Let the Caged Bird Sing: How Collectively Bargained Anti-Doping and Substance Abuse Policies Provide a Blueprint for Elevating Athletes' Collective Voice in Sports Organizations

By: Dani Bland

Villanova University Charles Widger School of Law

Spring 2022

TABLE OF CONTENTS

I. Introduction 4

II. Legal Backdrop of Collective Bargaining 5

a. U.S. Antitrust Law 6

b. U.S. Labor Law 8

III. Case Studies in American Professional Sports Leagues with Collectively Bargained Drug Policies 11

a. MLB 11

i. MLB Players Association ("MLBPA") History 11

ii. MLB/MLBPA Drug Policy Progression 14

1. History of the Joint Drug Agreement ("JDA") 14

2. Examining the Current JDA 16

b. NFL 23

i. NFL Players Association ("NFLPA") History 23

ii. NFL/NFLPA Drug Policy Progression 26

1. History of the NFL's Policies on Performance Enhancing Substances and Substances of Abuse 26

2. Examining the Current NFL Policy on Performance Enhancing Substances 26

3. Examining the Current NFL Policy and Program on Substances of Abuse 30

IV. World Anti-Doping Agency ("WADA"), an Independent Doping Agency ________ 32

a. WADA History ________ 33

b. WADA's Governance Structure ________ 34

c. World Anti-Doping Code (the "Code") Progression ________ 35

V. Comparing American Collectively Bargained Drug Policies with an Independent International Anti-Doping Agency's Policies ________ 40

d. Comparison ________ 40

e. Solutions ________ 40

VI. Conclusion ________ 42

Let the Caged Bird Sing: How Collectively Bargained Anti-Doping and Substance Abuse Policies Provide a Blueprint for Elevating Athletes' Collective Voice in Sports Organizations

I. Introduction

Society is in an age of athlete empowerment which captured undivided global attention in 2021 when the likes of Naomi Osaka[1] and Simone Biles[2] spoke publicly reminding people that athletes are human too, with physical and emotional needs just like every other person on the planet. Athletes are not circus animals performing impressive skills for an audience's entertainment. Performance may be part of athletics, and athletic skills are impressive and garner massive audiences, but there is a human behind the performer. Athletes such as Kevin Love have informed the world that athletes suffer from mental illness too.[3] The empowerment of athletes goes beyond mental health and physical wellbeing. Athletes have been fighting for decades for the same workers' rights as are enjoyed by people in other professions. American athletes in professional sports leagues now have unions representing them and negotiating on their behalf. Athletes should have rights and representation relating to policies imposed on them. Clean sport and equal bargaining power for athletes do not have to be mutually exclusive.

---

[1] *See generally* Naomi Osaka, *Naomi Osaka: 'It's O.K. to Not be O.K.'*, New York Times (July 8, 2021), https://time.com/6077128/naomi-osaka-essay-tokyo-olympics/

[2] *See generally* Daniella Silva, '*We're Human Too': Simone Biles Highlights Importance of Mental Health in Olympics Withdrawal* (July 27, 2021), https://www.nbcnews.com/news/olympics/we-re-human-too-simone-biles-highlights-importance-mental-health-n1275224

[3] *See generally* Kevin Love, *Everyone is Going Through Something,* The Players' Tribune (March 6, 2018), https://www.theplayerstribune.com/articles/kevin-love-everyone-is-going-through-something ; *See also* Kevin Love, *To Anybody Going Through It*, The Players' Tribune (Sept. 17, 2020), https://www.theplayerstribune.com/articles/kevin-love-mental-health

This paper explores how collectively bargained anti-doping and substance abuse policies succeed at providing athletes equal bargaining power while also maintaining clean sport. First, the legal backdrop and safeguards in place for collective bargaining in American professional sports leagues are established with an overview of U.S. antitrust and labor law. Then, two case studies of professional American sports leagues with collectively bargained anti-doping and substance abuse policies are examined. Each case study explains how the labor organization and policy/policies came to be, and then each league's policy's administration and substance is examined. Next, the World Anti-Doping Agency ("WADA"), an international independent anti-doping agency, is introduced. WADA is not subject to the same legal foundation as American professional sports leagues that collectively bargain, however, the success at elevating athlete voices found in collective bargaining can be translated into WADA's structure and the World Anti-Doping Code (the "Code"). The history of WADA and the hierarchy of its governance structure are delineated. Finally, collectively bargained anti-doping and substance abuse policies in American professional sports leagues are compared with WADA's governance structure and Code, and solutions to improve athlete rights, representation, and overall empowerment are suggested before the paper concludes.

II. Legal Backdrop of Collective Bargaining

Antitrust and labor law set the background for collective bargaining in American professional sports. Major American professional sports leagues collectively bargain their policies on performance enhancing substances and substance abuse.

a. U.S. Antitrust Law

Antitrust law is a tool professional American sports leagues such as the MLB, NFL, NHL, and NBA have leveraged to increase their power in negotiations with league management. Antitrust laws are designed to "preserve a competitive marketplace and protect consumer economic welfare."[4] Competition is hindered when employer conduct disrupts the market's ability to provide consumers with lower prices, better products, or more efficient production methods.[5] "The key issue in the sports context is whether the conduct at issue has predominantly anti-competitive effects—harming consumers—or whether the competitive restraint benefits consumers more than unrestrained market competition."[6] The centerpiece of American antitrust law is the Sherman Act of 1890, commonly referred to as the Sherman Antitrust Act, a federal statute prohibiting activities that restrict interstate commerce and competition in the marketplace.[7] It was the first United States federal statute to limit cartels and monopolies.[8]

The Sherman Act forbids contracts, combinations, or conspiracies that restrain commerce.[9] For the Sherman Act to apply, the challenged activity must (1) be concerted action (involving at least two parties); (2) cause an unreasonable restraint; and (3) affect interstate trade or commerce, or trade with foreign nations as long as the restraints are unreasonably restrictive to competition in a relevant market.[10] Only restraints that are unreasonable are found to violate the Sherman Act since even a simple contract between two parties technically restrains trade to

[4] Matthew J. Mitten et al., *Sports Law and Regulation: Cases, Materials, and Problems* 260, 227 (3d ed. 2013).
[5] *See* Jill K. Ingels, Comment, *Do Not Pass Go and Do Not Collect $200: Nike's Monopoly on USATF Violates Antitrust Laws and Prevents Athletes from Living at Park Place*, 27 Marq. Sports L. Rev. 171, 186 (2016).
[6] Sherif Farrag, *Olympians as Laborers: How Unionizing Can Help Athletse Bargain for Compensation an Better Structural Support*, Fordham IP, Media and Entertainment Law Journal 689, 709 (2022).
[7] Legal Information Institute, *Sherman Antitrust Act,* Cornell Law School, https://www.law.cornell.edu/wex/sherman_antitrust_act (last retrieved May 2, 2022).
[8] *The Antitrust Laws,* Federal Trade Commission, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last retrieved May 2, 2022).
[9] 15 U.S.C.A §1 (2004).
[10] Jill K. Ingels, *supra* note 5, at 187.

some extent.[11] When determining Sherman Act cases, courts choose between various standards of review.[12] Since the business of sports inherently requires some level of economic restraint, the rule of reason analysis is the standard courts use in sports business cases.[13] Rule of reason analysis is a totality of the circumstances, fact-specific analysis requiring a determination of whether the challenged conduct has a substantially adverse effect on competition.[14]

The Sherman Act has both civil and criminal implications.[15] The maximum civil fine is one million dollars, and the maximum criminal punishment is ten years imprisonment.[16] Courts are not required to choose between civil and criminal punishment, rather they may impose either or both at their discretion.[17]

The Sherman Act prevents most professional sports leagues[18] from unreasonable restraints on trade. If NFL, MLB, NHL, or NBA athletes are unhappy with an action by their respective league that they believe is a restraint on trade, they may file a claim under the Sherman Act. Litigation costs, steep fines and potential prison sentences are a strong deterrent to anti-competitive actions in the marketplace.

Professional sports leagues, however, can circumvent federal antitrust laws by entering into collective bargaining agreements with their players' labor organizations, but it will force

---

[11] *Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, Bona L., https://www.bonalaw.com/insights/legal-resources/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quick-look-tests (last retrieved April 28, 2022).
[12] *Id.*
[13] Sherif Farrag, *supra* note 6.
[14] Jill K. Ingels, *supra* note 5. *See* also *Antitrust Standards of Review*, *supra* note 11 for descriptions of the different standards of review and how the burden of proof shifts throughout the lifespan of a Sherman Act claim.
[15] Sherman Act, 15 U.S.C.A. §§ 1-3 (2004).
[16] *Id.*
[17] *Id.*
[18] All professional sports leagues in the U.S. are considered interstate commerce except for the MLB, which has an anti-trust exemption. See the MLB section of this paper for more.

them to the negotiation table.[19] The non-statutory labor exemption[20] to the federal antitrust laws shields "restraints on trade that are the product of a collective bargaining agreement between labor and management." [21] The Sixth Circuit decided that if a restraint is agreed upon in a CBA, it was bargained for and a party got something in return.[22] As long as a CBA was the result of good faith arms-length bargaining, its provisions will be exempt from antitrust law.[23] Collective bargaining between labor and management falls under labor law.

b. U.S. Labor Law

The non-statutory labor exemption to antitrust law encourages collective bargaining and the National Labor Relations Act ("NLRA"), a federal labor law statute initially passed by Congress as the Wagner Act in 1935, was enacted to provide guardrails to safeguard collective bargaining.[24] In professional sports, it has forced league management to take player unions seriously.[25] The NLRA was enacted to protect employee and employer rights[26], to encourage collective bargaining, and to reduce certain private sector labor and management practices which harm the general welfare of workers, businesses, and the national economy. [27] The act specifically protects workers' rights to "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[28] The NLRA proscribes five

[19] Andrew Brandt, Executive Director, Jeffrey S. Moorad Center for the Study of Sports Law, Sports Law Advanced Legal Business Practices Lecture at Villanova University Charles Widger School of Law (October 14, 2020).
[20] *See Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616, 621-22 (1975).
[21] Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports,* 94 No. 3 Columbia L. Rev. 1045 (April, 1994). (establishing non-statutory labor exemption).
[22] *McCourt v. California Sports Inc.*, 600 F.2d 1193 (1979); *See also Clarett v. NFL*, 369 F.3d 124 (2004).
[23] *McCourt, supra* note 22.
[24] National Labor Relations Act, 29 U.S.C. §§151-166.
[25] *See id.*
[26] While the NLRA provides employer rights under Section 8(b), they fall outside the scope of this paper which is focused on employee rights and will therefore not be addressed further.
[27] *Id.* See also *The Law,* National Labor Relations Board, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law (last retrieved April 27, 2022)
[28] National Labor Relations Act, *supra* note 24 at §§ 1,7.

types of unfair labor practices by employers: (1) interfering with or restraining employees' rights under the act; (2) "dominat[ing] or interfer[ing]" with the formation of a labor organization or supporting it financially or otherwise; (3) discriminating against employees in an effort to encourage or discourage membership in a labor organization; (4) retaliating against employees for filing charges or testifying in an NLRA action; or (5) refusing to bargain collectively with employees' representatives.[29]

The NLRA established the National Labor Relations Board ("NLRB") to enforce its provisions.[30] The NLRB has jurisdiction over unfair labor practice claims, and retains subpoena power, and the power to hold individuals in contempt. If after a formal hearing the Board finds that any party in a complaint has engaged, or continues to engage in, an unfair labor practice in violation of the NLRA, then the Board shall issue an opinion and an order requiring the party to "cease and desist the unfair labor practice, and to take affirmative action, including reinstatement of employees with or without back pay," as necessary to uphold the NLRA's underlying policies.[31] Although this statute aims to reduce the occurrence of strikes, the act does not diminish employees' right to strike.[32]

The NLRA addresses the "inequality of bargaining power" between labor and management by providing an express right for employees to organize and by forcing employers to collectively bargain with their corresponding labor organizations[33]. In other words, the NLRA affirmatively provides employees a voice. Collective bargaining statutes like the NLRA "take into account the economic reality that individual workers typically lack the economic bargaining

[29] *Id.* at §8.
[30] *Id.* at §3(a).
[31] *Id.* at §§10(a-c), 11(1).
[32] *Id.* at §13.
[33] Michael L. Wachter, *The Striking Success of the National Labor Relations Act,* Research Handbook on the Economics of Labor and Employment Law, p. 427 (2012).

power to stand up meaningfully for their individual rights."[34] If the MLB, NFL, NHL, or NBA refuse to negotiate with their league's players association, the association could file an unfair labor practice claim with the NLRB and the league would be subject to investigation and punishment.[35] The NLRA not only provides express rights to employees, but the teeth of its enforcement mechanism are an effective deterrent against violations by employers.

The non-statutory labor exemption is not absolute, however. Individual employees, here the players, can bring antitrust claims regarding CBA provisions if and when the relevant players association decertifies as a union.[36] Decertification is simple: To decertify, the union would merely send a letter to the NLRB stating that it no longer represents the players.[37] Decertification is risky because CBAs include a multitude of benefits such as health insurance, and because dissolving the union eliminates the benefit of collective power.[38]

The non-statutory labor exemption to antitrust law encourages leagues to bargain with their players associations and the NLRA balances the bargaining power between labor and management. Leagues are encouraged to collectively bargain because a resulting CBA would be protected from antitrust claims as long as the union remains intact. Union decertification further encourages collective bargaining by providing players with an out and by incentivizing management not to negotiate extreme restraints that could cause the union to decertify and individuals to bring antitrust claims against the league. American antitrust and labor law have given players a meaningful say in provisions included in league CBAs. Drug policies are

[34] *Collective Bargaining and Civil Liberties,* ACLU https://www.aclu.org/other/collective-bargaining-and-civil-liberties (last retrieved April 29, 2022).
[35] The NLRA is a U.S. statute that only applies if a worker is considered an "employee" and there is a wealth of litigation on what constitutes an employee however it is undisputed that MLB, NFL, NHL, and NBA players are all employees so that issue is outside the scope of this paper. *See* National Labor Relations Act, *supra* note 24.
[36] Andrew Brandt, *supra* note 19.
[37] *Id.*
[38] *Id.*

collectively bargained in many American professional sports leagues and their text provides insight into the power of players' aggregate voice and where their interests lie.

III. Case Studies in American Professional Sports Leagues with Collectively Bargained Drug Policies

To see how collective bargaining has affected player representation and player interests in drug policies, it is beneficial to look at how different leagues' players associations evolved and examine the features of each league's anti-doping policy and how these policies have progressed. This paper will use the MLB and the NFL as case studies. The MLB was selected because professional baseball originally had a unique exemption to antitrust law, however for player employment purposes that exemption has since been lifted and the MLB Players Association is on equal legal footing with players associations from other leagues. The NFL was selected because it started testing players for substances long before MLB and because the league was always subject to antitrust law, like every other professional sports league except for MLB. Both leagues are subject to labor law since players are employees.

a. MLB

i. MLB Players Association ("MLBPA") History

The MLBPA is the collective bargaining representative for all MLB players.[39] Founded in 1966, the MLBPA was not baseball players' first attempt at a union.[40] In 1885, nine players formed the first players union in professional baseball—the Brotherhood of Professional Base Ball (sic) Player.[41] Other attempts to organize included the Players' Protective Association in

[39] *History,* MLBPA https://www.mlbplayers.com/history (last retrieved May 1, 2022).
[40] *Id.*
[41] *Id.*

1900, the Fraternity of Professional Baseball Players of America in 1912, and the American Baseball Guild in 1946.[42]

Players sought outside assistance when they created the MLBPA, hiring Marvin Miller, a well-respected economist with union experience working for the United Steelworkers of America.[43] In 1968, Miller helped the MLBPA negotiate the first CBA in professional sports.[44][45] "The successful founding of the MLBPA changed the landscape for professional sport forever, serving notice that highly skilled athletes would seek the same basic employment rights that people in other professions had long taken for granted."[46] The MLBPA has used the NLRA as a tool to gain basic employment rights by filing unfair labor practice claims with the NLRB. While baseball players could leverage labor law to improve their bargaining power, they were unable to use antitrust law to their advantage until 1998.

In 1922, the U.S. Supreme Court ruled that the business of organized professional baseball was exempt from antitrust law, namely the Sherman Act.[47] The Sherman Act only applies to restraints on interstate commerce, and the Court deemed the travel between states for professional baseball as "merely incidental" to the business, and thus not interstate commerce.[48] This decision was upheld in *Toolson v. New York Yankees, Inc.*, a case in which George Toolson argued against MLB's reserve clause. [49] The Supreme Court held that baseball's antitrust exemption established in *Federal Baseball. . . v. National League. . .*, was affirmed by Congress through its inaction and thus antitrust laws would still not apply to baseball.[50]

---

[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] The MLB and MLBPA call their CBA the Basic Agreement.
[46] *History*, *supra* note 39.
[47] *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs,* 259 U.S. 200 (1922).
[48] *Id.*
[49] *Toolson v. New York Yankees*, *Inc.*, 346 U.S. 356 (1953).
[50] *Federal Baseball Club, Inc. supra* note 47.

Curt Flood was the next player to risk his career and challenge baseball's reserve clause which prevented players from reaching free agency.[51] Although Flood lost his case, the Supreme Court started to show signs of weakening baseball's antitrust exemption.[52] The Court said baseball's antitrust exemption was an anomaly and held that baseball was indeed interstate commerce but left it to Congress to lift the exemption.[53] Flood, a talented ballplayer, never stepped foot on another baseball field as a professional.[54]

Congress finally partially lifted baseball's antitrust exemption via a statute entitled the Curt Flood Act of 1998, paying homage to Curt Flood's sacrifice.[55] The act states that professional baseball players are covered under anti-trust laws when it comes to their employment.[56] Section two further notes that baseball players are granted the same antitrust rights as other professional sports league players.[57] In 1957, the U.S. Supreme Court had refused to extend baseball's exemption to the business of professional football in *Radovich v. NFL*, holding that professional football was subject to antitrust laws.[58] The final clause of section two declares the Curt Flood Act "[d]oes not change the application of the antitrust laws in any other context or with respect to any other person or entity."[59] The clause assures owners and the MLB commissioner that antitrust law is still inapplicable to all other aspects of professional baseball.[60] Congress made it crystal clear that the act only applies to the employment of players.[61] Although

[51] S*ee Flood v. Kuhn et al.*, 407 U.S. 258 (1972).
[52] *Id.*
[53] *Id.*
[54] Andrew Brandt, Executive Director, Jeffrey S. Moorad Center for the Study of Sports Law, Sports Law Advanced Legal Business Practices Lecture at Villanova University Charlges Widger School of Law (September 30, 2020).
[55] Sherman Act, 15 U.S.C.A. § 26(b) Application of Antitrust Laws to Professional Major League Baseball (2002).
[56] *Id.*
[57] *Id.*
[58] *Radovich v. NFL*, 352 U.S. 445 (1957).
[59] Sherman Act, 15 U.S.C.A. § 26(b) *supra* note 55.
[60] Edmund P. Edmonds, Comment, *The Curt Flood Act of 1998: A Hollow Gesture After All These Years?*, 9 Marq. Sports L. Rev. 318, 346 (1999).
[61] *Id.*

professional baseball initially had a unique relation to antitrust law, professional baseball players now have the same legal footing regarding their employment as professional athletes in other American professional sports leagues under both labor and antitrust law.

Over the years, the MLBPA has gone on strike, filed unfair labor claims with the NLRB, and has used the tactic of decertification so individuals could bring antitrust lawsuits.[62] These methods have enhanced player employment rights tremendously. To date there have been thirteen Basic Agreements (CBAs) between MLB and MLBPA.[63] The current Basic Agreement was ratified on March 10, 2022 after an owner-imposed ninety-nine-day lockout and is in effect through 2026.[64] The MLBPA and MLB collectively bargain their drug policy, called the Joint Drug Agreement ("JDA").[65]

ii. MLB/MLBPA Drug Policy Progression

1. History of the Joint Drug Agreement ("JDA")

The MLBPA and MLB collectively bargained a drug policy as part of their CBA for the first time in 2002 after the U.S. Senate Commerce Committee informed them they must implement a drug-testing plan.[66] The 2002 policy called for anonymous survey testing in 2003.[67] If greater than five percent of samples returned positive for performance enhancing drugs ("PEDs") in 2003, then mandatory random testing would start in 2004.[68] Approximately seven percent of anonymous survey tests taken in 2003 were positive so urine testing for PEDs with

---

[62] *See generally, Id.*
[63] *Id.*
[64] Mark Feinsand, *MLB, MLBPA Agree to New CBA; Season to Start April 7*, MLB https://www.mlb.com/news/mlb-mlbpa-agree-to-cba (last retrieved May 1, 2022).
[65] *History*, *supra* note 39.
[66] *Id.*
[67] Associated Press, *Major League Baseball Stops Testing Its Players for Steroids After Nearly 20 years, Report Says,* ESPN (Feb. 7, 2022). https://www.espn.com/mlb/story/_/id/33238595/major-league-baseball-stops-testing-players-steroids-nearly-20-years-report-says
[68] *Id.*

penalties for violations began the following year[69] "under a series of a (sic) repeatedly tightened drug agreements."[70]

Drug agreements tightened after criticism from the U.S. Senate Commerce Committee. Commerce Committee Chairman John McCain, an Arkansas Republican, stated "Your failure to commit to addressing this issue head on and immediately will motivate this committee to search for legislative remedies."[71] The Commerce Committee specifically disapproved of the laxity of the 2004 policy under which first time offenders merely received counseling, a stark contrast from the punishment of first-time offenders in the NFL.[72]

MLB Commissioner Bud Selig publicly released a letter arguing for stronger PED-related penalties to increase pressure on the MLBPA.[73] Effective in 2006, the union agreed to heftier penalties: fifty-days suspension for a first offense, 100-days suspension for a second offense, and a lifetime ban with ability to apply for discretionary reinstatement for a third offense.[74] Testing for banned amphetamines was also introduced.[75]

Commissioner Selig hired former U.S. Senator George Mitchell to investigate PEDs in professional baseball.[76] Over eighty players were implicated in the Mitchell Report by name, many of whom were previously suspected of or sanctioned for doping.[77] The Joint Drug Agreement between the MLBPA and MLB was updated in 2008 to include recommendations

---

[69] *Id.*
[70] Associated Press, *supra* note 67.
[71] Thomas Heath, *Senate Warns Baseball on Steroid Testing,* Washington Post (March 11, 2004). https://www.washingtonpost.com/archive/politics/2004/03/11/senate-warns-baseball-on-steroids-testing/5fac47ab-61f9-4dae-bd2f-1f7a0184eac6/
[72] *Id.*
[73] *History, supra* note 39.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*

from the Mitchell Report such as increasing the number of tests, annually releasing a summary of test results,[78] and implementing an independent program administrator to oversee the program.[79]

Blood testing for human growth hormone was introduced in 2012 but was suspended during the global Covid-19 pandemic.[80] 2014 saw the most significant revisions to the JDA since 2006.[81] The number of tests for banned substances again increased and punishments lengthened as well.[82] A first offense moved up from fifty to eighty games.[83] A second offense, moved from 100 to 162 games, and a third offense warrants a permanent suspension with the opportunity for discretionary reinstatement.[84] The MLB could not legally enforce the JDA from late 2021 to March of 2022 due to it expiring and due to the owner-imposed lockout that lasted for ninety-nine days.[85] The program under the JDA[86] resumed upon ratification of the 2022 Basic Agreement.[87]

2. Examining the Current JDA

The JDA is a short one-page document stating that the MLB Commissioner's Office and the MLBPA have agreed to the Joint Drug Prevention and Treatment Program ("the Program") which is a separate document.[88] Additionally the JDA outlines who the Program applies to, and the purpose behind it.[89] The JDA covers all major league players whether on a forty-man roster,

[78] The summary of drug test results indicates only the number of tests administered, the number that were adverse and what category of substance triggered the adverse tests to return positive results (PEDs, stimulants). *See Id.*
[79] *Id.*
[80] Associated Press, *supra* note 67.
[81] *History*, *supra* note 39.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] Associated Press, *supra* note 67.
[86] It is not currently clear whether there is new JDA or if the parties agreed to continue the previous JDA, but it is clear that the JDA is in effect and it is posted on the MLBPA website.
[87] *Id.*
[88] *Joint Drug Agreement,* MLBPA https://www.mlbplayers.com/jda (last retrieved May 3, 2022).
[89] *See Id.* Now that the relation between the terms has been established, this paper will use the terms "Program" and "JDA" interchangeably.

released, or a free agent, unless they have formally retired or are under contract with a non-MLB affiliated professional baseball league.[90] The purpose of the JDA is to educate players about the dangers of prohibited substance use, to deter and end the use of prohibited substances, and to provide for an orderly resolution of disputes regarding the program.[91] Disputes are handled under the grievance procedures outlined in the Basic Agreement.[92]

Balanced bargaining power has led to the current JDA/Program containing many provisions serving player interests. First, it is important to emphasize that the JDA was agreed on by the MLB and MLBPA.[93] Both parties[94] had an equal say in its ratification.[95] Players were not only given a say in the anti-doping policy but were given a say in its administration as well.[96] MLB's Program calls for an independent administrator who will be jointly selected by the MLB and MLBPA.[97] Either party may unilaterally remove the independent administrator by serving the other party with written notice at least sixty days prior to the end of the independent administrator's five-year term.[98] If the parties cannot reach an agreement on a replacement independent administrator after thirty days, the panel chair of the arbitration panel will review the candidates and select the replacement.[99] The independent administrator is responsible for releasing an annual report setting forth the number of tests conducted, the number of adverse

[90] *Joint Drug Agreement*, *supra* note 88.
[91] *Id.*
[92] *Id.*
[93] *Joint Drug Prevention and Treatment Program,* MLBPA, https://www.mlbplayers.com/_files/ugd/b0a4c2_df9222b1bea34634a60f154499aedcff.pdf (last retrieved May 1, 2022).
[94] The term "party" in this section refers to the MLB or MLBPA and the term "parties" will refer to the MLB and MLBPA collectively.
[95] *See generally, id.*
[96] *See Joint Drug Prevention*, *supra* note 93.
[97] *Joint Drug Prevention, supra* note 93 at §1(A).
[98] *Id.*
[99] *Id.*

analytical findings reported by the Montreal lab[100] that resulted in discipline, the number of non-analytical positive tests that resulted in discipline, the substances involved in the adverse analytical findings that resulted in discipline, and the number of therapeutic use exemptions granted broken down by medication type (i.e., ADHD), and the number of tests conducted each of the prior five MLB seasons.[101] No identifying information of players may be released in this report.[102]

Other administrative features of the Program include an Expert Panel on ADD/ADHD, a Medical Advisory Panel, and an annual Program review.[103] The expert panel on ADD/ADHD determines whether a therapeutic use exemption will be granted for ADD and/or ADHD medication in players who apply.[104] The parties will jointly appoint three independent psychiatrists to serve on this expert panel, one of whom they will select to be the chairperson.[105] The panelists serve five-year terms.[106] Each party can unilaterally decide not to renew a panelist's term by notifying the other party by October 31st of the last year of the panelist's term.[107]

The parties jointly appoint one board-certified endocrinologist, one board-certified physician with general medicine expertise, and one board-certified physician with sports medicine expertise to renewable five-year terms on the Medical Advisory Panel.[108] Each party

[100] The parties agree that the World Anti-Doping (WADA)-certified lab known as Laboratoire de Controle du Dopage in Montreal, Quebec, Canada will be the lab at which specimen are tested under the Program. *Id.* at §1(D).
[101] *Joint Drug Prevention, supra* note 93 at §1(A).
[102] *Id.*
[103] *Id.* at §1(F).
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at §1(G).

can unilaterally decide not to renew a panelist's term via notification procedures similar to those for nonrenewal of a panelist on the Expert Panel on ADD/ADHD.[109]

Annual review of the program takes place within thirty days of the conclusion of the World Series.[110] At this review both parties meet with the independent administrator, head of the Montreal lab, a representative from the specimen collector and transporter company, and the chair of the Expert Panel on ADD/ADHD regarding potential changes to the Program.[111] Any agreements proposed at the annual review meeting must be reached by the parties by February 1 of the subsequent year.[112] These policy provisions illustrate that MLB athletes have a say in who runs the Program and have an ongoing ability to make modifications as they see fit.

In MLB, the players association also has a say regarding which substances are prohibited and when players are tested for these substances.[113] The Program incorporates by reference Schedules I, II, and III of the Code of Federal Regulations' Schedule of Controlled Substances into its prohibited substances list.[114] The list of prohibited substances is found in Section two of the Program and contains drugs of abuse, performance enhancing substances, stimulants, DHEA, and diuretics and masking agents.[115] Parties must agree in order to add any additional substances, except that if the federal government adds a substance to the controlled substance schedules aforementioned, they are automatically added and the Commissioner is responsible for notifying all players of the new additions.[116] s

[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id* at §2.
[114] *Id.*
[115] *Id.*
[116] *Id.*

The MLBPA has agreed at a minimum for each player to be tested for prohibited substances except for drugs of abuse via urine sample at spring training, once randomly and unannounced during the season, and once randomly and unannounced during the offseason.[117] Players will also undergo a minimum of one random unannounced blood test for human growth hormones per season collected postgame from the player's nondominant arm unless he requests otherwise.[118] Additionally, the Program will conduct the following tests: 4800 random and unannounced urine tests for prohibited substances except for drugs of abuse during each season at least 200 of which are conducted during spring training; 350 random and unannounced urine tests for prohibited substances except for drugs of abuse during each offseason; 500 random and unannounced blood tests for human growth hormones each season; and 400 random urine blood tests for human growth hormone each offseason.[119] There is no limit to the number of tests an individual player is subjected to during any given timeframe but the overall randomized testing program is capped at these numbers.[120]

Offseason tests are not tested for drugs of abuse or stimulants.[121] Players are not tested for substances designated by the Program as "drugs of abuse" unless either party has information giving them reasonable cause to believe a player has in the preceding twelve months used, sold, or distributed a drug of abuse, or if a player is in a drug of abuse treatment program under the Program.[122] Additionally, players can be tested for other prohibited substances if either party has information giving it probable cause to believe the player has in the previous twelve months, engaged in use, possession, sale or distribution of performance enhancing substances, stimulants,

---

[117] *Id.* at §3.
[118] *Id.*
[119] *Id.*
[120] *Id.* at §3A(2).
[121] *Id.* at §3.
[122] *Id.* at §3(B).

DHEA, diuretics or masking agents.[123] If such reasonable cause exists, the party provides the other party with a description of the information supporting reasonable cause and the player will be immediately tested within forty-eight hours, but the player may dispute reasonable cause and wait for a decision from an arbitrator before undergoing testing.[124]

Players disciplined for taking performance enhancing substances, stimulants, masking substances, or DHEA will be subject to a mandatory testing program administrated by the Program's independent administrator.[125] Players who have been disciplined for positive tests will be subject to additional testing for the remainder of their career unless their suspension was reduced because the violation did not result from the player's significant fault or negligence.[126] This follow-up testing does not count toward the random tests issued each year.[127]

Players who violate the Program face unpaid suspensions increasing in length for subsequent violations.[128] The category with the harshest penalties is performance enhancing substances.[129] Players can be permanently suspended but may petition for discretionary reinstatement.[130] MLB players may not play in the playoffs in any season in which they served a suspension due to violating the Program, even if their suspension ends prior to the playoffs.[131]

The Program takes a rehabilitative approach to drugs of abuse. There is a drugs of abuse treatment program with a treatment board for which each party appoints one medical representative and one attorney representative.[132] This treatment board's goal is to reach

---

[123] *Id.* at §3C(1).
[124] *Id.*
[125] *Id.* at §3(D).
[126] *Id.*
[127] *Id.*
[128] *Id.* at §7.
[129] *Id.*
[130] *Id.*
[131] *Id.* at §7(H).
[132] *Id.* at §1.

unanimous decisions but when this is not possible, a majority governs, and if the four-person panel deadlocks, a fifth member will decide the issue.[133] Parties alternate appointing the fifth member.[134] Players are referred to the treatment board as the result of use or suspected use of a drug of abuse.[135] The player will undergo an initial evaluation to determine whether he needs a treatment plan.[136] A treatment plan may include counseling, inpatient or outpatient treatment, follow-up testing, and/or alcohol monitoring.[137] Players sign a written copy of their treatment plan and its initial duration.[138] The MLB Commissioner's Office may notify a general manager if one of his/her players are placed in a treatment program.[139] The team may only release information about the treatment program to a team trying to acquire the player as long as the team has written consent from the player.[140] If a player with a treatment plan subsequently tests positive for drugs of abuse, it is referred to the treatment board to monitor compliance with the treatment program and to determine whether modifications are necessary.[141]

Although players are not punished for testing positive for drugs of abuse, they are punished for failing to comply with their drugs of abuse treatment program.[142] Failure to comply with a treatment plan can look like refusing to submit to an initial evaluation or follow up tests, and consistently failing to participate.[143] If a player tests positive after committing to a treatment program, the player must convince the treatment board that the positive was not due to lack of

[133] *Id.*
[134] *Id.*
[135] *Id.* at §4.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.* at §5(D).
[140] *Id.*
[141] *Id.* at §4.
[142] *Id.* at §4(C).
[143] *Id.*

commitment to the treatment plan.[144] A player's willingness to enter inpatient therapy is considered.[145] Failure to comply with a treatment plan leads to escalating suspensions but if the substance is marijuana fines not to exceed $35,000 for any one violation are imposed instead.[146]

The MLBPA has used its equal bargaining power through collective bargaining to give its players a say in which substances are banned, how many tests can be conducted and when, power in appointment and removal of officials initiating the program, and in creating a rehabilitation program to treat players suffering from substance abuse. Collective bargaining gave MLB players a collective voice and the MLBPA used it to ensure that that voice is heard throughout the MLB's Program, not only by policy, but also in practice.

b. NFL

i. NFL Players Association ("NFLPA") History

NFL players took advantage of the NLRA's grant of an express right for employees to organize when they approached attorney Creighton Miller in 1956 about setting up a trade association to address player grievances.[147] The following year, the players submitted their first proposal to NFL Commissioner Bert Bell requesting a $5,000 minimum salary, continued salary payment during injury, and clean uniform equipment paid for and maintained by the teams.[148] The league did not respond.[149]

A month later[150], the Supreme Court ruled in *Radovich v. NFL,* that antitrust laws, including the Sherman Act, apply to the NFL and its member teams.[151] The NFL had argued that

---

[144] *Id.*
[145] *Id.*
[146] *Id.* at §7(D).
[147] *1956: The Beginning*, NFLPA, https://nflpa.com/about/history/1956-the-beginning (last retrieved on May 1, 2022).
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Radovich, supra* note 58.

its business was similar to MLB and it should therefore receive the same antitrust exemption,[152] but the Court rejected this notion stating that that exemption was limited to the "business of organized professional baseball" and those cases would not be used to exempt other businesses, athletic or otherwise.[153] The Court specifically found that radio and television transmissions were sufficient to constitute interstate commerce, a necessary element for Sherman Act claims.[154] This case was an important win for NFL players, as it forced the league to acquiesce to player demands or risk facing antitrust lawsuits.[155] *Radovich* resulted in player benefits including pension, hospitalization, and medical/life insurance.[156]

The American Football League ("AFL") burst onto the scene in 1960 as a competitor league to the NFL.[157] NFL owners threatened to terminate pensions of any NFL players who switched to the AFL.[158] Players took the league to court over this threat and won increased pensions and improved benefits.[159] The AFL and NFL merged in 1966, eliminating competition between leagues and thus reducing players' leverage.[160]

The NFLPA only represented sixteen of the twenty-six teams at this time, with the remaining ten still represented by the AFL Players Association ("AFLPA").[161] The NFLPA teams went on strike in 1968 during which the remaining ten teams agreed to a CBA with the

---

[152] *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922); and *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953) (establishing the antitrust exemption for professional baseball). But *see* 15 U.S.C.A. § 26(b) Application of Antitrust Laws to Professional Major League Baseball (1998). (common name: Curt Flood Act of 1998).
[153] *Radovich*, *supra* note 58.
[154] *Id.*
[155] *1956: The Beginning*, *supra* note 147.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*

owners.[162] This was the first CBA for professional football and it heavily favored the owners.[163] In 1970, owners requested that lawyers stay out of CBA negotiations and that the players stop asking for increased pay, so the AFLPA joined the NFLPA and the organization filed with the NLRB for official union certification to force management to the table.[164] Following a strike and a lockout, a new four-year CBA was reached later that summer.[165] In the 1980's the NFLPA decertified as a union so players could bring antitrust claims against the NFL.[166] In 1993, the NFLPA re-certified as a union.[167] The organization repeated this tactic in 2011.[168] The current CBA was ratified by the NFL Management Council and the NFLPA in 2020 and extends through the 2030 season.[169] The league's drug policies, the NFL Policy on Performance Enhancing Substances and the NFL Policy and Program on Substances of Abuse, were collectively bargained.[170]

[162] *Id.*
[163] *See Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] Dan Graziano, *NFL CBA Approved: What Players Get in New Deal, How Expanded Playoffs and Schedule Will Work,* ESPN, (March 15, 2020). https://www.espn.com/nfl/story/_/id/28901832/nfl-cba-approved-players-get-new-deal-how-expanded-playoffs-schedule-work
[170] *NFL Policy and Program on Substances of Abuse*, (2021), https://nflpaweb.blob.core.windows.net/website/Departments/Legal/2021-Policy-and-Program-on-Substances-of-Abuse.pdf *; NFL Policy on Performance-Enhancing Substances* (2021), https://nflpaweb.blob.core.windows.net/website/Departments/Player-Affairs/Wellness/2021-Policy-on-Performance-Enhancing-Substances.pdf

ii. NFL/NFLPA Drug Policy Progression

1. History of the NFL's Policies on Performance Enhancing Substances and Substances of Abuse

The NFL began testing for banned substances long before professional baseball did. The first year the NFL tested players for steroids was 1987, but only for informational purposes.[171] Suspensions for steroid use began in 1989, and random testing was introduced in 1990.[172] Pete Rozelle, NFL Commissioner at the time, stated

> *We've tried to educate the players for two years and at the same time learn more about steroids. We know now that it gives a strong competitive advantage and has severe medical effects. This is not a program designed to simply try to catch people but to get them off this harmful drug.*[173]

Three years later the first steroid policy was written into the NFL/NFLPA CBA.[174] Since then, many more substances have been prohibited for players and now there are two separate and distinct policies, both of which were collectively bargained. Players are punished under the NFL Policy on Performance Enhancing Substances, but the NFL Policy and Program on Substances of Abuse is more rehabilitation oriented.

2. Examining the Current NFL Policy on Performance Enhancing Substances

The NFL Policy on Performance Enhancing Substances ("PES Policy") was collectively bargained and agreed upon between the NFL Management Council and the NFLPA.[175] It is

---

[171] Sam Farmer, *Steroids 'Rampant' in Old NFL,* LA Times (March 24, 2005), https://www.latimes.com/archives/la-xpm-2005-mar-24-sp-nfl24-story.html
[172] *Id.*
[173] Thomas George, *NFL Players Face Ban for Steroid* Use, New York Times, (1989), https://www.nytimes.com/1989/03/22/sports/nfl-players-face-ban-for-steroid-use.html
[174] Sam Farmer, *supra* note 171.
[175] *NFL Policy on Performance, supra* note 170 at §1.

incorporated into their CBA which is in effect through 2030.[176] The policy's purpose is to prohibit and prevent the use of anabolic/androgenic steroids (including exogenous testosterone), stimulants, growth hormones, whether natural or synthetic and related or similar substances.[177] There are three primary concerns with substances prohibited under the PES Policy: (1) these substances threaten fairness and integrity of athletic competition; (2) adverse health effects of using prohibited substances; and (3) use of prohibited substances sends the wrong message to young people who may be tempted to use them.[178] The use of prohibited substances is considered conduct detrimental to the NFL and professional football and to public confidence in the game or its players, which are both punishable acts under NFL standard player contracts.

The NFLPA leveraged its bargaining power to ensure a continued say in the administration of the PES Policy. The PES Policy's independent administrator is jointly selected by the parties who will be equally responsible for his/her salary and who will act with equal obligation to both parties[179].[180] The independent administrator may be discharged by either party at any time by no less than one year's written notice to the other party.[181] To replace an independent administrator, the parties each identify at least three candidates, the top three of whom will be interviewed.[182] If an agreement is not reached, each party takes turns striking a candidate and the first party to strike is determined by a coin flip.[183]

---

[176] *Id.*
[177] *NFL Policy on Performance*, *supra* note 170.
[178] *Id.*
[179] The term "parties" in this section refers to the NFLPA and the NFL and the term "party" in this section refers to either the NFL or the NFLPA.
[180] *NFL Policy on Performance, supra* note 170 at §2.1.
[181] *Id.*
[182] *Id.*
[183] *Id.*

A Chief Forensic Toxicologist is also jointly selected by the parties, paid equally by the parties, and has equal obligation to both parties.[184] The Chief Forensic Toxicologist may be discharged by either party at any time by no less than one year's written notice to the other party.[185] The replacement procedure for the Chief Forensic Toxicologist is the same as that of the independent administrator.[186]

The parties will agree on a collection vendor for specimen collection, storage and transportation to the designated lab.[187] The independent administrator determines the appropriate lab or labs but either party has the right to discharge a testing lab if they provide the other party at least six months written notice.[188]

The NFLPA not only had a voice in the administration of the PES Policy, but also as to which substances are prohibited under it. The prohibited list includes anabolic agents[189], stimulants, masking agents, and certain prohibited methods.[190] The list does not refer to federal controlled substance schedules. The parties must mutually agree in order to modify the list of prohibited substances.[191]

The NFLPA achieved important player interests when it negotiated a maximum number of tests per year per individual player and by negotiating less testing during the offseason. Doping tests may be administered to free agents and are administered at annual scouting combines.[192] All players are urine tested for prohibited substances at least once per league year at

[184] *Id.* at §2.2.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] DHEA is categorized as a performance enhancing substance.
[190] *NFL Policy on Performance, supra* note 170 at 18-22.
[191] *Id.* at §1.
[192] *Id.* at §3.1.

training camp as part of their preseason physical.[193] Each week of preseason and the regular season ten players per club are randomly selected for urine testing, not including those undergoing reasonable cause testing.[194] This weekly randomized urine testing continues through the playoffs until the team's season ends.[195] During the offseason, a player may be tested a maximum of six times.[196] During a calendar year, a player may be tested via urine or blood tests a combined maximum of twenty-four times.[197] Blood testing for growth hormones can be conducted a maximum of six times per player per year.[198] During the season, random blood testing for growth hormones is conducted on a fraction of the players selected randomly for that week's weekly testing.[199] Any player subject to reasonable cause testing may be blood tested but these reasonable cause tests count toward the twenty-four combined urine and blood test per year limit.[200]

If a player tests positive for a prohibited performance enhancing substance, stimulant, masking agent, or is criminally convicted for use, possession, sale, or distribution of an illegal substance, he will be disciplined for violation of the PES Policy.[201] Suspension lengths vary depending on the type of substance and the player's number of prior offenses.[202] However, if a player tests positive for a stimulant during the offseason, the player is subject to the NFL Policy and Program on Substances of Abuse and there will be no discipline.[203] The NFL Management Council can reduce suspensions by up to fifty percent prior to the end of the appeal process if a

---

[193] *Id.* at §7.
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.* at §6.
[202] *Id.*
[203] *Id.*

player has provided full support which results in uncovering a violation by someone else subject to the PES Policy.[204] Additionally, the independent administrator may require a medical exam of any player who tests positive and if medical treatment is indicated it may be offered to the player.[205] Specimens that test positive are discarded thirty days after final discipline is awarded, and negative tests are discarded ninety days after analysis.[206] Substances categorized as substances of abuse are handled in a separate policy.

3. Examining the Current NFL Policy and Program on Substances of Abuse

The NFL and NFLPA also ratified the NFL Policy and Program on Substances of Abuse ("Substance Abuse Policy") in conjunction with their most recent CBA which is valid through 2030. The purpose of the Substance Abuse Policy is to assist players who misuse substances of abuse because they can lead to on the field injuries, alienation of the fans, diminished job performance, and to personal hardship.[207]

The NFLPA negotiated an equal say in hiring administrators under this policy as well. The parties jointly select the medical director and program administrator and both parties are equally responsible for the salaries of these officials.[208] Each NFL team will designate one of its team physicians as the team's substance abuse physician.[209] Section 1.3 of the Substance Abuse Policy lists substances designated as substance of abuse. Unlike professional baseball's policy, alcohol is included.[210]

[204] *Id.*
[205] *Id.* at §4.3.
[206] *Id.*
[207] *NFL Program on Substances*, *supra* note 170 at 1.
[208] *Id.* at §1.
[209] *Id.*
[210] *Id.* at §1.3.

The NFL and NFLPA compromised on marijuana.[211] All NFL players are tested for marijuana once each preseason and tests for marijuana may not be conducted outside of the preseason.[212] The NFL and NFLPA set up an intervention program for players suffering with substances of abuse.[213] There are three ways a player can enter the intervention program.[214] First, a player enters the intervention program if he returns a positive test result for a substance of abuse.[215] Second, a player enters the intervention program for any behavior occurring up to two seasons prior to the player's scouting combine.[216] Finally, a player can enter the intervention program by referring himself to the program prior to testing positive for a substance of abuse.[217]

Once in the program, there are two stages. In stage one the medical professional determines whether participation in the program may assist the player in preventing potential future misuse of substances of abuse.[218] The medical director may require the player to get tested.[219] Stage one shall not exceed sixty days without a formal written extension.[220] If a player is discharged from stage one, he is treated as if he was never in the intervention program.[221] If the player needs specific clinical treatment or intervention, he advances to stage two.[222] A player can also advance to stage two at his own request.[223] If a player fails to comply with stage one of the program, he is fined two-seventeenths of that season's salary and is advanced to stage two.[224] A self-referred player may not be fined for failure to cooperate with evaluation process or

---

[211] *Id.*
[212] *Id.*
[213] *Id.* at §1.4.
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.* at §1.5.1.
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*

compliance with the treatment plan.[225] The program does not want to punish players for seeking help.

During stage two a treatment plan is developed.[226] The player is subject to unannounced testing at the discretion of the medical advisor however the player shall not be tested more than ten times per calendar month.[227] The player's progress is monitored on a month-to-month basis.[228] A player in the intervention program may be disciplined for unexcused failures to appear for testing, positive test results, failure to cooperate with testing or clinical care.[229] Most of this discipline begins as a fine but after enough offenses can lead to suspension and eventually banishment with discretionary reinstatement.[230] Violations of law involving substances of abuse, however, immediately warrant suspensions and can vary in length depending on the circumstances.[231] The NFLPA negotiated a Substance Abuse Policy that looks out for the health and wellbeing of the player while also acknowledging the change in society's perception of marijuana.

IV. World Anti-Doping Agency ("WADA"), an Independent Doping Agency

WADA is a private foundation established under Swiss law with the goal of unifying and regulating the global fight against doping in sport.[232] Since it is a Swiss foundation, American antitrust laws and safeguards do not apply to WADA. WADA is solely an anti-doping agency.[233] It does not handle other matters related to any sport.[234] Labor law does not apply to WADA since

[225] *Id.*
[226] *Id.* at §1.5.2
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *Who We Are,* WADA, https://www.wada-ama.org/en/who-we-are (last retrieved May 3, 2022).
[233] *Id.*
[234] *See id.*

the athletes it oversees are not employees of WADA. Rather, sport organizations across the globe have adopted WADA's program, particularly the World Anti-Doping Code (the "Code").[235] This would be like if MLB or the NFL used WADA's anti-doping program and rules instead of creating their own. Let's take a look at WADA's history, its governance structure, and some features of the Code.

a. WADA History

WADA was founded in 1999, in the aftermath of a major doping scandal in the sport of cycling.[236] In February of that year, the International Olympic Committee ("IOC") held the First World Conference on Doping in Sport in Lausanne, Switzerland, bringing together parties from all over the world that were involved in the fight against doping in sport.[237] At this conference, the Lausanne Declaration on Doping in Sport was drafted.[238] This was a document providing for the creation of an international anti-doping agency meant to be operational in time for the upcoming 2000 Olympics in Sydney, Australia.[239] Thus, WADA was born. It was set up as a foundation backed by the IOC and supported by intergovernmental organizations, governments, public authorities, and other public and private bodies combatting doping in sport.[240] WADA was established "to protect athletes, promote the values of clean sport, and preserve the spirit of sport internationally."[241] WADA continues to be composed of and funded by the sport movement and governments across the globe.[242]

[235] *Id.*
[236] *Who We Are, supra* note 232.
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*

b. WADA's Governance Structure

WADA's policies are not collectively bargained like those in major American professional sports leagues such as MLB and the NFL, so it is important to look at the agency's governance structure to better understand the policies and how they were formed. WADA's governance structure is made up of a Foundation Board (the "Board"), an Executive Committee, five standing committees, ten expert groups, and a Nominations Committee.[243]

The Foundation Board is WADA's highest policy-making body and has thirty-eight members, thirteen of which currently happen to be former athletes.[244] Only four seats are reserved for athletes, however.[245] The Board consists of an equal number of representatives from the sport movement and world governments.[246] Members of the sport movement are appointed by organizations such as the IOC, or the International Paralympic Committee.[247] The four athlete members are appointed by and represent the sport movement.[248]

The fourteen-member Executive Committee handles day to day operations and management of WADA.[249] The President and Vice President are independent.[250] The sport movement and the public authorities each appoint one independent member as well.[251] The remaining members include an equal number of representatives from the sport movement and

[243] *Who We Are: Governance*, WADA, https://www.wada-ama.org/en/who-we-are/governance (last retrieved May 1, 2022).
[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.*

world governments.[252] One of the sport movement's five seats is reserved for an athlete.[253] A third of the committee happens to be former international-level athletes.[254]

Five standing committees serve an advisory role and report to the Executive Committee.[255] One of these committees is the Compliance Review Committee which is an independent body composed of an independent chair, two independent compliance experts, an athlete representative, and two members "nominated from their stakeholder group."[256] Ten expert groups also serve advisory roles.[257] A nominations committee vets candidates to ensure that they are qualified and appropriately independent for the role for which they seek.[258] There is also an athlete committee, but this is just one of the five advisory committees.[259]

WADA has begun to recognize areas of its governance structure needing reform and in November of 2021, WADA's Board adopted modifications mainly related to athletes' representation.[260] These reforms include adding an additional athlete to the Executive Committee.[261] Additionally, more of the athletes will be appointed by fellow athletes instead of by WADA officials.[262]

c. World Anti-Doping Code (the "Code") Progression

The centerpiece of WADA's anti-doping program is the Code. The Code was first approved in 2003 and went into effect in 2004.[263] The Code was updated in 2006, 2015, and

---

[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] *Id.*
[263] Matthew Phillip, *Sports Law: the History and Development of Anti-Doping Rules*, Shepherd and Wedderburn, (April 28, 2021) https://shepwedd.com/knowledge/sports-law-history-and-development-anti-doping-rules

most recently in 2021.[264] The major counterpart to the Code is WADA's International Standard on the Prohibited List (the "Prohibited List") which it has updated over the years.[265] WADA has also established seven other international standards including the International Standard on Testing and Investigations and the International Standard on Therapeutic Use Exemptions.[266]

Under the Code, presence of a prohibited substance in an athlete's sample is an anti-doping rule violation.[267] Attempted use of a prohibited substance, evading failing or refusing to submit to a sample collection, tampering with a specimen, and possession of a prohibited substance are also violations of the Code.[268] Under the Code, athletes can violate the doping rules without even doping.[269] Athletes in a WADA registered testing pool are required to submit each quarter where their location will be for one hour every day of the next three months to facilitate random testing.[270] This is called "whereabouts" and athletes must ensure they are updated at all times.[271] If an athlete misses three tests due to not being at that location during the one hour time frame, or if the athlete fails to properly submit their whereabouts three times in one calendar year, it is a violation of the Code and he/she is subject to suspension.[272] It is also prohibited to associate with an individual who is serving a suspension under the Code.[273] Finally, athletes violate the Code if they retaliate against someone for or discourage someone from reporting anti-doping rule violations.[274]

[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *World Anti-Doping Code 2021,* WADA, p. 21, https://www.wada-ama.org/sites/default/files/resources/files/2021_wada_code.pdf (last retrieved May 2, 2022).
[268] *Id.* at 22.
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.* at 24.
[274] *Id.* at 25.

Since WADA is an international anti-doping agency, it has accredited labs across the world that it sends samples to for testing.[275] To be added to the prohibited substance list, a substance must meet at least two of the following three criteria: (1) medical or other scientific evidence that the substance has the potential to enhance or enhances sport performance; (2) medical or other scientific evidence that the substance represents an actual or potential health risk to athletes; or (3) WADA has determined that using the substance violates the "spirit of the sport."[276] Alternatively, substances that can mask the detection of another prohibited substance are prohibited.[277] Prohibited substances are classified as specified or non-specified based on whether they are more or less likely for an athlete to have used for a purpose other than enhancement of sport performance.[278] Substances of abuse are substances that are frequently abused in society outside the context of sport.[279]

There are hardly any limitations to testing athletes for prohibited substances under the Code. "Any athlete may be required to submit to a doping test at any time and at any place by any Anti-Doping Organization with Testing authority over him or her".[280] There is no need for reasonable cause since there is no limit to the frequency of tests or reasoning for testing. The only limitation is that if an athlete is being tested at a competition, they may wait until immediately after finishing competing to submit their sample.[281] Athletes may be tested while they are serving a suspension.[282] Athletes coming out of retirement must give WADA six months advanced notice so they may be available for testing prior to their return.[283]

---

[275] *Id.* at 28.
[276] *Id.* at 33-34. The phrase "spirit of the sport" is not clearly defined in the Code.
[277] *Id.*
[278] *Id.* at 32.
[279] *Id.* at 33.
[280] *Id.* at 41.
[281] *Id.*
[282] *Id.* at 42.
[283] *Id.* at 46.

If an athlete tests positive for a banned substance which is unlikely to have been used for purposes other than doping, then the athlete shall be subject to a provisional suspension while their legal case plays out.[284] The athlete can eliminate a mandatory provisional suspension by demonstrating to a hearing panel that the violation (1) is likely to have involved a contaminated product, or (2) the violation involves a substance of abuse and the athlete establishes entitlement to reduced suspension length because they used it for reasons unrelated to sport performance.[285] Heroin and THC (the chemical compound in marijuana) are the only substances of abuse under the Code.[286]

Athletes alleged to have committed an anti-doping rule violation are entitled to a fair hearing within a reasonable time by an impartial and independent panel in compliance with WADA standards.[287] If an athlete is found to have violated the Code at a competition, his/her competition results will be disqualified, and any medals, points, or prize money must be forfeited.[288]

Suspensions for positive tests are four years for the most performing enhancing substances, subject to reduction for establishing that the violation was unintentional, and for intentional use of substances categorized as less likely to be used for performance enhancement.[289] For unintentional use of substances less likely to be used for performance enhancement, suspensions are for two years.[290] Suspension lengths can vary within a specified range depending on the circumstances.[291] If an athlete tests positive for a substance of abuse and

[284] *Id.* at 56-57.
[285] *Id.*
[286] *The Prohibited List*, WADA, https://www.wada-ama.org/sites/default/files/2022-01/2022list_final_en_0.pdf 16-17. (last retrieved May 3, 2022).
[287] *Id.* at 61.
[288] *Id.* at 63.
[289] *Id.* at 65.
[290] *Id.*
[291] *Id.* at 69.

they can establish that such use occurred out of competition and was unrelated to sport performance, then their suspension will be three months, but may be reduced to one month if the athlete completes a substance of abuse treatment program.[292] If a hearing panel determines that the violation occurred due to no fault or negligence of the athlete, then the athlete will not be suspended.[293] If fault or negligence that led to the violation was not significant, the suspension length may be reduced.[294] Individuals under the age of seventeen are subject to less severe suspensions than their older counterparts.[295] Suspensions are longer for prior offenders.[296] Suspended athletes may not participate in any activity, except for anti-doping education, authorized or organized by a signatory to WADA during his/her suspension.[297] Financial support of an athlete by a WADA signatory shall also be withheld during an athlete's suspension.[298] For team sports, if multiple teammates violate the Code during a competition event, then the team may be disqualified from competition.[299]

If an athlete's sporting organization is a WADA signatory, the athlete has no bargaining power. There is no set number of tests that WADA conducts, no limit on how many tests an athlete can be subjected to in any given timeframe, and an athlete may be tested at any time. Testing positive for substances of abuse results in suspension. Additionally, WADA does not run its own treatment program(s) for substances of abuse. Nor do athletes have a say in which substances are prohibited.

[292] *Id.* at 66.
[293] *Id.* at 69.
[294] *Id.* at 72.
[295] *Id.*
[296] *Id.*
[297] *Id.* at 86.
[298] *Id.* at 88-89.
[299] *Id.*

V. Comparing American Collectively Bargained Drug Policies with an Independent International Anti-Doping Agency's Policies

a. Comparison

The balance of power between players and management is evident not only from drug policy rules but also from their administration. Athletes have equal bargaining power in collectively bargained policies due to the nature of collective bargaining and the corresponding antitrust and labor laws. NFL and MLB athletes used this bargaining power and their collective voices via their player associations to negotiate testing parameters, which substances are prohibited, suspension lengths and drug treatment programs. They have additionally ensured that they will maintain a continued voice in the administration of the policy by negotiating the ability to jointly select administrators and the unilateral ability to discharge administrators, labs, etc. as long as they provide advance notice to their league. The NFLPA negotiated a maximum number of tests per player per offseason and calendar year, and the MLBPA negotiated a set number of tests per year for the overall league. The MLB and NFL have comprehensive rehabilitation programs to treat players struggling with substance abuse. Collective bargaining empowered players to advocate for their rights and interests while committing to a policy to promote clean sport. WADA is an independent Swiss agency set up differently than American sports leagues, however many lessons can be taken from collectively bargained drug policies to ensure athletes' collective voice is represented in drug policymaking and their rights are assured while striving for clean sport.

b. Solutions

First, athletes' voice can be empowered by more representation within WADA's governance structure. WADA boasts that a third of its Board happens to be athletes but that is only thirty-

three percent whereas athletes have fifty percent of a say in collectively bargained policies. Further, there is a stark difference between happening to be an athlete and one's job being to represent athletes. A former international-level athlete is not necessarily in a position focused on representing athletes. Only four out of thirty-eight Board seats are reserved for athletes and these athletes are chosen by their sport movement as opposed to by other athletes. Collective bargaining in American professional sports shows that a sports organization and its athletes often have different and even competing interests. Having athletes appointed by their sport organization does not provide athletes an unfettered voice. WADA's governance structure focuses on balancing government and sport organization representation but it barely provides athletes, the main individuals subject to the policy, a seat at the table. WADA does not provide athletes enough seats at the table for a meaningful say in policy. This lack of athlete representation is illuminated by the Code.

Unlike the American professional sports league policies from this paper's case studies, the Code has no limit on the number of times an athlete may be tested, nor does WADA need any cause to test for any prohibited substance, and substances of abuse are tested for in every sample collection. Athletes are tested just as much out of season as they are in season and their whereabouts must be updated at all times. While the NFL and MLB require some whereabout-like information, only the Code suspends athletes for missed tests and whereabouts mis-filings, and it does so even when these violations are unintentional.

Not only does the Code test for substances of abuse at all times, but the only substances it recognizes as substances of abuse are heroin and THC. Collectively bargained policies show that athletes and society generally, abuse far more substances than these two. The Code is far more punishment focused than the collectively bargained policies and offers little in the way of

rehabilitation. The Code offers no treatment plan of its own, rather it refers treatment out. As a practical matter, it may be unfeasible to offer a comprehensive treatment program across the globe since WADA is an international agency, but the emphasis on punishment over rehabilitation and the extremely minimal list of substances of abuse is not in the best interest of athletes' physical and mental health and wellbeing and it is unlikely that athletes would agree with this list if they had an equal say in the matter.

The prohibited list is imposed, not bargained. While the first two elements that can lead to a substance being prohibited are reasonable, the third, a substance that "violates the spirit of the sport" is vague and appears to be used as a catch all. Furthermore, WADA does not publicize which elements were met that made a substance prohibited, unless a substance is a masking substance.

VI. Conclusion

Clean sport is a noble and necessary undertaking and the creation of an independent international agency to create uniformity in this space is a workable way to achieve this goal. The execution, however, leaves much to be desired. WADA can fight for and promote clean sport without eroding athletes' rights and interests entirely. A maximum number of tests an athlete can be subjected to during a given timeframe does not inherently make the sport less clean. Neither does caging athletes' voices and providing them only token representation in policies that significantly impact them and their wellbeing. As collective bargaining in American professional sports illustrates, athletes can be empowered through increased representation and involvement in policymaking and policy administration. It is time for WADA to let the caged bird sing by giving athletes equal bargaining power in anti-doping policy discussions. Athletes

will trust the system more, their health and wellbeing will be improved, and clean sport will still be achieved.