

BLUE SKY STEROIDS

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Performance-enhancing substance use has attracted considerable political and media attention. However, relatively little analysis of the reasons for regulating substance use in professional sports exists. Most of the ostensible reasons for regulating performance-enhancing substance use are belied by leagues' inadequate commitment to the justifications in other contexts. Further, most of the methods of proposed regulation would be ineffective and unworkable. In place of the standard test-and-punish regime advocated by doping authorities, this Essay argues that performance-enhancing substance policy should be modeled after federal and state securities regulation. Instead of punishing use, regulators should require disclosure of all substances used, and punish only omissions and fraud of a material nature. The goals of a regulation regime would be better achieved without unintended negative consequences through a market approach based on minimum disclosure requirements.

I. INTRODUCTION

It should come as no surprise that the nation's political establishment in Washington, D.C., turned its attention to the scourge of performance-enhancing substances in professional sports.¹ This allowed politicians on Capitol Hill to take a break² from "interminable speeches"³ to fawn over the

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¹ Steroids use has been described as having reached "epidemic levels" in professional sports. Jim Thurston, *Chemical Warfare: Battling Steroids in Athletics*, 1 MARQ. SPORTS L.J. 93, 94 (1990).

² See Scott B. Shapiro, Comment, *Who Decides: Institutional Choice in Determining a Performance Enhancing Drug Policy for the NFL*, 7 WYO. L. REV. 183, 185-87 (2007) (discussing 2005 congressional hearings on the steroid issue).

³ BattlestarGalactica.com, Episode #111: Colonial Day, http://www.battlestar-galactica.com/moderndocs/jl_eps_guide0013.htm (last visited May 1, 2009) (providing a synopsis of *Battlestar Galactica: Colonial Day* (SciFi Channel television broadcast Feb. 2, 2005)) ("Politics is the only thing more boring than blood samples. All those interminable speeches, all that dreary pomp.").

likes of Roger Clemens and Rafael Palmeiro, as well as those players' (purportedly) artificially enhanced muscle mass. Even the President of the United States—with the nation in the midst of two conflicts abroad and teetering on the brink of economic disaster—thought the issue so pressing that it merited several minutes of his annual State of the Union address in 2004.⁴

Something has to be done to stop these athletes, we are told.⁵ Baseball's supposed "antitrust exemption" is on the table: if Bud Selig doesn't clean up the so-called national pastime, his league should be subject to federal antitrust law.⁶ And criminal laws are coming!⁷ Players may go to jail, where Super Bowl rings won't do them much good.

Amidst all the sound and fury,⁸ most policymakers pay only brief attention to the threshold question of why steroids and other performance-enhancing substances are a problem in professional sports.⁹ Steroids are bad, it is assumed, and so the only questions worth debating are how to ban them and how to test for them. All the major professional sports leagues

⁴ See Nicholas W. Schieffelin, Note, *Maintaining Educational and Athletic Integrity: How Will Schools Combat Performance-Enhancing Drug Use?*, 40 SUFFOLK U. L. REV. 959, 966 (2008) ("President Bush emphasized the escalating use of performance-enhancing drugs in our society and made it an issue of national concern . . ."); Adrian Wilairat, Comment, *Faster, Higher, Stronger? Federal Efforts to Criminalize Anabolic Steroids and Steroid Precursors*, 8 J. HEALTH CARE L. & POL'Y 377, 377 (2005).

⁵ See generally GEORGE J. MITCHELL, DLA PIPER LLP, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL (2007), available at <http://files.mlb.com/mitchrpt.pdf> (providing specific allegations of performance-enhancing substance use and making nineteen separate recommendations for change).

⁶ See Editorial, *A Bad Call: Direct Investigation of Professional Sports Scandals by Congress*, YOUNG LAW. (Phila.), May 8, 2008, at 5; Darryl Slater, *Power Tied to Privilege: MLB's Antitrust Exemption Offers Congress Basis for Steroids Hearings*, RICHMOND TIMES-DISPATCH, Dec. 18, 2007, at D2.

⁷ Wilairat, *supra* note 4, at 378.

⁸ According to Will Carroll, the "so-called debate over performance-enhancing drugs has not been much of a debate at all. Most times it has been an emotional plea or political grandstanding." WILL CARROLL, *THE JUICE: THE REAL STORY OF BASEBALL'S DRUG PROBLEMS* 15 (2005).

⁹ My Essay discusses the issue only in connection with professional sports. Amateur sports, college sports, and high school sports raise different issues in regards to performance-enhancing substance use. In particular, the negative health consequences of performance-enhancing substance use may be amplified in younger users. See Thurston, *supra* note 1, at 103. Young athletes may also lack the cognitive sophistication to appreciate fully the risks and benefits of performance-enhancing substance use. See Schieffelin, *supra* note 4, at 978-79. In addition, where testing is performed by state institutions such as public schools or universities, constitutional concerns can impede effective testing and discipline. See Thurston, *supra* note 1, at 112-14.

have now put in place some type of drug-testing regime through the collective bargaining process.¹⁰

Five main arguments underlie policymakers' assumptions and motivate their aggressive approaches to eradicating performance-enhancing substances from professional sports. These arguments, which surface in the literature and occasionally in policy discussions, are thought to justify testing athletes for banned substances and punishing those who fail the tests. First, performance-enhancing substances must be banned in order to "level the playing field."¹¹ Second, performance-enhancing substances are bad for player health.¹² Third, performance-enhancing substance users are poor role models for children who often idolize professional athletes.¹³ Fourth, use of performance-enhancing substances could expose players to influence by gamblers aimed at manipulating on-field competition to produce ill-gotten gains.¹⁴ Finally, fans do not like it when players use performance-enhancing substances, and want a game clean from the taint of steroids and other performance-enhancing substances.¹⁵ However, these rationales are either unconvincing, belied by the leagues' approach to related issues, or they are in pursuit of goals not likely to be achieved by any plausible "test-and-punish" regime.

In this Essay, I suggest a rethinking of the regulatory approach to performance-enhancing substance use in professional sports. Rather than test and punish through disciplinary sanctions and criminal law, aiming to control the *substance* of players' substance use, I suggest that performance-enhancing drugs be controlled through an approach modeled after federal and state regulation of the financial aspects of corporate activity.

The federal government's securities laws—and state "Blue Sky" laws designed in similar fashion—have traditionally shied away from imposing substantive restrictions on corporate activity. Corporations are not told to avoid particular kinds of risky investments, or to allocate assets in certain ways.¹⁶ Instead, the federal and state securities laws call for everything to be out in the open and visible, so that a shareholder can tell that a

¹⁰ David M. Wachutka, Comment, *Collective Bargaining Agreements in Professional Sports: The Proper Forum for Establishing Performance-Enhancing Drug Testing Policies*, 8 PEPP. DISP. RESOL. L.J. 147, 147 (2007).

¹¹ See *infra* Part II.A.

¹² See *infra* Part II.B.

¹³ See *infra* Part II.C.

¹⁴ See *infra* Part II.D.

¹⁵ See *infra* Part II.E.

¹⁶ Cf. UNIF. PRUDENT INVESTOR ACT § 3, 7 U.L.A. 15 (2006). Unlike state business laws, the Uniform Prudent Investor Act (UPIA) takes a substantive approach to regulating the investment of trust assets, mandating that they be diversified unless a trustee has a basis to believe that special circumstances justify a non-diverse portfolio. *Id.*

corporation is selling nothing more than the “Blue Sky.” Securities laws allow corporations to do whatever they want with shareholders’ money, so long as they *disclose* what they are doing with it. Substantive decisions are not reviewed and punished when found to be wrong, except in rare instances. Instead, it is the failure to disclose that leads to securities liability.

The “Blue Sky” approach achieves a level of market stability when substantive governmental intervention would be impossible or ineffective due to limited resources and the complexity of modern business affairs. Our securities regulation regime trusts that, in ordinary times, market forces will discipline corporate managers who waste or misdirect business assets.¹⁷ The disclosure approach minimizes monitoring costs and allows market arbitrage to replace governmental intervention as the source of discipline for corporate leaders.

A similar approach could do wonders in professional sports. Rather than ban certain substances and test for them (or their masking agents), sports leagues should simply call for all players to disclose all “non-food” substances they put into their bodies. Penalties would exist not for using drugs per se, but only for failing to disclose accurately those substances used.

II. THE FLAWED CASE FOR A “TEST-AND-PUNISH” REGIME

A. “LEVELING THE PLAYING FIELD”

The first argument in favor of an aggressive approach to regulating professional athletes’ use of steroids and other performance-enhancing substances is also the most vague. This argument is framed in ethical terms.¹⁸ Competition in professional sports “should be honorable,” and the use of performance-enhancing substances is “both cheating and a contradiction to the meaning of sport.”¹⁹ Testing regimes—accompanied

¹⁷ Writing anything about financial market regulation is always a challenge during extraordinary periods of market turmoil. While this Essay was in various stages of the publication process, America’s financial markets lost fully one-third of their value. Madlen Read, *Stocks Turn in Worst Effort for Obama: Dow Jones Down 32 Percent Since Election Day*, ASSOCIATED PRESS, Mar. 10, 2009, <http://www.newschief.com/article/20090310/NEWS/903105038>. In extraordinary times such as these, markets may overreact, undercutting their potential to allocate resources efficiently. See Thomas W. Joo, *Who Watches the Watchers? The Securities Investor Protection Act, Investor Confidence and the Subsidization of Failure*, 72 S. CAL. L. REV. 1071, 1108 n.199 (1999).

¹⁸ Thurston, *supra* note 1, at 95-96.

¹⁹ *Id.* at 95.

by disciplinary sanctions—are said to be justified because they will help ensure that competition occurs on a level playing field.

One weakness of the ethical argument against performance-enhancing substances is that it imagines that a level playing field can be achieved if drugs are eradicated. This may be unrealistic. Legal performance-enhancing techniques, like “weight machines, treadmills, better training programs, better diets, better dieting techniques, computer diagnosed training, [and] hyperbaric chambers . . . ,”²⁰ not to mention innate genetic differences in ability, will always produce an “unlevel” playing field in which some athletes have an advantage over others. The challenge for one seeking to justify a drug testing regime lies in “articulating a convincing distinction between these enhancers and steroids.”²¹

Even if they could be justified, testing regimes face a near-fatal impediment to success: the difficulty of defining what is banned. Two approaches to articulating the scope of any substance can be envisioned, and both approaches have significant real-world limitations. First, and most commonly, a testing regime can identify a list of “banned” substances.²² Alternatively, a testing regime can provide a generic description of a banned substance, for instance, as any substance not available over the counter that gives an athlete an unfair advantage over competitors.²³

A testing regime based on a list of banned substances fails to stop athletes from using new drugs that are not on the banned list.²⁴ In response to this problem, anti-doping authorities have expanded their list of banned

²⁰ Colin Latiner, *Steroids and Drug Enhancements in Sports: The Real Problem and the Real Solution*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 192, 208 (2006).

²¹ Lewis Kurlantzick, *Is There a Steroids Problem? The Problematic Character of the Case for Regulation*, 40 NEW ENG. L. REV. 789, 790 (2006).

²² See, e.g., WORLD ANTI-DOPING AGENCY, THE WORLD ANTI-DOPING CODE: THE 2009 PROHIBITED LIST INTERNATIONAL STANDARD (2009), available at http://www.wada-ama.org/rtecontent/document/2009_Prohibited_List_ENG_Final_20_Sept_08.pdf; see also Srikumaran Melethil, *Making the WADA Prohibited List: Show Me the Data*, 50 ST. LOUIS U. L.J. 75 (2005) (discussing the WADA list).

²³ One analyst proposed that a substance be banned if it “creates an unfair advantage” or has “unhealthy/damaging side effects.” Kirk Mango, *Performance Enhancement: Where Do We Draw the Line? Part II—The Guidelines*, BLEACHER REPORT, Aug. 29, 2008, <http://bleacherreport.com/articles/52268-performance-enhancement-where-do-we-draw-the-line-part-ii-the-guidelines>. Although no evident real-world examples of a truly generic approach exist, the drug policy of the National Collegiate Athletic Association (NCAA) may come close. The NCAA promulgates a specific list of banned drugs, but also prohibits any substance belonging to the “banned drug class.” NAT’L COLLEGIATE ATHLETIC ASS’N, 2008-09 NCAA BANNED-DRUG LIST, <http://www.ncaa.org/health-safety> (follow “2008-09 NCAA Banned-Drug List” hyperlink) (last visited Apr. 22, 2009). The “classes” described are fairly generic—“stimulants” and “diuretics,” for instance, could describe many common beverages. *Id.*

²⁴ Thurston, *supra* note 1, at 110.

substances “to include almost every conceivable performance-enhancing drug.”²⁵ But the science of drug creation will always move faster than the science of drug testing. A drug not “conceived” as performance enhancing might very well prove to be, but it will likely remain absent from the list of banned substances until years after its use permeates professional athletics. Anti-doping authorities tend to feel like “they are always a little bit behind.”²⁶ By the time a test is developed, a new version of the performance-enhancing drug may have been developed that would defeat the test.²⁷

Even where a substance is identified among a list of banned substances, existing technology may not allow accurate detection via non-invasive testing means.²⁸ Some types of doping, most notably autologous blood doping (in which an athlete receives a transfusion of the athlete’s own blood, drawn at an earlier time) are virtually undetectable.²⁹

Another striking example is the use of Human Growth Hormone (HGH). Even as sports leagues started to “get tough” on steroids, athletes turned to the use of HGH, which replicated some of the positive effects of steroids but proved nearly undetectable.³⁰ This substance naturally occurs in the body, and the only means of detection is through a blood test.³¹ However, the test only discovers unusually high levels of the hormone in the body,³² and can thus fail to detect use by many athletes.

In addition, athletes have proven adept at manipulating their substance use to avoid testing positive on an announced testing date, either by the timing of substance use or by employing masking agents which frustrate existing testing regimes.³³ For example, an athlete can use a banned substance, but then taper use before testing and avoid a positive result.³⁴ The sad fact of life in professional sports is that the testing regimes will

²⁵ E. Tim Walker, Comment, *Missing the Target: How Performance-Enhancing Drugs Go Unnoticed and Endanger the Lives of Athletes*, 10 VILL. SPORTS & ENT. L.J. 181, 208 (2003).

²⁶ Hector Del Cid, *Winning at All Costs: Can Major League Baseball’s New Drug Policy Deter Kids from Steroids and Maintain the Integrity of the Game?*, 14 SPORTS LAW. J. 169, 191 (2007).

²⁷ *Id.* at 192.

²⁸ See Thurston, *supra* note 1, at 147.

²⁹ Michele Verroken & David R. Mottram, *Doping Control in Sport*, in *DRUGS IN SPORT* 309, 339 (David R. Mottram ed., 4th ed. 2005).

³⁰ Del Cid, *supra* note 26, at 182.

³¹ *Id.*

³² *Id.*

³³ Thurston, *supra* note 1, at 109-10.

³⁴ Del Cid, *supra* note 26, at 191.

never catch up to the cheaters.³⁵ The financial stakes involved for players create powerful incentives for the use of ever more evasive performance-enhancing substances. So long as it remains a “certainty that a large number of cheating athletes will beat the tests,”³⁶ no testing-and-punishment regime will eradicate performance-enhancing substance use.

A further drawback of a specified list of banned substances is that inclusion of a substance on such a list can, ironically, encourage its use.³⁷ For instance, even though the scientific evidence on whether HGH is actually a performance enhancer is mixed, inclusion of HGH on doping lists may inadvertently promote its use among athletes.³⁸

A generically described “illicit substance” ban, rather than a ban based on a specific substance list, also fails to solve the problem. Here, the main impediment is the zealous representation provided to professional athletes by their players’ unions and associations.³⁹ Because any testing regime is necessarily a “required” subject of collective bargaining (particularly where failed tests lead to disciplinary sanction),⁴⁰ such a scheme requires union acquiescence. Given unions’ rightful concern with protecting their members from discipline in the absence of notice, they are likely to oppose any broad prohibition or extensive testing regime.⁴¹

B. PLAYER HEALTH

A second argument in support of aggressive anti-substance regimes posits that the use of steroids and other performance-enhancing substances and drugs has negative health effects on users.⁴² Anabolic steroids, in

³⁵ “The relatively small number of athletes who are ‘caught’ suggest that either drug abuse is not a rampant problem or, if it is rampant, that most of the ‘cheaters’ escape detection.” Melethil, *supra* note 22, at 89.

³⁶ Sarah Baldwin, Comment, *Performance Enhancing Drug Use in Olympic Sport: A Comparison of the United States and Australian Approaches*, 24 LOY. L.A. INT’L & COMP. L. REV. 265, 271 (2002) (quoting Glenn Zorpette, *The Chemical Games*, SCI. AM., Fall 2000, at 16-17).

³⁷ Melethil, *supra* note 22, at 87.

³⁸ *Id.* (“The mere listing of a substance or method in such a list is misinterpreted by most athletes that the substance or method offers an advantage.”).

³⁹ Neil Hayes, *Union’s Stance on Steroids Is Puzzling*, CONTRA COSTA TIMES, Mar. 11, 2004, at B1.

⁴⁰ Thurston, *supra* note 1, at 122.

⁴¹ Jarred R. Tynes, Comment, *Performance Enhancing Substances: Effects, Regulations, and the Pervasive Efforts to Control Doping in Major League Baseball*, 27 J. LEGAL MED. 493, 504 (2006).

⁴² See Thurston, *supra* note 1, at 94.

particular, are said to negatively affect players' health.⁴³ According to the famous *Mitchell Report*:

Steroid users place themselves at risk for psychiatric problems, cardiovascular and liver damage, drastic changes to their reproductive systems, musculoskeletal injury, and other problems. Users of human growth hormone risk cancer, harm to their reproductive health, cardiac and thyroid problems, and overgrowth of bone and connective tissue.⁴⁴

Woven into this argument about player health is the suggestion that steroids and other performance-enhancing drugs result in an "arms race" by athletes. That is to say, athletes who prefer to stay "clean" are compelled to use steroids out of a fear that *other* athletes use them.⁴⁵ In other words, athletes who would otherwise stay clean are coerced into substance use.⁴⁶

This argument, as Professor Lewis Kurlantzick argues, is similar to the "problem of coordination" faced by a group of fishermen who work in the same fishing grounds.⁴⁷ Individually, each fisherman might prefer to take a smaller catch today to preserve the fish population for future fishing.⁴⁸ Yet fearful that others will not exercise the same restraint, each is tempted to over-fish, and the result is a quick destruction of the fish population.⁴⁹ Steroid use, if athletes' stated reluctance is believed, results, at least in part, from a similar lack of coordination, resulting in a "tragedy of the commons."⁵⁰ This is an extension of the classic and familiar "prisoner's dilemma."⁵¹

But there is no reason why the players' collective representation—the players' association—cannot accomplish the necessary coordination.⁵² If collective action is really the problem, unions are well equipped to advocate on players' behalves, particularly given the unions' longstanding concern for the health of their members. That so little of the impetus for drug testing regime reform comes at the request of players' unions seems to run counter to the characterization of performance-enhancing drug use as the product of a prisoner's dilemma.

⁴³ *See id.*

⁴⁴ MITCHELL, *supra* note 5, at SR-8.

⁴⁵ Thurston, *supra* note 1, at 102-03.

⁴⁶ Latiner, *supra* note 20, at 209.

⁴⁷ Kurlantzick, *supra* note 21, at 792.

⁴⁸ Ian Ayres & Gideon Parchomovsky, *Tradable Patent Rights*, 60 STAN. L. REV. 863, 881-82 (2007) (describing the fishing example as a textbook tragedy of the commons).

⁴⁹ *See* Will Walsh, Comment, *Fishy Business*, 59 ALA. L. REV. 1661, 1663 (2008).

⁵⁰ *Id.*

⁵¹ *See* Richard H. McAdams & Janice Nadler, *Coordinating in the Shadow of the Law: Two Contextualized Tests of the Focal Point Theory of Legal Compliance*, 42 LAW & SOC'Y REV. 865, 871 (2008).

⁵² Kurlantzick, *supra* note 21, at 792.

Assertions of negative health effects associated with steroid use are undercut, to some degree, by the lack of accurate and rigorous scientific data concerning the kind of doses used by athletes.⁵³ Still, even in the absence of “controlled” studies, it seems clear that many athletes use substances at levels that do raise genuine health concerns.⁵⁴ Anabolic steroids’ negative side effects include increased risks of cancer and suppressed immune systems.⁵⁵ Further, long-term use of such substances can have deleterious effects both physiologically and psychologically.⁵⁶ Anecdotal evidence suggests that the common concept of “roid rage,” heightened aggressiveness flowing from steroid use, has scientific validity.⁵⁷ Other substances, such as weight-loss supplements, are documented as causes of death for athletes at both the professional and amateur levels.⁵⁸

Ultimately, however, expressions of concern for players’ health are unpersuasive because of how little regard we pay to other unhealthy choices and lifestyles of professional athletes. Football itself is an unhealthy activity; certainly, the position of offensive lineman would be banned if leagues truly valued players’ long-term health. Tobacco use among baseball players is tolerated.⁵⁹ Players are also permitted to engage in risky patterns of sexual promiscuity,⁶⁰ if not lionized for that dangerous course of conduct.⁶¹ Why we express concern about the plausible health risks from steroids, but not the obvious health risks of these other behaviors, is indecipherable, or at least indefensible.

⁵³ Thurston, *supra* note 1, at 103-04.

⁵⁴ See Glenn D. Braunstein, *Anabolic Steroid Use to Enhance Athletes’ Performance*, 65 S. CAL. L. REV. 373, 379 (1991).

⁵⁵ Thurston, *supra* note 1, at 105-06.

⁵⁶ Latiner, *supra* note 20, at 193.

⁵⁷ Thurston, *supra* note 1, at 106.

⁵⁸ See Shapiro, *supra* note 2, at 199; Tynes, *supra* note 41, at 494.

⁵⁹ See Julian Guthrie, *Baseball Players Chew Tension Away: Tobacco, Gum, Seeds Part of the Game*, S.F. CHRON., Oct. 22, 2002, at B10, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/chronicle/archive/2002/10/22/SP32948.DTL> (noting that Major League Baseball has yet to adopt a minor league ban on tobacco announced in 1993).

⁶⁰ E.M. Swift, *Dangerous Games: In the Age of AIDS, Many Pro Athletes Are Sexually Promiscuous, Despite the Increasing Peril*, SPORTS ILLUSTRATED, Nov. 18, 1991, <http://vault.sportsillustrated.cnn.com/vault/article/magazine/MAG1140269/index.htm>.

⁶¹ Wilt Chamberlain’s autobiographical claim to have slept with 20,000 women was not condemned, but rather has become part of the athlete’s legend. For instance, a satirist described the NBA’s decision to honor this infamous “record.” See Sportsman’s Daily, *Chamberlain’s 20,000-Women Mark Finally to Be Honored by NBA*, CBSSPORTS.COM, Sept. 16, 2008, <http://www.cbssports.com/spin/story/10980310>.

C. ROLE MODELS

A third argument made in support of aggressive anti-performance-enhancing substance regimes stems from the direct threat to younger athletes and fans.⁶² Professional athletes are considered “role models” for younger athletes, and, arguably, the use of performance-enhancing substances by professional athletes makes the use of such substances socially acceptable for younger potential users.⁶³

Whether such substances enhance an athlete’s on-the-field or on-the-court performance, the use of such substances “conveys a message to younger players . . . that cheating to win is acceptable as long as the player is not caught.”⁶⁴ Teenagers use performance-enhancing substances to emulate professional athletes.⁶⁵

There are two counters to this argument. First, at a basic level, if a professional athlete is a child’s role model for moral and ethical choices, his parent faces a serious problem. As Charles Barkley put it, “the biggest role models are parents, not famous jocks and famous people.”⁶⁶ Athletes make all sorts of choices that most parents would abhor their children using as life lessons. Athletes often carry guns (sometimes illegally),⁶⁷ are sexually promiscuous,⁶⁸ and are domestic abusers.⁶⁹ Nevertheless, athletes’ morally questionable conduct, with gambling as a notable exception, is rarely a lightning rod for public criticism in the same way that performance-enhancing drug use is.

More problematic for a testing policy, however, is the ironic result of overly enthusiastic testing. The more we test athletes, the more we will, inevitably, discover about their drug use. More positive tests mean more “fallen heroes.” The goal of preserving athletes’ moral status for role model purposes actually seems best served by a regime with *no* testing. So long as athletes do not brag about their own activities—or point the finger

⁶² MITCHELL, *supra* note 5, at 15.

⁶³ Thurston, *supra* note 1, at 103.

⁶⁴ Walker, *supra* note 25, at 201.

⁶⁵ Joseph M. Saka, Comment, *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, 359 (2007).

⁶⁶ JAMES MCCLOSKEY & JULIAN BAILES, WHEN WINNING COSTS TOO MUCH: STEROIDS, SUPPLEMENTS, AND SCANDAL IN TODAY’S SPORTS 31 (2005).

⁶⁷ Arty Berko et al., *Athletes & Guns: “Outside the Lines” Takes a Look at the Link Between Athletes and Guns*, ESPN.COM, Dec. 15, 2006, <http://sports.espn.go.com/espn/columns/story?id=2691043>.

⁶⁸ See *supra* notes 60-61 and accompanying text.

⁶⁹ Carrie A. Moser, *Penalties, Fouls and Errors: Professional Athletes and Violence Against Women*, 11 SPORTS LAW. J. 69, 70 (2004).

at other heroes—our children are free to idolize superstar athletes without negative effect.

D. MANIPULATION BY GAMBLERS

A fourth argument in favor of an aggressive anti-performance-enhancing substance regime begins with the recognition that, even when a substance is available through legal channels, many users acquire their performance-enhancing substances illegally.⁷⁰ The black market for steroids tops \$100 million in transactions per year.⁷¹ Sports leagues express concern that black market sellers of performance-enhancing substances can use the leverage provided by their knowledge of a player's use to blackmail him into throwing games or shaving points.⁷²

Baseball in particular has long feared manipulation by gamblers, and the possible leverage a drug dealer possesses over a player is cited as grounds for imposing harsh sanctions for drug use by athletes.⁷³ According to the *Mitchell Report*, “[t]he Commissioner’s Office has been concerned for decades that drug dealers could blackmail a player to alter the outcome of a game in exchange for maintaining the secrecy of the player’s substance use.”⁷⁴

The problem with justifying an anti-steroids regime with a fear of gambling, however, is twofold. First, the leagues all have separate rules to deter association with gamblers and the manipulation of on-field performance.⁷⁵ In any instance where drug use gives a gambler leverage over a player, the existing rules are more than adequate to impose a sanction.⁷⁶

More troubling is the escalation of blackmail that may result. Ironically, as the leagues impose harsher sanctions for drug use, they give more power to gamblers. A gambler seeking to manipulate a player is more likely to get what she wants if the penalties for revelation of the player’s drug use are significant.

If we are concerned about manipulation, moreover, we should test owners, coaches, and referees. These individuals are equally positioned, if

⁷⁰ Thurston, *supra* note 1, at 107-08.

⁷¹ *Id.*

⁷² MITCHELL, *supra* note 5, at 301.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Matthew B. Pachman, Note, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1429 (1990).

⁷⁶ That said, a drug-testing regime might uncover potentially vulnerable players left undiscovered under the association rule.

not better positioned, to manipulate the outcome of a sporting event. They could be vulnerable to manipulation by their drug dealers. But so far, little attention is directed toward a testing regime for such individuals.

E. FANS DON'T LIKE TAINTED SPORTS

A final argument in favor of aggressive treatment of performance-enhancing drugs is that the fans, on whose patronage professional sports depend, lose interest in professional sports when the integrity of competition is doubted.⁷⁷ This argument draws on the idea that performance-enhancing drugs produce an uneven playing field and suggests that leagues become “less appealing to spectators” if players use performance-enhancing substances to “become bigger, stronger, or faster than they otherwise would be.”⁷⁸ Fans want to see “natural talent and ability” on display, and the use of performance-enhancing drugs undercuts that spectacle.⁷⁹

The assertion that fans reject or would shy away from a league corrupted by steroids is a testable empirical proposition that remains untested. Maybe fans want to see “natural” talent on display; on the other hand, they certainly do not want to see five random guys off the street take the hard court against five other guys. Fans cheer for professional athletes who are, in many respects, genetic deviants—faster, stronger, and more talented than the average human. In an episode of *The Simpsons*, fans bemoan the potential loss of one of the town’s NBA players, “Nook of the North,” who they refer to as “Our Freak.”⁸⁰ Although this terminology is a bit harsh, it is clear that fans do not want to see normal people play. Professional athletes are heralded precisely for their abnormal genetic gifts and their abnormal commitment to physical fitness and training.

Perhaps the most striking real world evidence to contradict the fan preference justification for testing arises from the 1998 baseball season, in which both Sammy Sosa and Mark McGwire broke Roger Maris’s four-decade-old single season home run record.⁸¹ Although the subsequent histories written of Sosa and McGwire suggest their home run chases were “tainted” by substance use,⁸² fans were certainly cheering at the time.⁸³ Is it

⁷⁷ Wachutka, *supra* note 10, at 149-50.

⁷⁸ *Id.* at 149.

⁷⁹ *Id.* at 150.

⁸⁰ *The Simpsons: The Burns and the Bees* (FOX television broadcast Dec. 7, 2008).

⁸¹ See Daniel Healey, *Fall of the Rocket: Steroids in Baseball and the Case Against Roger Clemens*, 19 MARQ. SPORTS L. REV. 289, 300 (2008).

⁸² Wachutka, *supra* note 10, at 150.

⁸³ Healey, *supra* note 81, at 300. The “adulation” that fans gave to Sosa and McGwire allegedly inspired Barry Bonds to take up performance-enhancing substance use himself. *Id.*

safe to assume that fans were blissfully unaware of the possibility these two dramatically enhanced physical specimens were using something other than hard work to achieve their success? To make such an assumption gives fans too little credit. Fans must have noticed that, “at a time when most players’ skills begin to decline,”⁸⁴ McGwire and Sosa suddenly reached new levels of power. Fans suspected, but they cheered anyway. Similarly, fans have shown a remarkably short memory when it comes to their distaste for even admitted substance users.⁸⁵

If the integrity of baseball were called into question, one journalist argued, baseball would come to resemble professional wrestling.⁸⁶ Professional wrestling is known to be “fake,”⁸⁷ and its athlete-actors quite obviously partake in a regular diet of performance-enhancing substances. Yet professional wrestling is *amazingly* popular in this country,⁸⁸ even if derided by members of the sports media.

What is to say that fans would not cheer with equal vigor for a surgically, robotically, genetically, or chemically enhanced athlete? In any event, if fan preference is to be the basis for an anti-steroid regime, that regime would perhaps be better designed if it allowed fan preference to play an incentivizing role. The “Blue Sky” model developed in this Essay would do precisely that.

III. THE BLUE SKY MODEL

It has been said that if clean competition is the desired end point, “the only solution would be a complete ban of any performance enhancer.”⁸⁹ Others have argued that the only way to ensure policy effectiveness would

⁸⁴ Michael J. Cramer & James M. Swiatko, Jr., *Did Major League Baseball Balk? Why Didn't MLB Bargain to Impasse and Impose Stricter Testing for Performance Enhancing Substances?*, 17 MARQ. SPORTS L.J. 29, 36 (2006). Most visibly, during the 1998 home run chase McGwire was found to have the substance androstenedione in his locker. *Id.* at 42. Although this substance was legal in baseball at the time, it was banned by most other leagues and international anti-doping authorities. *Id.*

⁸⁵ The same fans who “pilloried” Jason Giambi in the spring of 2005 voted him “Comeback Player of the Year,” although he might only have been coming back from self-inflicted problems related to his use of illegal drugs.” MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS: BARRY BONDS, BALCO, AND THE STEROIDS SCANDAL THAT ROCKED PROFESSIONAL SPORTS* 267 (2006).

⁸⁶ *Id.* at 55.

⁸⁷ A.O. Scott, *A Wrestler's Hard Knocks, Both Given and Gotten, Start Taking Their Toll*, N.Y. TIMES, Dec. 17, 2008, at C7.

⁸⁸ Professional wrestling is the most popular television genre for the eighteen- to thirty-five-year-old male demographic. Lawrence Daressa, *Wrestling with Manhood*, CINEASTE, Spring 2004, at 96, available at 2004 WLNR 12683565.

⁸⁹ Del Cid, *supra* note 26, at 194.

be to increase greatly sanctions associated with a positive test result.⁹⁰ But is there another approach?

The federal securities laws were passed in the midst of the Great Depression and inspired by the stock market crash of “Black Tuesday,” October 29, 1929.⁹¹ Investors had pulled their money en masse from the publicly traded stock exchanges, resulting in the destruction of over \$14 billion dollars in market capitalization.⁹² Fraudulent stock promotions played a contributing role in the market crash.⁹³ The crash caused investors to lose faith in the market price of stocks as an accurate indicator of value and in the underlying business institutions as investments for their assets.⁹⁴ Federal securities regulation aimed to restore that faith.⁹⁵

Congress could have chosen to regulate business activity in a substantive manner in order to restore this lost investor confidence. Congress could have called on businesses to avoid risky investments, or to diversify their holdings across industries to avoid potential downturns.⁹⁶ But these approaches would deny corporations needed flexibility and require the government to launch a massive and expensive regulatory regime to identify and penalize offenders of whatever substantive behavioral standards Congress had put in place.

Instead, Congress enacted legislation to supplement various states’ “Blue Sky” laws.⁹⁷ Blue Sky laws were investor protection statutes, designed to protect shareholders from fraud and deception,⁹⁸ and required corporations seeking to raise capital through the sale of securities to register

⁹⁰ Tynes, *supra* note 41, at 507-08.

⁹¹ See JAMES D. COX & THOMAS LEE HAZEN, *CORPORATIONS* 292 (2d ed. 2003).

⁹² Sargon Daniel, Note, *Hedge Fund Registration: Yesterday’s Regulatory Schemes for Today’s Investment Vehicles*, 2007 COLUM. BUS. L. REV. 247, 276.

⁹³ COX & HAZEN, *supra* note 91.

⁹⁴ Brent J. Horton, *How Corporate Lawyers Escaped Sarbanes-Oxley: Disparate Treatment in the Legislative Process*, 60 S.C. L. REV. 149, 183 n.198 (2008) (citing James Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 30 (1959)).

⁹⁵ *Id.*

⁹⁶ Prior to the passage of the post-Enron Sarbanes-Oxley Act, the federal approach to regulation of the financial market emphasized disclosure rather than substantive corporate governance mandates. Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1523 (2005).

⁹⁷ See Stefania A. Di Trolio, *Public Choice Theory, Federalism, and the Sunny Side to Blue-Sky Laws*, 30 WM. MITCHELL L. REV. 1279, 1289-92 (2004) (discussing the history behind federal securities legislation).

⁹⁸ Charles G. Stinner, Note, *Estoppel and In Pari Delicto Defenses to Civil Blue Sky Law Actions*, 73 CORNELL L. REV. 448, 462 (1988).

with a state securities commissioner.⁹⁹ In passing the federal securities statutes, Congress sought to achieve a similar result. The federal approach imposed further requirements on affected corporations to disclose their financial information and business practices to shareholders, and imposed punishments, not for substantive business transactions, but for material fraud and failure to disclose. As Dean Clark explains, the federal securities acts are “based on a philosophy of full disclosure rather than on an ideal of substantive regulation.”¹⁰⁰

The core concept of the federal regulation of securities consists of “antifraud rules and a mandatory disclosure system.”¹⁰¹ Before securities can be sold to the public, the Securities Act of 1933 requires the corporation to file a disclosure document with the Securities and Exchange Commission (SEC) and circulate a portion of that document, a prospectus, to investors.¹⁰² The Securities Exchange Act of 1934 requires publicly-held companies—those that have sold shares that trade on public exchanges—to file regular reports with the SEC.¹⁰³

The SEC’s Rule 10b-5,¹⁰⁴ promulgated under authority provided by the 1934 Securities Exchange Act, is a “catchall antifraud provision.”¹⁰⁵ Rule 10b-5 helps “regulate the flow of information to the investing public and in many instances to compel corporate disclosure of material facts.”¹⁰⁶ The end-goal of this system may be to make pricing of securities more accurate.¹⁰⁷ Accurate pricing, in turn, ensures that capital will be directed to the corporate actors most likely to use financial resources provided by shareholders for productive economic activity.¹⁰⁸ Alternatively, the mandatory disclosure regime has been defended as reducing the agency costs associated with the separation of ownership and control in corporate enterprises.¹⁰⁹

⁹⁹ These laws were viewed as inadequate to regulate securities markets. COX & HAZEN, *supra* note 91, at 292 n.3.

¹⁰⁰ ROBERT CHARLES CLARK, CORPORATE LAW 719 (1986).

¹⁰¹ WILLIAM A. KLEIN & JOHN C. COFFEE, BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 428 (10th ed. 2007).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ 17 C.F.R. § 240.10b-5 (2008).

¹⁰⁵ COX & HAZEN, *supra* note 91, at 293.

¹⁰⁶ *Id.* at 293-94.

¹⁰⁷ Marcel Kahan, *Securities Laws and the Social Costs of “Inaccurate” Stock Prices*, 41 DUKE L.J. 977, 985 (1992).

¹⁰⁸ *Id.* at 1007.

¹⁰⁹ See generally Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1049-50 (1995) (noting that shareholders own corporations, but delegate control to corporate leaders, and explaining that to monitor their

The federal securities laws aim to ensure that investors have adequate information to make rational decisions in connection with the purchase or sale of securities.¹¹⁰ As the Supreme Court explains:

Disclosure, and not paternalistic withholding of accurate information, is the policy chosen and expressed by Congress. We have recognized time and again, a “fundamental purpose” of the various Securities Acts, “was to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry.”¹¹¹

Without federally mandated disclosure, market forces were seen as inadequate to regulate risk-taking by corporate actors.¹¹² “Self-help” remedies are less feasible in connection with the purchase and sale of securities than in ordinary contract settings.¹¹³ Investors need information about corporate activities to be presented in a reliable and standardized fashion to “facilitate comparisons among securities.”¹¹⁴ Absent federally mandated disclosure, investors might be reluctant to commit funds to corporate activity,¹¹⁵ and would certainly be more skittish in the event of market downturns.¹¹⁶ For securities markets to function properly, “much more disclosure is required than in most other markets.”¹¹⁷

Although there is much scholarly debate on the effectiveness of the federal mandatory disclosure policy,¹¹⁸ it seems clear that Congress believed that prior to the enactment of the Securities Act and Securities Exchange Act, corporate actors did not disclose sufficient information about their business activities.¹¹⁹

IV. HOW THE BLUE SKY MODEL WOULD SOLVE OUR STEROIDS “PROBLEM”

I do not argue that steroids and other performance-enhancing substances are good. To do so, as others have worried, might spark calls for

agents, shareholders must have access to information, and thus mandatory disclosure reduces monitoring costs for shareholders).

¹¹⁰ CLARK, *supra* note 100, at 719.

¹¹¹ *Basic, Inc. v. Levinson*, 485 U.S. 224, 234 (1988).

¹¹² Kun Young Chang, *Reforming U.S. Disclosure Rules in Global Securities Markets*, 22 ANN. REV. BANKING & FIN. L. 237, 245 (2003).

¹¹³ See RICHARD W. JENNINGS ET AL., *SECURITIES REGULATION* 3 (8th ed. 1998).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 52-53 (1983).

¹¹⁷ JENNINGS ET AL., *supra* note 113, at 3.

¹¹⁸ See Seligman, *supra* note 116, at 18-19.

¹¹⁹ See *id.*

an author's "crucifi[xion]."¹²⁰ The question isn't whether reducing performance-enhancing substance use among professional athletes is a laudable aspiration. The question is, given our society's expressed desire to regulate performance-enhancing drug use, how should that goal best be achieved from a policy perspective, pragmatically and promptly? The answer is through faith in the market, assisted by an aggressive regime designed to promote disclosure and punish fraud and omission.

Rather than impose obtrusive and unwieldy testing regimes, a disclosure-based framework should be implemented. Under this system, professional athletes would be required to file disclosure statements with the league office on a regular basis—perhaps three times a season, perhaps more regularly. In that statement, an athlete would disclose all *non-food substances*¹²¹ injected or ingested by the athlete. The league could then conduct a "privacy scrub," deleting references to medicines that implicate privacy concerns (such as drugs to treat baldness, or a sexually transmitted disease). The scrubbed lists would then be put online for the public to view, either on the league's website or on the individual sites of the players' teams.

A modest anti-fraud regime could be put in place to provide sanctions not for those who use performance enhancers, but for those who fail to disclose with complete candor the substances that they use. Once the information hits the "market," market forces could quickly curb the problem of steroid use. If fans detest steroid use, "it would make sense[,] simply as a matter of sound commercial judgment . . . to avoid . . . customer alienation[.]"¹²² for teams to decline to hire players with disclosed performance-enhancing substance records. Some teams could announce their preference to sign only "clean" players. If fans responded, by buying more tickets and memorabilia and watching more televised games, such teams would find their anti-substance stance profitable even if their on-the-field success took a short-term hit.

The market approach would also be more subtle than a heavy-handed testing regime. Some substances, like anabolic steroids or HGH, might be detested by fans; others, like pain killers, might be tolerated. And for players with known lingering injuries, the use of even HGH might be tolerated by fans; a universal testing and punishment approach is not capable of making such allowances.

¹²⁰ Joseph Siprut, *The Uproar Concerning Steroids in Baseball: A Slippery Slope with No Clear Answers*, ENT. & SPORTS LAW, Winter 2006, at 13, 13.

¹²¹ While a creative athlete might try to pitch a performance enhancer as "food," I trust that existing FDA and state law definitions of that term would avoid potential manipulation.

¹²² Kurlantzick, *supra* note 21, at 794.

The market approach would also be fair and consistent in a way that testing is not, by doing away with the “innocent dopee” defense. A number of athletes who tested positive for steroids denied that they had knowingly used performance enhancers.¹²³ A heavy-handed disciplinary approach would reject any such defense, while a lighter approach that allowed such a defense would invite athletes to maintain willful ignorance about what they put, or allowed trainers to put, into their bodies. By contrast, a disclosure regime would be clean. If an athlete failed to disclose an ingested or injected substance, the athlete’s failure would be clear. If an athlete disclosed a substance that he or she did not know contained a performance enhancer, the market would operate to bring that information to the athlete’s attention.

A disclosure system would stay current and ahead of the cheaters, since it does not depend on an ossified list of banned substances or an unenforceably broad category of enhancers. Of course, in order to be effective, punishment would need to be imposed on those who used a substance without disclosure. Punishment could only result where information came to light about a player’s use of a substance that contradicted his disclosures. Without a testing scheme, some players would use, lie, and remain undetected. The regulation of securities fraud, however, confronts the same issue. No aggressive auditing of financial statements is conducted by the SEC for every corporate submission; instead, the agency depends upon tips, often from Self-Regulatory Organizations (SROs) like the New York Stock Exchange and the National Association of Securities Dealers. In the same way, the steroids disclosure regime could launch investigations after receiving tips from the sports media, teams, and other individuals and entities affiliated with professional sports. Moreover, just as the SEC may launch investigations after sudden dramatic changes in corporate stock price, a steroids disclosure regime could launch proactive investigations when players’ performances deviate dramatically from past trends.

Information disclosed pursuant to the regime suggested in this Essay would allow each player to make an accurate assessment of what substances other athletes are using and would serve to reduce the trend towards an “arms race.” At present, players might use performance-enhancing drugs because they *suspect* others are doing so. Under the disclosure approach, players would have the information they need to make decisions about how to handle their own substance regimen.

¹²³ Lindsay J. Taylor, Note, *Congressional Attempts to “Strike Out” Steroids: Constitutional Concerns About the Clean Sports Act*, 49 ARIZ. L. REV. 961, 980 (2007).

To be sure, at least in the short term, a “disclosure” based performance-enhancing substance regime might lead to more substance use. This could present health concerns for particular athletes who choose to use such substances. Ultimately, of course, “the choice to risk harm associated with drug enhancements is ultimately up to the individual user”¹²⁴ Adults are “in a position to make a decision about what behavior is in their best interest, to weigh the risks and benefits according to their own values.”¹²⁵

Professional athletes are uniquely positioned to make these decisions for themselves, with a stable of trainers and team doctors to advise them. The increased public recognition of particular athletes’ choices could also lead to an increased level of public warning for such athletes. Indeed, a disclosure-based regime could stimulate more research on such substances and actually provide professionals with more information about the long-term consequences of such use.

A disclosure system would also bring to light information that might lead parents to suggest their children find other role models. In the short term, we might be shocked at the percentage of professional athletes who use performance-enhancing substances. But a disclosure system would also avoid the surprise disappointment a young fan faces at learning that her lifelong idol has done drugs. We would know from a player’s first day in the Big Leagues whether he would be the kind of person a youngster should idolize.

A disclosure system would eliminate the potential for drug dealers to use their leverage to manipulate players to achieve ill-gotten gambling gains. Since all substances used would become public information, dealers would have no leverage over their player clients.

Finally, a disclosure system would provide the ultimate test of the assertion that fans prefer a clean league to a dirty league. Market forces would drive owners to contract with the players that fans prefer—whether they are drug users with great ability, or clean players with less zip on their swings. Just as the securities laws restored faith in markets (at least until recently), a disclosure-based regime for steroids could restore fan faith in professional sports.

In some sense, the argument in favor of regulation-through-disclosure is justified if the steroid problem in professional sports is characterized as a market failure. The arguments against steroid use—particularly those that focus on fan preferences—are strengthened by the view that a market approach could solve the problem if only markets functioned properly.

¹²⁴ Latiner, *supra* note 20, at 209.

¹²⁵ Kurlantzick, *supra* note 21, at 791.

Teams would respond to fan preferences, and steroid users would be systematically excluded from professional sports through the forces of supply and demand. At present, those forces cannot solve the problem because performance-enhancing substance use is clouded in mystery and obfuscation.¹²⁶ Through disclosure, powerful market forces would be unleashed and produce an “optimal” level of substance use.

V. CONCLUSION

Whether or not the use of performance-enhancing substances is the best use of policymakers’ time, it has clearly attracted their attention. Most public discussion of the issue has been long on condemnation and short on nuanced evaluation of policy options. To date, doping authorities have called for ever-more-intrusive testing and ever-harsher sanctions, ignoring the painful reality that such efforts will never catch determined cheaters. It is hard to call the solution proposed in this Essay “radical,” given that it was one that Congress considered eight decades ago. Yet it offers an approach to addressing drug use in sports that could actually make a difference.

¹²⁶ See Melethil, *supra* note 22, at 80.