

WINNING AT ALL COSTS: USING LAW & ECONOMICS TO
DETERMINE THE PROPER ROLE OF GOVERNMENT IN
REGULATING THE USE OF PERFORMANCE-ENHANCING
DRUGS IN PROFESSIONAL SPORTS

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The prevalence of performance-enhancing drugs (PEDs) in sports is widely recognized. Employing the analytic tools of law and economics, this note addresses the question of whether federal government action to regulate PED use in sports represents an appropriate remedy for these problems. The author begins by providing a brief history of the emergence of PEDs in professional sports and presenting a brief overview of fundamental law and economics tools, including concepts derived from efficiency and welfare economics, the Coase Theorem, and behavioral law and economics. Applying these tools to the question presented, the author first suggests that the potentially prohibitive transaction costs incurred during the collective bargaining process and high enforcement costs of the bargained agreements represent two potential justifications for government regulation of PEDs in professional sports. The analysis next identifies and takes account of the externalities that attend decisions by professional athletes to use PEDs. The author weighs the argument that society's implicit approval of PEDs represents a positive externality that potentially overshadows two negative externalities imposed by PED use in sports—negative effects on the nation's youth and decreased public confidence in the integrity of sports—and concludes that PED use in sports has contributed to an endemic ethical crisis rather than an increase in social welfare. Finally, the author examines cognitive biases, particularly the "winner's bias," to conclude that athletes' natural inabilities to accurately measure the costs incurred by their decisions to use PEDs prevent them from properly considering the externalities their decisions impose on the rest of society. Weighing each of these factors in an efficiency analysis, the author recommends

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active government regulation of PEDs in sports as the socially optimal method of addressing the use of PEDs in American professional sports.

I. INTRODUCTION

For professional athletes, success in athletics can provide a high just as potent and addictive as any achieved using narcotics. In professional sports, pursuit of this high—standing victorious over a defeated opponent—consumes the world’s fiercest competitors. Residual notions of fair play, espoused by youth league coaches and well-meaning parents during the athletes’ formative years, are replaced by the overriding pursuit of the fruits of victory. Professional sports are driven by the desire, the *need*, to win.

I know this because for four years I toiled as a player in the National Football League.¹ While playing, I judged every choice—from what to eat to how much to sleep—by the effect it would have on my gridiron career. I was not an aberration. This fervent pursuit of victory compromises, to some extent, virtually every professional athlete’s decision-making ability. For many, performance-enhancing drugs (PEDs) provide a competitive edge that enables them to take another step toward their dreams. For others, the motivation is less pure: the fame and fortune accompanying drug-induced athletic success can be irresistible.

No athlete, of course, makes his or her decisions in a vacuum. Like a raindrop in a reflecting pool, a professional athlete’s choice to take PEDs creates, by virtue of the athlete’s visibility, waves that exceed the impact of the drugs on his individual career. Compounding the problem is not only its nature but its scope: far from just a single drop in this reflecting pool of American society, drugs in sports are a veritable rainstorm. This deluge threatens not only our nation’s children, but many of the ideals this country holds dear: integrity, hard work, and the valorous pursuit of victory.

At no time in American history has the awe-inspired question “How’d they do that?” following remarkable athletic accomplishments carried such gravity.² If enthusiasm is the mark of the true fan, skepti-

1. My professional football career spanned the North American continent and the Atlantic Ocean. I began my career with the Buffalo Bills in 2001 but spent the bulk of my first two seasons playing with the San Diego Chargers. Following a foray into now-defunct NFL Europe, I returned to the United States and spent time with both the Seattle Seahawks and Miami Dolphins during my last two years as a professional. I retired as a vested NFL veteran following the 2004 season and enrolled in the University of Illinois College of Law in the fall of 2005.

2. Consider, for example, any number of generation-defining athletic achievements over the past twenty years, beginning with Ben Johnson’s shattering of the men’s 100-meter dash world record in the 1988 summer Olympics and continuing with, among others, the 1998 baseball home run race between Mark McGwire and Sammy Sosa that culminated in McGwire’s record-setting seventy-home run season; Lance Armstrong and his return from cancer to win seven consecutive Tours de France from 1999 to 2005; Floyd Landis’s victory in that same race in 2006 following Armstrong’s retirement; Barry Bonds’s assault on baseball’s all-time home run record; Bill Romanowski’s record of 243 con-

cism has emerged as its constant companion. Today, no sooner do we applaud amazing athletic achievements than do we ponder the means by which they were accomplished.

By now, the prevalence of PEDs in sports is widely recognized. Many teenagers identify these drugs with the achievement, popularity, and wealth enjoyed by their heroes. To these impressionable teens, salvation appears available in a bottle. Concern over this message has sparked debate across the country on the government's appropriate role in addressing this growing national concern.

This note uses law and economics analysis to examine whether the federal government should actively regulate the use of PEDs in professional sports. Part II provides a brief history of the emergence of PEDs in professional sports. It also includes a primer on the fundamental aspects of law and economics, an understanding of which is helpful in grasping the arguments advanced in this note. Part III then applies these tools to the question presented, addressing it from three alternative economic perspectives. First, Part A examines the aggregate level of transaction costs involved with collectively bargaining drug-testing provisions in American professional team sports. Second, Part B compares the private costs and benefits athletes derive from using PEDs to the costs and benefits of their use on society as a whole, focusing on two potentially negative externalities: (1) the adverse influence of professional athletes' PED use on the nation's youth, and (2) the adverse effect of professional athletes' PED use on society's confidence in the integrity of sports. Part C examines drugs in sports from a behavioral law and economics perspective, asking whether elite athletes possess congenital character traits that skew their abilities to properly assess the costs and benefits of their decisions. Finally, Part IV uses the arguments advanced in Part III to recommend active government regulation of PEDs in professional sports.

II. BACKGROUND

PEDs have become ubiquitous in professional sports. To better appreciate this growing problem and its potential solutions, Subpart A examines the history of PEDs in sports, focusing on major revelations that have elevated this controversial topic to the forefront of American consciousness. Subpart B then introduces basic law and economics tools

secutive games played by an NFL linebacker over a sixteen-year career; and current NFL player Shawne Merriman, who, during the 2006 season, recorded a league-high seventeen sacks in only twelve games of action. Some of these accomplishments, like Johnson's world record, have been proven tainted by illegal drug use and wiped from the record. The suspicion of PED use keeps the others in a state of purgatory, perpetually drifting between the golden gates of sports legend and the dismal abyss of athletic infamy.

used in this note to evaluate whether governmental action is appropriate to remedy the drug problems exhibited in professional sports.³

A. *From Obscurity to Infamy:
Tracing the Emergence of PEDs in Professional Sports*

Long a part of the bodybuilding culture,⁴ steroids burst onto the international sports scene in the late 1980s. It was then that Canadian sprinter Ben Johnson, after capturing the 100-meter dash gold medal in world-record time at the 1988 Seoul Olympics, was stripped of his medal for failing an Olympic drug test.⁵ Steroids caught the public's attention again in the early 1990s when Lyle Alzado, a star football player in the late 1970s and early 1980s, claimed steroid use caused the brain cancer that ultimately took his life.⁶

Use of PEDs in the modern "steroid era," kindled in baseball in the mid-1990s⁷ and aflame by the historic 1998 home run race between slugers Mark McGwire and Sammy Sosa,⁸ has gone far beyond traditional steroids. A growing list of PEDs, including human growth hormone (HGH), THG, and EPO, has expanded the menu of chemical compounds available to help athletes achieve superior performance.⁹

Since it was first reported in 1998 that McGwire used androstenedione (andro), a then-legal steroid precursor, to help shatter baseball's thirty-seven-year-old single-season home run record,¹⁰ PEDs have remained the center of attention in the sports world. PEDs have tainted many sports, including track and field,¹¹ football,¹² and cycling.¹³ No

3. Though law and economics has not often been applied to the sports world, see Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1459 (2006), for an application of law and economics in the context of player contract negotiations.

4. See *At Muscle Beach, A Legacy of Steroid Use* (NPR radio broadcast Mar. 18, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4541304>.

5. Michael Janofsky, *Johnson Loses Gold to Lewis After Drug Test*, N.Y. TIMES, Sept. 27, 1988, at A1.

6. Lyle Alzado as told to Shelley Smith, *I'm Sick and I'm Scared*, SPORTS ILLUSTRATED, July 8, 1991, at 20.

7. Though there is some debate about the beginnings and endings of baseball's so-called steroid era, most commentators consider it to encompass a ten-year period beginning in the mid-1990s and ending in the years after the turn of the century. Recent developments, however, make one wonder whether the steroid era has truly concluded. For a comprehensive, though unofficial, report on the entire history of steroids and PEDs in professional baseball, see *Baseball's Steroid Era*, <http://thesteroidera.blogspot.com/> (last visited Aug. 28, 2007).

8. See Gary Smith, *Sportsmen of the Year: Big Swingers*, SPORTS ILLUSTRATED, Dec. 21, 1998, at 40, 42.

9. For a discussion of these and other drugs commonly used to improve athletic performance, see Keay Davidson, *Drugs Involved in BALCO Case*, S.F. CHRON., Feb. 13, 2004, at A23.

10. Steve Wilstein, *'Andro' Pill OK in Baseball, Not in Other Sports*, ASSOCIATED PRESS, Aug. 21, 1998.

11. Sprinter Ben Johnson was one of the first mainstream athletes exposed as a steroid user. See William Oscar Johnson & Kenny Moore, *The Loser*, SPORTS ILLUSTRATED, Oct. 3, 1988, at 20, 22. More recently, sprinter Marion Jones surrendered her Olympic medals after admitting she used PEDs. See Tim Layden, *Disgrace Jones*, SPORTS ILLUSTRATED, Oct. 15, 2007, at 20.

sport, however, so epitomizes the national debate on PEDs in athletics as Major League Baseball.

During the mass exposure of baseball's drug-induced power surge, the public frenzy surrounding steroids in baseball grew like wildfire as stories emerged daily implicating new players in the scandal. First, former National League Most Valuable Player Ken Caminiti publicly admitted that his MVP season was chemically enhanced.¹⁴ Then, Jose Canseco, considered by many to be the founding father of steroids in baseball, released a book, appropriately entitled *Juiced: Wild Times, Rampant 'Roids, Smash Hits, and How Baseball Got Big*, chronicling his own drug use and implicating others, including McGwire.¹⁵ Other names soon surfaced¹⁶ and other books soon followed.¹⁷

The attention received by other players, however, pales in comparison to the ongoing speculation about the use of PEDs by Barry Bonds. The slugger shattered McGwire's newly established single-season home run record in 2001¹⁸ and recently surpassed Hank Aaron's mark for career home runs.¹⁹ A book released in early 2006, *The Game of Shadows*,²⁰ contained reports linking Bonds to the Bay Area Laboratory Co-operative (BALCO), a San Francisco company that had been identified

12. Perhaps due to player fear resulting from Lyle Alzado's steroid and health developments in the early 1990s, Alzado, *supra* note 6, professional football witnessed few PED-related mishaps in the 1990s. The public's confidence in the sport has been shaken, however, by recent developments, including several drug-related suspensions over the past few years. Perhaps most notably, San Diego Chargers' Pro Bowl linebacker and former NFL Defensive Rookie of the Year Shawne Merriman was suspended four games in 2006 for violating the league's substance abuse policy. Mark Maske, *Chargers' Merriman Is Facing Suspension*, WASH. POST, Oct. 23, 2006, at E9.

13. Professional cycling has been inundated with PED problems. Though no evidence has proven the allegations, seven-time Tour de France winner Lance Armstrong has long fought rumors of PED use. See *Ex-Friends Say Armstrong Admitted Drug Use* (NPR radio broadcast June 24, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5508863>. In 2006, Tour de France favorites Jan Ullrich and Ivan Basso were implicated in a Spanish doping scandal and barred from competition only days before the race was to begin. Jamey Keaten, *Tour Favorites Barred in Doping Scandal*, ASSOCIATED PRESS, June 30, 2006. In late 2007, an independent arbitration panel upheld the results of American Floyd Landis's positive drug test during his victory in the 2006 Tour, stripping him of his title and banning him from competitive cycling for two years. *For the Record*, SPORTS ILLUSTRATED, Oct. 1, 2007, at 22.

14. Tom Verducci, *Totally Juiced*, SPORTS ILLUSTRATED, June 3, 2002, at 34, 36.

15. JOSE CANSECO, *JUICED: WILD TIMES, RAMPANT 'ROIDS, SMASH HITS, AND HOW BASEBALL GOT BIG* 7-8 (2005).

16. The list of players rumored to have used PEDs is long and distinguished. For an ongoing unofficial list, see *Baseball's Steroid Era*, *supra* note 7. One important development occurred in the summer of 2006, when pitcher Jason Grimsley admitted to authorities that he had used human growth hormone. See Jack Curry, *A New Front in Baseball's Drug War*, N.Y. TIMES, June 7, 2006, at D1.

17. See, e.g., HOWARD BRYANT, *JUICING THE GAME* (2005); WILL CARROLL, *THE JUICE* (2005).

18. Bonds hit seventy-three home runs in 2001, only three seasons after McGwire had broken Roger Maris's 1962 record of sixty-one homers in a single season. See *Baseball Almanac*, <http://www.baseball-almanac.com/players/player.php?p=bondsba01> (last visited Aug. 28, 2007).

19. At the conclusion of the 2007 season, Bonds had 762 career home runs, seven more than Hank Aaron's career mark of 755. See *Baseball-Reference.com*, <http://www.baseball-reference.com/b/bondsba01.shtml> (last visited Sept. 16, 2007).

20. MARK FAINARU-WADA & LANCE WILLIAMS, *THE GAME OF SHADOWS* (2006).

as a major hub for designer steroids and other PEDs.²¹ Bonds was recently indicted on federal charges of perjury and obstruction of justice stemming from his having allegedly lied to a grand jury in 2003 about his use of PEDs.²²

Spurred by this growing public scrutiny, Congress has taken preliminary steps to alleviate the country's concerns. In 2005, congressional committees held several highly publicized hearings featuring testimony from prominent sports figures.²³ In addition, congressional members introduced various bills in both the House of Representatives and the Senate proposing government action to alleviate the problem of PEDs in sports.²⁴ This note uses basic law and economics to analyze whether Congress's attempts to impose these or other regulations governing the use of PEDs in professional sports are appropriate.²⁵

B. Law and Economics: Using Behavioral Theories and Legal Rules to Predict and Incentivize Individual Actions

Law and economics provides powerful tools to assess the appropriateness of government involvement in any number of settings. At its essence, law and economics is the study of incentives in our daily lives. When left undisturbed, a variety of factors can lead people to make decisions that are socially suboptimal.²⁶ From the perspective of law and economics, the primary purpose of the legal system is to encourage or discourage various behaviors to achieve socially desirable ends. For Congress to become actively involved in regulating certain conduct—here, the use of PEDs in professional sports—it must determine that the

21. For a brief look at the proceedings involving BALCO, including implications regarding many of the athletes mentioned in the prior footnotes, see John Crumacker & Mark Fainaru-Wada, *Star-Studded Day for the Grand Jury*, S.F. CHRON., Dec. 12, 2003, at C1.

22. See Tom Verducci, *The Age of Innocence, Take 2: Is the Barry Bonds Era Finally Behind Us? Tick Tock*, SPORTS ILLUSTRATED, Nov. 26, 2007, at 22, 22 (discussing Bonds's alleged use of injectable steroid, human growth hormone, and designer steroids the "cream" and the "clear").

23. See, e.g., S. 1114, *The Clean Sports Act of 2005*, and S. 1334, *The Professional Sports Integrity and Accountability Act: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 109th Cong. (2005); *The Drug Free Sports Act of 2005: Hearing on H.R. 1862 Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 109th Cong. (2005) [hereinafter *DFSA Hearing*]; *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts To Eradicate Steroid Use: Hearing Before the H. Comm. on Government Reform*, 109th Cong. (2005) [hereinafter *Restoring Faith Hearing*]; *Steroids in Sports: Cheating the System and Gambling Your Health: Joint Hearing Before the Subcomm. on Commerce, Trade and Consumer Protection and the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 109th Cong. (2005).

24. See, e.g., Integrity in Professional Sports Act, S. 1960, 109th Cong. (2005); Professional Sports Responsibility Act of 2005, H.R. 3942, 109th Cong. (2005); Drug Free Sports Act, H.R. 3084, 109th Cong. (2005); Clean Sports Act of 2005, S. 1114, 109th Cong. (2005); Office of National Drug Control Reauthorization Act, H.R. 2565, 109th Cong. (2005).

25. This note does not evaluate the substance of the pending legislation, nor does it recommend specific governmental action. Instead, it merely uses law and economics principles to determine whether government involvement is appropriate, stopping short of determining how that involvement should occur.

26. For a discussion of welfare economics, social efficiency, and factors leading to suboptimal decision making, see *infra* Part II.B.1.

social inefficiencies resulting from suboptimal private decisions are so severe that they warrant government intervention. The explanation of basic law and economics concepts below is meant to provide the understanding necessary to fully grasp the arguments advanced in this note's analysis.

For the past forty years,²⁷ the study of law and economics has grown steadily in both influence²⁸ and breadth.²⁹ As explained by Judge Richard Posner, the study of economics no longer is limited to supply-and-demand curves, inflation, and other traditional microeconomic concepts.³⁰ Today, law and economics has been applied to almost every legal doctrine.³¹

Indeed, "economics is the science of rational choice in a world—our world—in which resources are limited in relation to human wants."³² This economic concept, formally recognized as rational choice theory, is the study of man's rational pursuit of utility maximization³³—how individuals subjectively weigh the benefits versus the costs of the choices they make in their everyday lives to achieve their desired ends.³⁴ Because people are assumed to implicitly balance the ramifications of their decisions, it follows that they respond to behavioral incentives that aug-

27. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS 2 & n.2* (4th ed. 2004) (noting that the modern law and economics movement began in the early 1960s with two landmark articles, Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960), and Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961)).

28. See *id.* at 3 (listing several prominent law and economics scholars who have been appointed to the federal judiciary, including Associate Justice Stephen Breyer of the United States Supreme Court; Circuit Judge Richard A. Posner and Chief Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit; Circuit Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit; Chief Judge Douglas Ginsburg of the United States Court of Appeals for the D.C. Circuit; and Chief Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit).

29. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW 6* (7th ed. 2007) (noting that the study of economics is not about money, but is instead about the efficient use of broader resources, only one of which is money).

30. See *id.*; see also STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS* (2005) (examining the economic justifications for a number of common activities, from parenting to prostitution); Cento G. Veljanovski, *The Economic Approach to Law: A Critical Introduction*, 7 *BRIT. J.L. & SOC'Y* 158, 161 (1980) (noting that law and economics has now been applied to such social behaviors as church attendance, suicide, marriage, divorce, and abortion).

31. See, e.g., COOTER & ULEN, *supra* note 27 (exploring in separate chapters the law and economics approach to the traditional legal doctrines of property, torts, contracts, and criminal law); POSNER, *supra* note 29 (extending economic analysis to fields such as business organizations and financial markets, regulated industries, taxation, civil and criminal procedure, and constitutional rights).

32. POSNER, *supra* note 29, at 3; see also Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 469, 474 (1897) ("[T]he man of the future is the man of statistics and the master of economics. . . . We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose . . .").

33. Utility maximization is only one of several definitions of rational choice theory. For a discussion of this and other views, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 *CAL. L. REV.* 1051, 1060–66 (2000).

34. See COOTER & ULEN, *supra* note 27, at 15; POSNER, *supra* note 29, at 3–4.

ment or abate the benefits or costs associated with these choices.³⁵ Legal rules that encourage socially desirable conduct and discourage undesirable conduct provide one such set of incentives.³⁶

By adopting an *ex ante* perspective,³⁷ economics appeals to law-makers by providing “a scientific theory to predict the effects of legal sanctions on behavior.”³⁸ Economists equate the traditional law of demand, which states that the quantity demanded of any good changes in inverse relation to its price,³⁹ to the parallel concepts of legal sanctions and human behavior: “[P]eople respond to higher prices by consuming less of the more expensive good, so presumably people respond to heavier legal sanctions by doing less of the sanctioned activity.”⁴⁰ In this way, “economics provides a behavioral theory to predict how people respond to changes in laws.”⁴¹ Harnessing these predictive powers channels one of the assets of law and economics: its use in reviewing law and policy.

Used as a normative evaluation tool, law and economics asks whether a given set of laws properly incentivizes individual choices to achieve broader social goals.⁴² Furthermore, law and economics examines whether laws achieve these social goals efficiently, *i.e.*, at the lowest cost to society.⁴³

1. *Efficiency and Welfare Economics*

Though law and economics employs different definitions of efficiency,⁴⁴ the term as used in this note refers to basic cost-benefit analysis, known as Kaldor-Hicks efficiency.⁴⁵ Stated simply, a change is Kaldor-

35. See POSNER, *supra* note 29, at 4 (“The concept of man as a rational maximizer implies that people respond to incentives—that if a person’s surroundings change in such a way that he could increase his satisfactions by altering his behavior, he will do so.”); see also LEVITT & DUBNER, *supra* note 30, at 20 (“Economics is, at root, the study of incentives An incentive is a bullet, a lever, a key: an often tiny object with astonishing power to change a situation.”); Korobkin & Ulen, *supra* note 33, at 1054 (“The seminal insight that economics provides to the analysis of law is that people respond to incentives . . .”).

36. See Korobkin & Ulen, *supra* note 33, at 1054 (noting that the law can encourage desirable behavior through subsidization and discourage undesirable behavior through taxation).

37. POSNER, *supra* note 29, at 7; Veljanovski, *supra* note 30, at 164.

38. COOTER & ULEN, *supra* note 27, at 3; see also Korobkin & Ulen, *supra* note 33, at 1055 (noting that “[l]aw and economics is, at root, a behavioral theory”).

39. POSNER, *supra* note 29, at 4.

40. COOTER & ULEN, *supra* note 27, at 3; see also R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 4 (1988) (“[W]e must be content with the knowledge that for groups of human beings, in almost all circumstances, a higher (relative) price for anything will lead to a reduction in the amount demanded.”).

41. COOTER & ULEN, *supra* note 27, at 4.

42. See *id.*

43. See *id.*

44. See *id.* at 16 (discussing various forms of economic efficiency, including productive efficiency, in which any given output cannot be obtained using a lower-cost combination of inputs, and allocative, or Pareto, efficiency, in which a given transaction cannot be changed so as to make at least one person better off without leaving another person worse off).

45. See *id.* at 48. Kaldor-Hicks efficiency is also sometimes referred to as a “potential Pareto improvement.” *Id.*; see also *supra* note 44 (discussing Pareto efficiency).

Hicks efficient when the gainers gain more than the losers lose.⁴⁶ To ensure *social* efficiency, one must evaluate not only private costs and benefits, but also the costs and benefits incurred on, and enjoyed by, society as a whole.⁴⁷

A subset of microeconomic theory known as welfare economics examines this relationship between private choice and social impact.⁴⁸ More specifically, welfare economics “explores how the decisions of many individuals . . . interact to affect the well-being of . . . a group.”⁴⁹ Welfare economics posits that for every activity there exists a point of equilibrium at which the marginal costs from producing one more unit of that activity exactly equal the marginal benefits received from that additional unit.⁵⁰ Stated differently, at a given activity’s equilibrium point, additional units of that activity lead to an inefficient outcome because the incremental costs of producing that unit will exceed its incremental benefits, resulting in a net loss to social welfare. Consequently, welfare economists assert that in well-functioning markets there exists an efficient amount of *every* conduct, including social negatives like crime, drug use, or underage pregnancy. To an economist, for example, society would have “too little” crime if the marginal social costs of deterring crime exceeded the marginal social benefits gained from further crime reduction.⁵¹

In this “decision-making market,” which strives for supply-and-demand equilibrium for any given conduct, market failures can prevent efficient social outcomes.⁵² One common market failure is the presence of an externality.⁵³ An externality is a benefit or cost that helps or harms a party not explicitly involved in an exchange.⁵⁴ Welfare economics identifies the problem of externalities, which arise when individuals make decisions based solely on their own welfare, failing to consider the ramifications of their actions on other individuals or on society as a whole.⁵⁵

46. COOTER & ULEN, *supra* note 27, at 48.

47. *See id.*; *see also* Veljanovski, *supra* note 30, at 169 (referring to efficiency as the “concept of unimprovability; there is no rearrangement of productive activity . . . that would increase the welfare of society”).

48. *See* COOTER & ULEN, *supra* note 27, at 43.

49. *Id.*

50. *See id.*

51. *See* Korobkin & Ulen, *supra* note 33, at 1092 (“Policymakers rarely wish to deter 100% of even undesirable conduct, because the costs of doing so would likely be too great.”).

52. *See* COOTER & ULEN, *supra* note 27, at 44.

53. *Id.*

54. *See id.* at 44–45; *see also* A.C. PIGOU, THE ECONOMICS OF WELFARE 172 (4th ed. 1962) (discussing the theoretical underpinnings of externalities, though never explicitly using that term).

55. A.C. Pigou was one of the first to identify the problem of externalities:

In general industrialists are interested, not in the social, but only in the private, net product of their operations. . . . [S]elf-interest will tend to bring about equality in the values of the marginal *private* net products of resources invested in different ways. But it will not tend to bring about equality in the values of the marginal *social* net products except when marginal private net product and marginal social net product are identical. When there is a divergence between these two sorts of marginal net products, self-interest will not, therefore, tend to make the national dividend a maximum

These negative externalities result in inefficiencies that lead to socially suboptimal outcomes.⁵⁶

Consider, for example, pollution produced by a manufacturing plant.⁵⁷ Assume the plant will pollute at the level that maximizes its profits, with little regard for the comfort or health of those around it, many of whom the pollution harms. From the plant's perspective, it is producing pollution at the optimum level; from society's perspective, however, the plant is polluting too much. Thus, the costs imposed on society exceed the costs contemplated by the plant in making its production decisions. This difference between the plant's privately optimal pollution level and the community's socially optimal level represents the negative externality inflicted on society by the plant's excessive pollution. The challenge of regulation is to align the incentives of these divergent interests so that the manufacturing plant produces pollution at a level that is socially, rather than merely privately, optimal.⁵⁸ Such alignment ideally occurs through bargaining,⁵⁹ but where bargaining is likely to fail, more drastic intervention and regulation may be warranted.

2. *The Coase Theorem and Transaction Costs*

University of Chicago professor Ronald Coase, in an article many consider the opening salvo of the modern law and economics movement,⁶⁰ identified the reciprocal nature of the externality problem:

The problem which we face in dealing with actions which have harmful effects is not simply one of restraining those responsible for them. What has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm.⁶¹

Coase recognized that every decision to regulate conduct provides potential benefit to one party at the cost of potential harm to the other, with the ultimate question being which party's interests should prevail.

In the pollution example, forcing the plant to lower its output or increase its costs of production in order to reduce pollution will cause the plant to suffer financial loss. According to Coase, the pertinent question is whether the plant should be allowed to harm those around it by con-

PIGOU, *supra* note 54, at 172 (emphasis added).

56. *See id.*

57. The manufacturing plant hypothetical is used frequently in law and economics literature to discuss externalities. *See, e.g.*, COOTER & ULEN, *supra* note 27, at 44–45; PIGOU, *supra* note 54, at 184; Coase, *supra* note 27, at 1.

58. *See* COOTER & ULEN, *supra* note 27, at 45.

59. Absent market failures such as externalities, efficient outcomes theoretically result from successful bargaining because the parties to a negotiation should only agree to the terms of the deal if those terms satisfy their subjective interests. At least theoretically, if the terms are anything less than satisfactory to the parties, no deal should be reached. *See id.* at 87 (stating that “if the parties can bargain successfully with each other, the efficient outcome will be achieved”).

60. *See, e.g., id.* at 2 n.2; POSNER, *supra* note 29, at 23.

61. Coase, *supra* note 27, at 27.

tinuing to pollute at its current level or whether those affected by the pollution should be permitted to force the plant to incur the additional costs of reducing its pollution.⁶² If the involved parties engage in successful bargaining, an efficient outcome results: the parties agree upon a level of pollution that is efficient in light of their respective costs.⁶³

This example demonstrates the Coase Theorem, which, as restated by Cooter and Ulen, says the following: “When transaction costs are zero, an efficient use of resources results from private bargaining”⁶⁴ The problem, of course, arises from the improbability of the basic assumption upon which Coase qualified his logic. Transaction costs, in fact, are never zero.⁶⁵ Cooter and Ulen defined transaction costs as “the costs of exchange” and divided these costs into three distinct categories: (1) search costs, those incurred while locating a party with whom to bargain; (2) bargaining costs, those incurred while actually negotiating the terms of the agreement; and (3) enforcement costs, those incurred while monitoring performance of the agreement and punishing for breach.⁶⁶

As these transaction costs increase, it becomes more difficult for private parties to reach an efficient resolution.⁶⁷ In fact, “the administrative costs might well be so high as to make any attempt to deal with the problem within the confines of [the private parties] impossible.”⁶⁸ One potential solution, suggested Coase, is government regulation.⁶⁹ If the government can impose laws and regulations that settle the matter between the parties more efficiently, i.e., at a lower cost, then government involvement might be advantageous. Coase recognized, however, that governmental action is not without its own set of costs: “[T]he govern-

62. See *id.* at 2 (“The real question that has to be decided is: should [Party] A be allowed to harm [Party] B or should B be allowed to harm A?”).

63. See, for example, Coase’s discussion, *id.* at 8–10, of *Sturges v. Bridgman*, 11 Ch. D. 852 (1879), a case in which the noise and vibration caused by a confectioner’s machinery operating next door to a doctor’s office made the doctor’s use of parts of his office impractical. The efficient solution, said Coase, was to bargain: “If the doctor’s income would have fallen more through continuance of the use of this machinery than it added to the income of the confectioner, there would clearly be room for a bargain whereby the doctor paid the confectioner to stop using the machinery.” Coase, *supra* note 27, at 9; see also discussion *supra* note 59.

64. COOTER & ULEN, *supra* note 27, at 89; see Coase, *supra* note 27, at 8 (“[T]he ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost.” (emphasis added)).

65. See Coase, *supra* note 27, at 15 (“The argument has proceeded up to this point on the assumption . . . that there were no costs involved in carrying out market transactions. This is, of course, a very unrealistic assumption.”).

66. COOTER & ULEN, *supra* note 27, at 91–92; see also Coase, *supra* note 27, at 15 (“In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on.”).

67. See Coase, *supra* note 27, at 15 (“[O]perations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost.”).

68. *Id.* at 17.

69. See *id.*; see also COOTER & ULEN, *supra* note 27, at 96–97 (suggesting that the imposition of laws in certain circumstances can encourage bargaining by lowering transaction costs).

mental administrative machine is not itself costless. It can, in fact, be on occasion extremely costly.”⁷⁰ Ultimately, Coase advocated for the usual cost-benefit analysis of economic efficiency in determining what situations are most conducive to government involvement: the government should take action when the benefits of its doing so exceed the costs.⁷¹

3. *Behavioral Law and Economics*

Rational choice theory, the foundation upon which law and economics was built, has been criticized for oversimplifying the factors influencing individuals’ decision-making processes.⁷² Much of this criticism arises from experimental evidence showing that actors frequently fail to act “rationally”⁷³—that is, their actions are not based on subjective comparisons of personal costs and benefits—but instead systematically deviate from rational behavior based on a variety of cognitive biases and mental shortcuts.⁷⁴ Thus, while at a broad level rational choice theory remains a helpful model to anticipate human responses to changes in law, behavioral economists assert that these deviations can identify failures in the conventional predictive model.

Where these deviations are shown to be systematic in nature, however, their presence enhances the predictive powers of economics.⁷⁵ By

70. See Coase, *supra* note 27, at 18.

71. See *id.*

72. See generally Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473 (1998) (noting that “[o]bjections to the rational actor model . . . are . . . almost as old as the field itself”); Korobkin & Ulen, *supra* note 33. Notable economists, however, continue to defend rational choice theory on theoretical grounds. Judge Posner, for one, remains a devout believer in the undiminished utility of rational choice theory:

[A]bstraction is of the essence of scientific inquiry, and economics aspires with some success to be scientific. . . . [A]n economic theory of law will not capture the full complexity, richness, and confusion of the phenomena . . . that it seeks to illuminate. But its lack of realism in the sense of descriptive completeness, far from invalidating the theory, is a precondition of theory. A theory that sought faithfully to reproduce the complexity of the empirical world in its assumptions would not be a theory—an explanation—but a description.

. . . .

The obvious fact that people do not always make rational choices . . . does not invalidate rational-choice theory. Economics is concerned with explaining and predicting tendencies and aggregates rather than the behavior of each individual

POSNER, *supra* note 29, at 16–17.

73. This is not to suggest that actors affected by cognitive biases are per se “irrational.” See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 204 (2006) (“The prospect of errors in some cases does not suggest that the behavior in question is irrational in the sense of being arbitrary or lacking plausible justification. The point instead is that the behavior, even if sensible in many cases, leads to systematic error in some of them. Bounded rationality is hardly the same as irrationality.”).

74. See Jolls et al., *supra* note 72, at 1476–77 (discussing the significant ways in which most people depart from standard economic reasoning); Korobkin & Ulen, *supra* note 33, at 1055 (noting that the presence of credible experimental evidence undercuts many assumptions of rational choice theory).

75. As one group of scholars suggested:

The project of behavioral law and economics . . . is to take the core insights and successes of economics and build upon them by making more realistic assumptions about human behavior. We wish to retain the power of the economist’s approach to social science while offering a better

incorporating these systematic deviations from rational behavior into its models, behavioral law and economics, as the field is known,⁷⁶ more accurately predicts the effects changes in law will actually have on behavior. Thus, the goal of behavioral law and economics is to make the core insights of rational choice more realistic by infusing proven patterns of human behavior. As an example, consider two commonly cited deviations, the overoptimism bias and the availability heuristic, and their potential effects on legal policy.

The overoptimism bias is an innate protective mechanism that serves to insulate people from the sometimes-harsh realities of their daily lives.⁷⁷ Essentially, it is “the belief that good things are more likely than average to happen to us and bad things are less likely than average to happen to us.”⁷⁸ Take, for example, a survey of Virginia residents applying for marriage licenses.⁷⁹ Despite known statistics showing that nearly half of all marriages end in divorce, couples applying for marriage licenses estimated there was zero chance of their own marriages experiencing this same unfortunate fate.⁸⁰ The perception is clearly wrong, but the overoptimism bias explains why couples continue to marry despite the sober realities of divorce statistics.

Like the overoptimism bias, the availability heuristic also arises by necessity, this time from the imperfect cognitive abilities—limited computational skills and flawed memories—of the human psyche.⁸¹ Studies have shown that people rely on a series of predictable mental shortcuts to compensate for these mental shortcomings. One of these shortcuts is the availability heuristic.⁸² The availability heuristic suggests that “the frequency of some event is estimated by judging how easy it is to recall

description of the behavior . . . in society and the economy. Behavioral law and economics, in short, offers the potential to be law and economics with a . . . greater power to explain the observed data.

Jolls et al., *supra* note 72, at 1487.

76. Scholars have also referred to behavioral law and economics as “legal pragmatism.” See Korobkin & Ulen, *supra* note 33, at 1057.

77. If people realized, for example, the statistical probabilities of various events occurring in their lives—falling ill to cancer, having an automobile accident, declaring bankruptcy—most would never get out of bed in the morning!

78. Korobkin & Ulen, *supra* note 33, at 1091; see also Jolls et al., *supra* note 72, at 1541 (“[O]veroptimism leads most people to believe that their own risk of a negative outcome is far lower than the average person’s.”).

79. See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 440–44 (1993).

80. See *id.* at 443.

81. See Jolls et al., *supra* note 72, at 1477; Korobkin & Ulen, *supra* note 33, at 1087 (“When actors overestimate the relevance of salient or memorable incidents at the expense of [proven statistical probabilities], they employ the ‘availability heuristic.’”); see also Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99, 101 (1955).

82. See Jolls et al., *supra* note 72, at 1477; see also Korobkin & Ulen, *supra* note 33, at 1143 (“To save time, avoid complexity, and generally make dealing with the challenges of daily life tractable, actors often adopt decision strategies or employ heuristics that lead to decisions that fail to maximize their utility.”).

other instances of this type”⁸³ In other words, “[p]eople tend to conclude . . . that the probability of an event . . . is greater if they have recently witnessed an occurrence of that event than if they have not.”⁸⁴

Behavioral law and economics suggests that to have the desired effect, legal incentives must operate not only on an individual’s internal cost-benefit calculus, but must also attempt to account for these innate flaws in that person’s ability to correctly conduct that calculus. Consequently, understanding the countermeasures to these systematic deviations is vital to the law’s efficiency.⁸⁵ The government, armed with the resources to identify, study, and counter these systematic deviations, is uniquely situated to harness the predictive power of behavioral theories and implement the necessary means to achieve socially desired ends.

To summarize, law and economics presents a valuable tool to evaluate legal policy and the behavioral incentives provided by law. Understanding transaction costs, externalities, and cognitive biases helps lawmakers decide when and how government action is appropriate to regulate various activities. This note’s analysis uses these tools to determine whether the government should assume an active role in combating the use of PEDs by professional athletes.

III. ANALYSIS

The economic goal of any program regulating PEDs in professional sports should not be to completely eradicate their use, but rather to achieve a socially optimal level of PED use.⁸⁶ To determine what role, if any, the government should take in pursuing this socially efficient outcome, this note considers three alternatives based on the economic theories introduced in Part II.B. First, Subpart A examines the aggregate transaction costs incurred by owners and athletes when privately negotiating drug-testing provisions. Subpart B then shifts from this argument and considers whether athletes, in deciding to use PEDs, impose negative externalities on society. The externalities discussed here include (1) the impact of PEDs in professional sports on the nation’s youth, and (2) the impact of PEDs in professional sports on the public’s confidence in the integrity of the athletic enterprise. Finally, Subpart C uses the subfield of behavioral law and economics to examine the role of the overoptimism bias in athletes’ decisions and to suggest another potential cognitive bias,

83. Jolls et al., *supra* note 72, at 1477.

84. *Id.*

85. See Jolls & Sunstein, *supra* note 73, at 212–16.

86. The economic goal of legal policy is not to eradicate illegal behavior from society, but rather to optimize the amount of that illegal behavior. In the context of crime, for example, at some point the marginal costs incurred to decrease crime will exceed the marginal benefits gained by society. At such point, economic theory suggests that it is no longer socially efficient for additional resources to be allocated toward law enforcement. See *supra* notes 50–51 and accompanying text.

referred to as the “winner’s bias,” which this note defines as the congenital competitiveness commonly exhibited in elite athletes.

A. Potentially Prohibitive Transaction Costs Exist in Markets Featuring Large Numbers of Parties and High Enforcement Costs

According to Coase, one of the government’s primary considerations when determining whether to regulate PEDs in professional sports should be the level of transaction costs the parties will incur while privately negotiating potential resolutions.⁸⁷ Recall that transaction costs are commonly divided into three categories: search, bargaining, and enforcement costs.⁸⁸ Because athletes in every major American professional team sport⁸⁹ play under collective bargaining agreements,⁹⁰ this portion of the analysis examines the transaction costs incurred during the collective bargaining process.⁹¹

Scholars disagree on the relative level of transaction costs associated with successful collective bargaining.⁹² Search costs are undeniably low because the parties involved in negotiations—league management and players’ unions—are readily identifiable. The bargaining and enforcement costs of collective bargaining, however, are more difficult to quantify. This section examines factors contributing to the bargaining

87. See *supra* notes 64–71 and accompanying text.

88. See *supra* note 66 and accompanying text.

89. For simplicity, this analysis considers only the transaction costs related to bargaining in the context of team sports. In individual sports, the transaction costs would presumably be lower, because athletes negotiate directly with event organizers regarding the terms of their participation; this process is not itself without cost, however, as it requires individual negotiation with each athlete, as opposed to collective bargaining with a single organization.

90. COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS’ ASSOCIATION (2005), available at <http://www.nhlpa.com/CBA/2005CBA.asp>; COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION (2006), available at http://www.nflpa.org/pdfs/Agents/CBA_Amended_2006.pdf; MAJOR LEAGUE BASEBALL COLLECTIVE BARGAINING AGREEMENT (2002), available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf; NATIONAL BASKETBALL PLAYERS ASSOCIATION COLLECTIVE BARGAINING AGREEMENT (2005), available at <http://www.nbpa.com/downloads/CBA.pdf>.

91. For broad discussions of the economics of labor law and collective bargaining, see generally DOUGLAS L. LESLIE, CASES AND MATERIALS ON LABOR LAW 44–79 (2d ed. 1985); Oliver E. Williamson, Michael L. Wachter & Jeffrey E. Harris, *Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange*, 6 BELL J. ECON. 250 (1975).

92. Compare Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics, and Negotiations Approach*, 68 S. CAL. L. REV. 363, 385–86 (1995) (noting that zero transaction costs are rare and that the collective bargaining process can be costly), and Douglas L. Leslie, *Multiemployer Bargaining Rules*, 75 VA. L. REV. 241, 254–58 (1989) (arguing that there are “serious transaction costs in labor-management gap-filling”), and Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1357–58 (1988) (asserting that bargaining in the internal labor market poses problems of high transaction costs), with Dennis O. Lynch, *Deferral, Waiver, and Arbitration Under the NLRA: From Status to Contract and Back Again*, 44 U. MIAMI L. REV. 237, 300 (1989) (arguing that transaction costs are close to zero), and Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 267 (1987) (“Bargaining costs are likely to be lower in labor negotiations than in many other settings.”).

and enforcement costs of these negotiations and concludes that these costs, when considered over time and aggregated among all professional sports, are relatively high.⁹³

The most salient factor elevating the bargaining costs of a transaction is often an increasing number of parties involved in the negotiation.⁹⁴ Those who assert that collective bargaining is relatively costless generally contend that it involves only two parties.⁹⁵ While it is true that only two sides—management and labor—sit at the negotiating table, each of these sides in a professional sports negotiation represents large and diverse constituencies—dozens of owners or hundreds of athletes.⁹⁶ These constituencies frequently have significant internal differences.⁹⁷ Before reaching a resolution, not only must the two sides agree, but they must also reach consensus within their diverse constituencies, often an even more difficult task. This poses a threat of high bargaining costs.⁹⁸

A second cause of high bargaining costs in professional sports collective bargaining is hostility among the parties.⁹⁹ Indeed, emotions—never something to be overlooked in the competitive world of athletics—often serve as barriers to rapid agreement. The threat of strike, a right afforded laborers by the NLRA,¹⁰⁰ embodies these hostilities¹⁰¹ and has played a recurring role in the history of American sports.¹⁰² While a

93. For a discussion of what constitutes “high” versus “low” transaction costs, see COOTER & ULEN, *supra* note 27, at 95.

94. *See id.* at 93; POSNER, *supra* note 29, at 51.

95. *See* Schwab, *supra* note 92, at 267–68.

96. League negotiators represent team owners, approximately thirty in each of the major American professional team sports. These owners often have different priorities depending largely upon the size of their markets. *See* discussion *infra* note 97. On the labor side, union negotiators represent diverse groups of athletes, ranging from thousands of individuals in the case of the National Football League to hundreds in the National Basketball Association. *See* Schwab, *supra* note 92, at 267 n.85 (“The union speaks with a single voice when negotiating with management. The union negotiator, however, must quell and merge diverse interests among the rank and file . . .”).

97. During the NFL’s most recent labor negotiations, for example, a single controversial issue, namely the question of the most appropriate way for large and small market teams to split revenues and preserve parity within the league, arose among the owners and nearly prevented successful agreement. *See* Leonard Shapiro, *Cracks in Revenue Sharing Threatens NFL*, WASHINGTON POST, Mar. 5, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A1461-2005Mar25.html> (providing an overview of the NFL’s winter meetings and the revenue-sharing issue).

98. *See* Guido Calabresi, *Transaction Costs, Resource Allocation, and Liability Rules—A Comment*, 11 J.L. & ECON. 67, 68 n.5 (1968) (“By transaction costs, I have in mind costs like those of getting large numbers of people together to bargain . . .”).

99. *See* COOTER & ULEN, *supra* note 27, at 93.

100. *See* National Labor Relations Act § 7, 29 U.S.C. § 157 (2000) (permitting employees to engage in “concerted activities for the purpose of collective bargaining”).

101. *Cf.* Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 997 (1984) (“The strike imposes costs on both parties: on the employer, by forcing him to reduce or cease production, and on the workers, by stopping their wages.”).

102. For a history of labor stoppages in baseball, basketball, football, and hockey, visit the websites of their respective players’ unions. *See* MLBPA History, <http://mlbplayers.mlb.com/pa/info/history.jsp> (last visited Aug. 28, 2007); NBPA History, <http://www.nbpa.com/history.php> (last visited Aug. 28, 2007); NFLPA History, http://www.nflpa.org/AboutUs/NFLPA_History.aspx (last visited Aug. 28, 2007); Origins of the NHLPA, <http://www.nhlpa.com/AboutTheNHLPA/WhatIs.asp> (last visited Aug. 28, 2007).

strike itself clearly imposes significant transaction costs,¹⁰³ the costs incurred by the *threat* of work stoppage—made legitimate by prior willingness to take such drastic steps—can be paralyzing as well.

Transaction costs climb even higher when the contentious topic of athlete drug testing is added to the list of issues negotiated in professional sports bargaining. The National Labor Relations Board, in accordance with the NLRA,¹⁰⁴ has made employee drug testing a mandatory subject of collective bargaining.¹⁰⁵ The parties, as part of their obligations to bargain in good faith,¹⁰⁶ must negotiate mandatory subjects to either resolution or impasse.¹⁰⁷ Requiring conclusion of such a controversial issue clearly leads to more protracted negotiations and higher bargaining costs.

Though not an exhaustive list of contributing factors,¹⁰⁸ the large, diverse, and antagonistic nature of the parties, combined with the contentious issue of random suspicionless drug testing, indicates the presence of high bargaining costs in professional sports collective bargaining.¹⁰⁹

In addition to high bargaining costs, long-term enforcement costs of the bargained agreements, particularly of drug-testing provisions, are exceptionally high.¹¹⁰ There are, for example, significant costs in terms of both time and money required to develop tests for emerging PED threats.¹¹¹ Beyond research, there are also costs associated with obtaining and examining samples, determining appropriate punishment, and enforcing sanctions. All told, effective PED enforcement could impose significant overall costs.

103. See Posner, *supra* note 101, at 997.

104. 29 U.S.C. § 158(d) (governing the obligation to bargain in good faith over working conditions).

105. See Nat'l Labor Relations Bd. Gen. Couns. Mem. GC 87-5 (Sept. 8, 1987), available at http://www.nlr.gov/shared_files/GC%20Memos/1987/GC%2087-5.pdf (making drug testing a mandatory subject of collective bargaining under the meaning of Section 8(d) of the National Labor Relations Act).

106. 29 U.S.C. § 158(d).

107. See Bierman & Gely, *supra* note 92, at 388.

108. For other potential factors leading to high transaction costs in this context, see POSNER, *supra* note 29, at 62 (discussing bilateral monopolies, which refer to situations in which neither party to a transaction has good alternatives to dealing with the other); Schwab, *supra* note 92, at 279–80 (introducing informational asymmetries as another source of high transaction costs); Wachter & Cohen, *supra* note 92, at 1358–59 (further discussing the transaction costs incurred by informational asymmetries).

109. See Wachter & Cohen, *supra* note 92, at 1373 (“[T]he process of collective bargaining is costly. Drafting an acceptable collective bargaining agreement involves time, data collection, and legal expenses. More important, strikes and lockouts—the results of failed negotiations—may impose significant costs on both sides.”).

110. See COOTER & ULEN, *supra* note 27, at 94 (“For complex transactions, monitoring behavior and punishing violations of the agreement can be costly.”).

111. See, e.g., Judy Battista, *N.F.L. and Union To Strengthen Steroid Testing*, N.Y. TIMES, Jan. 25, 2007, at D1 (noting the NFL’s \$500,000 commitment to research a test for human growth hormone); Dick Patrick & Bob Nightengale, *Lack of Testing Fuels HGH Use*, USA TODAY, June 9, 2006, at 7C (noting Major League Baseball’s \$450,000 commitment to research a test for human growth hormone).

Notwithstanding the low search costs seen in collective bargaining, the bargaining and enforcement costs of professional sports collective bargaining—led by work stoppage costs and drug-testing enforcement costs—can be quite high. When aggregated among all collectively bargained sports and considered over time, these costs become even greater. The next section offers an alternative argument: that even without high transaction costs, the potentially negative externalities associated with PEDs in professional sports justify government regulation.

B. Externalities and the Social Costs of Performance-Enhancing Drugs in Sports

Externalities are costs or benefits imposed on parties not directly involved, or accounted for, when deciding upon a particular course of action.¹¹² No decisions are made in isolation, and even the most rote choices often have broader effects than one believes. A child choosing not to brush her teeth makes a seemingly private decision, yet one that potentially imposes a positive pecuniary externality on her dentist (who will be paid to fill her cavities) and a negative pecuniary externality on her parents (who will be paying the dentist's bill).

The gravity of such externalities becomes more pronounced when the decision in question shifts from the relatively harmless, such as choosing not to brush one's teeth, to the potentially fatal, such as choosing to use illegal drugs. When the decision maker is a highly visible athlete and the drugs involved are PEDs, the potential negative externalities are significant. The externalities of this situation may be divided into a number of different categories,¹¹³ two of which have emerged as the primary social concerns: (1) the negative influence that drug use among professional athletes has on the nation's youth, and (2) the public's lost confidence in the integrity of sports.

This section begins by examining the validity of these two potential externalities. It then determines whether athletes fail to give adequate weight to the costs and benefits their private choices impose on others—a prerequisite for the existence of an externality.¹¹⁴ This section concludes with an alternative hypothesis: that society's tastes have evolved such that it now derives subjective *benefits* from PEDs in sports, thereby making their use a *positive* externality that should arguably go unimpeded by government intervention.

112. See *supra* notes 54–57 and accompanying text.

113. See, e.g., Alan C. Page, *Random Testing of Professional Athletes*, 33 WM. & MARY L. REV. 155, 156 (1991) (listing fair competition, public confidence in the games, high visibility of athletes as role models, and the health and safety of the athletes as the primary policy reasons used to support random drug testing of professional athletes).

114. See *supra* note 55 and accompanying text.

1. What Messages Do Drug-Abusing Athletes Send Our Children?

Society's primary concern with the increasingly prevalent use of steroids and PEDs in professional sports is the message that their use sends to America's teenagers.¹¹⁵ Many teenagers see steroids and other PEDs as quick and easy solutions to sources of teen angst. Dr. Denise Garibaldi, a psychologist whose son committed suicide while in a steroid-induced depression, listed several teen fears eased by the use of PEDs: failing to make the team, to obtain a college scholarship, or to be noticed by professional scouts; lack of peer acceptance; unattractiveness to the opposite sex; pressures to keep pace with teammates and competitors who use PEDs; and preoccupation with physique that often results in diminished self-esteem.¹¹⁶ In addition to social acceptance, some teenagers view PEDs as a gateway to achieving their athletic dreams. Even at early ages, many teens strive to continue their athletic careers in college or beyond; such aspirations of athletic accomplishment make them vulnerable to the call of steroids.¹¹⁷

Like past generations of adolescents, modern teenagers struggle for acceptance and status among their peers. Steroids and other PEDs present an attractive means for teens to improve their appearance or athleticism and to move up the social food chain so common in schools. While every young person copes differently with these various pressures to be accepted and to achieve, many adolescents look to their heroes, professional athletes, for answers.

Regardless of whether they agree,¹¹⁸ professional athletes are role models.¹¹⁹ Young people aspire to hit the long ball like Mark McGwire,¹²⁰ punish people like Shawne Merriman,¹²¹ or run like Marion

115. See Colin Latiner, *Steroids and Drug Enhancements in Sports: The Real Problem and the Real Solution*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 192, 194 (2006) ("The worst dangers about rising steroid use involve their use by youths."); *id.* at 210 ("Concern for youth health and moral questions regarding the use of enhancement by youths in sports is without a doubt the driving force in this issue.").

116. Denise A. Garibaldi, *The Challenge and the Tragedy*, 40 NEW ENG. L. REV. 717, 721 (2006).

117. See Latiner, *supra* note 115, at 214.

118. In a 1993 Nike television commercial, Charles Barkley, one of the greatest players in the history of the NBA, famously proclaimed, "I am not a role model. I am not paid to be a role model. . . . Parents should be role models. Just because I dunk a basketball doesn't mean I should raise your kids." *I Am Not a Role Model* (Nike television commercial 1993), available at <http://www.youtube.com/watch?v=WRYeGZRo9Q>.

119. Athletes are arguably role models for not only children, but people of every age:

[I]t is overly simplistic to play ostrich to the impact of an athlete's behavior on our nation's children or its adults. . . . When athletes started shuffling in the end zones, so did we. When athletes change their hair style, so do we. It is only wishful thinking that the analogy does not extend to such negatives as drug abuse. . . . In reality, many of us would like to 'be like Mike.'"

Dante Marrazzo, *Athletes and Drug Testing: Why Do We Care if Athletes Inhale?*, 8 MARQ. SPORTS L.J. 75, 81 (1997).

120. See *Chicks Dig the Long Ball* (Nike television commercial 1999), available at <http://www.youtube.com/watch?v=4tD21rYWVw>.

121. Shawne Merriman, one of the NFL's most dominant defensive players, was suspended for four games during the 2006 season for violating the league's substance abuse policy. See Maske, *supra* note 12.

Jones.¹²² The message being sent is clear: if world-class athletes believe they need PEDs to make *them* better,¹²³ then imagine the impact these same substances can have on a teenager. Teens often focus only on the results, not the ethical dilemmas or health problems posed by the shortcuts used to achieve them. Said one expert in addiction intervention:

To impressionable young athletes, [PED use by Olympic and professional athletes] can create the impression of implied legitimacy. Reports of . . . steroid users do not necessarily translate into images of cheaters or lawbreakers in the eyes of a young athlete. It is more likely that they see . . . celebrit[ies] . . . in great physical condition, perform[ing] at the top of their game, and mak[ing] a great deal of money. For many high school athletes this can serve as validation that steroids are their ticket to a starting position, a college scholarship, or a career in professional sports.¹²⁴

Statistics detailing the use of PEDs strongly suggest that teenagers are getting this unfortunate message. A 1993 survey by the Centers for Disease Control and Prevention found that approximately 2.2% had used illegal steroids.¹²⁵ That number steadily increased over the next ten years until, in 2003, one in sixteen high school students, 6.1% or approximately one million students, reported having used illegal steroids.¹²⁶ Not coincidentally, this time span corresponded to the steroid boom in professional sports, particularly Major League Baseball's highly visible and exhaustively publicized "steroid era."¹²⁷

The link to the use of these substances by professional athletes is clear. When his father confronted him about his steroid problem, Rob Garibaldi, a baseball player who began using steroids at age eighteen, said: "I'm a baseball player, baseball players take steroids. How do you think Bonds hits all his home runs? How do you think all those guys do

122. The sprinter won five medals—three gold and two bronze—during the 2000 summer Olympics in Sydney, Australia. See FAINARU-WADA & WILLIAMS, *supra* note 20, at 92. In October 2007, however, Jones pleaded guilty to lying to federal prosecutors and admitted to using PEDs during her Olympic campaign. Layden, *supra* note 11.

123. Consider Barry Bonds, who had already compiled Hall of Fame statistics before allegedly turning to performance-enhancing drugs to advance his own career. See FAINARU-WADA & WILLIAMS, *supra* note 20, at 36–39.

124. Chip Dempsey, *Steroids: The Media Effect and High School Athletes*, 40 NEW ENG. L. REV. 731, 732–33 (2006).

125. See CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL YOUTH RISK BEHAVIOR SURVEY: 1991–2005—TRENDS IN THE PREVALENCE OF MARIJUANA, COCAINE, AND OTHER ILLEGAL DRUG USE (2006), available at http://www.cdc.gov/HealthyYouth/yrbs/pdf/trends/2005_YRBS_Drug-Use.pdf.

126. See *id.*; Dempsey, *supra* note 124, at 733. Strengthening the argument that athletes' actions send messages to America's children is a recent statistic indicating that, in the years since 2003, at which time the professional leagues began clamping down on steroids in their respective sports, steroid use among youths has declined to 4.0%. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 125.

127. See discussion *supra* note 7.

all this stuff? You think they do it from just working out [like] normal?”¹²⁸ Dr. Garibaldi, his mother, explained:

[O]ur society, especially our youth, ha[s] heard an implicit message, that to be competitive and successful in sports and to have the edge of added strength and power, performance-enhancing supplements and/or steroids are necessary.

....

... Subjected to media images, messages from successful professional athletes, and an unspoken code that steroids provide the edge, youth in particular have heeded that message.¹²⁹

Dante Marrazzo summarized the impact that athletes have: “They are our heroes and role models. . . . We . . . wear what they wear and drink what they drink Their influence on our behavior cannot be overstated”¹³⁰

For additional evidence of the strong link between the use of PEDs by professional athletes and teens, consider the popularity of andro, the steroid precursor made famous in 1998 when a reporter saw a bottle of the supplement in Mark McGwire’s locker.¹³¹ Though baseball did not ban andro until early 2005,¹³² it was illegal in 1998 in several other sports and has since been outlawed by Congress.¹³³ Notwithstanding its known dangers, however, national sales of andro quadrupled following the discovery of McGwire’s use of the product, with teenagers comprising many of the new consumers.¹³⁴

Congress, in several recent hearings investigating steroid use in Major League Baseball and the other professional sports, has heeded this growing problem and identified youth safety as the focal point of its legislative efforts.¹³⁵ Said U.S. Representative John Sweeney during one such hearing: “As athletes . . . turn[] to substances such as andro and its

128. Mark Fainaru-Wada, *Dreams, Steroids, Death—A Ballplayer’s Downfall*, S.F. CHRON., Dec. 19, 2004, at A1.

129. Garibaldi, *supra* note 116, at 717, 719.

130. Marrazzo, *supra* note 119, at 75. *Compare id.* at 81, with Page, *supra* note 113, at 155 (“Simply put, whatever role professional athletes who use and/or abuse drugs and alcohol play in our nation’s substance abuse problems, these athletes are barely the tip of the iceberg.”).

131. Wilstein, *supra* note 10.

132. See Chris Snow, *MLB Steroid Policy Outlined*, BOSTON GLOBE, Jan. 14, 2005, at C1.

133. See Anabolic Steroid Control Act of 2004 § 2(a)(1)(B), Pub. L. No. 108-358, 118 Stat. 1661 (codified at 21 U.S.C. § 802(41)(A) (Supp. IV 2004)).

134. Tom Farney, *Senators Want Over-the-Counter Andro Ban*, ESPN.COM, Oct. 24, 2003, <http://espn.go.com/gen/news/2003/1024/1645745.html>; see also BRYANT, *supra* note 17, 158–59 (noting that andro sales increased 500% in 1998).

135. See, e.g., *DFSA Hearing*, *supra* note 23, at 8–9 (statement of Rep. Edolphus Towns, Member, House Comm. on Energy and Commerce) (“[M]y primary concern is the effect of steroid use . . . on our children. They idolize our pro athletes, and they listen very carefully to every word they say and to every swing and to every pass and to every shot they take. We can not allow the stupid decision of a few misguided, greedy pros to permanently harm a child’s health”); *Restoring Faith Hearing*, *supra* note 23, at 3 (statement of Rep. Tom Davis, Chairman, House Comm. on Government Reform) (“Our primary focus remains on the message being sent to the 500,000 steroid users in America’s high schools, children who play baseball, children who idolize and emulate professional baseball players.”).

muscle-building cousins, our children have become more susceptible to the allure of performance-enhancing substances. . . . [T]he use of steroids in sports would not be of such profound concern if it did not impact children so drastically.”¹³⁶

To summarize, there is strong evidence linking the troubling increases in teen PED use to the prevalent use of these substances by professional athletes. While this evidence is not empirical in nature,¹³⁷ the correlations are simply too strong, and the role of athletes in American society too pronounced, to, as one commentator has said, “play ostrich” to the influence of athletes on America’s children.¹³⁸ U.S. Representative Elijah Cummings, during a congressional hearing on steroid use in Major League Baseball, said the following:

The iconic status of the elite athletes in America’s society gives them tremendous influence over the attitudes and behaviors of . . . young people who aspire to be like them. The alleged . . . personal choices of even a few elite players can speak even louder than the scripted promotional messages that prominent athletes are paid to recite. Young people are the most impressionable consumers . . . of these messages and there is clear evidence that steroid use among young people is increasing at the same time that steroid use in professional [sports] is [so] widespread.¹³⁹

Returning to the economic questions presented, for these harms to be negative externalities imposed on society, they must, by definition, be ignored or incompletely accounted for by the athletes when determining whether to use PEDs. If an athlete fully considers the impact that his decision will have on children and still determines that the overall benefits of using PEDs outweigh the total social costs, then these harms are not an externality. As examined below, however, evidence indicates that the overwhelming performance incentives available in professional sports skew the athletes’ costs-and-benefits analyses virtually beyond repair. Before addressing these important issues this analysis first turns its attention to another potential externality from PEDs in professional sports: the public’s lost confidence in the integrity of the athletic enterprise.

136. *Anabolic Steroid Control Act of 2004: Hearing on H.R. 3866 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 6 (2004) (statement of Rep. John Sweeney).

137. Though this note is not empirically oriented, compiling and statistically analyzing causation data for the propositions advocated herein would be an interesting undertaking. With data most likely compiled through high school student surveys, many independent variables could be considered in a causation regression, including the person’s (1) age; (2) extracurricular activities, particularly involvement in athletics; (3) financial resources; (4) home state, perhaps identified by region; (5) hometown, identified as either urban or rural; (6) high school size; (7) classroom performance; (8) other activities; and (9) interest in professional sports, expressed on a scale.

138. Marrazzo, *supra* note 119, at 81.

139. *Restoring Faith Hearing*, *supra* note 23, at 46 (statement of Rep. Elijah Cummings, Member, House Comm. on Government Reform).

2. *Athletic Integrity: Does How We Play the Game Truly Matter More Than Winning?*

Sports have a pervasive influence on American society. Super Bowls are regularly among the most watched television programs in American history,¹⁴⁰ the World Cup and Olympics draw enormous global attention,¹⁴¹ and the media's insatiable appetite for sports transforms athletes into some of society's most visible personalities.¹⁴² Fans and non-fans alike must admit that sports have an incredible impact on the whole of American culture.

The book *The Games Do Count* chronicles this impact by cataloguing the importance of sports in the lives of American icons, including presidents, senators, television personalities, and successful businesspersons.¹⁴³ All pointed to athletic participation as a foundation of their later success; as leaders of the country, their insights are particularly enlightening. Said President George W. Bush, former owner of baseball's Texas Rangers: "[Kids] learn how to . . . sacrifice for something greater than themselves: the team. . . [W]atching sports and cheering for a team [are] . . . part of the [American] social fabric."¹⁴⁴ Hall of Fame running back Jim Brown seconded the President's motion: "[Sports] allow us to compete and sacrifice, to build character and, even if only for a moment, to transcend the everyday."¹⁴⁵ J.C. Watts, a former professional football player and U.S. Representative, best summarized the many lessons taught by athletics:

I tell young men and women all the time that if they take everything they learned on the football field, the basketball court, the baseball diamond, and apply those principles to the business arena, or to being a mom or a dad, or to being an elected official, they work, because they're universal. . . .

. . . [S]ports [are] a great educator for . . . hard work, sacrifice, and personal responsibility. . . .

. . . .

140. Super Bowl XLI, played in February 2007, was the third-most-watched television program of all time, its 93.2 million viewers trailing only the series finale of *M*A*S*H* and the 1996 Super Bowl between Dallas and Pittsburgh, which drew 94.1 million viewers. *Colts-Bears Draws No. 3 Audience of All Time*, NFL.COM, Aug. 7, 2007, <http://www.nfl.com/news/story?id=09000d5d800226d0&template=with-video&confirm=true> (last visited Sept. 4, 2007).

141. David J. Stern, *Law and Sports*, N.Y. ST. B.J., May/June 1994, at 44, 44.

142. See Marrazzo, *supra* note 119, at 75 (calling athletes "our heroes and . . . [our] villains").

143. BRIAN KILMEADE, *THE GAMES DO COUNT: AMERICA'S BEST AND BRIGHTEST ON THE POWER OF SPORTS* (2004) (including interviews with Presidents Gerald Ford, George H. Bush, and George W. Bush; Henry Kissinger; Condoleezza Rice; Jack Welch; John Kerry; Jon Stewart; Donald Trump; and many others).

144. BRIAN KILMEADE, *George W. Bush*, in *THE GAMES DO COUNT*, *supra* note 143, at 306, 310.

145. Jim Brown, *Foreword* to KILMEADE, *THE GAMES DO COUNT*, *supra* note 143, at viii, viii.

... You approach life the same way you'd approach the big game: You prepare yourself, you train, you condition, you make the sacrifices, the commitment, and you persevere.¹⁴⁶

Integrity is arguably the greatest of sport's many lessons. Though in 1991 he disagreed that professional athletes should be forced to succumb to random drug testing,¹⁴⁷ Alan Page, a member of the Pro Football Hall of Fame and a justice on the Minnesota Supreme Court, recognized the importance of integrity in sports: "[T]he public has a strong interest in the integrity of the individuals participating in a given sport. This [integrity] is a crucial part of what gives a sport its value."¹⁴⁸ To former President Ronald Reagan, the final score was truly secondary to the integrity of the competition. Reagan's son, Ron, said, "[He] understood that winning isn't the only thing; that how you play the game ultimately *is* the game . . ."¹⁴⁹ Indeed, society has strong interest in the integrity of the games we play and watch: "Those individuals who purchase tickets, watch on television, or are merely interested in professional sports have a right to expect that the participants perform at the highest possible level and that they do not engage in any fraud or deception with respect to their performance."¹⁵⁰

Though these are only the opinions of a few, it is clear that they reflect the thoughts of many—that sports embody numerous values that American society seeks to promote. So while protecting the nation's youth might be the legislature's number one goal,¹⁵¹ preserving the integrity of the games is not far behind. The use of PEDs in sports obviously threatens that integrity, because "[d]rug[] abuse among athletes discredits sports as an institution . . ."¹⁵² U.S. Representative Henry Waxman, during the congressional hearing on steroids in baseball appropriately entitled *Restoring Faith in America's Pastime*, stated: "Now America is asking baseball for integrity, an unequivocal statement against cheating, an unimpeachable policy and a reason for all of us to have faith in that sport again."¹⁵³

Though baseball has occupied the forefront of this debate, these arguments undoubtedly extend into every professional sport. Given the undeniably strong interest America has in athletics, anything undermin-

146. BRIAN KILMEADE, *J.C. Watts*, in *THE GAMES DO COUNT*, *supra* note 143, at 76, 79–80.

147. Page, *supra* note 113, at 155–56.

148. *Id.* at 158.

149. BRIAN KILMEADE, *Ronald Reagan*, in *THE GAMES DO COUNT*, *supra* note 143, at 112, 117.

150. Page, *supra* note 113, at 157.

151. *See supra* notes 135–36 and accompanying text.

152. Marrazzo, *supra* note 119, at 90.

153. *Restoring Faith Hearing*, *supra* note 23, at 11 (statement of Rep. Henry Waxman, Member, House Comm. on Government Reform); *see also id.* at 56 (statement of Sen. Jim Bunning, Member, Major League Baseball Hall of Fame) ("The players and Major League Baseball must be held accountable for the integrity of the game."); *id.* at 42–43 (statement of Rep. Mark Souder, Member, House Comm. on Government Reform) ("How low has the integrity of baseball sunk? Their example is sad. . . Right now, its records and current players, the overwhelming percentage who are completely innocent are all tainted.").

ing the athletic enterprise, whether gambling, violence, or PEDs, has a negative impact on the country's overall social welfare. The analysis now shifts to whether athletes fail to consider these potentially harmful effects of their conduct, a prerequisite for a negative externality to exist.

3. *Do Athletes Take Outside Parties into Consideration When Deciding Whether to Use PEDs?*

For an externality to exist, an action's total social impact cannot be included in one's decision-making calculus.¹⁵⁴ It is an action's unanticipated or unaccounted-for consequence on uninvolved parties that inefficiently affects society's overall welfare. For professional athletes to impose externalities on society, they must fail to fully consider the impact their PED decisions have on people other than themselves. There is insufficient hard data to know whether this is indeed the case, but a survey of the realities facing professional athletes provides a plausible response.

Despite the undeniable effects their choices have on American society,¹⁵⁵ many professional athletes fail to account for the ramifications of their actions on the nation's most impressionable generation and the country's confidence in the integrity of sports. This conclusion is rooted in one primary argument: the incentives rewarding athletes for superior performance, when combined with the short window in which to achieve success, are so privately compelling that it is virtually impossible for the athletes to fully evaluate the social costs and benefits of their decisions.

The benefits to be gained, in the form of fame and fortune, from success in professional sports are, for many, simply incomprehensible. On its website, *USA Today* maintains a searchable salary database for players in each of the four major American professional team sports. The average annual earnings per player in baseball, basketball, football, and hockey were \$2,827,104,¹⁵⁶ \$4,179,965,¹⁵⁷ \$1,678,236,¹⁵⁸ and \$1,662,687,¹⁵⁹ respectively. Between the four major leagues, the average

154. See *supra* notes 54–57 and accompanying text.

155. See discussion *supra* Part III.B.1, III.B.2.

156. During the 2006 Major League Baseball season, 823 players earned a total of \$2,326,706,685. See USATODAY.com Salaries Databases—Baseball, <http://asp.usatoday.com/sports/baseball/salaries/mediansalaries.aspx?year=2006> (last visited Oct. 12, 2007).

157. During the 2006–2007 National Basketball Association season, 435 players earned a total of \$1,818,284,972. See USATODAY.com Salaries Databases—Basketball, <http://asp.usatoday.com/sports/basketball/nba/salaries/mediansalaries.aspx?year=2005-06> (last visited Oct. 12, 2007).

158. During the 2006 National Football League season, 1907 players earned a total of \$3,200,396,115. See USATODAY.com Salaries Databases—Football, <http://asp.usatoday.com/sports/football/nfl/salaries/mediansalaries.aspx?year=2006> (last visited Oct. 12, 2007).

159. During the 2006–2007 National Hockey League season, 727 players earned a total of \$1,208,773,393. See USATODAY.com Salaries Databases—Hockey, <http://asp.usatoday.com/sports/hockey/nhl/salaries/mediansalaries.aspx?year=2005-06> (last visited Oct. 12, 2007).

earnings per player were \$2,197,883,¹⁶⁰ a 6300% premium over the average American worker.¹⁶¹

Even these averages pale in comparison, however, to the money earned by the games' best players. Quarterback Peyton Manning received a \$34.5 million signing bonus with the Indianapolis Colts in 2004.¹⁶² Yankees shortstop Alex Rodriguez signed a contract valued at a quarter of a *billion* dollars in 2001.¹⁶³ For the 2004–2005 season, NBA superstar Shaquille O'Neal earned \$27,696,430, or nearly \$76,000 *per day*,¹⁶⁴ every day of the year.

Fame, though not as quantifiable as a player's salary, often accompanies the exorbitant salaries seen in professional sports. Modern-day athletes enjoy equal celebrity with actors, musicians, and models. In an attempt to measure fame, *Forbes* releases its "Celebrity 100,"¹⁶⁵ which ranks the world's most powerful celebrities by considering income, Internet references, press clippings, television and radio mentions, and magazine presence.¹⁶⁶ The 2006 list featured twenty athletes, including Tiger Woods (5th), Kobe Bryant (25th), LeBron James (46th), Tom Brady (52nd), Michelle Wie (74th), and Serena Williams (87th).¹⁶⁷

With companies like Nike, McDonald's, and Coca-Cola frequently harnessing athletes' persuasive powers to promote their goods and services, endorsements are another means of measuring an athlete's fame. Consider, for example, Michael Jordan. Though he retired from the NBA in 2003, two years later Jordan was still one of the highest earners in sports, posting 2005 income of over \$33 million.¹⁶⁸ Global soccer star David Beckham reportedly earns \$24 million each year from endorsements,¹⁶⁹ while golfer Phil Mickelson recently signed an \$80 million endorsement contract with club-maker Callaway.¹⁷⁰

160. A total of 3892 players earned \$8,554,161,165. See *supra* notes 156–59 and accompanying text.

161. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 2581, NATIONAL COMPENSATION SURVEY: OCCUPATIONAL WAGES IN THE UNITED STATES, JUNE 2005, at 2 tbl.1-1 (2006), available at <http://www.bls.gov/ncs/ocs/sp/ncbl0832.pdf> (indicating a mean hourly wage of \$18.62 and a mean work week of 35.7 hours, computing to approximately \$34,500 in average annual earnings).

162. See USATODAY.com Salaries Databases—Football, *supra* note 158 (follow "Indianapolis Colts" hyperlink; then follow "Manning, Peyton" hyperlink).

163. Murray Chass, *Rodriguez Strikes It Rich in Texas*, N.Y. TIMES, Dec. 12, 2000, at D1.

164. See USATODAY.com Salaries Databases—Basketball, *supra* note 157 (follow "Miami Heat" hyperlink; then follow "O'Neal, Shaquille" hyperlink).

165. Lea Goldman & Kiri Blakeley, *The Celebrity 100*, FORBES.COM, June 15, 2006, http://www.forbes.com/2006/06/12/06celebrities_money-power-celebrities-list_land.html.

166. *Id.* (follow hyperlink for "more" at end of story).

167. *Id.*

168. Lacey Rose, *The World's Best Paid Athletes*, FORBES.COM, Mar. 22, 2006, http://www.forbes.com/business/2006/03/22/woods-sharapova-nike_cx_lr_0322athletes_2.html (follow hyperlink to "world's best paid athletes"; then follow "next" hyperlink).

169. *Id.*

170. *Id.*

As evidenced by these “fame data,” high earnings power is not restricted to the “big four” American team sports. *Forbes* reaffirmed the earnings potential found in all professional sports when, in 2006, it published a list of the world’s best-paid athletes during the prior twelve months, including earnings from both competition and endorsements.¹⁷¹ Golfer Tiger Woods led the pack, earning \$87 million in that span.¹⁷² Formula One Racing’s Michael Schumacher was second, with income of more than \$60 million.¹⁷³ Lance Armstrong, winner of seven consecutive Tours de France, raked in \$28 million.¹⁷⁴ *Forbes*’s statistics reaffirm that as much as it pays to be a professional athlete, it pays even more to be the best: the twenty-five people on *Forbes*’s list collectively earned \$702.4 million over the twelve-month period, an average of over \$28 million each.¹⁷⁵

For most people, the prospect of earning millions of dollars a year is too obscure to fully comprehend. To professional athletes, however, the opportunity could not be more real. The money available in their profession surrounds them every day—in the vacations their teammates take, the cars they drive, and the homes in which they live. Having reached their sport’s elite level, professional athletes know they are only a few home runs, sacks, goals, or baskets away from enjoying these same luxuries: “The difference between being a star making . . . \$20 million per year in [Major League Baseball] or driving a UPS truck is the difference between a .225 average and a .275 average (or 1 hit every 20 at bats). When this is found in a vial, you begin to understand the temptation.”¹⁷⁶ Finding a way to hit those extra home runs or record those additional sacks becomes their driving force.

The pressure of the clock that runs on every professional athlete’s career often adds overwhelming urgency to this drive to excel. Athletes realize that they have a very short window of opportunity to earn fame and fortune in professional sports. Average career lengths, particularly in the four major team sports, are less than five years.¹⁷⁷ Injuries are prevalent; every day an athlete competes could literally be his last.

In addition to the risk of injury, competition for the few spots in each sport is fierce; even the slightest slip in performance can result in an athlete losing his job.¹⁷⁸ The story of Leroy Reams is illustrative. Reams

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. Brian R. Cook, Commentary, *The Deal with the Devil*, 40 NEW ENG. L. REV. 765, 766 (2006).

177. See D. STANLEY EITZEN, *FAIR AND FOUL: BEYOND THE MYTHS AND PARADOXES OF SPORT* 183 (3d ed. 2006).

178. See, e.g., Lisa Pike Masteralexis, *Drug Testing Provisions: An Examination of Disparities in Rules and Collective Bargaining Agreement Provisions*, 40 NEW ENG. L. REV. 775, 777 (2006) (“Keep in mind that players are playing in an ultra-competitive environment where many, many players are striving for a limited number of . . . roster jobs.”); Interview by Scott Pelley with Bill Romanowski,

debuted in the big leagues as a pinch hitter on May 7, 1969. He struck out on three pitches, was sent back to the minor leagues immediately after the game, and he never again returned to the major leagues.¹⁷⁹ Such stories are part of every sport's locker room mythology.

By combining the opportunity for generational wealth and world-wide fame with a shrinking window of time to realize that opportunity, one begins to appreciate the incentives acting in athletes' lives as they ponder whether to turn to PEDs to elevate or prolong their careers. As one baseball player noted, "You've set up a reward system where you're paying people \$1 million to put the ball into the seats. Well, I need help doing that."¹⁸⁰

Even short-term success can translate into long-term financial freedom. Consider Brady Anderson, a baseball player who averaged fourteen home runs per year during a fifteen-year major league career.¹⁸¹ In 3271 career at-bats prior to 1996, Anderson hit a total of seventy-two home runs.¹⁸² Riddled with insecurity,¹⁸³ Anderson's low point came in 1991, when, after struggling at the plate for much of the season, he was sent down to the minor leagues.¹⁸⁴ A few years later, however, Anderson, back in the major leagues after dedicating himself to the weight room and discovering the power of creatine, a cutting-edge nutritional supplement, emerged as a superstar, belting fifty home runs during the 1996 season.¹⁸⁵ Though Anderson played six more seasons, he hit more than twenty home runs only one other time.¹⁸⁶ The 1996 season, however, was all he needed. In 1992, Anderson earned \$365,000.¹⁸⁷ In five seasons with the Orioles following his 1996 home run burst, Anderson made a total of nearly \$29.5 million.¹⁸⁸ Though Anderson has never been directly implicated as a steroid user, his story, regardless of whether it involved illegal PEDs, demonstrates the tangible performance results from "getting big," as well as the incredible financial rewards available for even a short burst of remarkable on-field achievement.

former NFL linebacker, *60 Minutes* (CBS television broadcast Oct. 16, 2005), available at http://www.cbsnews.com/sections/i_video/main500251.shtml?channel=60Sunday (enter "Romanowski" in "Search Videos" box; then select "'Romo' on Jerry Rice and THG") (Romanowski saying that "you have a lot of fear of losing your job . . . [b]ecause at any given time, there's always five, six, seven guys trying to take your spot . . .").

179. See BRYANT, *supra* note 17, at 82.

180. Verducci, *supra* note 14, at 44; see also Latiner, *supra* note 115, at 198 ("[C]oncerns of financial success, athletic health, and fair competition can potentially conflict.").

181. See *Brady Anderson*, in *BASEBALL ALMANAC*, <http://www.baseball-almanac.com/players/player.php?p=anderbr01> (last visited Sept. 4, 2007).

182. See *id.*

183. See BRYANT, *supra* note 17, at 81 ("Anderson feared that the statistics on the back of [his baseball] card would be a lasting reminder of all he was not.").

184. *Id.* at 82.

185. *Brady Anderson*, in *BASEBALL ALMANAC*, *supra* note 181.

186. See *id.*

187. *Id.*

188. See *id.*

Make no mistake, the almighty dollar drives professional sports. For the athletes, the incentive is to win—now and at any cost. Winning brings fame, fame brings money, and money is the name of the game.¹⁸⁹ Like a drug itself, players become addicted to the rewards of their profession:

The louder the public applause, the greater the desire to stay within earshot. . . . With professional athletes, fame comes in a package so seductive anyone presented with it would be hard-pressed to put it down. Athletes are showered with money, celebrity, and more[—]an almost-universal consensus that their physical prowess is so glorious, magical, and precious, nothing else they do could ever measure up to their performance in the sports arena.¹⁹⁰

A recent commentary discussed the tensions in today's professional sports world: "The lure of fame and fortune is evident at every level of [sports] The need to feed the beast looks the other way when steroids may help to sell the game."¹⁹¹

Faced with these overwhelming incentives, it is at least understandable, if not acceptable, that athletes fail to consider the effects their decisions have on something as ambiguous as the nation's "social welfare" when deciding whether to use PEDs to advance their careers. The rewards are simply too compelling and the perceived risks too remote. Placed in their shoes, it is the rare individual who would not be tempted by similar promises of wealth and celebrity.¹⁹² In fact, given this incentive structure, perhaps the amazing thing is not that so many athletes use PEDs, but that *more* athletes choose not to.¹⁹³

To summarize this portion of the analysis, two potential externalities have emerged as the primary social concerns of increasing PED use among professional athletes. The first is the negative example their use sets for our nation's youth. The second is the public's growing mistrust in

189. See Latiner, *supra* note 115, at 197–98 ("These leagues are driven by profit, and because enhancement of athletes can lead to better performance, it is possible that profits may rise as a result.")

190. Joan Vennoch, Op-Ed., *Stakes High, Bruschi Rolls Dice*, BOSTON GLOBE, Oct. 23, 2005, at E11.

191. Cook, *supra* note 176, at 767–68.

192. See Rick Collins, *Changing the Game: The Congressional Response to Sports Doping via the Anabolic Steroid Control Act*, 40 NEW ENG. L. REV. 753, 762–63 (2006) (questioning whether athletes are so different from others in society who have succumbed to temptation, such as stock traders acting on insider information or corporate executives selling company secrets). Under this philosophy, perhaps Mark McGwire, instead of being vilified for allegedly using PEDs during his career, should be celebrated for choosing to stop using supplements when he learned of the impact his use was having on children. See BRYANT, *supra* note 17, at 186.

193. President Bush has recognized the incentive problem facing today's athletes:

[P]eople involved in sports have a responsibility to send the right messages. They must take their responsibility seriously as sportsmen. . . . I don't want some pro athlete feeling like he can increase his worth in the marketplace by taking steroids. He or she is hurting his or her body and at the same time sending messages to eighth-grade kids that if you want to succeed all you have to do is take steroids. It's an irresponsible message sent by professional athletes who should know better.

BRIAN KILMEADE, *George W. Bush*, in *THE GAMES DO COUNT*, *supra* note 143, at 310.

the integrity of sports. These externalities exist because the scales upon which the athletes weigh their decisions are undeniably tipped in favor of the pursuit of athletic achievement. In the athletes' eyes, the benefits of success almost certainly outweigh virtually any cost.

4. *The Alternative Hypothesis: Do PEDs Actually Enhance Social Welfare by Providing More of What Society Wants?*

This section presents an alternative economic hypothesis to the negative externality proposition offered above: that society's willingness to invest increasing amounts of time and money in professional sports implies that it approves of, and benefits from, PEDs in sports. If so, these PEDs arguably impose a *positive* externality on society. The prototypical example of a positive externality is a beekeeper's bees pollinating his neighbor's flowers.¹⁹⁴ Though the beekeeper maintains the bees for his private use, his neighbor enjoys the benefits of pollination with none of the costs—a positive externality. While this note has thus far considered the potentially negative externalities resulting from professional athletes' decisions to use PEDs, one can argue that, like the beekeeper's bees, PEDs actually add to social welfare.¹⁹⁵

As one writer has observed, "Athletes are but a microcosm of society."¹⁹⁶ If this is true, it could follow that society is not endangered by the lessons taught by sports, but, conversely, that sports are poisoned by the lessons being taught in society. Has *society* made athletes into what they are today? Indeed, perhaps society's implicit encouragement of PEDs in sports lies at the root of the problem.

The fuel that drives the machine, money, comes from consumers—every Sunday couch potato, Monday morning quarterback, and Saturday superfan. By holding the keys to the proverbial bank, the power of change appears to rest with the American public. Newspaper editorials, sports talk radio shows, exposé television programs, and law review notes pass largely unobserved and unheeded by professional athletes. To enact change, it is necessary to strike athletes at the very foundation of their enterprise: their bank accounts.¹⁹⁷ Nothing speaks more loudly than empty seats and low television ratings. If the financial rewards disappear amid cries for drug reform, perhaps athletes will embrace their status as role models in American society and make their decisions accordingly: "[I]f . . . fans are likely to change their . . . consumption of the sport in the

194. See COOTER & ULEN, *supra* note 27, at 44.

195. As counterintuitive as this seems, economists are also famous for suggesting that there can be "too little" crime and "too few" accidents. See *supra* notes 50–51 and accompanying text.

196. Marrazzo, *supra* note 119, at 78; see also 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, 181 (2003) ("Sports are a partial reflection of societal norms and values.").

197. See Lewis Kurlantzick, *Is There a Steroids Problem? The Problematic Character of the Case for Regulation*, 40 NEW ENG. L. REV. 789, 794 (2006) ("League action would be rooted in a practical concern about the financial implications of athletes with bad images.").

absence of league action against steroid use, it would make sense simply as a matter of sound commercial judgment to take action to avoid this customer alienation.”¹⁹⁸

Yet by virtually every measure, sports in America are as popular as they have ever been. Game attendance is at an all-time high.¹⁹⁹ The leagues have negotiated record television contracts with the world's largest networks.²⁰⁰ The 2007 Super Bowl was the third most-watched television program in history.²⁰¹ Franchise values²⁰² and player salaries²⁰³ have never been higher. What message is the American public sending? So long as the turnstiles continue to spin and the advertisers continue to pay, change may never come. Despite protests in the media and critical conversations at the water cooler, dollars speak louder than words.²⁰⁴ Said Brian Cook in *A Deal with the Devil*:

198. *Id.*

199. See Mark Maske, *Cowher Won't Return as Steelers Coach*, WASH. POST, Jan. 5, 2007, at E5 (noting that the NFL set a regular-season attendance record for the fourth consecutive year, with total paid season attendance of over seventeen million fans); Press Release, Major League Baseball, *Major League Baseball's Record Attendance Tops 76 Million* (Oct. 2, 2006), available at http://mlb.mlb.com/news/press_releases (follow “MLB Press Releases Archive” hyperlink; then enter “October” and “2006” in pull-down menu and follow “Go” hyperlink; then follow “More Results” hyperlink; then select appropriate press release) (noting that baseball, with total season attendance of over seventy-six million people in 2006, set a regular-season attendance record for the third consecutive year); *NBA Sets All-Time Attendance Records*, NBA.COM, Apr. 19, 2007, http://www.nba.com/news/attendance_070419.html (stating that the NBA finished the 2006–07 regular season with the highest average and total attendance in league history); *NHL Sets Records for Total, Average Attendance*, NHL.COM, Apr. 19, 2006, <http://www.nhl.com/news/2006/04/269348.html> (noting that the NHL set records for average and total attendance during the 2005–06 regular season).

200. Bill Griffith, *NFL Extends Contracts with CBS, FOX for \$8B*, BOSTON GLOBE, Nov. 9, 2004, at F1 (discussing the NFL's six-year, \$8 billion contract extending an original agreement worth \$17.2 billion); *ESPN, MLB Agree to 8-Year Contract*, ARIZ. REPUBLIC, Sept. 15, 2005, available at <http://www.azcentral.com/arizonarepublic/sports/articles/0915mlbtv0915.html> (discussing baseball's eight-year, \$2.37 billion contract with ESPN and its six-year, \$2.5 billion contract with Fox); *NBA TV Deal Moves to ABC, ESPN*, ESPN.COM, Jan. 22, 2002, <http://espn.go.com/nba/news/2002/0122/1315389.html> (reporting the NBA's new television contract worth \$4.6 billion).

201. See *Colts-Bears Draws No. 3 Audience of All Time*, *supra* note 140.

202. For recent estimates of franchise values in Major League Baseball, the National Basketball Association, the National Football League, and the National Hockey League, see Forbes Lists, <http://www.forbes.com/lists> (under the “Sports” heading, follow the hyperlink for each respective sport) (last visited Sept. 4, 2007).

203. See MAJOR LEAGUE BASEBALL COLLECTIVE BARGAINING AGREEMENT, *supra* note 90; NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, *supra* note 90; NATIONAL FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT, *supra* note 90; NATIONAL HOCKEY LEAGUE COLLECTIVE BARGAINING AGREEMENT, *supra* note 90.

204. See Verducci, *supra* note 14, at 48 (quoting former Major League outfielder Chad Curtis: “If you polled the fans, I think they'd tell you, ‘I don't care about illegal steroids. I'd rather see a guy hit the ball a mile or throw it 105 miles an hour.’”). In an analogous situation, consider the response of fans to the bevy of off-the-field problems recently encountered by the Cincinnati Bengals. In a fourteen-month span beginning in December 2005, nine Bengals were arrested on charges involving drug possession, domestic violence, breaking and entering, stealing, and weapons. Bill King, *Bad Behavior: Will Fans Ever Walk Away?*, STREET & SMITH'S SPORTSBUSINESS JOURNAL, Sept. 17–23, 2007, at 1, 17–18. Rather than walking away in frustration, however, Bengals fans embraced the team as never before. During the 2006 season, the Bengals set home attendance records and increased their streak of consecutive capacity crowds to twenty-eight games. *Id.* at 18. All 114 private stadium suites were occupied, and the team now has a season-ticket waiting list. *Id.* In addition, Bengals jersey sales were third in the NFL. *Id.*

We want to be entertained and who better to entertain us than these pumped up gladiators. We want to watch larger than life figures who climb into the ring and battle the tigers and lions for our enjoyment. And like the gladiators, we care not whether they die from a lion, steroids, or neglect.²⁰⁵

Cook continued by saying that “[w]e no longer herald the uncommon accomplishments of the average man.”²⁰⁶ Instead, American society has adopted a “win at any price, everyone’s doing it, look at what I will get if I can pull this off” attitude.²⁰⁷ Said Lisa Pike Masteralexis: “[W]e are living in a society that rewards the ability to perform at the highest levels and is obsessed by our appearance, even if both are achieved through artificial means”²⁰⁸

If society, hesitant as it might be to admit it, has embraced Cook’s drug-engorged gladiators through its continued financial support of the athletic enterprise, then the use of these drugs may, in fact, augment social welfare. Put differently, people, as demonstrated by their spending patterns, derive subjective joy from seeing incredible feats of athletic accomplishment. For many, it appears that the benefits derived from seeing such achievements—even amidst mounting evidence of the chemically enhanced methods by which they are attained—outweigh any negative effects, thereby increasing that population’s overall welfare. Such is the definition of a positive externality.

Some will undoubtedly read the preceding paragraph with horror. How can drugs possibly be viewed as a benefit to society?²⁰⁹ From the perspective suggested in this hypothesis—that society craves superhuman achievement, even if attained by artificial means—the drugs are not the problem but are merely a by-product of some larger concern. Perhaps the problem of PEDs in sports is more of an ethical crisis reflective of society as a whole: “[athletes] are, after all, what we in society have made them to be.”²¹⁰

205. Cook, *supra* note 176, at 768; see also Verducci, *supra* note 14, at 48 (quoting former National League MVP Ken Caminiti, a professed steroids user, as saying, “[The fans] come to the arena to watch gladiators. . . . They want to see warriors.”).

206. Cook, *supra* note 176, at 768.

207. *Id.* at 766.

208. Masteralexis, *supra* note 178, at 777.

209. This portion of the analysis considers only the possibility that PEDs impose a positive benefit on *society*. There is also a potential positive externality enjoyed by the teammates of players choosing to use PEDs. The fact that players choose to use PEDs implies their belief that this use will make them better players; better players lead to better teams. Obviously, the better a team is, the greater the financial and social rewards available for every member of that team, regardless of whether he is using PEDs personally. In this way, not only do the athletes using PEDs benefit from their use, but their teammates do as well.

210. Marrazzo, *supra* note 119, at 91 (“As we demand our athletes to be role models for our youth, we should provide leadership and role models for the athletes themselves. They are, after all, what we in society have made them to be.”).

C. Using Behavioral Law and Economics to Explain Systematic Deviations from Predictability

Faced with the overwhelming incentives discussed above, it certainly seems reasonable to evaluate athlete decision making using the traditional economic model of cost-benefit analysis, which, given a series of simplifying assumptions, is known as rational choice theory.²¹¹ Recent scholarship, however, has identified systematic deviations from “rational” behavior. These deviations, caused by innate character traits known as cognitive biases, help further explain why athletes continue to make the decisions they do regarding their use of PEDs. Scholars have referred to this expansion of the law and economics field as “behavioral law and economics.” Though scientists have identified many cognitive biases—the hindsight bias,²¹² self-serving bias,²¹³ and status quo bias/endowment effect,²¹⁴ to name but a few—this section explains one common cognitive bias discussed in behavioral law and economics, the overoptimism bias, and considers its application to athletes’ drug-use decisions. Next, it offers a different theory: that the inherently competitive nature of some individuals, most notably elite athletes, acts as a quasi-cognitive bias, pushing them toward victory with little consideration for the costs incurred by their decisions. This note refers to this systematic deviation as the “winner’s bias.”

1. Applying the Overoptimism Bias to the Use of PEDs in Sports

Recall from the background discussion²¹⁵ that the overoptimism bias causes actors to overestimate the probability of positive events in their lives and to underestimate the likelihood of negative events.²¹⁶ A driver, for example, even if she knows the statistical probability of being in an automobile accident, will likely underestimate her own chances of being in such an accident.²¹⁷ Accounting for the overoptimism bias in athletes’ decisions to use PEDs strengthens the argument that the government should become actively involved in discouraging PED use among professional athletes.

As the study of personal choice, traditional economics is premised on the idea that any activity can be encouraged or discouraged by increasing the costs incurred or benefits gained from engaging in that activ-

211. See *supra* notes 33–34 and accompanying text. For a fuller discussion of rational choice theory, including its limitations, see Korobkin & Ulen, *supra* note 33, at 1055–75.

212. See Korobkin & Ulen, *supra* note 33, at 1095–96.

213. See *id.* at 1093–94.

214. See *id.* at 1107–10.

215. See *supra* notes 78–80 and accompanying text.

216. See Korobkin & Ulen, *supra* note 33, at 1091.

217. See *id.* at 1092; see also *supra* notes 79–80 and accompanying text (discussing the overoptimism bias in the context of marriages).

ity.²¹⁸ The overoptimism bias, like the other cognitive biases, undercuts this argument. In the context of professional sports, more frequent testing and harsher penalties for failed tests are intended to deter athlete drug use. If, however, the overoptimism bias causes athletes to underestimate the risks of being caught despite these higher costs, more frequent tests and increased penalties will not have the desired effect.

To compensate for this skew in predicted behavior, it might be necessary for the governing body, whether the individual sport or the federal government, to *overdeter* by imposing a cost structure that is objectively too harsh. Because such dramatic measures appear too strict on their face, it is unlikely that such enhanced penalties would be approved during the collective bargaining process. Such stringent guidelines could, however, be unilaterally imposed by the federal government. The next section presents a corollary to the overoptimism bias, the winner's bias, which posits that elite athletes fail to act predictably because of their innate drive to be victorious in competitive situations.

2. *The "Winner's Bias": The Innate Competitive Fire that Drives Elite Athletes to Win at All Costs*

This note suggests that the inherent competitiveness of world-class athletes, referred to herein as the "winner's bias," causes deviations from standard rational choice theory just as predictable as the overoptimism bias.²¹⁹ The winner's bias hypothesizes that certain people, many of them athletes, when faced with a choice between either guaranteeing themselves victory, even if combined with the threat of harm, or protecting themselves from that harm, but leaving uncertain their chances at victory, will generally choose the former.²²⁰

Though cognitive biases typically exist to some degree in most people, the winner's bias is a much more limited theory: this note suggests the winner's bias is present only in a certain cross section of the popula-

218. See *supra* notes 35–36 and accompanying text.

219. The winner's bias shares some similarities with other human urges, such as hunger, thirst, and sexual desire, which Korobkin and Ulen refer to as "visceral cravings." See Korobkin & Ulen, *supra* note 33, at 1117. These cravings overpower actors and cause them to act in ways that do not maximize utility, such as the dieter who is driven to overeat or the sleepy driver who falls asleep at the wheel. A primary difference between visceral cravings and the winner's bias, however, is that the outcomes caused by cravings are generally against the actor's subjective aspirations—the dieter clearly wishes to lose weight and the driver to remain awake—while actors influenced by the winner's bias *want* to win. Thus, choices made in response to the winner's bias propel actors closer to their subjective goals, while choices made as a result of visceral cravings often push actors further from theirs. For a full discussion of visceral cravings, see *id.* at 1117–19.

220. The winner's bias is also analogous to what Jolls, Sunstein, and Thaler refer to as "bounded willpower," which predicts that people "will often behave in ways at odds with conventional economic analysis, due to problems of self-control." See Jolls et al., *supra* note 72, at 1538. In the criminal context, they further suggest that flawed temporal discount rates, i.e., the inability to accurately compare present benefits with future costs, contribute to criminals' bounded willpower. See *id.*; see also Korobkin & Ulen, *supra* note 33, at 1119–20 (discussing the inconsistent comparisons of short- and long-term benefits and costs). Similar arguments can be made with respect to athletes.

tion—a cross section including many of history's most successful athletes.²²¹ Elite athletes combine a variety of personal characteristics to achieve athletic greatness. It is undeniable they possess rare physical abilities—the talent to leap higher, run faster, and balance better. Many also exhibit high “sport IQs” that help them maneuver through the chaos surrounding them in competition by reacting with sport-specific savvy. Perhaps no trait, however, separates elite athletes more than their internal competitive fires. Because there is a dearth of empirics supporting this suggestion, this note turns instead to anecdotal evidence to investigate the plausibility, if not the statistical reality, of the winner's bias.

The winner's bias manifests itself in cheating in sports. As long as sports have existed, participants have tried to gain advantages.²²² To athletes, “it ain't cheating if you don't get caught” is more than a casual saying; it is a way of life. Indeed, “those determined to win at any cost will inevitably find a way to cheat.”²²³ Fans observe rampant cheating in every game on television: the wide receiver trapping the ball against the ground yet attempting to convince officials that he made a legal catch; the runner on second stealing the catcher's signs and relaying them to the hitter; or the tennis star arguing that an opponent's shot was out-of-bounds, though she knows that it fell inside the line. The winner's bias proposes that these people, rather than making conscious decisions to cheat, are instead driven to do so because they are innately obsessed with winning. These same qualities could carry over to the context of PEDs.

In a 1995 poll of 198 Olympic-caliber athletes, 195 of them said that they would take PEDs if they knew they would win without being caught.²²⁴ As Olympians, these athletes lacked the monetary incentives typical in American professional sports. Their sole motivation was the pursuit of victory.

To those athletes for whom the call of fame and fortune does exist, the internal drive to succeed is equally as prevalent, acting as another lever on their decision-making mechanism and pushing them toward the lure of PEDs. While money might be “the name of the game,”²²⁵ win-

221. This is not to suggest that no other people, aside from elite athletes, are born with this innate competitive fire. Other people are undoubtedly competitive in their own lives; but most simply lack other qualities—notably, world-class athleticism—that produce incredible athletes.

222. See, e.g., George Diaz, *Citius, Altius, Fortius—Swifter, Higher, Stronger*, ORLANDO SENTINEL, Sept. 15, 2000, at G3 (noting that at the inaugural Olympics, athletes ate sheep and dog testicles to improve performance).

223. Collins, *supra* note 192, at 762. In a twenty-year study of nearly 80,000 high school, college, and professional athletes, athletes scored worse than the general population on tests of moral reasoning. Equally as troubling, athletes rarely scored higher as college seniors than as high school freshmen, often scoring worse. The results support the argument that “winning is more important than fair play.” See George Dohrmann, *Do College Athletics Corrupt?*, SPORTS ILLUSTRATED, Mar. 5, 2007, at 67.

224. See Michael Bamberger & Don Yaeger, *Over the Edge*, SPORTS ILLUSTRATED, Apr. 14, 1997, at 60, 62; cf. Jolls et al., *supra* note 72, at 1538–40 (discussing the effects of “bounded willpower” and “hyperbolic discounting” on criminals' decisions to commit crimes).

225. See discussion *supra* Part III.B.3.

ning, not surprisingly, remains the greatest motivation for many elite athletes. Michael Jordan, considered by many to be the greatest competitor of the modern era, confirmed that a true competitor's motivation rests beyond financial incentives: "I love to compete and it isn't the money. I just love the competition. . . . I could play you for a dollar. But . . . if I'm going to play then I'm going to play to win."²²⁶ Stories of Jordan's competitive nature, from his feats on the hardwood to his forays in Las Vegas, are legendary. In his book, *Rare Air*, Jordan offered the following:

[T]he object of the game is to win. . . . [A] lot of people might approach it another way. They might think, "It is only a game and you are supposed to have fun, so you shouldn't make a game larger than life." I don't agree If I'm going to play, then when I walk between those white lines, I'm going to play to win.²²⁷

The winner's bias cannot be distilled to a simple choice between cheating and not. This intense desire to win undercuts virtually *any* fear, not only the fear of being caught. The 1995 Olympian poll is again illustrative: fifty percent of the athletes indicated they would trade five years of continuous success in their sport knowing that at the conclusion of the five years they would die.²²⁸ As a 1966 Tour de France cyclist once said, "[I]f it takes 10 [pills] to kill you, I'll take 9."²²⁹ To many athletes, then, sports are literally life and death.

Perhaps no modern athlete better embodies the winner's bias than New England Patriots linebacker Tedy Bruschi. After suffering a debilitating stroke before the 2005 football season,²³⁰ Bruschi fought back from partial paralysis to return to the gridiron midway through that same season, a decision that raised many eyebrows.²³¹ At the time, Bruschi had already played professionally for nine seasons and won three Super Bowls as a member of the Patriots.²³² He undoubtedly had trophies on his mantle and a bank account full of money. He had a wife and beautiful children. Why, then, risk all of these things with apparently so little to gain and so much to lose? To many athletes, the answer is simple: the need to compete and the need to win.

This note suggests three independent economic reasons supporting government's active role in regulating the use of PEDs in professional

226. MICHAEL JORDAN, *RARE AIR: MICHAEL ON MICHAEL* 76 (Mark Vancil ed., 1993).

227. *Id.* at 28.

228. See Bamberger & Yaeger, *supra* note 224, at 62; cf. Jolls et al., *supra* note 72, at 1538–40 (discussing the effects of "bounded willpower" and "hyperbolic discounting" on criminals' decisions to commit crimes); Korobkin & Ulen, *supra* note 33, at 1123 (using cigarettes as an example of "multiple selves": "A stiff tax on cigarettes . . . can be viewed as aiding the future-oriented self in its battle with a more present-oriented self that values immediate gratification over long-term health.").

229. Garibaldi, *supra* note 116, at 724 (second alteration in original).

230. See Ron Borges & Nick Cafardo, *Bruschi Had Mild Stroke, Team Says—Scenarios Vary for Treatment*, BOSTON GLOBE, Feb. 18, 2005, at A1.

231. See, e.g., Vennoch, *supra* note 190.

232. Tedy Bruschi—Official New England Patriots Biography, <http://www.patriots.com/team/index.cfm?ac=playerbio&bio=153> (last visited Sept. 4, 2007).

sports. First, the aggregate transaction costs of allowing the individual parties to independently bargain socially desirable drug-testing provisions are so high that the government should step in to alleviate the social burden. Second, athletes fail to consider the externalities their decisions impose on the rest of society, and government intervention would encourage them to internalize the social costs of their actions. Third, cognitive biases, including the “winner’s bias,” cause athletes to act socially suboptimally and the government, using the contours of the law, should take an active role in “debiasing” the athletes.

IV. RECOMMENDATION

This note recommends that the federal government, in an effort to address growing national concerns related to the use of PEDs in society,²³³ assume an active role in developing comprehensive drug management strategies governing the use of PEDs in American professional sports.²³⁴ This note does not suggest concrete steps that the government could take toward these desired ends. Instead, it simply offers economic justifications for the government’s active involvement.

Congress is uniquely situated to tackle the complex issues presented by PEDs in professional sports. First, by removing drug testing from the bargaining table and putting it under the auspice of federal regulation, the government would greatly reduce the transaction costs involved in collective bargaining. Second, by instituting more thorough and uniform testing, imposing stiffer penalties for failed tests, and better informing athletes of the widespread social side effects of their actions, the federal government could proactively encourage and incentivize the athletes to internalize and mitigate, to a large extent, the negative externalities from their decisions. Third, by identifying and counteracting the cognitive biases and decision-making heuristics exhibited by professional athletes when deciding whether to use PEDs, the federal government could facilitate more socially desirable decisions by the athletes.

233. See Sal Ruibal, *Doping Hardly a New Issue: WADA's Formation a Step in Enforcement*, USA TODAY, Sept. 9, 2004, at 3C (noting that since drug testing began in 1968 “every significant athletic achievement . . . has been greeted by eager cheers and wary skepticism”).

234. An issue not addressed in this note is the constitutionality of any proposed governmental action. Government involvement in what has traditionally been a private enterprise risks implicating constitutional rights of the athletes. See Matthew J. Mitten, *Drug Testing of Athletes—An Internal, Not External, Matter*, 40 NEW ENG. L. REV. 797, 805–06 (2006); Joshua Peck, Note, *Last Resort: The Threat of Federal Steroid Legislation—Is the Proposed Legislation Constitutional?*, 75 FORDHAM L. REV. 1777 (2006); see also Marrazzo, *supra* note 119, at 85 (asking the threshold question of whether the testing body “can be determined to be a state actor, or if its activities are colorable as state action”).

A. *The Government's Role in Lowering Transaction Costs*

As Coase recognized, the government presents a viable means to lower transaction costs in situations where such costs impede private resolution:

It is clear that the government has powers which might enable it to get some things done at a lower cost than could a private organisation [T]here is no reason why, on occasion, such governmental administrative regulation should not lead to an improvement in economic efficiency. This would seem particularly likely when . . . a large number of people are involved and in which therefore the costs of handling the problem through the market or the firm may be high.²³⁵

In most situations, private bargaining remains the preferred path to allowing parties to reach acceptable agreements.²³⁶ However, in circumstances where private bargaining has achieved inefficient results due to high transaction costs, the government, through legal reform, can “lubricate” the bargaining process, lower that process’s costs to society, and reach more socially desirable outcomes.²³⁷ Here, the aggregate costs of negotiating such a contentious issue, given the thousands of athletes, dozens of owners, millions of dollars, and abundant national interests involved, are prohibitively high.

To do this, the government would likely amend the National Labor Relations Act to remove employee drug testing from the list of mandatory bargaining subjects, at least in the limited context of professional sports,²³⁸ and instead institute its own set of PED procedures and punishments. By eliminating such a contentious issue, bargaining time would be reduced and the threat of strike—perhaps the most socially salient concern in terms of transaction costs²³⁹—would be greatly diminished. As discussed in the next section, even more significantly, public intervention of this sort would permit the government to structure comprehensive drug management strategies that deter and punish drug use among professional athletes at a socially desirable level.

B. *The Government's Role in Encouraging Socially Efficient Internalization of Harmful Externalities*

The second economic argument is that even if the parties negotiate a resolution, as many professional leagues indeed have, the bargained-for

235. Coase, *supra* note 27, at 17–18.

236. See *supra* note 59 and accompanying text.

237. See COOTER & ULEN, *supra* note 27, at 97.

238. Because of the unique social position of professional sports, see discussion *supra* Part III.B.2, it seems unnecessary to extend any changes to the NLRA to other professions or industries.

239. This section is limited to the context of transaction costs. Other social concerns discussed herein, such as children’s safety and athletic integrity, are not being compared to social concern with the threat of strike.

resolutions fail to adequately consider the costs inflicted on society by athletes' actions and therefore are not *socially efficient*. An efficient drug-testing scheme accounts for all social costs and benefits, i.e., potential externalities stemming from the use of PEDs in professional sports. Congressional action encourages parties to internalize the inefficient spillover of their decisions on unassuming parties in society.²⁴⁰ Pigou identified government's rationale for correcting externalities: "In any industry, where . . . the free play of self-interest will cause an amount of resources to be invested different from the amount that is required in the best interest of the national dividend, there is a *prima facie* case for public intervention."²⁴¹

Recall that economics is the study of personal choice.²⁴² The government influences these personal choices by subsidizing or taxing daily activities.²⁴³ Said Coase: "Since . . . people choose to perform those actions which they think will promote their own interests, the way to alter their behaviour . . . is to make it in *their* interest to do so."²⁴⁴ Pigou's justification for government involvement, offered nearly a century ago, is no less relevant today: "It is . . . possible for the State . . . to remove the divergence [between private and societal interests] by 'extraordinary encouragements' or 'extraordinary restraints' . . ."²⁴⁵ The government, by increasing the penalties associated with PED use, has an opportunity to deter athlete drug use with such severity that athletes will internalize and counterbalance the residual negative social effects of those continuing, despite the heightened scrutiny, to use PEDs. Done correctly, this would potentially eliminate the negative externalities from professional athletes' PED use and lead to a socially efficient amount of PED use in professional sports.²⁴⁶

C. *The Government's Role in Debiasing Through Law*

The winner's bias and other cognitive effects provide a final piece in the case supporting congressional action in the fight against PED use in professional sports. The government is uniquely situated not only to identify these biases, but also to develop countermeasures to their undesired effects.

240. See PIGOU, *supra* note 54, at 331. *But see* COASE, *supra* note 40, at 26 ("[I]t is easy to show that the mere existence of 'externalities' does not, of itself, provide any reason for governmental intervention.").

241. PIGOU, *supra* note 54, at 331.

242. See *supra* notes 32–34 and accompanying text.

243. The government, for example, uses speeding tickets to tax decisions to drive in excess of the speed limit and special driving lanes to subsidize decisions to carpool.

244. COASE, *supra* note 40, at 27–28 (emphasis added).

245. PIGOU, *supra* note 54, at 192.

246. Recall that the economic goal of drug deterrence is not total elimination, but merely reduction to a socially optimal level. See *supra* notes 49–51 and accompanying text.

Despite being congenital in nature, cognitive biases are not without remedy. Ironically, perhaps the most effective response to cognitive effects is the intentional triggering of other cognitive biases that counterbalance the original.²⁴⁷ In this process, which Jolls and Sunstein term “debiasing through law,” the government develops legal policies that help reduce or eliminate biased behavior by intentionally altering a person’s perceptions of the world around him.²⁴⁸

Though Jolls and Sunstein discussed many potential methods of debiasing,²⁴⁹ one in particular, the availability heuristic, is especially promising to mitigate the ill effects of the optimism or winner’s bias. Recall that the availability heuristic proposes that “making an occurrence available to individuals will increase their estimates of the likelihood of occurrence”²⁵⁰ Furthermore, studies have shown that providing people with “concrete, narrative” information, as opposed to purely statistical data, makes the occurrence in question more readily “available” to their internal recall systems.²⁵¹ These findings suggest that the government should provide athletes with stories of other athletes—perhaps friends or colleagues—who have been caught using PEDs, or of teenagers—like Rob Garibaldi—who have tragically died from PED use. Such stories can make these disheartening possibilities more easily recallable, thereby offsetting the negative effects of the winner’s bias, for example, on athletes’ PED decisions.

D. Addressing Opposition to Government Intervention

As with any debate, there are many counterarguments to the suggestion that the government should actively regulate PED use in professional sports.²⁵² These counterarguments focus in one of two general areas. First, the government’s administrative and law-making processes are not themselves costless, and the government’s costs far exceed those incurred by the sports themselves. Second, private resolution remains the best solution because the government, due to its unfamiliarity with

247. See Jolls & Sunstein, *supra* note 73. But see Jolls et al., *supra* note 72, at 1543–44 (questioning whether government actors, while attempting to enact policies to counter these systematic deviations, would fall prey to these same behavioral biases, rendering their attempts largely ineffective).

248. See Jolls & Sunstein, *supra* note 73, at 200, 202–03.

249. See, e.g., *id.* at 210–11 (discussing debiasing through framing).

250. *Id.* at 210.

251. *Id.* (“Concrete information appears to render the incident in question available in a way that can successfully counteract optimism bias.”).

252. Though Pigou has been criticized for adopting such an optimistic view of public intervention, he stressed there existed many situations in which government intervention would be inappropriate:

The case, however, cannot become more than a *prima facie* one, until we have considered the qualifications, which governmental agencies may be expected to possess for intervening advantageously. It is not sufficient to contrast the imperfect adjustments of unfettered private enterprise with the best adjustments that economists in their studies can imagine. For we cannot expect that any public authority will attain, or will even whole-heartedly seek, that ideal.

PIGOU, *supra* note 54, at 331–32.

the nuances of the various sports, will impose legislation that poorly addresses the sports' individual needs.

1. *Comparing the Costs of Legislation to the Costs of Private Bargaining in the Professional Sports Context*

The government is not itself costless.²⁵³ It should only become involved upon determining that its own costs would be less than the aggregate costs of allowing the parties to bargain their own resolutions.²⁵⁴ This note contends that even though most professional sports have drug-testing provisions currently in place, the related private transaction costs remain virtually incalculable. First, the number of parties—owners, athletes, and sports—is large and diverse.²⁵⁵ Second, the costs of strike are imposing.²⁵⁶ Third, the administrative and enforcement costs of monitoring, testing, and punishing athletes are exceptionally high.²⁵⁷ That the sports have already incurred some of these costs by successfully bargaining drug-testing provisions has little relevance when one considers the problem in the long-term. A fire doused today can easily be rekindled tomorrow. When aggregated over time and among the various American professional sports, these costs expand exponentially, making government intervention a much more socially efficient, i.e., cheaper, alternative than private bargaining.

Even assuming, *arguendo*, that the government's transaction costs do exceed those incurred by the private parties, it does not necessarily follow that the government should remain uninvolved in regulating PED use in professional sports. Transaction costs are merely the first step of the analysis. Even in hypothetically costless transactions,²⁵⁸ other factors—namely, negative externalities and socially suboptimal decisions caused by cognitive biases—can cause socially inefficient results. Thus, though transaction costs alone *might* not merit government involvement, when considered with these other rationales, the government clearly provides the most efficient and comprehensive solution.

2. *Law's Dynamic Nature, Agency Enforcement, and Misaligned Incentives*

Some argue that because employee drug testing is a mandatory subject of collective bargaining, government intervention would contradict

253. Coase, *supra* note 27, at 18.

254. *Id.*

255. *See supra* notes 96–97 and accompanying text.

256. *See supra* notes 100–03 and accompanying text.

257. *See supra* notes 110–11 and accompanying text.

258. Such transactions are necessarily hypothetical, as even the simplest real-world transactions involve some minimal level of costs. *See* Coase, *supra* note 27, at 15 (noting that costless transactions are “a very unrealistic assumption”).

the intent of the federal labor laws²⁵⁹ and that government should therefore refrain from becoming involved in the bargaining process.²⁶⁰ Under-scoring this is the idea that each governing body is uniquely situated to most effectively address PED use within its respective sport,²⁶¹ the government, on the other hand, must consider the problem from a more detached view and is therefore likely to overlook many of the nuances present in individual sports by imposing prophylactic legislation.

These concerns, while valid, are easily refuted. First, the law is dynamic, responding to changes in social norms and evolving to meet the demands placed upon it by a democratic government.²⁶² If society has identified the use of PEDs in professional sports as a major concern, the law should evolve to address this emerging danger. Second, the government, though operating from a high elevation, has ways of focusing in on important issues. While this note does not purport to recommend specific government action, one potential way to focus the government's power is to create an administrative agency specifically charged with eradicating PEDs from professional sports.²⁶³ By employing experts in the various sports and soliciting active involvement from the leagues, it is plausible that the government could develop tailored solutions. Third, and perhaps most importantly, why should society now expect the parties to reach an appropriate resolution when for years they have failed to address the situation? The parties themselves lack proper incentives to take sufficient corrective action. If the media and the government had not brought PEDs to the public's attention, it is unclear whether the athletes or the ownership would have ever taken unilateral action to clean up their respective sports.²⁶⁴

259. See, e.g., Schwab, *supra* note 92, at 254 (“[Congress] determined that optimal labor policy would leave labor relations to private, collective bargaining between labor and management.”).

260. See, e.g., Marrazzo, *supra* note 119, at 87 (“The success of any employee-related program, particularly one as emotionally charged as drug testing, rests with the ‘buy in’ of its participants. Accordingly, the collective bargaining process should be allowed to provide the necessary forum for debate and resolution of drug testing programs in professional sports.”); Masteralexis, *supra* note 178, at 775 (“I am convinced that performance enhancing drug use in professional sports should be addressed at the collective bargaining table and not on the floor of Congress.”).

261. See Mitten, *supra* note 234, at 806 (“Athletic governing bodies are in the best position to establish appropriate drug testing programs to regulate the permissible bounds of competition and to protect athletes’ health and safety.”).

262. Consider, for example, the evolution of the free speech laws. Many of the things seen on broadcast television today, including sexual innuendo, seminudity, and foul language, were not permitted on television fifty years ago. As society’s opinion about what is or is not acceptable for public broadcast has changed, the laws have evolved with it.

263. Administrative agencies, such as the Securities and Exchange Commission, Federal Communications Commission, Federal Trade Commission, and Food and Drug Administration, are commonly employed by the federal government to obtain expertise in specialized industries. See, e.g., Paul Sabatier, *The Acquisition and Utilization of Technical Information by Administrative Agencies*, 23 ADMIN. SCI. Q. 396, 396 (1978).

264. Cf. Cook, *supra* note 176, at 767 (“The disgraced athletes are not disgraced because they used, they are disgraced because they got caught.”).

Having already discussed the athletes' incentives in detail,²⁶⁵ consider for a moment the incentives of the ownership and its track record over the past decade in dealing with these issues. Though little information comes directly from the owners, their representatives, both within team management and league administration, have repeatedly had opportunities to investigate individuals suspected of drug use; each time these opportunities passed without action.²⁶⁶ To date, any steps to remedy the PED situation have come only at the prodding of the media²⁶⁷ and pressure from the government²⁶⁸—the inevitable backlash from “getting caught.” Absent these external triggers, team owners, management, league officials, and athletes were content to watch the money roll in.²⁶⁹ Professional sports, like any successful business venture, are driven by the profit motive: “These leagues are driven by profit, and because [chemical] enhancement of athletes can lead to better performance, it is possible that profits may rise as a result. In this environment the concerns of financial success, athletic health, and fair competition can potentially conflict.”²⁷⁰

Baseball, in light of its recent steroid developments, has been a lightning rod for much of the criticism. The owners' response has been called “especially slow and reluctant,” a delayed reaction so that baseball could breathe life back into a sport that was on life-support following the 1994 labor strike.²⁷¹ Today, however, fans have returned to the game in droves,²⁷² thanks in large part to the bulked up players patrolling the diamond.

Other professional sports are not immune from scrutiny. Football, with arguably the most respected American PED policy, has been criticized as well:

265. See discussion *supra* Part III.B.3.

266. See CANSECO, *supra* note 15, at 207 (“[T]he owners knew something was afoot. They could see it in the long list of shattered records, and in the long parade of ripped-and-cut athletes they employed. Plenty of trainers knew much, much more—I know because I told them myself. And the Major League Players Association knew what was going on, there’s no doubt in my mind.”); Shaun Assael & Peter Keating, *Who Knew?*, ESPN MAG., Nov. 21, 2005, at 69, 79–80, 84.

267. See, e.g., BRYANT, *supra* note 17, at 381–85; CANSECO, *supra* note 15, at 262; FAINARU-WADA & WILLIAMS, *supra* note 20, at xiv; Assael & Keating, *supra* note 266, at 70. See generally Verducci, *supra* note 14.

268. See, e.g., *Restoring Faith Hearing*, *supra* note 23; Address Before a Joint Session of the Congress on the State of the Union, 40 WEEKLY COMP. PRES. DOC. 94, 100 (Jan. 20, 2004) (“Athletes play such an important role in our society, but unfortunately, some in professional sports are not setting much of an example. . . . [T]onight I call on team owners, union representatives, coaches and players to take the lead, to send the right signal, to get tough, and to get rid of steroids now.”); *McCain: Baseball ‘Can’t Be Trusted,’* USATODAY.COM, Mar. 20, 2005, http://www.usatoday.com/sports/baseball/2005-03-20-congress-steroids_x.htm.

269. See Harvey Araton, *Players’ Steroids Proposal Lacking in Muscle*, N.Y. TIMES, Aug. 11, 2002, at 8-2 (“[T]he owners . . . have been complicit, content to watch balls fly out of the ballparks and make the cash registers ring.”).

270. Latiner, *supra* note 115, at 197–98.

271. See *id.* at 205, 215.

272. See Press Release, Major League Baseball, *supra* note 199 (noting that baseball has achieved record attendance in three consecutive seasons).

The NFL's cooperative business model operates differently and contains no structural incentive for the league to expose widespread doping in the sport. The NFL is not charged with creating and protecting an ideal of the sport of football. For the NFL, the "ideal" is whatever generates sales of its entertainment product. Exposure of widespread doping would damage public interest in the sport and diminish football's sports market share, which would, in turn, hurt the league and its member teams. Add to this the public's appetite for bigger, faster, harder-hitting players, and it is not difficult to understand why the NFL would be motivated to look the other way on the issue of player doping.²⁷³

To summarize, perhaps the strongest answer to each of the above arguments is that society should care not that the private parties have reached or could reach *any* solution, but instead that they reach the *socially desirable*, or *socially efficient*, solution. Whether the cause of social inefficiencies is high transaction costs, negative externalities, suboptimal decisions caused by cognitive biases, or a combination of the three, the government is positioned to develop socially efficient drug management strategies that are comprehensive, fair, and appropriate. In so doing, the government removes the problem from the individual parties, most of whom lack incentive to take corrective action, and positions itself to provide legal guidance that adequately protects society from the dangers of PEDs.

V. CONCLUSION

In conclusion, while theoretically it remains desirable and reasonable to look to the athletes and the owners to police their own actions, from a practical standpoint this note has shown such expectations to be largely unfounded. Faced with the overwhelming incentives present in modern sports—whether tangible like money or intangible like the competitor's inner drive—it is both unrealistic and arguably unfair to ask the athletes to protect themselves from the innate parts of their own character that we cheer so heartily while they are within the competitive arena. Thus, this note proposes that Congress should remove the onus of developing drug-testing provisions from the individual parties and should itself create drug management strategies aimed at reducing PED use in American professional sports to a socially desirable level.

While this note suggests that government action is clearly superior to the primary alternative of allowing the parties to privately negotiate resolutions, even this conclusion is somewhat unsatisfying. Given the proud history of American sports and the venerated integrity of the pro-

273. Daniel P. Fox, *Structural Barriers in Antidoping Measures*, 8 SPORTS LAW. J. 271, 276, 277 (2001) (calling the NFL's drug testing measures a "public relations stratagem, not an example of a league pursuing a higher ideal of sport").

verbial sportsman, the economic solution of “taxing” undesirable behavior, here in the form of either suspensions or fines, seems rather distasteful. Perhaps this note’s most enlightening thought comes not from either of these alternatives, but from another hypothesis offered briefly in the externality analysis: that the power of change rests with the American people. Society cannot continue to shower praise upon these athletes for their amazing athletic achievements while at the same time questioning the methods in which these achievements are attained. Though individuals continue to speak out against the ill effects of PEDs in sports, dollars speak louder than words. By spending record amounts on sports entertainment, America is implicitly approving the win-above-all mentality found not only in sports, but across modern society. As one commentator has noted: “[D]emonizing the drugs has too conveniently allowed us to externalize the problem, shifting the focus away from the painful introspection required. Perhaps the problem of steroids in sports lies not within the drugs, but within us.”²⁷⁴

274. Collins, *supra* note 192, at 763; *see also Restoring Faith Hearing, supra* note 23, at 258 (statement of Rep. Dennis Kucinich, Member, House Comm. on Government Reform) (“[I]f we leave here today without looking at the larger questions of pressures to succeed, pressures to win, pressures to make money, pressures to be bigger, pressures to be better, win at all costs, at the cost of health, at the cost of reputation, at the cost of life—if we don’t look at these life questions of win at all costs, if we don’t think about this, if we don’t go deeper with our thinking here today, we will be back here years from now, regardless of what these players so graciously commit to do.”).

