Strength and Conditioning Committee in order to “ensure that the educational efforts [emphasized] legitimate training methods for professional athletes.” *Id.*

<sup>72</sup> *Id.* The MLBPA was also required to “contribute \$200,000 to an antidrug charitable, educational or research organization.” *Id.* In exchange for players’ participation in MLB’s educational efforts and the MLBPA’s donation, the Commissioner “determined that he [would] not exercise his authority under [MLB’s] Joint Drug Agreement against [p]layers and former [p]layers named in the Mitchell Report.” *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* If players tested positive, all thirty clubs were notified, “but players [would] remain draft eligible.” *Id.* If players did not comply with drug testing, they [would] not be eligible for selection [in the draft].” *Id.*

<sup>76</sup> See USA TODAY, *supra* note 22.

<sup>77</sup> *Id.* Additionally, the agreement called for increased random urine testing, and players “[who were] suspended before [MLB’s] All-Star game [became] ineligible for election and selection to the [All-Star] game.” *Id.* Moreover, rules regarding collection of specimens were modified after Ryan Braun successfully overturned his initial suspension through the grievance process, as further discussed below. See *id.*

<sup>78</sup> *Id.* The lab would “conduct Carbon Isotope Ratio Mass Spectrometry (IRMS) tests of any urine specimens that [varied] materially.” *Id.*

suspended for an entire season of 162 games without pay.<sup>79</sup>

*B. MLB's Current Joint Drug Prevention and Treatment Program*

Section 2 of MLB's current Joint Drug Prevention and Treatment Program ("the Program") sets forth a list of prohibited substances and provides that "[a]ll [p]layers shall be prohibited from using, possessing, selling, facilitating the sale of, distributing, or facilitating the distribution of any Drug of Abuse, Performance Enhancing Substance, Stimulant, DHEA, Diuretic and/or Masking Agent (collectively referred to as "Prohibited Substances)."<sup>80</sup> Section 2A defines "Drugs of Abuse" to include "[a]ny and all drugs or substances included on Schedules I and II of the Code of Federal Regulations' Schedule of Controlled Substances."<sup>81</sup> Section 2B defines "Performance Enhancing Substances" to include "[a]ny and all anabolic androgenic steroids covered by Schedule III of the Code of Federal Regulations' Schedule of Controlled Substances."<sup>82</sup> Finally, Sections 2C and 2D set forth the banned substances labeled "Stimulants" and "DHEA," respectively.<sup>83</sup>

Section 3 of the Program sets forth the testing procedures and protocols for the aforementioned banned substances.<sup>84</sup> In addition to the unannounced urine specimen collections that are collected upon players' reporting to spring training,<sup>85</sup> the IPA is required to conduct 4,800 unannounced urine specimen collections for PEDs, stimulants, and DHEA during the regular

<sup>79</sup> *See id.* Players who served any PED suspension during the season were "ineligible for that year's postseason." *Id.* In certain instances involving positive drug tests, an arbitrator would "have the discretion to reduce discipline if the player prove[d] the use was not intended to enhance performance." *Id.* Furthermore, urine tests conducted during the regular season increased from 1,400 to 3,200, and "400 random blood collections [were] used to detect [hGH] in addition to the mandatory one [hGH blood test] for each player [conducted] during spring training." *Id.* Lastly, each player would have at least one IRMS test performed on his specimens, and didehydroepiandrosterone was added to the banned substances list. *See id.*

<sup>80</sup> *See Major League Baseball's Joint Drug Prevention and Treatment Program, supra* note 8, at 8.

<sup>81</sup> *Id.* Such drugs include natural cannabinoids, synthetic THC and cannabimimetics, cocaine, LSD, opiates, ecstasy, GHB, and PCP. *See id.*

<sup>82</sup> *Id.* at 8-9. Section 2B sets forth a non-exhaustive list of seventy-six different banned PEDs. *See id.* at 9-11.

<sup>83</sup> Section 2C provides a list of fifty-six banned stimulants. *See id.* at 11-13. Section 2D states, "DHEA is a [p]rohibited [s]ubstance covered by the Program." *Id.* at 13.

<sup>84</sup> Additionally, this section sets forth provisions for reasonable cause testing, follow-up testing, collection procedures and testing protocols, positive test results, notice to the parties involved, multiple disciplines for the same use, and therapeutic use exemptions. *See id.* at 15-25.

<sup>85</sup> *See id.* at 15.

season and 350 urine collections during the off-season.<sup>86</sup> Furthermore, in addition to the unannounced blood specimen collections for hGH that are conducted during spring training, the IPA is also required to conduct 500 blood specimen collections during the regular season and 400 collections during the off-season.<sup>87</sup>

Section 7A of the Program sets forth the disciplinary provisions for PED violations.<sup>88</sup> First-time violations result in an eighty-game suspension, second-time violations result in a 162-game suspension with a pay suspension of 183 days, and third-time violations result in “[p]ermanent suspension from MLB.”<sup>89</sup> Players who are permanently suspended “may apply, no earlier than one (1) year following the imposition of the suspension, to the Commissioner for discretionary reinstatement after a minimum period of two (2) years.”<sup>90</sup>

Section 8 of the Program sets forth the procedures for appeals, including arbitration proceedings and grievance procedures.<sup>91</sup> Section 8A provides that an “[a]rbitration [p]anel shall have jurisdiction to review any determination that a [p]layer has violated the Program.”<sup>92</sup> Section 8B states that the:

Commissioner’s Office shall have the burden of establishing that a [p]layer’s test result was ‘positive’...and that the test result was obtained pursuant to a test authorized under the Program and was conducted in accordance with the [c]ollection [p]rocedures and [t]esting [p]rotocols of the Program and the protocols of the Montreal Laboratory...[but] is not required to otherwise establish intent, fault, negligence or knowing use of a [PED] on the [p]layer’s part.<sup>93</sup>

Players may challenge the “initial showing by the Commissioner’s Office that the result was ‘positive’ or that it was obtained pursuant to a test authorized under the Program and was conducted in accordance with the

<sup>86</sup> See *id.* at 16. See also *Details of MLB, MLBPA Labor Agreement*, *infra* note 242 and accompanying text.

<sup>87</sup> See *Major League Baseball’s Joint Drug Prevention and Treatment Program*, *supra* note 8, at 16-17. See also *Details of MLB, MLBPA Labor Agreement*, *infra* note 242 and accompanying text.

<sup>88</sup> See *Major League Baseball’s Joint Drug Prevention and Treatment Program*, *supra* note 8, at 37.

<sup>89</sup> *Id.* at 37-38.

<sup>90</sup> *Id.* at 38. The Commissioner has the authority to hear the player’s reinstatement application and issue a determination within thirty days of the conclusion of the hearing. The player may challenge the Commissioner’s determination under a grievance procedure before an arbitration panel. See *id.*

<sup>91</sup> See *id.* at 49-56.

<sup>92</sup> *Id.* at 49.

<sup>93</sup> *Id.* at 50. For blood test results involving hGH, “the Commissioner’s Office shall have the burden of establishing the presence of hGH in the [p]layer’s blood specimen...[including establishing] the accuracy and reliability of the blood test administered to the [p]layer.” *Id.*

[c]ollection [p]rocedures.”<sup>94</sup> However, the Commissioner’s Office “will carry its burden (a) by demonstrating that there was no deviation; (b) by demonstrating that the deviation was authorized by the parties or by the IPA in an individual case...or (c) by demonstrating that the deviation did not affect the accuracy or reliability of the test result.”<sup>95</sup> Therefore, once the Commissioner’s Office meets its burden that the player’s sample tested positive for a banned substance in accordance with proper drug testing procedures, there is a presumption that the substance was present due to the player’s fault or negligence. The burden then shifts to the player to prove the affirmative defense that the presence of the banned substance in his positive test result “was not due to his fault or negligence.”<sup>96</sup>

Finally, Section 9 sets forth the educational programs and materials to be developed by the IPA, in consultation with the Commissioner and the MLBPA.<sup>97</sup> Section 9(3) provides that the Joint Education Committee “will include [educational] components on proper nutrition, training and performance.”<sup>98</sup> In addition, Section 9(2) requires the production of “educational materials...[to] be made available to all Major League [c]lubs and [p]layers...throughout each season.”<sup>99</sup> Furthermore, the educational program will create a “joint website and other technological resources containing information pertinent to the Program in consultation with a jointly-selected expert (or experts).”<sup>100</sup>

## II. NUMEROUS MLB PLAYERS HAVE BEEN ACCUSED OF USING PEDS

### A. *Barry Bonds*

In 2008, Barry Bonds, former San Francisco Giants player and MLB’s all-time career homerun leader, was indicted in the Northern District Court of California for allegedly using PEDs.<sup>101</sup> Greg Anderson, a personal trainer whose clientele included professional athletes like Bonds, was alleged to

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<sup>94</sup> *Id.* at 51.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* However, the player “cannot satisfy his burden by merely denying that he intentionally used a [PED]; [rather, he] must provide objective evidence in support of his denial. Among other things, such objective evidence may question the accuracy or reliability of the ‘positive’ test result.” *Id.* If the player successfully “proves by clear and convincing evidence that he bears no significant fault or negligence for the presence of the [PED] in his test result, the [a]rbitration [p]anel may reduce the mandated suspension.” *Id.*

<sup>97</sup> *See id.* at 56.

<sup>98</sup> *Id.* at 57.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 56.

<sup>101</sup> Superseding Indictment, *United States v. Bonds*, No. CR 07-0732-S (N.D. Cal. May 13, 2008).

have illegally obtained and distributed PEDs to his clients, including Bonds.<sup>102</sup> Anderson was also affiliated with a laboratory located in Burlingame, California, known as BALCO, which conducted tests of Anderson's clients' specimens, including blood tests.<sup>103</sup> Evidence was later obtained that included "positive tests for the presence of anabolic steroids and other [PEDs] for Bonds and other professional athletes."<sup>104</sup> Bonds testified before a grand jury under oath that he had never received or taken any steroids from Anderson.<sup>105</sup> Bonds was subsequently indicted with fourteen counts of False Declarations Before a Grand Jury in violation of 18 U.S.C. § 1623(a), as well as one count of Obstruction of Justice in violation of 18 § U.S.C. 1503.<sup>106</sup>

The Ninth Circuit Court of Appeals discussed in greater detail Bonds' connection with Anderson and BALCO. Anderson, a long-time friend of Bonds, provided Bonds with "substances including 'vitamins and protein shakes,' 'flax seed oil,' and a 'cream,'" some of which allegedly contained steroids.<sup>107</sup> Bonds provided Anderson with five or six blood samples and approximately four urine samples, which were allegedly used to determine whether Bonds was deficient in certain nutrients.<sup>108</sup> Although Anderson informed Bonds that he tested negative for steroids,<sup>109</sup> BALCO "recorded [on its log sheets], under the name 'Barry Bonds,' positive results of urine and blood tests for [PEDs]."<sup>110</sup> Anderson later pled guilty to illegally distributing PEDs to professional athletes and remained imprisoned for

<sup>102</sup> *Id.* at 1:27-2:4. The Internal Revenue Service-Criminal Investigation Division investigated Anderson "concerning [BALCO's] distribution of anabolic steroids and other illegal [PEDs] and the related money laundering of proceeds from the drug distributions." *Id.* at 2:5-11.

<sup>103</sup> *Id.* at 1:25-2:4. BALCO stands for Bay Area Laboratory Co-Operative.

<sup>104</sup> *Id.* at 3:2-4.

<sup>105</sup> *See id.* at 3:20, 4:15, 5:9, 6:27, 7:13, 8:8-23, 9:24, 10:15, 11:10, 12:6-24, and 13:12-13.

<sup>106</sup> *See id.* at 3-14. Anderson refused to testify at the grand jury proceeding and was subsequently imprisoned after being held in contempt of court. *See United States v. Bonds*, 2009 U.S. Dist. LEXIS 16120 (N.D. Cal. Feb. 19, 2009), at n.2. Consequently, the Northern District Court of California held that certain documents and biological specimens, as well as Anderson's statements that constituted hearsay, either were or may be inadmissible. *See id.* at \*9, \*11, \*13, \*17, \*20, \*23, \*25-27, \*33.

<sup>107</sup> *United States v. Bonds*, 608 F.3d 495, 498 (9th Cir. 2010). Bonds admitted to paying Anderson \$15,000 per year for weight training and at one point provided Anderson with a "gift" of \$20,000. *See id.* at 499. Bonds testified that "he took whatever supplements and creams Anderson gave him without question because he trusted Anderson as his friend" and that "he did not believe anything Anderson provided him contained steroids." *Id.*

<sup>108</sup> *See id.* Anderson took the samples to BALCO's then-Director of Operations, James Valente, who assigned Bonds' samples with code numbers, which were logged in a book, and then sent the urine samples to Quest Diagnostics and the blood samples to LabOne & Specialty Lab for analysis. *See id.* at 498. However, Bonds' urine and blood test results were labeled under the name "Barry Bonds." *See id.* at 497.

<sup>109</sup> *See id.* at 499. Anderson told Bonds, "You're - you're negative," and Bonds trusted Anderson's statement. *See id.*

<sup>110</sup> *Id.* at 497. The government subsequently seized these records. *See id.* at 498.

contempt of court for failing to testify against Bonds.<sup>111</sup>

The government attempted to “introduce Valente’s testimony that Anderson told him for each sample that ‘[t]his blood/urine comes from Barry Bonds’” in order to demonstrate a link between the positive test results and Bonds.<sup>112</sup> Bonds “filed a motion in limine to exclude numerous pieces of evidence...[including]...the laboratory blood and urine test results, and the BALCO log sheets of test results.”<sup>113</sup> Bonds argued that “Anderson’s statements were inadmissible hearsay and that the lab results could not be authenticated as Bonds’ in that manner.”<sup>114</sup>

The Ninth Circuit first affirmed the district court’s finding that Anderson’s statements failed to meet FRE Rule 807’s requirement of “[having] trustworthiness.”<sup>115</sup> The Court then affirmed the district court’s finding that Bonds failed to expressly or impliedly authorize Anderson to identify the samples as his and thus rejected the government’s argument that Anderson’s statements were authorized pursuant to FRE Rule 801(d)(2)(C).<sup>116</sup> Next, the Court affirmed the district court’s finding that “Anderson was an independent contractor, rather than an employee”<sup>117</sup> and thus rejected the government’s argument that Anderson’s statements were permitted as “statements by an agent” pursuant to FRE Rule 801(d)(2)(d). Finally, the Court affirmed the district court’s finding that BALCO’s log sheets constituted inadmissible hearsay.<sup>118</sup>

### B. *José Canseco*

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<sup>111</sup> *See id.* at 499.

<sup>112</sup> *Id.* at 500. On appeal, the government argued that Anderson’s statements were admissible pursuant to the residual exception of Federal Rules of Evidence (“FRE”) Rule 807, the exceptions for authorized statements pursuant to FRE Rule 801(d)(2)(C), or “for statements by an agent” pursuant to FRE Rule 801(d)(2)(D). *Id.*

<sup>113</sup> *Id.* at 499-500.

<sup>114</sup> *Id.* at 500.

<sup>115</sup> *See id.* at 502. The district court found that “Anderson’s statements were untrustworthy, in major part because Valente admitted that he once mislabeled a sample when Anderson asked him to do so.” *Id.*

<sup>116</sup> *See id.* at 503-04. The Court reasoned that there was “no evidence of discussions [between Bonds and Anderson] about how Anderson was to deal with [Bonds’] samples.” *Id.* at 503.

<sup>117</sup> *Id.* at 504. The Court reasoned that there was “no evidence that Bonds directed or controlled any of Anderson’s activities.” *Id.* at 505. Rather, the evidence suggested a “lack of control exercised by Bonds” in his relationship with Anderson. *Id.* Moreover, the Court reasoned that a principal-agent relationship did not exist between Bonds and Anderson, because “Anderson did not generally act subject to Bonds’ control in his capacity as a some-time trainer, nor did he or Bonds manifest assent that Bonds had the right to control Anderson’s actions as a trainer.” *Id.* at 506.

<sup>118</sup> *See id.* at 508. The Court reasoned that the government “[could not] link the samples to [Bonds] without Anderson’s testimony.” *Id.* Accordingly, the log sheets went “no further toward showing the actual sample came from [Bonds] than Valente’s testimony about what Anderson told him.” *Id.*



Initial reports regarding the use of steroids in MLB involved former Oakland Athletics player, José Canseco.<sup>119</sup> Canseco was “the subject of the first media speculation about his use of steroids, and Boston Red Sox fans taunted him for his alleged steroids use during the 1988 American League Championship Series.”<sup>120</sup>

In his autobiography *Juiced: Wild Times, Rampant ‘Roids, Smash Hits, and How Baseball Got Big*, Canseco “admitted experimenting with steroids and other drugs to build muscle and improve his power...[and] claimed to know a number of major leaguers who had used steroids and other PEDs to enhance their game.”<sup>121</sup> One month after the book’s publication in February 2005, Canseco and several other players mentioned in his book were invited to testify before the House of Representatives’ Committee on Government Reform during hearings regarding the use of steroids in MLB.<sup>122</sup> Although Canseco mentioned in his opening statement that his attorney advised him not comment on his alleged use of steroids, Canseco “went on to answer every question directed at him, noting beforehand that being denied immunity would compromise his answers.”<sup>123</sup> Contrary to other players’ testimony, Canseco reported that he witnessed widespread use of steroids in MLB and “claimed that [MLB] had turned its back on steroids problems because the resulting power increase helped the sport recover from the work stoppage that cut off the 1994 season.”<sup>124</sup>

In addition to his own use of steroids and hGH, Canseco claimed that he personally injected five other players with steroids and hGH and educated such players on how to use steroids.<sup>125</sup> Canseco stated that he “[a]bsolutely” injected some of his former teammates, such as Mark McGwire, Rafael Palmeiro, Ivan Rodriguez, Juan Gonzalez, and Jason Giambi, often times in a bathroom stall prior to a game or batting practice.<sup>126</sup> Canseco said steroid use and hGH injections at the time were “so common”

<sup>119</sup> *The Mitchell Report*, *supra* note 9, at SR-14.

<sup>120</sup> *Id.*

<sup>121</sup> *See* ESPN, *supra* note 7.

<sup>122</sup> *See id.* MLB informed the Committee that Commissioner Selig, as well as six of seven players invited to testify, would not appear. Consequently, the Committee “issued subpoenas to [eleven] individuals, including Selig, Mark McGwire, José Canseco, Sammy Sosa, Curt Schilling, Frank Thomas, Rafael Palmeiro, and [then-MLBPA] chief Donald Fehr.” *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Jose Canseco: ‘Juiced,’* CBS NEWS (Aug. 5, 2005), <http://www.cbsnews.com/news/jose-canseco-juiced/2/>.

<sup>126</sup> *Id.* In response to Canseco’s comments, McGwire released the following statement: “Once and for all, I did not use steroids nor any illegal substance. The relationship that these allegations portray couldn’t be further from the truth.” *Id.* Additionally, Palmeiro’s lawyer stated the following: “Mr. Palmeiro categorically denies that he has ever engaged in illicit use of steroids or any substance banned by [MLB].” *Id.* Giambi, who admitted to a federal grand jury that he had used steroids since at least 2001, replied: “I think [what Canseco said is] sad. I think it’s delusional.” *Id.*

and represented “common ground” among players.<sup>127</sup>

### C. *Alex Rodriguez*

In February 2009, following the release of a *Sports Illustrated* article naming him as one of 104 players who tested positive for PEDs in 2003, former New York Yankees third baseman Alex Rodriguez “admitted he used steroids from 2001 to 2003 while playing for the Texas Rangers.”<sup>128</sup> Rodriguez said he turned to PEDs because he felt “an enormous amount of pressure to perform after signing a huge contract with [the Texas Rangers],”<sup>129</sup> but acknowledged that his decision was “naïve” and “stupid” at a time “when ‘baseball was a different culture.’”<sup>130</sup>

In 2013, the *Miami New Times* published documents that identified several MLB players, including Rodriguez, who were alleged to have obtained hGH and other PEDs from an anti-aging clinic located in Coral Gables, Florida, known as Biogenesis.<sup>131</sup> On August 5, 2013, MLB suspended Rodriguez for 211 games, which was “four times the length of the other thirteen players suspended in connection with the Biogenesis investigation, and the longest non-lifetime ban in baseball history.”<sup>132</sup> One day after his suspension was imposed, Rodriguez “filed a grievance under the [MLB collective bargaining agreement], indicating his intent to appeal MLB’s suspension.”<sup>133</sup> Rodriguez subsequently lost potential sponsorship contracts from companies like Nike and Toyota<sup>134</sup> and faced a loss of up to \$30 million in “certain performance-based milestones in his contract with the Yankees.”<sup>135</sup> As a result, Rodriguez sued MLB and Commissioner Selig for one count of Tortious Interference with Prospective Business Relationships and one count of Tortious Interference with Existing

<sup>127</sup> *Id.*

<sup>128</sup> See ESPN, *supra* note 7.

<sup>129</sup> *Id.* Rodriguez signed a ten-year contract worth \$252 million with the Texas Rangers on December 11, 2000. See *Fifteen Things to Know on 15th Anniversary of Rangers’ \$252 Million Megadeal with A-Rod*, ESPN (Dec. 11, 2015), [http://www.espn.com/mlb/story/\\_/id/14330504/alex-rodriguez-252-million-contract-texas-rangers-remains-landmark-15th-anniversary](http://www.espn.com/mlb/story/_/id/14330504/alex-rodriguez-252-million-contract-texas-rangers-remains-landmark-15th-anniversary).

<sup>130</sup> See ESPN, *supra* note 7.

<sup>131</sup> Complaint at 10, *Rodriguez v. Major League Baseball*, No. 2013-02 (S.D.N.Y. 2013). A disgruntled former employee of Biogenesis, Porter Fischer, provided the documents, claimed that he was owed back pay, and sought to embarrass Biogenesis’ owner, Anthony Bosch. See *id.* Milwaukee Brewers’ outfielder Ryan Braun was also identified in the Biogenesis documents, as discussed below. See *id.* at 11.

<sup>132</sup> *Id.* at 25. Rodriguez’s suspension exceeded the then-fifty-game suspension for first-time violations by 161 games. See *id.*

<sup>133</sup> *Id.*

<sup>134</sup> See *id.* at 26.

<sup>135</sup> *Id.* at 27. Rodriguez’s contract with the Yankees was set to expire in 2017. See *id.* at 29.

Contracts.<sup>136</sup>

*D. Mark McGwire*

In August 1998, when coverage of steroid use in MLB “reached what seemed at the time to be a peak,” former St. Louis Cardinals player Mark McGwire was found to be “using the [then-legal] steroid precursor androstenedione while chasing the single-season home run record.”<sup>137</sup> At the time, androstenedione was “banned by the [NFL] and the NCAA” but was not a banned substance in MLB, “which had yet to institute a testing program for many substances.”<sup>138</sup> During a 2005 hearing before the House of Representatives Committee on Government Reform, McGwire stated that “he could not answer any questions about his past, including those related to his alleged involvement with PEDs.”<sup>139</sup> On January 11, 2010, McGwire released a statement to the Associated Press that he used steroids and hGH “on and off for nearly a decade.”<sup>140</sup> During his first four years on the Hall of Fame voting ballot, McGwire “failed to earn even [twenty-five percent] of the vote...and his support fell below [twenty percent] in the 2011 [Hall of Fame] voting, [which was] the first [such voting] held after his admission [to using PEDs].”<sup>141</sup>

*E. Ryan Braun*

Ryan Braun, a current player for the Milwaukee Brewers, successfully “avoided suspension under [the Program] by demonstrating that MLB had failed to maintain the proper chain-of-custody for [his] urine samples.”<sup>142</sup> In October 2011, Braun tested positive for elevated testosterone and was initially suspended fifty games.<sup>143</sup> However, in February 2012, Braun’s

<sup>136</sup> See *id.* at 28-29. However, Rodriguez later dropped all lawsuits and accepted his suspension.

<sup>137</sup> *The Mitchell Report*, *supra* note 9, at SR-14. The androstenedione was discovered in McGwire’s locker. See Selig, *supra* note 18, at 101. During the 1998 season, McGwire broke Roger Maris’ 1961 single-season homerun record of sixty-one homeruns after he hit seventy homeruns. McGwire edged former Chicago Cubs player Sammy Sosa by five homeruns. See ESPN, *supra* note 7. The homerun race between McGwire and Sosa, who were both named the *Sports Illustrated* “Sportsman of the Year” in 1998, “captured the attention of the country and helped to reclaim popularity for [MLB] four years after a strike had shortened the 1994 season.” *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Mark McGwire Admits Using Steroids*, CBS NEWS (Jan. 11, 2010, 3:06 PM), <http://www.cbsnews.com/news/mark-mcgwire-admits-using-steroids/>. McGwire stated that he “wished [he] had never played during the [S]teroid [E]ra” and that he used PEDs for “health purposes” and not “for any type of strength use.” *Id.*

<sup>141</sup> ESPN, *supra* note 7.

<sup>142</sup> Complaint at 11, *Rodriguez v. Major League Baseball*, No. 2013-02 (S.D.N.Y. 2013).

<sup>143</sup> *Ryan Braun Apologizes for PED Use*, ESPN (Aug. 23, 2013), [http://www.espn.com/mlb/story/\\_/id/9592788/ryan-braun-milwaukee-brewers-apologizes-ped-use](http://www.espn.com/mlb/story/_/id/9592788/ryan-braun-milwaukee-brewers-apologizes-ped-use). Dino Laurenzi Jr. was the individual who collected Braun’s urine sample following the Brewers’

fifty-game suspension was “overturned when an arbitrator ruled that [Braun’s] urine sample was mishandled.”<sup>144</sup> One day after his suspension was overturned, Braun held a news conference at the Brewers’ spring training stadium in Phoenix, Arizona, where he “proclaimed [that] he had been vindicated.”<sup>145</sup> Braun further stated:

If I had done this intentionally or unintentionally, I’d be the first one to step up and say, ‘I did it.’ By no means am I perfect, but if I’ve ever made any mistakes in my life I’ve taken responsibility for my actions. I truly believe in my heart, and I would bet my life, that this substance never entered my body at any point...I will continue to take the high road because that’s who I am, and that’s the way that I’ve lived my life. We won because the truth is on my side. The truth is always relevant, and at the end of the day the truth prevailed...Ultimately, as I sit here today, the system worked because I am innocent, and I was able to prove my innocence.<sup>146</sup>

However, after being identified as one of the players who allegedly received hGH and other PEDs from the Biogenesis clinic in Florida,<sup>147</sup> Braun received a sixty-five game suspension from MLB on July 22, 2013.<sup>148</sup> In August 2013, upon accepting his suspension, Braun “admitted taking [PEDs] during his [National League Most Valuable Player] season of 2011” and said that he “took a cream and lozenge containing banned substances while rehabilitating an injury.”<sup>149</sup>

#### F. Roger Clemens

Roger Clemens, a former player for the New York Yankees, was identified in the Mitchell Report and alleged to have “used anabolic steroids on multiple occasions in 1998, 2000, and 2001, and [hGH] on multiple

National League Division Series game versus the Arizona Diamondbacks on October 1, 2011. *Id.*

<sup>144</sup> *Id.* Laurenzi “stored the samples from Braun and two other players at home and dropped [the samples] off at a FedEx office on Monday [October 3, 2011], rather than send [the samples] immediately, as specified in [MLB’s] drug collection rules.” *Id.* The MLBPA argued that “[Braun’s] specimen was handled improperly, and arbitrator Shyam Das overturned [Braun’s fifty-game suspension] on [February 23, 2012].” *Id.*

<sup>145</sup> *Id.* Following Braun’s news conference, his lawyer “criticized Laurenzi when [Laurenzi] defended himself.” *Id.*

<sup>146</sup> *Transcript of Ryan Braun’s Statement*, MILWAUKEE WISCONSIN JOURNAL SENTINEL (Feb. 24, 2012), <http://archive.jsonline.com/blogs/sports/140333483.html>.

<sup>147</sup> See Complaint at 11, *Rodriguez v. Major League Baseball*, No. 2013-02 (S.D.N.Y. 2013).

<sup>148</sup> *Ryan Braun Apologizes for PED Use*, *supra* note 143. Braun was suspended “[fifty] games for the drug infraction and [fifteen] games for his conduct at the time of the grievance.” *Id.*

<sup>149</sup> *Id.*

occasions in 2000.”<sup>150</sup> Following the release of the Mitchell Report, Clemens explicitly denied using PEDs and “stated publicly that he would appear before the [House Committee on Government Reform] to answer any questions.”<sup>151</sup> During a deposition conducted on February 5, 2008, Clemens testified under oath that he had “not used steroids or [hGH]...[and] had never possessed or seen anabolic steroids or [hGH], and that he had never discussed anabolic steroids or [hGH] with anyone.”<sup>152</sup> During the hearing before the House Committee on Government Reform on February 13, 2008, Clemens further testified under oath that he had “never taken steroids or [hGH],” and that his former strength coach, Brian McNamee, had “never given [him] [hGH]...or steroids of any kind.”<sup>153</sup>

Clemens was subsequently charged with one count of Obstruction of Congress in violation of 18 U.S.C. §§ 1505, 1515(b)<sup>154</sup> for knowingly making false and misleading statements during his testimony before the House Committee on Government Reform. Furthermore, Clemens was charged with three counts of False Statements in violation of 18 U.S.C. § 1001(a)(2), (c)(2) for “knowingly and willfully [making] a materially false, fictitious, and fraudulent statement and representation” regarding his use of anabolic steroids and hGH injections and his false accusations of McNamee injecting him with Vitamin B12.<sup>155</sup> Finally, Clemens was charged with two counts of Perjury in violation of 18 U.S.C. § 1621(1) for willfully and knowingly providing false testimony under oath regarding his use of hGH and anabolic steroids.<sup>156</sup>

### G. *Manny Ramirez*

In May 2009, Manny Ramirez, a former player for the Boston Red Sox, was suspended for fifty games for violating MLB’s drug policy.<sup>157</sup> Ramirez was suspended “for using human chorionic gonadotropin [“hCG”] after

<sup>150</sup> Indictment at 8, *United States v. Clemens*, 793 F. Supp. 2d 236 (D.D.C. 2011) (No. CR-10-223). The Mitchell Report’s investigation with respect to Clemens was based on “statements [made] by Clemens’ former trainer, Brian McNamee, who claimed that he had previously injected Clemens...more than a dozen times with steroids and [hGH] between 1998 and 2001, while Clemens said the injections were painkillers.” *See also* ESPN, *supra* note 7.

<sup>151</sup> Indictment at 9, *Clemens*, 793 F. Supp. 2d 236 (No. CR-10-223).

<sup>152</sup> *Id.* at 11.

<sup>153</sup> *Id.* at 11-12.

<sup>154</sup> *Id.* at 7-14.

<sup>155</sup> *Id.* at 14-17.

<sup>156</sup> *Id.* at 17-19. While Clemens pleaded not guilty to all six charges in his trial that began in July 2011, “a mistrial was declared just days into the trial, after prosecutors showed video that was previously ruled to be inadmissible.” *See also* ESPN, *supra* note 7. Clemens was “found not guilty on all six counts” when he was re-tried in 2012. *Id.*

<sup>157</sup> *Id.* Ramirez’s fifty-game suspension cost him \$7.7 million of his \$25 million salary for the 2009 season. *See id.*

high levels of testosterone were detected during a spring training drug test.”<sup>158</sup> In a statement from the MLBPA, Ramirez said he was using hCG as a “medication for a personal health issue,” and his agent, Scott Boras, added that the hCG was “prescribed by a doctor for a medical condition.”<sup>159</sup> During spring training of the 2011 season while playing for the Tampa Bay Rays, Ramirez again tested positive for yet another PED, and MLB informed him that he would face a one hundred-game suspension.<sup>160</sup> Ramirez, who did not want to serve the one hundred-game suspension, instead opted to retire.<sup>161</sup>

### III. STATISTICS INDICATE A DANGEROUS RATE OF ADOLESCENT PED USAGE

Various studies have been conducted regarding the use of PEDs among adolescents in the United States. For example, Digital Citizens Alliance commissioned a Zogby Analytics poll to conduct surveys about the use of steroids among teenagers.<sup>162</sup> The 2013 study concluded that PED usage among teenagers was high, as “[t]hirty-six percent of males aged 18-25 said that they, or someone they know, had taken [PEDs] like steroids or [hGH]. In all, over [eight] percent admitted that they themselves had taken [PEDs].”<sup>163</sup> Furthermore, six percent of parents surveyed “said that they knew their son had taken steroids and an additional [ten] percent said they knew someone else who had, [and] [o]ne in [five] parents were worried that

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<sup>158</sup> *Id.* Athletes typically used hCG—a fertility drug that MLB banned in 2008—between cycles of steroids. *See id.*

<sup>159</sup> *Id.* Upon Ramirez’s return to the Dodgers in July 2009, the *New York Times* published an article that reported Ramirez was “among the major leaguers who tested positive during [MLB’s] 2003 survey testing period.” *Id.*

<sup>160</sup> *Rays’ Manny Ramirez to Retire*, ESPN (Apr. 10, 2011), <http://www.espn.com/mlb/news/story?id=6310125>. MLB had informed Ramirez of “an issue” under the MLB drug program. *See id.*

<sup>161</sup> *See id.* Had he accepted the one-hundred game suspension, Ramirez “would have become the first player [at the time] to be suspended twice for a [PED] violation since [MLB’s drug program] went into effect in 2005.” *Id.* In 2012, Ramirez returned to MLB and played for the Oakland Athletics after serving a reduced fifty-game suspension; however, he was later released after he failed to be called up from the minor leagues. *See also* ESPN, *supra* note 7.

<sup>162</sup> *Zogby Poll: Teens and Steroids*, DIGITAL CITIZENS ALLIANCE (Oct. 3, 2013), <http://www.digitalcitizensalliance.org/blog/cybersafe-world/zogby-poll-teens-and-steroids/>. The study involved two separate surveys of 352 adults in the United States with male children between the ages of fourteen and twenty-five, as well as 350 males in the United States between the ages of eighteen and twenty-five. *Id.*

<sup>163</sup> *Better at Any Cost: The Dangerous Intersection of Young People, Steroids, and the Internet*, DIGITAL CITIZENS ALLIANCE REPORT IN PARTNERSHIP WITH THE TAYLOR HOOTON FOUNDATION 6, <http://media.digitalcitizensactionalliance.org/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/a46c7adf-339a-4403-bae2-a03777700b91.pdf> (last visited Nov. 15, 2016).

their child may take [PEDs] in the future.”<sup>164</sup> Additionally, the study found that teenagers understood the risk of using PEDs, as “[t]hirty-six percent of males aged 18-25 said that taking [PEDs] without a doctor’s supervision was ‘potentially life threatening’...[fifty-five] percent said it was ‘potentially harmful to overall health’...[and] [l]ess than [seven] percent thought that [PED] usage was ‘not very dangerous’ or ‘not dangerous at all.’”<sup>165</sup>

In addition, the Zogby Analytics poll concluded that professional athletes’ use of PEDs sends a “dangerous message to young athletes.”<sup>166</sup> For example, “[o]ne in five males ages 18-25 said that taking [PEDs] is ‘the only way to make it in professional sports’...[and] [a]n additional [twenty-four] percent said it was ‘critical to enhancing one’s athletic performance.’”<sup>167</sup> Moreover, a “whopping [seventy-seven] percent of males surveyed said that [PED] usage in professional sports ‘puts pressure on young athletes to use drugs to get ahead’...[and] [p]arents felt exactly the same [way].”<sup>168</sup>

Additionally, the Partnership for Drug-Free Kids conducted a 2013 Partnership Attitude Tracking Study that measured “substance abuse attitudes and behaviors” among parents and students.<sup>169</sup> The study found that the prevalence rate of steroid use among teenagers rose from five percent in 2009 to seven percent in 2013, whereas the prevalence rate of hGH use among teenagers more than doubled from five percent in 2009 to eleven percent in 2013.<sup>170</sup> Furthermore, the study found that teenagers’ perceived risk of the use of non-prescribed hGH and non-prescribed steroids decreased significantly.<sup>171</sup> In addition, the study found that twenty-eight percent of teenagers surveyed in 2009 agreed with the statement “knowing that some successful athletes use [PEDs] makes me more likely to use or consider using them,” whereas this figure decreased to seventeen percent in

<sup>164</sup> *Id.* at 6.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* These findings were consistent with a recent University of Minnesota study, which found that 5.9% of boys and 4.6% of girls in middle school and high school admitted to using steroids. *See id.* at 6-7.

<sup>169</sup> *The Partnership Attitude Tracking Study*, PARTNERSHIP FOR DRUG-FREE KIDS 6 (2013), <http://www.drugfree.org/wp-content/uploads/2014/07/PATS-2013-FULL-REPORT.pdf> (last visited Nov. 15, 2016). The study consisted of two samples: 750 parents with at least one child between the ages of ten and nineteen, and 3,705 teenage students in grades nine through twelve. *See id.*

<sup>170</sup> *See id.* at 21.

<sup>171</sup> *See id.* at 22. In 2012, eighty-six percent of surveyed teenagers perceived that there was “great or moderate risk” in using non-prescribed hGH, and this figure decreased to eighty-one percent in 2013. *See id.* In 2009, eighty-five percent of surveyed teenagers perceived that there was “great or moderate risk” in using non-prescribed steroids, and this figure decreased to eighty-two percent in 2013. *See id.*

2013.<sup>172</sup> Furthermore, seventeen percent of teenagers surveyed in 2009 agreed that using PEDs in athletics was okay “if it’s the only way to win,” whereas this figure decreased to eight percent in 2013.<sup>173</sup>

The study concluded that there were “noteworthy trends in the perceived accessibility of steroids and peer use.”<sup>174</sup> For example, twenty-five percent of teenagers surveyed in 2009 reported that they had friends who used steroids, whereas this figure decreased to twenty-one percent in 2013.<sup>175</sup> Next, twenty-six percent of teenagers surveyed in 2009 reported that steroids were “very/fairly easy to get,” whereas this figure decreased to twenty-one percent in 2013.<sup>176</sup> Finally, although the study found that “only [three] percent of parents believe[d] their teen ha[d] ever used steroids or other [PEDs],” the study also highlighted “a disconnect between parents and teens” regarding whether parents had actually discussed the use of steroids or other PEDs with their teenage children.<sup>177</sup>

#### IV. PHILOSOPHICAL THEORIES OF PUNISHMENT CONDEMN THE USE OF PEDS

Before presenting the proposed amendments to MLB’s approach to punishing PED usage, it is useful to articulate two distinct philosophical approaches to punishment, in order to demonstrate why such amendments are more consistent with moral intuitions than the status quo. These two theories of punishment are the retributive theory and consequentialist theory.

##### A. *Retributive Theory and Kantianism*

According to the retributive theory of punishment, criminal offenders deserve punishment because their behavior “upsets the peaceful balance of society, and punishment helps to restore the balance.”<sup>178</sup> Under the

<sup>172</sup> *Id.* at 23. However, eighty-eight percent of teenagers surveyed in 2013 believed that using steroids for athletic performance or physical appearance could lead to a risk of severe health problems. *See id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 24.

<sup>175</sup> *See id.*

<sup>176</sup> *See id.* Thirty-seven percent of teenagers surveyed in 2009 believed that steroids were difficult to obtain, whereas this figure increased to forty-three percent in 2013. *See id.* at 26.

<sup>177</sup> *Id.* at 24. While fifty-eight percent of parents reported that they discussed the use of steroids or other PEDs with their teens, “only [twelve] percent of teens indicate[d] that the last conversation they had with their parents about the risks of drug use included talking about [hGH].” *Id.*

<sup>178</sup> *Punishment – Theories of Punishment*, JRANK, <http://law.jrank.org/pages/9576/Punishment-THEORIES-PUNISHMENT.html> (last visited Dec. 18, 2016). The retributive theory of punishment is also commonly referred to as a “deontological” theory of punishment. *See also* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *infra* note 181.



retributive theory, the transgression itself serves as the basis for imposing punishment.<sup>179</sup> Retributivist philosophers believe that human beings possess free will and have the ability to make rational decisions; however, those individuals who make a “conscious choice to upset the balance of society should be punished.”<sup>180</sup> The retributive theory of punishment is considered to be “deontological” in nature if backward-looking, or *ex post*, considerations prevail over forward-looking, or *ex ante*, considerations, where “punishment is seen either as a good in itself or as a practice required by justice.”<sup>181</sup>

There are several moral bases and justifications for punishment under the retributive theory. First, punishment is justified under the principle of vengeance, as “wrongdoers should be forced to suffer because they have forced others to suffer.”<sup>182</sup> In other words, “wrongdoers are thought to deserve to suffer, so punishment is justified on the grounds that it gives to wrongdoers what they deserve.”<sup>183</sup> Equating punishment with the gravity of the offense is “embedded in the Judeo-Christian tradition in the Mosaic laws of the Old Testament that emphasize the idea of ‘an eye for an eye,’” or *lex talionis*.<sup>184</sup> According to the retributive principle of “let the punishment fit the crime...punishment should fit primarily the moral gravity of the crime and, to a lesser extent, the characteristics of the offender,” as there are some offenders who “may be less blameworthy or culpable due to factors outside of their control,” such as diminished capacity, mental disease, or immaturity.<sup>185</sup> Examples of retributive principles of punishment currently used in the United States justice system include mandatory sentencing policies and sentencing guidelines, where “punishment under these sentencing systems focuses primarily on the seriousness and characteristics of the criminal act rather than the offender.”<sup>186</sup> Therefore, punishment is the primary objective under the retributive theory, while deterrence is a secondary objective.

Philosopher Immanuel Kant advocated for a theory of punishment that embraces a retributivist approach. Kant expressed his beliefs regarding the theory of punishment, commonly known as “Kantianism,” in his eighteenth-

<sup>179</sup> *See id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Punishment*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 13, 2003), <https://plato.stanford.edu/entries/punishment/#ThePun> (revised July 31, 2015).

<sup>182</sup> *See* JRANK, *supra* note 178.

<sup>183</sup> Kevin Murtagh, *Punishment*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <http://www.iep.utm.edu/punishme/#H2> (last visited Dec. 18, 2016).

<sup>184</sup> *Philosophies of Punishment*, WORDPRESS 15-16, <https://marisluste.files.wordpress.com/2010/11/soda-filozofijas-3.pdf> (last visited Dec. 18, 2016).

<sup>185</sup> *Id.* at 16.

<sup>186</sup> *Id.*

century writing, *Science of Right*.<sup>187</sup> In his discussion of punishment, Kant refers to what he calls the “principle of equality,” where an individual who commits a wrongful act has not only inflicted suffering upon another, but also has “upset the balance of the scale of justice...and therefore rendered himself deserving of suffering.”<sup>188</sup> Additionally, Kant refers to the “principle of retaliation,” where an individual’s wrongful act is to be “regarded as perpetrated on himself.”<sup>189</sup> Therefore, according to Kant, “the justification of punishment is derived from the principle of retaliation, which is grounded in the principle of equality.”<sup>190</sup> Kant discusses these principles in his *Science of Right*:

But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other. It may be rendered by saying that the undeserved evil which any one commits on another is to be regarded as perpetrated on himself. Hence it may be said: "If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; if you kill another, you kill yourself." This is the right of retaliation (*jus talionis*); and, properly understood, it is the only principle which in regulating a public court, as distinguished from mere private judgment, can definitely assign both the quality and the quantity of a just penalty.<sup>191</sup>

A second moral basis for punishment under the retributive theory is “to protect the legitimate rights of both society and the offender.”<sup>192</sup> For example, “[s]ociety shows its respect for the free will of the wrongdoer through punishment...[and] [p]unishment shows respect for the wrongdoer because it allows an offender to pay the debt to society and then return to society, theoretically free of guilt and stigma.”<sup>193</sup>

A final rationale for punishment under the retributive theory is denunciation, where “punishment should be an expression of societal

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<sup>187</sup> W. Hastie, *From Immanuel Kant, Science of Right* (1790), AMERICAN UNIVERSITY, [http://www1.american.edu/dgolash/Kant\\_on\\_Punishment.html](http://www1.american.edu/dgolash/Kant_on_Punishment.html) (last visited Dec. 18, 2016).

<sup>188</sup> See Murtagh, *supra* note 183.

<sup>189</sup> *Id.* (Citing C.L. TEN, CRIME, GUILT, AND PUNISHMENT 104 (Oxford 1987)).

<sup>190</sup> *Id.*

<sup>191</sup> See Hastie, *supra* note 187.

<sup>192</sup> See JRANK, *supra* note 178.

<sup>193</sup> *Id.*

condemnation.”<sup>194</sup> The denunciation theory is considered a “hybrid of utilitarianism and retribution...[i]t is utilitarian because the prospect of being publicly denounced serves as a deterrent...[and] retributive because it promotes the idea that offenders deserve to be punished.”<sup>195</sup> In his *Science of Right*, Kant states:

Yet the attack committed on the honor of the party aggrieved may have its equivalent in the pain inflicted upon the pride of the aggressor, especially if he is condemned by the judgment of the court, not only to retract and apologize, but to submit to some meaner ordeal, as kissing the hand of the injured person. In like manner, if a man of the highest rank has violently assaulted an innocent citizen of the lower orders, he may be condemned not only to apologize but to undergo a solitary and painful imprisonment, whereby, in addition to the discomfort endured, the vanity of the offender would be painfully affected, and the very shame of his position would constitute an adequate retaliation after the principle of "like with like."<sup>196</sup>

#### B. *Consequentialist Theory and Utilitarianism*

In addition to the retributive theory of punishment, the consequentialist theory of punishment “views punishment as justified to the extent that its practice achieves...whatever end-state the theorist specifies, such as the public interest, the general welfare, [or] the common good.”<sup>197</sup> Contrary to deontological theories of punishment, a theory is consequentialist in nature if forward-looking, or *ex ante*, considerations prevail over backward-looking, or *ex post*, considerations.<sup>198</sup>

One type of consequentialist theory of punishment is utilitarianism. According to the utilitarian theory of punishment, “the rightness or wrongness of an action is determined by the balance of good over evil that is produced by that action.”<sup>199</sup> Utilitarianism is based on the belief that “laws should be used to maximize the happiness of society [and] [b]ecause crime and punishment are inconsistent with happiness, they should be kept to a minimum.”<sup>200</sup> Although utilitarian philosophers such as John Stuart Mill and Jeremy Bentham acknowledge that a crime-free society does not exist, they “endeavor to inflict only as much punishment as is required to prevent

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* See below for further discussion on the utilitarian theory of punishment and deterrence.

<sup>196</sup> See Hastie, *supra* note 187.

<sup>197</sup> See STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 181.

<sup>198</sup> *See id.*

<sup>199</sup> See Murtagh, *supra* note 183.

<sup>200</sup> See JRANK, *supra* note 178.

future crimes.”<sup>201</sup>

Utilitarianism is consequentialist in nature because it “recognizes that punishment has consequences for both the offender and society and holds that the total good produced by the punishment should exceed the total evil.”<sup>202</sup> For example, if punishing an offender would produce a higher balance of happiness over unhappiness compared with another available option, such as public denunciation or not taking any action at all, then punishment is justified. However, if the opposite is true, then such other option is preferable and punishment is not justified. Utilitarian philosophers take into account “every consequence of a given punishment insofar as it affects the balance of happiness over unhappiness.”<sup>203</sup>

The utilitarian theory of punishment “seeks to punish offenders to discourage, or ‘deter,’ future wrongdoing.”<sup>204</sup> Punishment is considered to have a deterrent effect “when the fear or actual imposition of punishment leads to conformity.”<sup>205</sup> Deterrence is based on a “rational conception of human behavior in which individuals freely choose between alternative courses of action to maximize pleasure and minimize pain.”<sup>206</sup> Two types of deterrence are specific and general deterrence. Specific deterrence involves “the effectiveness of punishment on that particular individual’s future behavior...[and] [r]ecidivism rates...are often used to measure the specific deterrent value of punishments.”<sup>207</sup> Furthermore, specific deterrence incapacitates an offender so as to “physically prevent [him or] her from committing another crime for a specified period...[and] this incapacitation is designed to be so unpleasant that it will [in theory] discourage the offender from repeating [his or] her criminal behavior.”<sup>208</sup> General deterrence inquires “whether the punishment of particular offenders deters other people from committing deviance...[and] [a] comparison of crime rates over time or across jurisdictions is typically used to ascertain the general deterrent value of punishment.”<sup>209</sup> Moreover, general deterrence signifies that the “punishment serves as an example to the rest of society, and it puts others on notice that criminal behavior will be punished.”<sup>210</sup>

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> See Murtagh, *supra* note 183.

<sup>204</sup> See JRANK, *supra* note 178.

<sup>205</sup> See WORDPRESS, *supra* note 184, at 20.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> See JRANK, *supra* note 178.

<sup>209</sup> See WORDPRESS, *supra* note 184, at 21.

<sup>210</sup> See JRANK, *supra* note 178.

A final rationale for the utilitarian theory of punishment is rehabilitation.<sup>211</sup> The ultimate goal of rehabilitation is to “restore a convicted offender to a constructive place in society through some combination of treatment, education, and training”<sup>212</sup> and thus “prevent future crime by giving offenders the ability to succeed within the confines of the law.”<sup>213</sup> Contrary to the retributive theory of punishment, rehabilitation “focuses on the particular characteristics of individual offenders that require treatment and intervention.”<sup>214</sup> Rehabilitation is utilitarian in nature in that it affords judges and other officials discretion to “tailor punishments for the greatest good to the individual offender.”<sup>215</sup>

#### V. SOLUTION: IMPLEMENT A “TWO-STRIKE” PENALTY SYSTEM FOR POSITIVE PED TESTS

To combat the increasing prevalence of PEDs in baseball, MLB should heighten the severity of punishments for positive drug tests by implementing a “two-strike” penalty system: a one-year suspension without pay for first-time offenders and a lifetime ban from MLB for second-time offenders.

Section 7A of the Program, which sets forth the disciplinary provisions for drug offenders,<sup>216</sup> should be amended to develop a more stringent drug policy. First, instead of imposing an eighty-game suspension for first-time offenders,<sup>217</sup> MLB should suspend first-time offenders for a one-year period, including the All-Star Game and the entire postseason, without pay. Second, instead of imposing a 162-game suspension with a pay suspension of 183 days for second-time offenders,<sup>218</sup> MLB should impose a lifetime ban on second-time offenders, thereby reducing the number of “strikes” for PED violations in Section 7A from three to two.

There are several justifications for adopting a two-strike drug policy. First, adopting an automatic “one-strike” policy that imposes a lifetime ban for first-time offenders may be too harsh because the language of Section 7A suggests that a player, who successfully appeals his suspension by proving the affirmative defense that he bore no fault or negligence for the presence of the PED in his test result, still receives his first “strike.”

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<sup>211</sup> *See id.*

<sup>212</sup> *See* WORDPRESS, *supra* note 184, at 22.

<sup>213</sup> *See* JRANK, *supra* note 178.

<sup>214</sup> *See* WORDPRESS, *supra* note 184, at 23.

<sup>215</sup> *Id.*

<sup>216</sup> *See Major League Baseball’s Joint Drug Prevention and Treatment Program*, *supra* note 8, at 37.

<sup>217</sup> *See id.* at 37-38.

<sup>218</sup> *Id.*

notwithstanding a potential reduction in his suspension. The reasoning behind this policy is likely intended to encourage players to take greater precautions when putting substances into their bodies. On the other hand, one may argue that implementing a “one-strike” policy is still feasible, as Section 7A could be amended to state that a player who successfully proves the affirmative defense does not receive a reduction in his suspension, but rather, merely avoids incurring his one “strike.” However, under such a policy, a player who, for example, successfully proves the affirmative defense in three different positive drug tests could be regarded as abusing the system, but he would not receive his one “strike.” Second, a one-year ban without pay will incentivize first-time offenders to take additional precautionary steps to ensure that the products they put into their bodies are appropriate and safe, knowing that a second positive drug test will result in a lifetime ban. Finally, a more stringent two-strike drug policy will further demonstrate to fans, players, and the rest of society that MLB is dedicated to maintaining the integrity of baseball and protecting all players’—both professional and amateur—long-term health, thus affirming MLB’s commitment to demonstrate to all athletes that “the use of [PEDs] is illegal, it is cheating, it does long-term damage to an athlete’s health, and it puts at risk an athlete’s reputation and integrity.”<sup>219</sup> Therefore, a two-strike system is more appropriate than a three-strike system because players will be incentivized to take greater health precautions when putting substances into their bodies, players will feel the increased financial constraints associated with lengthier suspensions without pay, and players will be further deterred from engaging in socially undesirable behavior that could lead to forfeited roster posts, negative publicity, and possible arbitration or litigation.

A. *Application of Philosophical Theories of Punishment to PED Usage*

1. Retributive Theory

Under the retributive theory of punishment, philosophers such as Kant would posit that players who use PEDs have upset the peaceful balance of MLB’s competitive fairness and threatened the integrity of the game.<sup>220</sup> Consequently, punishment in the form of yearlong suspensions and lifetime bans will demonstrate to society that such deceitful and immoral conduct will not be tolerated. Furthermore, because players possess the ability to exercise their free will when deciding whether or not to consume PEDs,

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<sup>219</sup> See Selig, *supra* note 18, at 107.

<sup>220</sup> See JRANK, *supra* note 178 and accompanying text.

players who have transgressed the Program's provisions by deliberately using PEDs deserve to be punished because they consciously chose to gain an unfair advantage over other players.<sup>221</sup> Such offenders have victimized and caused suffering to those players who chose to adhere to the Program's stipulations but subsequently lost roster spots or potential wages to players who wrongfully developed augmented offensive capabilities by using PEDs.<sup>222</sup> Therefore, to equate the punishment with the crime, offenders should lose their roster spots and potential wages by serving unpaid yearlong suspensions and lifetime bans.<sup>223</sup>

According to Kant's principle of equality, offenders not only inflict suffering upon other law-abiding players, but also "upset the balance of the scale of justice...and therefore rendered [themselves] deserving of suffering."<sup>224</sup> Additionally, under Kant's principle of retaliation, offenders' wrongful actions, which displace innocent players from club rosters, are to be "regarded as perpetrated on [the offenders themselves],"<sup>225</sup> which justifies imposing year-long suspensions and lifetime bans upon such offenders. Furthermore, because the punishment should be based on the moral gravity of the offense,<sup>226</sup> using PEDs to cheat one's way to garnering awards, fame, and money is a serious moral offense that warrants punishment.

In addition, under the retributive theory of punishment, punishing PED offenders serves to protect the legitimate rights of both society and offenders.<sup>227</sup> For example, society shows its respect for offenders' free will through punishment in the form of suspensions and lifetime bans, and punishment shows respect for the offender because it allows him to pay his debt to society by sitting out for an entire year without pay before returning to MLB (for first-time offenders) or for life (for second-time offenders).<sup>228</sup>

Finally, imposing yearlong suspensions and lifetime bans on offenders has a denunciative effect. Because suspensions and lifetime bans are expressions of societal condemnation,<sup>229</sup> these forms of punishment send a message to society that players who violate the Program deserve to be punished for their wrongful conduct. Furthermore, the prospect of being publicly denounced serves as a deterrent for players who value upholding their reputation and integrity and maintaining their salaries, sponsorships,

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<sup>221</sup> See STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 181 and accompanying text.

<sup>222</sup> See *The Mitchell Report*, *supra* note 9, at SR-8 to -10.

<sup>223</sup> See WORDPRESS, *supra* note 184, at 15-16.

<sup>224</sup> See Murtagh, *supra* note 183.

<sup>225</sup> See *id.*

<sup>226</sup> See WORDPRESS, *supra* note 184, at 16.

<sup>227</sup> See JRANK, *supra* note 178.

<sup>228</sup> See *id.*

<sup>229</sup> See *id.*

and roster spots.<sup>230</sup> In effect, suspensions and lifetime bans cause offenders to internalize the pecuniary costs of their immoral conduct in the form of foregone salaries and sponsorship deals, as well as reputational costs in the form of negative publicity, forfeited roster spots, and possible arbitration or litigation.

## 2. Consequentialist Theory

Under the consequentialist theory of punishment, utilitarian philosophers such as John Stuart Mill and Jeremy Bentham would argue that the balance of good over evil that is produced by a player's decision to use PEDs determines the rightness or wrongness of such action.<sup>231</sup> Furthermore, because punishing offenders has consequences for both the offending player and society, the total good produced by the punishment should outweigh the total evil, as punishment should only be inflicted to the extent that it prevents future violations of the Program.<sup>232</sup>

Several alternatives exist for punishing players who violate the Program. First, the player may be publicly reprimanded in the form of a monetary fine. However, because MLB players rank among the highest-paid athletes in the world, a fine may fail to adequately deter offenders' wrongful conduct in the future and may be regarded as a mere slap on the wrists. Second, there is the option of not taking any action at all in response to a player's positive drug test. A failure to act would not only exacerbate the problem of PED use by encouraging further consumption of PEDs among professional and adolescent athletes, but also stand in stark contrast to MLB's commitment to demonstrate to society that "the use of [PEDs] is illegal, it is cheating, it does long-term damage to an athlete's health, and it puts at risk an athlete's reputation and integrity."<sup>233</sup> Lastly, players may be punished in the form of yearlong suspensions without pay and lifetime bans. These forms of punishment are justified in that they maximize overall societal welfare, serve the public interest and common good, and produce the highest balance of happiness over unhappiness<sup>234</sup> for the following reasons.

First, by suspending players for one year without pay for a first-time violation of the Program and imposing a lifetime ban for a second violation, such forms of punishment would discourage professional and adolescent

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<sup>230</sup> *See id.*

<sup>231</sup> *See* Murtagh, *supra* note 183.

<sup>232</sup> *See* JRANK, *supra* note 178.

<sup>233</sup> *See* Selig, *supra* note 18, at 107.

<sup>234</sup> *See* JRANK, *supra* note 178. *See also* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 181. *See also* Murtagh, *supra* note 183.



athletes from using PEDs and promote the use of safe, appropriate, and legal training methods to achieve success.<sup>235</sup> In addition, by publicly condemning and denouncing the use of PEDs, these forms of punishment would adequately deter offenders from engaging in such wrongful behavior in the future. The fear of a potential lifetime ban from MLB would cause first-time offenders to scrupulously conform to the Program's requirements and may result in a decreased rate of recidivism.<sup>236</sup> Consequently, these forms of punishment would have a high specific deterrent value. Furthermore, such punishment would have a specific deterrent effect by incapacitating first-time offenders in the form of a one-year suspension without pay and repeat offenders in the form of a lifetime ban.<sup>237</sup> Additionally, such punishment would have a high general deterrent value by serving as an example to the rest of society that using PEDs will not be tolerated, thus putting others on notice that such behavior will be punished.<sup>238</sup> Moreover, a more stringent drug policy in MLB will further demonstrate to the millions of adolescent athletes and fans that cheating one's way to achieve success by gaining an unfair advantage over others is socially unacceptable behavior and severely punishable.

Finally, and most importantly, punishment in the form of suspensions and lifetime bans protects adolescent athletes' long-term health. Because younger athletes tend to emulate their favorite athletes' behavior,<sup>239</sup> adolescent athletes may be more likely to refrain from purchasing PEDs on the black market and will instead resort to using safe and acceptable nutritional and training methods if they observe their professional counterparts engaging in and promoting the same conduct. Since they are subject to significant hormonal changes associated with puberty,<sup>240</sup> adolescent athletes who use PEDs like steroids and hGH are increasingly vulnerable to developing serious health complications such as psychiatric problems, cardiovascular damage, liver damage, thyroid damage, changes to their reproductive systems, musculoskeletal injury, overgrowth of bone and connective tissue, and even cancer.<sup>241</sup> However, a more stringent drug policy in MLB that heightens the severity of punishments associated with the use of PEDs among professional athletes would have the effect of protecting not only the integrity of baseball, but also the long-term health of

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<sup>235</sup> See Selig, *supra* note 18, at 94. See also USA TODAY, *supra* note 22.

<sup>236</sup> See WORDPRESS, *supra* note 184, at 20.

<sup>237</sup> See JRANK, *supra* note 178.

<sup>238</sup> See *id.*

<sup>239</sup> See *Better at Any Cost: The Dangerous Intersection of Young People, Steroids, and the Internet*, *supra* note 163, at 6. See also *The Partnership Attitude Tracking Study*, *supra* note 169, at 23.

<sup>240</sup> See *The Mitchell Report*, *supra* note 9, at SR-8.

<sup>241</sup> See Indictment at 3-4, *United States v. Clemens*, 793 F. Supp. 2d 236 (D.D.C. 2011) (No. CR-10-223), *supra* notes 43-44.

adolescent athletes who look up to their professional role models.

#### VI. POTENTIAL CHALLENGES AND ISSUES MAY ARISE FROM A “TWO-STRIKE” SYSTEM

Despite the potential benefits associated with increasing the severity of punishments for PED offenders, there are several possible challenges and issues that may arise from implementing a “two-strike” penalty system.

First, the collective bargaining process of convincing the MLBPA to agree to more stringent punishments for PED violations may entail increasingly difficult and time-consuming negotiations between club owners and the MLBPA. On November 30, 2016, prior to the expiration of the pre-existing collective bargaining agreement on December 1, 2016, MLB and the MLBPA agreed to a “new five-year labor agreement that will allow play to continue uninterrupted through the 2021 season.”<sup>242</sup> Among the various changes to the new collective bargaining agreement include increases in the number of in-season and off-season urine and blood tests administered to players with respect to the Program.<sup>243</sup> Furthermore, the new agreement contains increased punishments for Stimulants violations under Section 7B of the Program<sup>244</sup> to “[fifty] games for a second time violation; [one hundred] games for a third time violation, and up to a permanent suspension for a fourth time violation.”<sup>245</sup> However, it is important to note that the new collective bargaining agreement does not contain any changes in the punishments for PED violations under Section 7A of the Program.

Nevertheless, one change in the new collective bargaining agreement may encourage the MLBPA to agree to increased punishments for PED violations during the next round of collective bargaining set to occur in 2021: the “[a]rbitration [p]anel will be provided more discretion to reduce penalties based on mitigating circumstances.”<sup>246</sup> Since players can have

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<sup>242</sup> *Details of MLB, MLBPA Labor Agreement*, MLB.COM (Dec. 2, 2016), <https://www.mlb.com/news/details-of-mlb-mlbpa-labor-agreement/c-210125462> (last visited Feb. 20, 2018).

<sup>243</sup> The number of in-season random urine tests will increase from 3,200 to 4,800. The number of off-season random urine tests will increase from 350 to 1,550, which will allow for every player on each club’s forty-man roster to be subject to at least one random off-season urine test. The number of in-season random blood tests will increase from 260 to 500. The number of off-season random blood tests will increase from 140 to 400. *See id.*

<sup>244</sup> *See Major League Baseball’s Joint Drug Prevention and Treatment Program*, *supra* note 8, at 11-13, 38-39.

<sup>245</sup> *See Details of MLB, MLBPA Labor Agreement*, *supra* note 242.

<sup>246</sup> *Id.*

their suspensions reduced if they present “clear and convincing” objective evidence that the presence of the PED in their specimens was not due to their “fault or negligence” under Sections 8(B)(3) and 8(B)(4) of the Program,<sup>247</sup> providing the arbitration panel with enhanced discretion to reduce penalties based on mitigating circumstances may facilitate the MLBPA’s consent to heightened punishments for PED violations, because players may be more likely to receive reduced suspensions in their arbitration proceedings upon appealing their punishments.

Second, more stringent punishments for PED violations may have negative effects on fan attendance at MLB games. If clubs’ best-performing players are given lengthier suspensions in the form of a one-year suspension or a lifetime ban, fans may be discouraged from attending ballgames if they are unable to see their favorite athletes compete for such an extended period of time. Consequently, a drop in ballpark attendance could lead to a resultant reduction in ticket revenues, concessions and club merchandise sales, television ratings, and the probability of a club making the postseason, which could exacerbate frustration among a club’s fan base and adversely affect a club’s profitability. Furthermore, disgruntled parents may decide not to take their children to baseball games if clubs’ players have been suspended for using PEDs, possibly because they do not want to expose their children to such harmful products or reward these clubs by purchasing game tickets. One counter-argument to this potential challenge is the fact that MLB’s total fan attendance actually spiked during the Steroid Era, due in part to fans’ desire to experience firsthand the excitement of seeing bigger, faster, and stronger players hitting more homeruns at significantly greater distances and at higher speeds off the bat. For example, total fan attendance increased during the Steroid Era from over forty-six million fans in 1985 to over seventy-two million fans in 2000 to approximately seventy-three million fans in 2016.<sup>248</sup> Thus, if fans were less interested in attending games when they know that they will not have the excitement of seeing stronger players hitting more homeruns, then this would present a challenge for imposing more stringent punishments for PED usage.

Finally, if MLB further restricts professional players’ use of PEDs by heightening the severity of punishments for PED violations, there is the potential danger that online suppliers of PEDs and other dubious supplements may shift their focus to selling their products to the teenage and pre-teenage markets. With the increased ease and availability of purchasing steroids and other PEDs on the Internet, teenagers are vulnerable

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<sup>247</sup> See *Major League Baseball’s Joint Drug Prevention and Treatment Program*, *supra* note 8, at 51.

<sup>248</sup> See *1980-1989 Ballpark Attendance*, *supra* note 3.

to being exposed to online merchants' marketing efforts on the black market and purchasing illegal products, some of which have been found to contain "contaminants such as lead and other heavy metals; liquid mixers such as cooking oil, horse urine; and other filthy contents and dangerous substances."<sup>249</sup> Furthermore, countless online vendors promote their products to the general public by broadcasting videos on popular websites such as YouTube and search engines like Google that contain embedded links to their individual websites, where teenagers can purchase these harmful products without a prescription simply by using a credit card.<sup>250</sup> In addition to online retailers, laboratories and clinics like Biogenesis<sup>251</sup> have provided PEDs not only to professional athletes, but also to "high school and college athletes as well."<sup>252</sup> Therefore, if leagues like MLB increase the severity of punishments for PEDs and further crack down on professional players' use of PEDs, then "suppliers may become even more dependent on the teen market,"<sup>253</sup> which could pose serious threats to the safety and long-term health of adolescent athletes.

#### CONCLUSION

Since the beginning of the Steroid Era in the 1980s, MLB has experienced a widespread prevalence of PED use among its players. By exploring the evolution of MLB's drug policy, discussing examples of players accused of using PEDs, examining statistical information regarding adolescents' use of PEDs, reviewing the retributive and consequentialist philosophical theories of punishment including Kantianism and utilitarianism, proposing a "two-strike" solution for PED offenders, and identifying possible challenges and issues associated with this solution, this Note has argued that MLB should adopt a more stringent drug policy than the one currently set forth in the Program in order to maintain the integrity of baseball and protect adolescents' long-term health by further discouraging the use of PEDs. Failure to address this alarming issue may result in more of our nation's youth and future generations developing life-threatening health complications at earlier stages in their lives. Now is the time for MLB to step up to the plate.

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<sup>249</sup> See *Better at Any Cost: The Dangerous Intersection of Young People, Steroids, and the Internet*, *supra* note 163, at 7-8, 10.

<sup>250</sup> See *id.*

<sup>251</sup> See Complaint at 10-11, *Rodriguez v. Major League Baseball*, No. 2013-02 (S.D.N.Y. 2013).

<sup>252</sup> See *Better at Any Cost: The Dangerous Intersection of Young People, Steroids, and the Internet*, *supra* note 163, at 13.

<sup>253</sup> *Id.* at 14.



