

# AMERICAN PROFESSIONAL SPORTS IS A DOPER'S PARADISE: IT'S TIME WE MAKE A CHANGE

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## ABSTRACT

The collapse of potentially the biggest fight in boxing history, Floyd Mayweather Jr. versus Manny Pacquiao, clearly highlights the inadequacy of the United States' anti-doping policy. The fight, which would have generated an estimated \$200 million during a major recession, was lost because of the chaotic and fundamentally flawed American anti-doping policy. Boxing and the three major American professional sports leagues—the National Football League, National Basketball Association, and Major League Baseball (The Big Three)—have very different structures with respect to regulating doping; boxing uses a multi-jurisdictional approach, while The Big Three depend on a Collective Bargaining Agreement (CBA) system. However, both approaches similarly fail to effectively address doping and will never be able to effectively combat doping practices. Unlike the American system, the World Anti-Doping Agency (WADA), with its unilateral and independent implementation of anti-doping rules, successfully regulates international sports.

American anti-doping approaches currently have many loopholes that easily permit athletes to dope and have built-in conflicts of interest that limit effective regulation. Additionally, the CBA approach has an intrinsic and thus unavoidably sluggish approach for dealing with new doping issues, which provides cheaters with a consistent leg up. This article traces the history of doping in sports, outlines anti-doping legislation in the United States, analyzes the problems facing the boxing and CBA anti-doping approaches, and presents a remedy for the ailing American system. The primary recommendation is for Congress to require that an independent agency unilaterally implement anti-doping rules in American professional sports in a method similar to how the International Olympic Committee requires Olympic sports to adopt the anti-doping regulations imposed by WADA.

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## I. INTRODUCTION

On January 7, 2010, both the boxing community and the American economy took a hit when what was potentially the biggest fight in boxing history was called off. The much-anticipated March 13, 2010 bout between Floyd Mayweather Jr., who was undefeated, and Manny Pacquiao, the current best pound-for-pound fighter in the world,<sup>1</sup> was derailed over a drug testing disagreement.<sup>2</sup> Mayweather insisted on Olympic-style drug testing,

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1. *The Ring Ratings Pound For Pound*, THE RING, <http://www.ringtv.com/ratings/> (last visited Mar. 28, 2010).

2. Dan Rafael, *Arum: "The Fight's Off,"* ESPN (Jan. 7, 2010), <http://sports.espn.go.com/sports/boxing/news/story?id=4803490>.

which would have subjected both fighters to random blood tests all the way until the fight.<sup>3</sup> However, Pacquiao maintained that both fighters were subject to the procedures of the Nevada State Athletic Commission, which would have been the athletic commission responsible for regulating the fight.<sup>4</sup> The Nevada commission only tests urine for banned substances either before the fight or immediately after the fight.<sup>5</sup>

Pacquiao, who was superstitious, refused to be blood tested up until the day of the fight because he claimed that he is weakened for up to three days whenever he has blood removed, and he did not want to fight the biggest fight of his boxing career in a weakened state.<sup>6</sup> After a marathon mediation session, the parties could not come to an agreement over drug testing procedures.<sup>7</sup> Even though both fighters had agreed to all other terms in the fight contract, they could not come to consensus on this issue.<sup>8</sup> Consequently, the fight was called off. Each fighter left an approximated \$40 million payday on the table for a fight that would have generated an estimated \$200 million—a more than welcome revenue-generating event during a major recession.<sup>9</sup> All of this was lost because of fundamental flaws in American anti-doping policy.

This sports catastrophe is a reminder that United States (U.S.) professional sports anti-doping reform is far from over. Like boxing, the three major American sports leagues—the National Football League (NFL), National Basketball Association (NBA), and Major League Baseball (MLB) (collectively known as The Big Three)—have a fundamentally flawed anti-doping approach. Boxing and The Big Three have very different structures with respect to regulating doping: boxing uses a multi-jurisdictional approach, while The Big Three depend on a Collective Bargaining Agreement (CBA) system.<sup>10</sup> However, both approaches share unfortunate characteristics—they fail to effectively address doping, they will never be able to effectively address doping, and they need a complete overhaul.

This article argues that both the boxing and CBA systems are fundamentally flawed and need to be scrapped, replaced by a uniform and

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3. *Id.*

4. *Id.*

5. NEV. ADMIN. CODE § 467.850 (2010).

6. Rafael, *supra* note 2; Dan Rafael, *Drug Test Procedures Being Debated*, ESPN (Dec. 23, 2009), <http://m.espn.go.com/general/boxing/story?storyId=4766171>.

7. Rafael, *supra* note 2.

8. *Id.*

9. *Id.*

10. See Paul Haagen, *The Players Have Lost That Argument: Doping, Drug Testing, and Collective Bargaining*, 40 NEW ENG. L. REV. 831, 840 (2006); Nabil Hassan, *Victor Conte Slams Professional Boxing's Drug Testing*, BBC, <http://news.bbc.co.uk/sport2/hi/boxing/8485892.stm> (last updated Jan. 28, 2010).

unilateral system run by one independent organization. The approach to regulate doping in professional sports needs to be radically changed because all of these anti-doping regimes currently have many loopholes that easily permit athletes to dope and contain built-in conflicts of interest that limit effective regulation. Additionally, the CBA approach, which the biggest American sports leagues use, has an intrinsically and thus unavoidably sluggish approach for dealing with new doping issues, which provides cheaters with a consistent leg up.

With regards to The Big Three, this article will focus on the NFL's anti-doping regime. Many experts argue that the NFL is the model citizen when it comes to anti-doping policies and that it is head and shoulders above the NBA and MLB.<sup>11</sup> This article will demonstrate that America's best anti-doping regime is far from adequate and fundamentally flawed. Essentially, at its best, American sports fall significantly short from addressing doping.

This article is divided into five sections. Section II will review the history of doping in sports, while Section III will discuss anti-doping legislation in the U.S. Section IV will provide an overview of anti-doping regimes in American professional sports, both professional leagues, and boxing, and will also review the approach used by the World Anti-Doping Agency (WADA) to fight doping. Finally, Section V will present the various problems facing the American anti-doping system, and Section VI will illustrate an approach that can remedy the inefficiencies of the American system.

## II. A BRIEF HISTORY OF DOPING

Athletes have been using substances to improve their athletic abilities since ancient times. The attempt to get an edge over the competition is not a new trend. Historians note that athletes dating back to the ancient Greeks,

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11. See Paul A. Fortenberry & Brian E. Hoffman, *Illegal Muscle: A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports' CBAs that Led to the Steroid Controversy*, 5 VA. SPORTS & ENT. L.J. 121, 136 (2006); Sarah R. Heisler, *Steroid Regulation in Professional Sports: Sarbanes Oxley as a Guide*, 27 CARDOZO ARTS & ENT. L.J. 199, 215 (2009) (citing Judy Battista, *How Good Is the "Best" Drug Policy?*, N.Y. TIMES, Oct. 14, 2005, at D4; Mike Freeman, *NFL is Seeing Fewer Flaws in Testing Players for Drugs*, N.Y. TIMES, Oct. 7, 2001, § 8, at 7; Kathy Kiely, *Focus on NBA, NHL to Improve Drug-Testing Policies*, USA TODAY, Nov. 15, 2005, at 5c; Mark Maske, *NFL Ahead of MLB on Steroids*, WASH. POST, Dec. 16, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A4452-2004Dec16.html>); Allan H. Selig & Robert D. Manfred, Jr., *The Regulation of Nutritional Supplements in Professional Sports*, 15 STAN. L. & POL'Y REV. 35, 54 (2004).

and maybe even earlier, used anything they could to improve their performance, like teas, diet alterations, ointments, and rubs.<sup>12</sup>

Unfortunately, in the twentieth century, athletes have turned to dangerous doping substances and methods, like steroids, to improve their athletic performance.<sup>13</sup> Athletes dope to increase strength and muscle size, shorten the time their bodies need to recover from injuries and workouts, reduce body fat, and improve their ability to train for longer periods of time at a high intensity.<sup>14</sup> More clearly put, “[d]oping is the use of performance enhancing drugs or methods by athletes to gain a competitive advantage.”<sup>15</sup>

An example of a doping method is blood oxygenation enhancement. Blood oxygenation enhancement is a method that increases an individual’s hemoglobin concentration above a normal person’s level.<sup>16</sup> This increases the athlete’s ability to add oxygen intake because the “additional hemoglobin molecules can transport extra oxygen molecules throughout the body.”<sup>17</sup> The extra oxygen improves athletic endurance and performance.<sup>18</sup>

One of the most infamous doping substances used in sports is the anabolic steroid. “Anabolic Steroids are any drug(s) (other than [sic] estrogens, progestins, and corticosteroids) or hormonal substance(s), chemically related to testosterone, a male hormone that promotes muscle growth.”<sup>19</sup> The use of anabolic steroids can be traced back to the 1930s, when a team of German scientists was able to create a synthetic version of testosterone for men who had a testosterone deficiency.<sup>20</sup> Anabolic steroids were then used during World War II to help soldiers increase their strength and physical performance.<sup>21</sup>

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12. Heisler, *supra* note 11, at 205; see Kristin Jo Custer, *From Mice to Men: Genetic Doping in International Sports*, 30 HASTINGS INT’L & COMP. L. REV. 181, 182 (2007).

13. See Laura S. Stewart, *Has the United States Anti-Doping Agency Gone Too Far? Analyzing the Shift from “Beyond a Reasonable Doubt” to “Comfortable Satisfaction,”* 13 VILL. SPORTS & ENT. L.J. 207, 208 (2006).

14. See Heisler, *supra* note 11, at 205.

15. Michelle Venables, *Doping in Sports: Blood Oxygenation Enhancement*, ILLUMIN, <http://illuminate.usc.edu/article.php?articleID=124> (last visited April 23, 2010).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Anabolic Steroids*, CENTER FOR SUBSTANCE ABUSE RES., <http://www.cesar.umd.edu/cesar/drugs/steroids.asp> (last visited Apr. 25, 2010).

20. *Id.*; see also Rebecca Shore, *How We Got Here: A Timeline of Performance-Enhancing Drugs in Sports*, SPORTS ILLUSTRATED (Mar. 11, 2008, 3:14 PM), <http://sportsillustrated.cnn.com/2008/magazine/03/11/steroid.timeline/index.html>.

21. Jim Thurston, *Chemical Warfare: Battling Steroids in Athletics*, 1 MARQ. SPORTS L. J. 93, 97-98 (1990).

Athletes began using anabolic steroids in Eastern Europe during the 1950s.<sup>22</sup> Soviet bloc athletes, especially Olympic wrestlers and powerlifters, used anabolic steroids to improve their strength and performance in competitions.<sup>23</sup> In 1958, Dr. Ziegler, an American physician, created a form of anabolic steroids called Dianabol, which was a major advancement in steroids.<sup>24</sup> Dianabol provided muscle-building benefits without side effects, such as prostate enlargement.<sup>25</sup> After the advancement, anabolic steroid use among professional American athletes also increased. During the 1960s, anabolic steroids became widespread among American weightlifters and NFL players.<sup>26</sup>

In 1975, in direct reaction to the proliferation of steroid use among athletes, the International Olympic Committee (IOC) banned the use of steroids in Olympic competition.<sup>27</sup> In 1988, steroid abuse finally gained public concern when the famous track rivalry between Carl Lewis and Ben Johnson was marred by a steroid controversy.<sup>28</sup> Ben Johnson, a Canadian track star, smashed the 100-meter dash world record and won a gold medal at the 1988 Seoul Olympics.<sup>29</sup> However, the IOC stripped his gold medal when they discovered that Johnson had tested positive for the anabolic steroid Stanozol.<sup>30</sup>

In 1998, the Tour de France was the center of a steroid scandal.<sup>31</sup> After a drug raid, the team director of the Festina team admitted that he oversaw his team's use of steroids.<sup>32</sup> This scandal prompted stricter drug regulations and the creation of WADA in 1999.<sup>33</sup> WADA is an independent agency that the international community funds with the sole purpose of cleaning up sports.<sup>34</sup>

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22. See Heisler, *supra* note 11, at 205; Fortenberry & Hoffman, *supra* note 11, at 122; Thurston, *supra* note 21, at 98; *Anabolic Steroids*, *supra* note 19.

23. See Heisler, *supra* note 11, at 205; Fortenberry & Hoffman, *supra* note 11, at 122; Thurston, *supra* note 21, at 98; *Anabolic Steroids*, *supra* note 19.

24. Thurston, *supra* note 21, at 98; Shore, *supra* note 20.

25. Thurston, *supra* note 21, at 98; Shore, *supra* note 20.

26. See Heisler, *supra* note 11, at 205; Fortenberry & Hoffman, *supra* note 11, at 122; Thurston, *supra* note 21, at 98.

27. See Heisler, *supra* note 11, at 206; Fortenberry & Hoffman, *supra* note 11, at 122; *Anabolic Steroids*, *supra* note 19; Shore, *supra* note 20.

28. Heisler, *supra* note 11, at 206; Thurston, *supra* note 21, at 93; Shore, *supra* note 20; see Fortenberry & Hoffman, *supra* note 11, at 122.

29. Thurston, *supra* note 21, at 93; Shore, *supra* note 20.

30. Shore, *supra* note 20.

31. *Id.*

32. *Id.*

33. See RICHARD W. POUND, *INSIDE THE OLYMPICS: A BEHIND-THE-SCENES LOOK AT THE POLITICS, THE SCANDALS AND THE GLORY OF THE GAMES* 68-72 (2004); Shore, *supra* note 20.

34. See POUND, *supra* note 33; *About WADA*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/About-WADA/> (last visited Apr. 25, 2010).

During the 1990s and the early 2000s, steroids were very prominent in American professional sports, especially baseball. During this period, otherwise known as the steroid era, baseball experienced record home-runs.<sup>35</sup> Three players collectively surpassed the thirty-seven year-old single season homerun record of sixty-one homeruns by Roger Marris in 1961 six times.<sup>36</sup> In 2002, Ken Caminiti admitted he used steroids during the 1996 baseball season when he won the National League Most Valuable Player award.<sup>37</sup> The shocking admission was followed by the Bay Area Laboratory Co-Operative (BALCO) scandal in 2003, where BALCO was found supplying steroids to athletes.<sup>38</sup> Various prominent athletes were ultimately subpoenaed to testify before a grand jury regarding BALCO's operation, including track star Marion Jones and MLB players Barry Bonds, Jason Giambi, and Garry Sheffield.<sup>39</sup>

The steroid era made doping an even more prominent social issue in the U.S. and culminated when President George W. Bush mentioned the need to address steroid abuse in his January 2004 State of the Union speech.<sup>40</sup> During the next few years, Congress tried to address doping through various bills but was only successful in passing the Anabolic Steroid Act of 2004.<sup>41</sup> This Act did not do much to address doping; it did not require leagues to test for doping in any particular way and did not address many substances.<sup>42</sup>

Steroid abuse and doping in general have continued to grow. Steroid use is no longer just a problem among professional and elite athletes; it has now become an epidemic among ordinary amateur athletes.<sup>43</sup> A National Institute on Drug Abuse (NIDA) study in 2008 found that 2.5% of twelfth grade males reported using steroids during the past year.<sup>44</sup> Because of this, it is more important than ever for the government to step in and do something about this issue.

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35. *Single-Season Leaders & Records for Home Runs*, BASEBALLREFERENCE.COM, [http://www.baseball-reference.com/leaders/HR\\_season.shtml](http://www.baseball-reference.com/leaders/HR_season.shtml) (last visited Apr. 16, 2010).

36. *Id.*

37. Shore, *supra* note 20.

38. *Id.*

39. *Id.*

40. Jack McCallum, *The Real Dope*, SPORTS ILLUSTRATED, Mar. 17, 2008, at 28, 28.

41. Heisler, *supra* note 11, at 209-11.

42. Joseph M. Saka, *Back to the Game: How Congress Can Help Sports Leagues Shift the Focus From Steroids to Sports*, 23 J. CONTEMP. HEALTH. L. & POL'Y 341, 348 (2007).

43. Fortenberry & Hoffman, *supra* note 11, at 122.

44. *NIDA InfoFacts: Steroids (Anabolic-Androgenic)*, NAT'L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/infofacts/steroids.html> (last visited Apr. 6, 2010).

### III. AMERICAN ANTI-DOPING LAWS

Congress first addressed doping in 1990 with the Anabolic Steroid Control Act of 1990 (ASCA).<sup>45</sup> This Act added anabolic steroids to the Schedule III list of the Controlled Substances Act (CSA).<sup>46</sup> The ASCA defined anabolic steroids as “any drug or hormonal substance, chemically and pharmacologically related to testosterone.”<sup>47</sup> This Act also made the possession of steroids without a prescription a felony.<sup>48</sup>

The ASCA classified twenty-seven anabolic steroids as controlled substances.<sup>49</sup> However, the ASCA did not effectively address the doping problem in the U.S. like Congress thought it would.<sup>50</sup> Technology improved and made steroids and other doping methods more potent and more difficult to trace with established drug tests.<sup>51</sup> Testing could not keep up with the new doping methods being used by athletes.<sup>52</sup>

To combat this losing battle, the IOC created WADA, an independent anti-doping oversight agency.<sup>53</sup> WADA’s main goal is to fight against doping in all sports.<sup>54</sup> A similar agency, the United States Anti-Doping Agency (USADA), was created under the auspices of WADA with the purpose of making sports clean in the U.S.<sup>55</sup> USADA has the responsibility of keeping the U.S. Olympics, Paralympics, and sports included in the Pan American Games clean of drugs and to “uphold the Olympic ideal of fair play.”<sup>56</sup>

Fourteen years after ASCA was created, Congress realized that the legislation did not sufficiently address doping abuse.<sup>57</sup> For example, there were many loopholes that permitted athletes to legally use steroid precursors.<sup>58</sup> One loophole was that the ASCA only prohibited immediate precursors, or “any drug or hormonal substance, chemically and pharmacologically related to testosterone.”<sup>59</sup> However, the law did not encompass

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45. Saka, *supra* note 42, at 346.

46. *Id.*

47. *Id.*

48. Heisler, *supra* note 11, at 207.

49. *Id.*

50. Saka, *supra* note 42, at 346; *see also* Heisler, *supra* note 11, at 208.

51. Heisler, *supra* note 11, at 208.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *USADA History*, U. S. ANTI-DOPING AGENCY, <http://www.usada.org/history> (last visited Apr. 26, 2010).

57. Saka, *supra* note 42, at 348.

58. *Id.* at 346.

59. *Id.*

many other steroid precursors.<sup>60</sup> Steroid precursors did not fall within the definition of immediate precursors because they were “derivatives of testosterone that metabolize into anabolic steroids once ingested.”<sup>61</sup> In essence, this loophole allowed the continued use of steroids.

As a result, Congress enacted the Anabolic Steroid Control Act of 2004, which amended the original ASCA.<sup>62</sup> The new legislation added more substances, including tetrahydrogestrinone (THG), to the list of Schedule III drugs banned in the CSA.<sup>63</sup> Unfortunately, the Act again did not address all steroid precursors.<sup>64</sup> Additionally, the Act did not address other doping substances or doping methods. While there are federal laws that address which substances are banned, there are no laws regarding testing procedures. The federal government has left this responsibility to the states and the individual sports leagues.

Congress does have the constitutional right under the Commerce Clause to regulate doping and drug testing in professional sports.<sup>65</sup> The Supreme Court has explicitly stated that the NFL and other professional leagues operate in interstate commerce, which consequently permits Congress to regulate them.<sup>66</sup> Similarly, the Supreme Court has held that the sport of boxing was a business that operated within interstate commerce and thus, Congress could regulate it.<sup>67</sup> In sum, current legislation only bans certain substances. There is no legislation that controls drug testing in professional sports. However, under the Commerce Clause, Congress has the constitutional power to regulate doping and drug testing in all professional sports, specifically boxing and the NFL.<sup>68</sup>

#### IV. ANTI-DOPING REGULATION SYSTEMS

There are various manners in which doping is regulated in sports in the U.S. and internationally. Boxing has a chaotic multi-body regulatory system. The NFL and other American professional sports leagues depend on collective bargaining between owners and players associations. Finally,

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60. *Id.* (citing Anabolic Steroids Control Act of 1990, 21 U.S.C. § 802(41)(A) (2000)).

61. *Id.* (citing Adrian Wilairat, *Faster, Higher, Stronger? Federal Efforts to Criminalize Anabolic Steroids and Steroid Precursors*, 8 J. HEALTH CARE L. POL'Y 377, 392 (2005)).

62. *Id.* at 348.

63. *Id.*

64. *Id.*

65. *Flood v. Kuhn*, 407 U.S. 258, 282 (1972); *Radovich v. NFL*, 352 U.S. 445, 452 (1957); *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 241 (1955).

66. *Radovich*, 352 U.S. at 452.

67. *Int'l Boxing Club of N.Y.*, 348 U.S. at 241.

68. Congress has passed national regulations in the past, which gives precedent for Congress regulating sports. See Amateur Sports Act of 1978, Pub. L. 95-606, § 1, 92 STAT. 3045, 3045-46, amended by Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501 et seq. (2001).

there are independent and unilateral regulatory regimes, like WADA, which have the exclusive authority to dictate drug policies for athletes competing under their jurisdiction.

#### A. NATIONAL FOOTBALL LEAGUE (COLLECTIVE BARGAINING)

Professional athletes employed by member NFL clubs and other clubs in American professional sports leagues are unionized.<sup>69</sup> The National Labor Relations Act (NLRA) requires employers and unionized employees to bargain “in good faith with respect to wages, hours, and other terms and conditions of employment.”<sup>70</sup> Employers cannot unilaterally make employment rule changes regarding any subject that the NLRA requires to be negotiated between employers and employees.<sup>71</sup> The National Labor Relations Board (NLRB) has consistently found that drug policies that require testing of employees is an employment subject that must be bargained over between the employer and the representative of the unionized employees.<sup>72</sup> Therefore, the leagues must bargain with players unions to set or modify any drug policy. Neither club owners nor the players unions can unilaterally promulgate any drug regulations. In other words, they need to negotiate and come to a mutual agreement over the terms of any drug policy.

As mentioned above, this article discusses the anti-doping policies of The Big Three through the prism of the NFL because the media and legislature widely consider the NFL’s collectively bargained drug policy as the best and most comprehensive drug testing program.<sup>73</sup> Paul A. Fortenberry, in the article *Illegal Muscle: A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports’ CBAs That Led to the Steroid Controversy*, argues the NFL as a whole has a superior drug policy because it:

- (1) provides a comprehensive list of banned substances,
- (2) tests players during the preseason, regular season, postseason and even during the off-season,
- (3) gives the testing authority more discretion under the Reasonable Cause Testing clause,
- (4) applies

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69. Selig & Manfred, *supra* note 11, at 48.

70. *See id.* (quoting *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348-49 (1958)).

71. *Id.* (citing *Johnson-Bateman Co.*, 295 N.L.R.B. 180, 182-83 (1989)).

72. *Id.* (citing *Johnson-Bateman Co.*, 295 N.L.R.B. at 182-83; *Kysor/Cadillac*, 307 N.L.R.B. 598, 598-99 (1992), *enforced*, 9 F.3d 108 (6th Cir. 1993); *Coastal Chem. Co.*, 304 N.L.R.B. 556, 567-68 (1991)).

73. *Id.* at 54; *see* Heisler, *supra* note 11, at 215 (citing Battista, *supra* note 11, at D4; Freeman, *supra* note 11, at 7; Kiely, *supra* note 11, at 5c; Maske, *supra* note 11); Fortenberry & Hoffman, *supra* note 11, at 136.

beyond players, to team personnel and (5) provides greater disciplinary remedies for violations of the policy.<sup>74</sup>

For example, the NFL conducts drug testing year round, while the MLB tests only during the season and the NBA only tests during training camp.<sup>75</sup> Another example demonstrating the NFL's superiority over the other leagues is the fact that the NFL policy covers non-players, while MLB and NBA policies only cover players.<sup>76</sup> Thus, the NFL deters trainers, coaches, and other personnel from helping athletes dope.<sup>77</sup>

The NFL and the National Football League Players Association (NFLPA) have a negotiated agreement regarding the regulation of steroids and substance abuse called the National Football League Policy on Anabolic Steroids and Related Substances (Steroid Policy). In the Steroid Policy, the NFL addresses doping rather than doing so in their general collective bargaining agreement. Under the Steroid Policy, the NFL "prohibits the use of anabolic/androgenic steroids (including exogenous testosterone), stimulants, human or animal growth hormones, whether natural or synthetic, and related or similar substances."<sup>78</sup> The NFL also prohibits masking agents and diuretics used to hide the presence of the substances listed above.<sup>79</sup>

The Steroid Policy outlines drug testing procedures under six contexts—pre-employment, annual preseason testing, preseason/regular season group testing, postseason, off-season, and reasonable cause.<sup>80</sup> First, after being tested prior to employment, the Steroid Policy requires all players to be tested for banned substances at least once per year.<sup>81</sup> This mandatory test is conducted during the preseason.<sup>82</sup> The NFL also randomly tests ten players at a time on every team each week during the preseason and regular season.<sup>83</sup> The Steroid Policy additionally requires the periodic random drug testing of ten players on every team that qualifies for

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74. Fortenberry & Hoffman, *supra* note 11, at 136.

75. *Id.* at 138.

76. *Id.* at 139.

77. *Id.*

78. NAT'L FOOTBALL LEAGUE POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES § 1 (2010), available at <http://images.nflplayers.com/mediaResources/files/PDFs/PlayerDevelopment/2010%20Steroid%20Policy.pdf> [hereinafter NFL POLICY].

79. *Id.*

80. *Id.* § 3A.

81. *Id.*

82. *Id.*

83. *Id.*

the postseason.<sup>84</sup> The random testing continues as long the team is in the playoffs.<sup>85</sup>

During the off-season, any player under contract can be tested up to six times.<sup>86</sup> “Any player selected for testing during the off-season will be required to furnish a urine specimen at a convenient location acceptable to the Independent Administrator.”<sup>87</sup> The league can, but does not have to, test free-agent players, which are rookies or veterans that are not under contract with a club.<sup>88</sup> Nevertheless, the NFL does conduct annual drug testing for draft-eligible football players.<sup>89</sup>

Lastly, the Steroid Policy permits the league to test, on an ongoing basis, all players that have previously tested positive for a listed banned substance.<sup>90</sup> These players are subject to ongoing reasonable cause testing during the season and off-season.<sup>91</sup> The league can also randomly test any player for which it has reasonable basis to conclude has violated the policy.<sup>92</sup> However, a player can only be tested a maximum of twenty-four times every year.<sup>93</sup>

All testing is subject to the testing procedures outlined in section 3B of the Steroid Policy. Every player is notified on the day of the test that he will be tested.<sup>94</sup> The NFL does not conduct blood doping tests; only urine tests are conducted.<sup>95</sup> In order to “prevent evasive techniques,” tests are conducted under the observation of an “authorized specimen collector.”<sup>96</sup> A player is subject to discipline if he violates the policy.<sup>97</sup> A violating player can be suspended or, if appropriate, can have his affiliation with the NFL terminated.<sup>98</sup> Any suspended player is not paid during the duration of the suspension.<sup>99</sup>

A player’s discipline depends on whether the violation is his first, second, or third policy offense. Upon the first offense, a player is

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84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* § 2.

94. *Id.* § 3B.

95. *Id.*

96. *Id.*

97. *Id.* § 5.

98. *Id.*

99. *Id.*

suspended for a minimum of four regular season or postseason games without pay.<sup>100</sup> If a player violates the policy for a second time, he is suspended without pay for a minimum of eight regular season or postseason games.<sup>101</sup> Finally, if a player violates the policy for a third time, he is suspended for a year without pay.<sup>102</sup> Such a player needs to petition for reinstatement and is not necessarily guaranteed reinstatement.<sup>103</sup>

#### B. BOXING (MULTI-JURISDICTIONAL SYSTEM)

Boxing is regulated on a on a multi-body basis. In other words, state commissions and boxing sanctioning organizations regulate boxing together. The states regulate any boxer fighting in their jurisdiction, while the sanctioning organizations regulate any boxer fighting for their title. The sanctioning organization gives the boxers permission to fight for the title, but these boxers can negotiate to fight in the state of their choice. Thus, if Boxer A wants to defend his title, he must follow the procedures of the title's sanctioning organization, separately choose a venue for his fight, and follow the procedures outlined by the state hosting the fight event.

Both the states and the sanctioning organizations have their own anti-doping policy. Fighters must follow both in order to avoid punishment by either body. In practice, these overlapping anti-doping policies supplement each other. The state can have an anti-doping measure that the sanctioning organization does not address and vice-versa.

State commissions are responsible for regulating boxing in order to protect the health and safety of boxers.<sup>104</sup> State commissions are also responsible for qualifying referees and judges and licensing fighters, managers, and promoters.<sup>105</sup> "Professional boxing is one of the few sports that is not regulated by a single governing body. In the [U.S.], each commission has different rules when it comes to drug testing, with the Nevada State Athletic Commission (NSAC), for example, responsible for all fights taking place in Las Vegas."<sup>106</sup> Therefore, boxers are subject to the anti-doping policy of the state in which they fight. In order to review the anti-doping approach taken by state commissions, this article will discuss the

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100. *Id.* § 6.

101. *Id.*

102. *Id.*

103. *Id.*

104. Michael J. Jurek, *Janitor or Savior: The Role of Congress in Professional Boxing Reform*, 67 OHIO ST. L.J. 1187, 1198 (2006).

105. *Id.*

106. Hassan, *supra* note 10.

anti-doping policies of NSAC and the California State Athletic Commission (CSAC), two of the most prominent state commissions.

The NSAC prohibits boxers from using any steroid or substance listed in the current *Prohibited List* published by WADA.<sup>107</sup> However, boxers only need to submit to a urine analysis if directed to do so by the commission.<sup>108</sup> If the commission decides to test fighters, it can only test fighters before or immediately after fights.<sup>109</sup> Thus, boxers do not have to be tested for steroids. If a fighter tests positive, he is subject to discipline by the NSAC.<sup>110</sup> However, the NSAC does not have any guidelines on disciplining violating fighters.<sup>111</sup>

The lack of guidelines manifests itself in the inconsistent disciplining the NSAC has imposed in the past. For the most part, the NSAC has been consistent with regards to punishing athletes that use banned substances by punishing athletes that tested positive for nine months.<sup>112</sup> For example, the NSAC fined boxer Fernando Vargas \$100,000 and suspended him for nine months after testing positive for the illegal steroid Stanozolol after his September 14, 2002 fight with Oscar De La Hoya.<sup>113</sup> On the other hand, the NSAC suspended mixed martial arts fighter Kimo Leopoldo for only six months after testing positive for the same steroid, Stanozolol, after his June 19, 2004 fight.<sup>114</sup> Furthermore, the NSAC suspended Julio Cesar Chavez, Jr., son of legend Julio Cesar Chavez, for only seven months and fined him ten percent of his \$100,000 purse for testing positive for the banned diuretic Furosemide after his November 14, 2009 fight.<sup>115</sup>

The CSAC only requires fighters to submit urine samples for analysis to detect steroid or other banned substance use either before or after the fight.<sup>116</sup> The commission has the discretion to decide whether to test before

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107. See NEV. ADMIN. CODE § 467.850 (2010).

108. *Id.*

109. *Id.*

110. *Id.*

111. See generally *id.*

112. See John Morgan, *NSAC Issues Karo Parisyan Nine-Month Suspension: UFC 94 Win Overtaken*, MMAJUNKIE.COM (Mar. 17, 2009), <http://mmajunkie.com/news/14288/nsac-issues-karo-parisyan-nine-month-suspension-ufc-94-win-overtaken-mma>; Ivan Trembow, *Bonnar Suspended 9 Months For Steroid Use*, MMAWEEKLY.COM (Nov. 3, 2006), <http://mmaweekly.com/bonnar-suspended-9-months-for-steroid-use-2>.

113. Michael Katz, *Vargas Suspended for Positive Test*, N. Y. TIMES, Nov. 21, 2002, at D7.

114. Mike Sloan, *Kimo Suspended Six Months, Fined \$5,000*, SHERDOG (Aug. 16, 2004), <http://www.sherdog.com/news/news/Kimo-Suspended-Six-Months-Fined-5000-1938>.

115. Brett Okamoto, *Julio Cesar Chavez Jr. Receives Seven-Month Suspension*, LAS VEGAS SUN (Mar. 1, 2010), <http://www.lasvegassun.com/news/2010/mar/01/julio-cesar-chavez-jr-receives-seven-month-suspens/>. Furosemide, “can be used by fighters to help cut weight or possibly mask steroid use.” *Id.*

116. CAL. CODE REGS. tit. 4, § 303(b) (2009).

or after the fight, but it is unclear how the commission determines when the tests will be conducted.<sup>117</sup> Like the NSAC, CSAC does not test randomly during the training period. CSAC prohibits the use of “(1) Stimulants (2) Narcotics (3) Cannabinoids (marijuana) (4) Anabolic agents (exogenous and endogenous) (5) Peptide hormones (6) Masking agents (7) Diuretics (8) Glucocorticosteroids (9) Beta—2 agonists (asthma medications) (10) Anti-estrogenic agents, [and] (11) Alcohol” before or during a match.<sup>118</sup> Like the NSAC, the CSAC also does not have any guidelines on disciplining violating fighters.<sup>119</sup>

Additionally, boxing is regulated by various worldwide sanctioning organizations. There are three prominent sanctioning organizations—World Boxing Association (WBA), International Boxing Federation (IBF), and the World Boxing Council (WBC).<sup>120</sup> These organizations are mostly responsible for ranking fighters and sanctioning title bouts. Nevertheless, they also have their own anti-doping policies, albeit much less comprehensive than the state commissions’ policies.

The WBA prohibits the use of any steroids or substances listed as a prohibited substance by the IOC or “other agency as authorized by the WBA Medical Advisor.”<sup>121</sup> Drug testing is only mandatory in World Championship fights.<sup>122</sup> The drug testing is conducted in the form of a urine analysis and is required to be taken before and/or after the fight.<sup>123</sup> However, the WBA does not mention the procedure for determining when the test will be conducted, and rather only states that the time and place of the test has to be announced to the fighter at some point prior to the test.<sup>124</sup> The WBA may also periodically test fighters who have previously tested positive for a banned substance. However, the WBA only tests fighters that are fighting in a World Title bout.<sup>125</sup>

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117. *Id.*

118. *Id.* § 303(c).

119. *See generally id.*

120. Jurek, *supra* note 104, at 1196.

121. *Rules of World Boxing Association*, WORLD BOXING ASS’N, [http://wbanews.com/artman/publish/regulations/WBA\\_Rules\\_Adopted\\_in\\_Punta\\_Cana\\_2008.shtml](http://wbanews.com/artman/publish/regulations/WBA_Rules_Adopted_in_Punta_Cana_2008.shtml) (last visited Apr. 9, 2010). The IOC does not publish a prohibited list of banned substances and doping methods. WADA publishes a list of prohibited substances and doping methods, which the IOC follows. Nonetheless, the WBC says it adheres to the IOC list. *See World Anti-Doping Code*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/> (last updated Oct. 2010).

122. *Rules of World Boxing Association*, *supra* note 121, at app. A art. 13, app. C art. 45.

123. *Id.* at app. A art. 13.

124. *Id.*

125. *Id.* at app. C art. 45.

The WBA outlines various ways that fighters are disciplined when they test positive for banned substances. If a fighter in a World Championship fight fails a test, he is not able to fight for a WBA championship for two years, unless he can present medical evidence demonstrating his rehabilitation.<sup>126</sup> Additionally, “no boxer who has tested positive for prohibited substances can be rated, retain a title, or be permitted to fight in a sanctioned bout for a period of no less than six months from the date of the positive test.”<sup>127</sup>

The WBC has similar drug testing regulations. Drug tests are only required for world title fights or elimination fights.<sup>128</sup> Otherwise, the WBC does not require testing for boxers involved in normal bouts. The testing is done in the form of a urine test.<sup>129</sup> The WBC requires that the urine test be conducted after a fight and will not test fighters before fights, unless the state hosting the fight has a law that requires testing before the fight.<sup>130</sup>

The policy prohibits the use of stimulants, diuretics, sedative hypnotics, hallucinogens, and “infusions of blood, red cells or plasma expanders.”<sup>131</sup> It is unclear whether steroids and other performance enhancing drugs fit within one of those listed categories.<sup>132</sup> If a boxer in a championship fight tests positive in an anti-doping test, he cannot fight for a title for a year.<sup>133</sup> However, if the champion wins and tests positive and the losing challenger does not test positive, the champion will only face the punishment of losing his title.<sup>134</sup> This is an odd punishment structure because it appears that a champion who wins a fight and tests positive receives a less severe punishment than a champion who loses a championship fight and tests positive.<sup>135</sup>

Unlike the WBA and the WBC, the IBF requires all of its fighters to be tested, regardless the type of fight.<sup>136</sup> A urine analysis is conducted immediately after every fight.<sup>137</sup> The IBF has a distinct list of banned substances, which include Methadone, Barbiturates, D-Amphetamine, Morphine,

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126. *Id.* at app. A art. 13.

127. *Id.* at app. C art. 45.

128. *Rules and Regulations*, WORLD BOXING COUNCIL, [http://www.wbcboxing.com/downloads/NEW\\_RULES\\_AND\\_REGULATIONS\\_WEB\\_FINAL\\_2009.pdf](http://www.wbcboxing.com/downloads/NEW_RULES_AND_REGULATIONS_WEB_FINAL_2009.pdf) (last visited Apr. 9, 2010).

129. *Id.* § 4.9(e).

130. *Id.*

131. *Id.* § 4.9(g).

132. *Id.*

133. *Id.* § 4.9(h).

134. *Id.*

135. *Id.*

136. *Rules for IBF, USBA, & Intercontinental Championship and Elimination Bouts*, IBF/USBA, 6 (July 2006), <http://www.ibf-usba-boxing.com/rules/boutrules> [hereinafter *IBF & USBA Rules*].

137. *Id.*

Glutethimide, Marijuana, Meperidine, Chlorpromazine, Tetrahydrocannabinol, PropoxypheneCodeine, Anabolic Steroids, Quinine, Cocaine, and Pain Killers.<sup>138</sup> The IBF does not outline its punishment for fighters that test positive for banned substances.<sup>139</sup> Thus, the IBF has significant discretion when imposing punishment for violations.<sup>140</sup> For example, in 2000, then IBF champion Roy Jones Jr. tested positive for the IBF banned substance Androstenedione after his win.<sup>141</sup> The IBF took a lenient stance by letting Jones Jr. keep his belt and not fining or suspending him for his positive test.<sup>142</sup>

### C. WADA

Unlike the NFL, WADA is an independent agency with the ability to unilaterally regulate doping without having to bargain with its members.<sup>143</sup> WADA is as an “international independent agency composed and funded equally by the sport movement and governments of the world.”<sup>144</sup> WADA is a Swiss private law foundation.<sup>145</sup> Its purpose is to “to promote and coordinate the fight against doping in sports internationally.”<sup>146</sup> In 2002, WADA released the World Anti-Doping Code (the Code), which is a uniform set of anti-doping rules that all WADA members follow.<sup>147</sup> The Code replaced the Olympic Movement Anti-Doping Code from 1999.<sup>148</sup> The Code was revised in 2009.

The Code’s anti-doping rules govern all Code signatories, which include the IOC, International Federations, International Paralympic Committee, National Olympic Committees, and other sporting bodies.<sup>149</sup> For example, the International Basketball Federation (FIBA) became a signatory of the 2009 revised WADA Code.<sup>150</sup> As a result, every national governing body and tournament that is a part of FIBA must adopt the Code’s anti-doping regulations. In essence, these signatories agree to prohibit the

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138. *Id.*

139. *Id.*

140. *Id.*

141. Hassan, *supra* note 10.

142. *Id.*

143. Selig & Manfred, *supra* note 11, at 44.

144. *About WADA*, *supra* note 34.

145. *Id.*

146. *WADA History*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/About-WADA/History/WADA-History/> (last visited Apr. 26, 2010).

147. *Id.*

148. In re CONI, Case No. 841, Advisory Opinion, 5 (Court of Arbitration for Sport 2005).

149. *World Anti-Doping Code*, *supra* note 121, at 16.

150. *New FIBA Internal Regulations Governing Anti-Doping*, CHINESE OLYMPIC COMMITTEE (Aug. 1, 2009), [http://en.olympic.cn/news/doping\\_control/2009-01-08/1714763.html](http://en.olympic.cn/news/doping_control/2009-01-08/1714763.html).

substances on WADA's Prohibited List and to use the methods outlined in the Code to prevent the use of these substances.<sup>151</sup>

In general, the Code is a very harsh and strict document.<sup>152</sup> The Code implements strict liability in that “[i]t is not necessary that intent, fault, negligence or knowing [u]se [of a banned substance] on the athlete’s part be demonstrated in order to establish an anti-doping violation.”<sup>153</sup> Code signatories must also follow WADA’s 2010 Prohibited List.<sup>154</sup> This document prohibits an extensive list of anabolic steroids, peptide hormones, growth factors, Beta-2 agonists, hormone antagonists and modulators, diuretics, other masking agents, and doping methods.<sup>155</sup> The Code’s International Standard for Testing delineates the exact method of testing for such prohibited substances.<sup>156</sup>

WADA requires organizations under it to conduct both in-competition and out-of-competition testing.<sup>157</sup> In-competition testing refers to the “period commencing twelve hours before a Competition in which the Athlete is scheduled to participate through the end of such Competition” and drug testing related to the competition.<sup>158</sup> Thus, organizations under WADA must test throughout the entire year, whether the athletes are actively competing or not. With few exceptions, athletes are not notified ahead of time that they are being tested or where the test will be conducted.<sup>159</sup>

Athletes subject to out-of-competition testing or in-competition testing can be selected in two ways. WADA members must conduct both target tests and random tests. In target testing, athletes are selected on a non-random basis.<sup>160</sup> Their selection can be based on, but not limited to, the following reasons: “[w]ithdrawal or absence from expected [c]ompetition;

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151. See Daniel Gandert, *The World Anti-Doping Agency as an Institution* (unpublished manuscript) (on file with the Northwestern University School of Law Program on Negotiation and Mediation).

152. Haagen, *supra* note 10, at 838.

153. *World Anti-Doping Code*, *supra* note 121, § 2.1.1.

154. See *id.* § 4.

155. *The 2011 Prohibited List*, WORLD ANTI-DOPING AGENCY (Sept. 18, 2010), <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/International-Standards/Prohibited-List/>.

156. See generally *International Standard for Testing*, WORLD ANTI-DOPING AGENCY (Jan. 1, 2009), <http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/International-Standards/Testing/>.

157. *World Anti-Doping Code*, *supra* note 121, § 5.1.1.

158. *International Standard for Testing*, *supra* note 156, § 3 (emphasis omitted).

159. *Id.* § 4.3.10.

160. *Id.* § 3.1.

[g]oining into or coming out of retirement; [b]ehavior indicating doping; [and s]udden major improvements in performance.”<sup>161</sup>

On the other hand, WADA members can randomly select athletes for testing. In other words, “[a]thletes are chosen arbitrarily from a list or pool of [a]thlete names.”<sup>162</sup> Again, athletes who are either randomly selected or target selected for testing will not know that they are being tested until a few moments before testing.

The WADA Code does not specify exactly which athletes should be targeted for testing, how many tests are conducted, or what types of test should be conducted. However, WADA recognizes that signatories may have limited resources.<sup>163</sup> Consequently, WADA leaves it to signatories to prioritize their testing needs and best use their resources.<sup>164</sup> For example, it is up to signatories to plan how many urine tests compared to blood tests will be conducted.<sup>165</sup>

WADA also requires that members create testing pools in order to effectively conduct out-of-competition testing by keeping track of athletes’ whereabouts.<sup>166</sup> WADA states that having information regarding an athlete’s whereabouts during the off-season or out-of-competition period is critical in order to test them without warning and prevent them from evading drug detection.<sup>167</sup> All athletes placed in testing pools must provide information about their whereabouts during various times of the year,<sup>168</sup> making them subject to testing.<sup>169</sup> WADA states that without this information, “[t]esting can be inefficient and often impossible.”<sup>170</sup>

WADA has very harsh punishments for athletes who are caught committing a doping offense. A first violation is a two-year suspension and a second violation is a lifetime ban.<sup>171</sup> Lastly, WADA has sole discretion with regards to which substances are banned.<sup>172</sup> Signatories do not have any say as to which substances are banned. Despite this rule, the Code permits athletes governed by the Code to appeal culpability and sentences

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161. *Id.* § 4.4.2 (emphasis omitted).

162. *Id.* § 3.2 (emphasis omitted).

163. *Id.* § 4.3.

164. *Id.*

165. *Id.*

166. *Id.* § 11.1.

167. *Id.*

168. *Id.*

169. *Id.* § 11.4

170. *Id.* § 11.1.1.

171. *World Anti-Doping Code*, *supra* note 121, § 10.7. Section 10.7 outlines other penalties for other types of violations, such as trafficking of banned substances. *Id.*

172. *Id.* § 4.3.3.

imposed on them with regards to a Code violation.<sup>173</sup> Athletes can bring such an appeal to the Court of Arbitration of Sport.<sup>174</sup> Because all signatories must follow the rules promulgated by WADA,<sup>175</sup> WADA unilaterally implements the anti-doping policy.

## V. A FUNDAMENTALLY FLAWED AMERICAN SYSTEM

The approach to regulating doping in American professional sports is fundamentally flawed. The following section will review the different ways in which the NFL, with its collective bargaining approach, and boxing, with its multi-jurisdictional approach, fail to effectively address steroid regulation.

### A. COLLECTIVELY BARGAINED FOR ANTI-DOPING FAILURE

#### 1. *Massive Loopholes*

Even though many laud the NFL Steroid Policy, it has various loopholes that permit players to dope, while evading detection. First, the NFL's in-season random testing is structured in a way that allows players to know that they cannot be tested on game days.<sup>176</sup> Many experts, including Gary Wadler from WADA, believe the NFL's predictable testing framework allows athletes to outmaneuver testing with fast acting steroids and masking agents.<sup>177</sup> Wadler also mentioned that giving players a cushion from being tested on game days does not make sense because the extra time allows athletes to use masking agents, provides enough time to flush the body of drugs, or allows athletes to use another person's drug-free urine.<sup>178</sup>

Second, if a player cannot provide a urine sample when selected to do so, no one chaperones the athlete when he produces the make-up urine sample at a later time.<sup>179</sup> Essentially, a player can use this loophole in an attempt to circumvent testing. For example, a player could force himself not to urinate when selected for testing; then, when not being chaperoned during the make-up urine testing session, he can use someone else's urine.

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173. *Id.* § 13.2.

174. *Id.* § 13.2.3.

175. See FIFA & WADA, Case No. 976 & 978, Advisory Opinion, 209 (Court of Arbitration for Sport 2005), [http://www.rdes.it/RDES\\_2\\_06\\_fifa&wada.pdf](http://www.rdes.it/RDES_2_06_fifa&wada.pdf) (determining that FIFA was required to obey WADA's rules as a member of the Olympic movement).

176. Heisler, *supra* note 11, at 215 (citing Michael S. Schmidt, *Doping Experts Find Loopholes Beyond Baseball*, N. Y. TIMES, Dec. 11, 2007, at D1).

177. *Id.*

178. *Id.*

179. *Id.*

Third, if these loopholes are not enough, the Steroid Policy contains a confidentiality clause that states “[t]he confidentiality of players’ . . . tests results will be protected to the maximum extent possible, recognizing that players who are disciplined for violating [the Steroid] Policy will come to the attention of and be reported to the public and the media.”<sup>180</sup> Essentially, the NFL minimizes punishment and determent with regards to doping. They refuse to release positive test results in order to protect players from being publicly chastised. This is a suspect rule with suspect motivation. It seems the NFL does not want to do the most it can to deter doping in its sport.

Last, a Minnesota labor law has rendered the NFL’s Steroid Policy ineffective in Minnesota. Recently, two Minnesota Vikings players tested positive for a banned substance and were subsequently suspended by the NFL.<sup>181</sup> However, they filed a suit in a Minnesota state court claiming a Minnesota labor law “prevents the NFL from suspending them for a drug they took outside the workplace.”<sup>182</sup>

Minnesota’s potential ability to challenge and override the NFL’s Steroid Policy has significantly weakened the Policy. Because the case is still pending in the Minnesota court, the NFL cannot act on the violations until the case is decided. If the Minnesota law holds up in court, a player in one state could have the advantage of taking a substance that a player in another state could not.<sup>183</sup> Consequently, in order to be fair and uniform with regards to its Steroid Policy, the NFL deferred the suspension of two New Orleans Saints players charged with the same violation,<sup>184</sup> meaning that the Minnesota law has forced the NFL to change the way it enforces its Steroid Policy. This situation could reoccur with regards to another rule of the Steroid Policy. Thus, a state’s ability to override any NFL policy significantly weakens the NFL’s ability to effectively regulate doping.

The NFL Steroid Policy has many weaknesses that are caused and exacerbated by the fact that the collective bargaining process has built in conflicts of interests and a cumbersome process for modifying the policy itself. The following section will discuss the conflicts of interest that impede the NFL and other sports leagues from effectively regulating doping.

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180. NFL POLICY, *supra* note 78, § 13A.

181. T.J. Quinn, *Loophole Leads Vikes’ Case to Congress*, ESPN.COM (Nov. 3, 2009), [http://sports.espn.go.com/nfl/columns/story?columnist=quinn\\_tj&id=4620501](http://sports.espn.go.com/nfl/columns/story?columnist=quinn_tj&id=4620501).

182. *Id.*

183. *Id.*

184. *Smith, Grant to Play for Saints*, ESPN.COM (Sept. 15, 2009), <http://sports.espn.go.com/nfl/news/story?id=4476485>.

## 2. *Conflicts of Interests*

Players and owners developing an anti-doping policy through the collective bargaining process have a conflict of interest that significantly hampers the creation of an effective anti-doping policy. As much as everyone loves their professional teams, sports are a business for everyone who is involved, especially the owners and players. Both parties have millions of dollars at stake when it comes to their respective sport, league, and team. When owners and players negotiate the terms to the collective bargaining agreement, it is no surprise that they try to negotiate with their best interests in mind; negotiating the terms of the anti-doping policy is no different. Unfortunately, a truly effective anti-doping policy is not in either party's interest and thus, they are motivated to install a lenient and porous policy with many loopholes.

Both owners and players financially benefit from doping.<sup>185</sup> Players that dope usually perform better.<sup>186</sup> The better the athletes perform, the more revenue the owners make. The more revenue owners make, the more valuable players are to their owners.<sup>187</sup> The more valuable players are, the higher their salaries are.<sup>188</sup>

Additionally, many players can only reach the professional level by doping, while others need doping to reach the "upper echelons of the profession."<sup>189</sup> Players who feel this pressure have no desire for a harsh anti-doping policy.<sup>190</sup> Both parties have a lot to gain from doping and thus, it is no surprise that the collective bargaining process leads to poor anti-doping policies.

Players are also motivated to negotiate a lenient anti-doping policy to avoid financial penalties.<sup>191</sup> Violating anti-doping policies can lead to fines and suspensions.<sup>192</sup> Further, suspensions can be very costly for athletes because clubs withhold wages from suspended athletes.<sup>193</sup>

Another reason athletes are motivated to shy away from strict policies is the fact that they have an interest in maintaining a positive image in the

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185. Tiffany D. Lipscomb, *Can Congress Squeeze the "Juice" Out of Professional Sports? The Constitutionality of Congressional Intervention into Professional Sports' Steroid Controversy*, 69 OHIO ST. L.J. 303, 317 (2008).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 317-18.

191. *Id.* at 318.

192. *Id.*

193. *Id.*

eyes of the public.<sup>194</sup> A positive image is important to athletes because it implicates their legacy in the sport and can affect their ability to attract endorsements. Doping or being suspected of doping can severely damage a player's reputation, as demonstrated with the cases of Roger Clemens, Barry Bonds, Mark McGwire, and Alex Rodriguez.<sup>195</sup> Doping has tarnished their legacies so much that these players, once considered guaranteed for the Hall of Fame, might not be elected.<sup>196</sup>

Developing effective anti-doping policies in the collective bargaining process is also hindered by the fact that both owners and players view anti-doping regulations as simply a bargaining chip. Bud Selig, long time commissioner of Major League Baseball, believes that "through collective bargaining, parties attempt to achieve gains in certain core areas (such as payroll regulation), often as a trade-off for, or at the expense of, not making ground in other important areas," such as doping regulation.<sup>197</sup> Thus, it is difficult to balance the various interests of the parties and, unfortunately, anti-doping is not at the top of their lists.<sup>198</sup>

In sum, negotiating anti-doping policies through the collective bargaining process subjects policy-making to conflicts of interests. It is no surprise the NFL and the other major sports leagues in the U.S. have various loopholes and ineffective regulations. Furthermore, this process will undoubtedly continue producing more ineffective regulations in the future and prolong doping indefinitely. The collective bargaining process dooms the development of proper regulations.

### 3. *Regulating at a Snail's Pace*

Not only is the NFL's Steroid Policy afflicted by conflicts of interest, but it is also negatively affected by the fact that every modification to the Steroid Policy requires a mutual agreement between both the owners and the players' union. As explained above, the NLRA deems drug testing as a labor issue that must be collectively bargained for. Neither owners nor players can unilaterally decide what the policy should look like. Consequently, every issue regarding drug testing in the NFL must be negotiated.

Owners and players' unions have to negotiate with each other to address new developments in doping, such as new drugs or evasion

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194. *Id.*

195. *See id.* at 318-19.

196. *See id.* at 319.

197. Selig & Manfred, *supra* note 11, at 57.

198. *See id.*

techniques. Negotiations take time and consequently, the NFL cannot and has not been able to quickly address new doping developments. The collective bargaining process weighs down the NFL. As long as the NFL addresses doping through the collective bargaining process, it will forever be on the losing side of a cat and mouse game with cheaters. Similar to conflicts of interest, this flaw dooms the NFL. The NFL's current slow reaction towards implementing Human Growth Hormone (HGH) blood testing is a perfect example of this flaw.

In February of 2010, a British rugby player's blood sample was the first positive result for HGH ever. The athlete, Terry Newton, was tested by a United Kingdom Anti-Doping Agency and was banned from competition for two years.<sup>199</sup> WADA, together with the United Kingdom Anti-Doping Agency, conducted the blood test.<sup>200</sup>

A blood test for HGH has existed since the 2004 Athens Olympics and has been available in the U.S. since 2008.<sup>201</sup> Travis Tygart, the executive director of the United States Anti-Doping Agency, explained that WADA offers the HGH blood test.<sup>202</sup> He mentioned that extensive research has been conducted that shows that the test is scientifically valid.<sup>203</sup> WADA authorities, such as the Agency Director General David Howman, look at Newton's positive drug test as a reason for sports organizations all over the world to increase blood testing in order to catch athletes who have "been using [HGH] with no impunity for a number of years."<sup>204</sup>

While WADA has quickly addressed this new medical advancement, the NFL has approached this new issue at a snail's pace. The collective bargaining process has clearly slowed down the mighty NFL, which was praised for its anti-doping policy. In January of 2010, the NFL told the NFLPA about its interest in testing for HGH.<sup>205</sup> However, an NFLPA representative stated that "'there's no reason' to implement blood testing at this time. . . ."<sup>206</sup> Similarly, George Atallah, the NFLPA assistant executive director of external affairs, told the New York Post, "there's no reason to believe that blood-testing for NFL players will or should be implemented"

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199. Lance Pugmire, *HGH Testing Receives a Boost: British Rugby Player's Positive Result Could Aid Efforts By Baseball and the NFL, Which Are Pushing To Conduct Blood Testing*, L.A. TIMES, Feb. 25, 2010, at C1.

200. *Id.*

201. *Id.*

202. *NFL, Union At Odds Over HGH Test*, ESPN.COM, <http://sports.espn.go.com/nfl/news/story?id=4940922> (last updated Feb. 24, 2010).

203. *Id.*

204. Pugmire, *supra* note 199.

205. *Id.*

206. *Id.*

and that the “[NFL] should instead focus on preserving the drug-testing policy that we have in place.”<sup>207</sup> Testing for HGH became a part of the 2011 Collective Bargaining Agreement, however, the NFLPA refused to agree to the details, which has resulted in increased delays for the implementation of the test.<sup>208</sup>

Whether it is because the NFLPA’s motive is to advance its interest or not, the NFLPA does not want to address the apparently reliable HGH drug test. Even though there appears to be abundant scientific research about the HGH blood test’s reliability, the NFLPA insists on conducting its own independent analysis of the test, which naturally is delaying the implementation of the test.<sup>209</sup> Gary Wadler from WADA states that “[t]here’s now a positive, the test is commercially produced. There’s no excuses to hide from testing anymore, and the pressure is on all sports leagues to implement blood testing.”<sup>210</sup>

It takes two in the collective bargaining process and that is why, when it comes to addressing doping the process is flawed. If one party delays or has a strict position on an issue, like the NFLPA has with regards to HGH, then a new doping development cannot be addressed. By the time the NFL begins testing for HGH, cheaters will have moved on to another doping method, which the NFL does not test for. This is occurring now and will ultimately occur again in the future. At its best, the NFL will always be behind the curve when it comes to regulating doping.

In sum, the NFL’s collective bargaining process is fundamentally flawed. The Steroid Policy allows players to dope and evade detection.<sup>211</sup> These loopholes and ineffective regulations are caused by the fact that the Steroid Policy is negotiated through the collective bargaining process. Both negotiating parties have other interests that conflict with the idea of implementing effective anti-doping policies.<sup>212</sup> Furthermore, the collective bargaining process requires both parties to negotiate the terms of every rule.

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207. *NFL, Union At Odds Over HGH Test*, *supra* note 202.

208. See *Union's Questions Unanswered as Clock Ticks on HGH Testing for 2011 Season*, WASHINGTON POST (Oct. 7, 2011), available at [http://www.washingtonpost.com/sports/redskins/unions-questions-unanswered-as-clock-ticks-on-hgh-testing-for-2011-season/2011/10/07/gIQA5uOVTL\\_story.html](http://www.washingtonpost.com/sports/redskins/unions-questions-unanswered-as-clock-ticks-on-hgh-testing-for-2011-season/2011/10/07/gIQA5uOVTL_story.html) for a description of how disagreement between the union and the league is continuing to prevent the NFL from implementing HGH testing.

209. Gary Myers, *NFL Union Changing Stance On HGH Blood Test Under New Union Chief DeMaurice Smith*, N.Y. DAILY NEWS (Feb. 27, 2010), [http://www.nydailynews.com/sports/football/2010/02/27/2010-02-27\\_union\\_changing\\_stance\\_on\\_hgh\\_blood\\_test.html](http://www.nydailynews.com/sports/football/2010/02/27/2010-02-27_union_changing_stance_on_hgh_blood_test.html).

210. Pugmire, *supra* note 199.

211. See Jarrett Bell, *NFL Drug Program Called Flawed*, USA TODAY, Mar. 31, 2005, at 1C.

212. See Juliet Macur, *N.F.L. Falls Short of a Leap on H.G.H.*, N.Y. TIMES, Aug. 6, 2011, at D1 (providing Travis Tygart, the Chief Executive of the United States Anti-Doping Agency’s description of why it is problematic for doping controls in sport to be negotiated).

Having to negotiate every term prevents the NFL from quickly addressing new doping issues. In essence, the collective bargaining process has led to the current ineffective anti-doping policies and inevitability will lead to further ineffectiveness.<sup>213</sup>

## B. BOXING ANARCHY

Boxing's anti-doping approach is utterly chaotic and like the NFL, it falls flat. Current boxing anti-doping regulations are very limited and permit boxers to easily dope while evading detection. Furthermore, like the NFL, the parties making the regulations have conflicts of interest that prevent them from implementing effective policies to rid the sport of drugs. Victor Conte, who provides legal supplements to boxers and who used to work with WADA to help catch dopers, believes that "[t]he testing that is being utilized in boxing is virtually worthless."<sup>214</sup> Similarly, WADA regards boxing's testing as "pathetic."<sup>215</sup>

### 1. *Pathetic Anti-Doping Regulations*

First, the state athletic commissions and boxing sanctioning organizations all implement egregiously limited testing. For example, while the CSAC requires drug testing before and after all fights, it does not test all fighters during their fight preparation.<sup>216</sup> The WBA only tests fighters competing in championship fights,<sup>217</sup> while the WBC similarly tests only fighters competing in title or elimination bouts.<sup>218</sup> Both test fighters immediately after the bout.<sup>219</sup> Along the same lines, the IBF tests all fighters competing under its organization, but only tests fighters after they compete.<sup>220</sup> Interestingly enough, the NSAC doesn't even require testing, and when it does test, it only tests before or immediately after the fight.<sup>221</sup>

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213. See Mark Maske, *Still No Resolution Over HGH*, WASH. POST, Aug. 25, 2011, at D07; Eddie Pells, *Questions from NFL Union Put HGH Testing in Jeopardy*, DENVER POST, Oct. 7, 2011, [http://www.denverpost.com/sports/ci\\_19064491](http://www.denverpost.com/sports/ci_19064491) (describing the way that even though the NFL agreed to adding an HGH test to its 2011 Collective Bargaining Agreement, the details negotiated between the union and league have prevented the test from taking place).

214. Hassan, *supra* note 10. Interestingly, Conte is again providing supplements to athletes and worked with WADA to catch dopers. Conte pleaded guilty in 2005 to conspiracy to distribute steroids and money laundering as a result of his involvement with BALCO. See David Kravets, *Balco Founder Admits Steroid Distribution*, THE INDEPENDENT, July 16, 2005, at 54.

215. Hassan, *supra* note 10.

216. CAL. CODE REGS. tit. 4, § 303 (2009).

217. *Rules of World Boxing Association*, *supra* note 121, at app. C art. 45.

218. *Rules and Regulations*, *supra* note 128, § 4.9.

219. *Id.* § 4.9(e)(1); *Rules of World Boxing Association*, *supra* note 121, at app. A art. 13.

220. *IBF & USBA Rules*, *supra* note 136, at 6.

221. NEV. ADMIN. CODE § 467.850(5) (2010).

At its best, these regulatory bodies only conduct in-competition testing and completely ignore out-of-competition testing. Fighters can easily dope and evade detection with such sporadic testing. Conte explains, “these athletes have advisors who understand that all you have to do [to evade boxing’s testing] is taper off the different species of drugs.”<sup>222</sup> In other words, many boxers have doping experts advising them on how to evade detection based on the sporadic testing.

Boxing also falls short when it comes to banning substances and punishing fighters that violate the anti-doping policy. For example, the NSAC, CSAC, and IBF have no guidelines for punishing fighters that violate the anti-doping policy.<sup>223</sup> Without guidelines, exterior pressures and conflicting interests can influence the individuals determining punishments. Consequently, inconsistent punishments are implemented.

As mentioned above, the NSAC suspended Fernando Vargas for nine months, while it punished Julio Cesar Chavez, Jr. for only seven months and Kimo Leopoldo for six months for similar violations.<sup>224</sup> Vargas and Leopoldo took a banned steroid and Chavez took a diuretic, which masks the use of similar steroids.<sup>225</sup> In a more extreme case, the IBF did not even punish Roy Jones, Jr., the then champion and pound-for-pound best fighter in the world, in any way for taking the banned substance Androstenedione<sup>226</sup> because it was not in the IBF’s interest to suspend the best fighter in the world. Without guidelines, commissions and organizations have the ability to impose lenient punishment when it is beneficial to them.

Furthermore, every state has a different list of banned substances. There is no uniform set of banned substances, which could potentially give certain fighters an unfair advantage, because they could take a substance in one jurisdiction, which boxers fighting in other states could not take. In other words, a fighter can develop his career in a state that allows the fighter to dope in manners other states do not allow. Staying in that state would allow the fighter to perform better and, thus, have more exciting fights. Exciting fights and boxers make more money. A fighter can use the more lenient state to become a more prominent fighter. Boxing’s current anti-doping regulations are simply pathetic and do not in any way address doping in the sport.

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222. Hassan, *supra* note 10.

223. *See generally* CAL. CODE REGS. tit. 4, § 303 (2009); NEV. ADMIN. CODE § 467.850; *IBF & USBA Rules*, *supra* note 136.

224. Katz, *supra* note 113; Okamoto, *supra* note 115; Sloan, *supra* note 114.

225. Katz, *supra* note 113; Okamoto, *supra* note 115; Sloan, *supra* note 114.

226. Hassan, *supra* note 10.

## 2. *Conflicts of Interest*

Similar to the NFL, those individuals who are responsible for implementing anti-doping rules in boxing are afflicted with conflicts of interest, which impedes the development of viable and effective rules. Fights, and especially championship fights, are a significant source of revenue for both states and sanctioning organizations. Fights attract tourism and consumer spending to states.<sup>227</sup> Thus, states want to attract the best fighters in order to host the best fights. Hosting the best fights will generate more revenue for the states. States are financially motivated to regulate doping leniently, because lenient policies will entice the better performing doping fighters to arrange fights in their state.

Sanctioning organizations are also financially motivated to implement lenient anti-doping policies. In order for boxers to fight for an official title, the sanctioning organizations charge a fee of three percent of each fighter's purse.<sup>228</sup> If the fighters do not pay the fee, they cannot fight for the title or be recognized as an official champion.<sup>229</sup> The more revenue a title fight creates, the more the sanctioning organization makes off of its title fee. Better fighters create more revenue and, thus, get larger purses. Consequently, these organizations have a large interest in having the best boxers fight for their titles.

It is important to note that the better the boxers are that fight for a sanctioning organization's title, the more prestigious a title becomes. The more prestigious a title is, the more the best fighters in the world will want to win that title. If the best fighters want to win that title, the sanctioning organization will attract the best fights, which will generate larger title fees. Again, the bigger the purse, the more the sanctioning organization makes, making the sanctioning organizations motivated to leniently regulate doping in order to attract the best performing fighters as possible.

As explained above, fighters, like other athletes, perform better and recover from injuries more quickly when they dope.<sup>230</sup> Better fighters generate more revenue and have bigger fight purses the same way that better performing football players draw more revenue for the NFL.<sup>231</sup> Consequently, implementing strict drug testing is not in the states' or sanctioning organizations' best interest.

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227. See Mola Lenghi, *NMB Hopes Fighting Will Attract Tourism*, CAROLINALIVE.COM (Aug. 23, 2010), <http://www.carolinalive.com/news/story.aspx?id=500932>.

228. Jurek, *supra* note 104, at 1196.

229. *Id.*

230. Lipscomb, *supra* note 185, at 317.

231. *Id.*

Restricting doping could possibly hinder the performance of fighters. If one state highly restricts fighters, fighters will simply go and fight in another state that is more lenient. Additionally, if a sanctioning organization regulates fighters too strictly, fighters will choose to instead fight for another organization's title. The organization that loses the chance to sanction a title fight misses a chance to collect a significant fee. A three percent fee of a \$20 million purse is worth \$600,000, which is very significant. Essentially, the sanctioning organizations and state have a major conflict of interest that motivates them to implement lenient anti-doping policies. Boxing itself is not capable of addressing its poor anti-doping policies.

## VI. THE REMEDY

The inadequacies of the American anti-doping approach can be effectively remedied by implementing a system similar to WADA: one independent organization unilaterally making decisions regarding anti-doping policies. WADA currently has stricter and more effective anti-doping policies than the NFL and boxing, all of which are a result of WADA being an independent and unilaterally operating agency. For example, the WADA Code provides for much harsher sanctions for athletes who violate its anti-doping rules. While the NFL, whose penalties are much harsher than those in boxing, punishes first time offenders with a four-month suspension and second time offenders with an eight-month suspension, the WADA Code punishes first time offenders with a two-year ban and second time offenders with a lifetime ban.<sup>232</sup>

As demonstrated above, organizations following WADA's rules also test for more drugs than does the NFL and boxing. For example, both the Australian Sports Anti-Doping Agency and the United Kingdom Anti-Doping Agency, which both follow WADA's rules, conduct HGH blood tests in their respective professional rugby leagues.<sup>233</sup> The NFL and

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232. Many critics found WADA's penalties in the 2003 Code to be harsh. Almost all second time offenses led to a lifetime ban. As a result, WADA adapted their code to allow for reduced sanctions in attempt to help athletes who are accidentally accused. See Daniel Gandert, *Puerta: Applying the Principles of Justice to the World Anti-Doping Code 2* (2010) (unpublished manuscript) (on file with author).

233. Pugmire, *supra* note 199; Brent Read, *NRL Agrees To Blood Testing For Human Growth Hormone*, THE AUSTRALIAN (Mar. 18, 2010), <http://www.theaustralian.com.au/news/sports/nrl-agrees-to-blood-testing-for-human-growth-hormone/story-e6frg7mg-1225842167575>; *WADA President Praises Australian National Rugby League for Adopting Blood Testing*, WORLD ANTI-DOPING AGENCY (Mar. 19, 2010), <http://www.wada-ama.org/en/News-Center/Articles/WADA-President-Praises-Australian-National-Rugby-League-for-Adopting-Blood-Testing/>.

boxing, on the other hand, do not permit blood testing and in no way address the use of HGH.<sup>234</sup>

WADA also bans doping methods that American sports do not address. WADA bans blood doping methods that enhance an athlete's oxygen transfer,<sup>235</sup> while the NFL, NSAC, CSAC, IBF, and WBA do not explicitly ban these modern doping methods.<sup>236</sup> The NSAC and WBA prohibit substances banned by WADA, but do not explicitly say that they prohibit those doping methods banned by WADA. Only the WBC bans blood doping methods, such as infusions of blood, red cells, and plasma expanders.<sup>237</sup>

Additionally, organizations following the WADA Code provide more extensive testing than the broken boxing anti-doping systems. Unlike boxing, WADA conducts out-of-competition testing.<sup>238</sup> WADA can prevent the scenario in which boxers dope during their training camps and wane off of the drugs by the time of the fight to go undetected.

WADA testing is also much more extensive than the NFL's testing. While the NFL does conduct effective out-of-competition or off-season testing, it conducts very poor in-competition or in-season testing.<sup>239</sup> As explained above, the NFL's regimented season testing allows players to know when they are going to be tested. On the other hand, organizations following the WADA Code test athletes on the same day of the competition and also test athletes on any other day of the quarter without providing advance notice.<sup>240</sup> Athletes competing under organizations following the WADA code cannot predict when they will be tested and, as result, cannot strategically avoid detection like athletes can in the NFL.

The conflicts of interest both the NFL and boxing face can easily be remedied by divesting all anti-doping policy responsibilities to one independent agency. In American professional sports, the same parties who have financial stakes in the sport have the responsibility of making anti-doping

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234. See Maske, *supra* note 213; Pells, *supra* note 213 (describing the way that the NFL has still waited to implement its HGH testing although it is now part of the league's collective bargaining agreement, since the union has not reached an agreement with the league regarding the details of the testing programme).

235. *The 2011 Prohibited List*, *supra* note 155, § M1.

236. CAL CODE REGS Tit. 4, § 303(c) (2009); NEV ADMIN CODE § 467.850 (2010); NFL POLICY, *supra* note 78; *IBF & USBA Rules*, *supra* note 136; *Rules of World Boxing Association*, *supra* note 121.

237. *Rules and Regulations*, *supra* note 128, § 4.9(g)(2).

238. See James Halt, *Where is the Privacy in WADA's "Whereabouts" Rule*, 20 MARQ. SPORTS L. REV. 267, 272 (2009).

239. NFL POLICY, *supra* note 78.

240. *International Standard for Testing*, *supra* note 156, § 11.4.2.

policies. However, as explained above, it is in their financial interest to not stringently enforce doping restrictions.<sup>241</sup>

Divesting the anti-doping responsibilities to one independent agency would erase the conflicting interests. An independent agency, such as WADA, is sheltered from most external pressures, and can act in the way that is best to achieve the goal of cleaning sports. For example, although WADA receives half of its funding from international sports federations, WADA has no direct financial stake in any sport.<sup>242</sup> In other words, it does not profit directly when a certain league or event has success. It does not care whether the athletes create more revenue through their doping induced performances.

Additionally, WADA is kept independent by the fact that the IOC requires its members to join WADA.<sup>243</sup> Even if these federations did not help fund WADA, they would be required to join WADA as a result of being a part of the Olympic movement.<sup>244</sup> Thus, WADA can avoid external pressures because those who financially fund WADA cannot influence WADA's actions.

Consequently, WADA's independence allows it to have the sole purpose of ensuring clean sports.<sup>245</sup> Having an independent agency make anti-doping rules is the logical way to remedy the conflict of interest that afflicts the American anti-doping system. It is important to note that an independent agency, such as WADA, does not guarantee that doping will be completely removed from sports.<sup>246</sup> However, it does address steroid use much more effectively. An independent agency only faces the daunting challenge of catching cheaters and does not face the challenge of dealing with other competing interests.

Furthermore, it is crucial that the independent agency have the complete ability to unilaterally implement its policies. In other words, creating anti-doping policies should not be a part of the collective bargaining process. As exemplified by the HGH ordeal, the collective bargaining process prevents the NFL from quickly addressing new doping

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241. See Macur, *supra* note 212 (providing Tygart's description about the problem of financial implications getting in the way of effective drug testing).

242. *About WADA*, *supra* note 34.

243. *World Anti-Doping Code*, *supra* note 121, at 16.

244. Olympic Charter, art. 25.

245. WADA holds the mission of leading "a collaborative worldwide campaign for doping-free sport." *About WADA*, *supra* note 34.

246. As stated by John Fahey, the president of the World Anti-Doping Agency, "there will always be athletes who will attempt to get an edge over their competitors in any possible way." John Fahey, President, WADA, Introductory Remarks at WADA Press Conference, Vancouver (February 11, 2010), available at [http://www.wada-ama.org/Documents/News\\_Center/News/1/Intro\\_remarks\\_JFahey\\_PC\\_Vancouver\\_11Feb.2010.pdf](http://www.wada-ama.org/Documents/News_Center/News/1/Intro_remarks_JFahey_PC_Vancouver_11Feb.2010.pdf).

developments.<sup>247</sup> Sports leagues depending on collective bargaining will always be unnecessarily late in addressing doping issues.

Action must be taken to implement an independent unilateral anti-doping regulatory system and Congress would be a logical candidate to spearhead such an initiative. As explained above, Congress would have the constitutional ability to implement or be a part of such change.<sup>248</sup> Congress could, for example, create an independent anti-doping agency similar to WADA and require that all sports adhere to its anti-doping regulations. Congress would need to use its constitutional ability to regulate professional sports and create a federal law that would remove the regulation of doping in sports from the realm of the NLRA.<sup>249</sup> Thus, anti-doping regulations would not be something sports leagues would be required to collectively bargain over.

Similarly, states would no longer need to regulate doping in boxing. Sanctioning organizations, many of which are internationally based, could continue to implement their own anti-doping regulations on boxers fighting in the U.S. However, there would be no need for the sanctioning organizations to even be involved with anti-doping in the U.S. because all of the boxers fighting under these organizations would still have to adhere to the independent agency's anti-doping rules, which would be far more comprehensive. Ultimately, American sports will not begin to be cleansed of doping until an independent and unilateral agency controls anti-doping regulation.

## VII. CONCLUSION

In sum, the American anti-doping approach must be changed. Individual sports cannot be given the impractical responsibility of regulating themselves. Conflicts of interest and the collective bargaining process prevent the implementation of effective anti-doping rules in American sports. The status quo will not fix doping abuse in American sports. An independent agency that can unilaterally implement anti-doping rules can address the shortcomings the American system suffers from. This is a call of action to clean American sports.

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247. See *Union's Questions Unanswered*, *supra* note 208 (describing of how disagreement between the union and the league is continuing to prevent the NFL from implementing HGH testing).

248. *Radovich v. NFL*, 352 U.S. 445, 452 (1957); *United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236, 241 (1955).

249. This could be similar to the Ted Stevens Amateur and Olympic Sports Act., 36 U.S.C. § 220501, where Congress used its authority to regulate the Olympic sports and to put them under the control of the United States Olympic Committee.