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DETERRENCE DEFEATS DOPING: HOW ARBITRATION CAN RESOLVE MAJOR LEAGUE BASEBALL'S PERFORMANCE- ENHANCING DRUG PROBLEM

Brice Barnes

I. INTRODUCTION

In December 2013, Robinson Cano signed a ten-year, \$240 million contract with the Seattle Mariners.¹ Only five years later, he tested positive for performance-enhancing drugs (PEDs) and was suspended for eighty games.² That same year he was traded to the New York Mets, where he has spent the rest of his career up to the time of this article's publication.³ Despite already facing an eighty-game suspension, Cano tested positive for PEDs again in 2020 and

¹ Katherine Acquavella, *Three Moves Mets Could Make with Robinson Cano's Salary off Their Books in 2021*, CBS SPORTS: MLB (Nov. 19, 2020), <https://www.cbssports.com/mlb/news/three-moves-mets-could-make-with-robinson-canos-salary-off-their-books-in-2021/>.

² Tyler Kepner, *With a Second Doping Suspension, A Solid Career Is Reduced to a Footnote*, N.Y. TIMES: ON BASEBALL (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/sports/baseball/robinson-cano-mets-suspended.html>.

³ Anthony DiComo, *Mets Officially Get Cano, Diaz from Mariners*, MLB (Dec. 3, 2018), <https://www.mlb.com/news/mets-complete-cano-diaz-trade-with-mariners-c301374582#:~:text=Robinson%20Cano%20traded%20to%20Mets&text=With%20the%20remaining%20salaries%20of,on%20their%20payroll%20each%20year.>

was suspended for the entirety of the 2021 season.⁴ Mr. Cano is not alone: He is one of several players who have been suspended for PED use and continued to use steroids.⁵ Why is it that Major League Baseball (MLB or the League) players continue to use steroids, even in cases where they have been suspended in the past? The underlying reason is likely the PED policy's failure to create enough deterrence from using these PEDs in the first place.

This article analyzes MLB's PED⁶ policy and proposes amending the policy by arbitrating the agreement to create one that further deters players from using PEDs.

MLB players are subject to the terms of the contract that they collectively negotiate with the League, called the Collective Bargaining Agreement (CBA).⁷ To create the CBA, MLB and the Major League Baseball Players' Association (MLBPA) negotiate the terms of the agreement that will govern the players' employment.⁸ The CBA contains the terms of players' employment in the League, including the length of the season, maximum and minimum salaries, and terms of supplemental agreements such as the Joint Drug Prevention and Treatment Program (Program).⁹

⁴ Kepner, *supra* note 2.

⁵ *Steroid Suspensions in Major League Baseball: Major League Baseball Players Suspended for Using Performance Enhancing Drugs*, BASEBALL ALMANAC, https://www.baseball-almanac.com/legendary/steroids_baseball.shtml (last visited Jan. 13, 2022) [hereinafter *Steroid Suspensions in Major League Baseball*]. Other players, like Manny Ramirez and Bartolo Colon, have been suspended more than once. *Id.*

⁶ *Prohibited Substances List*, MLB (July 1, 2015) <http://mlb.mlb.com/pa/pdf/prohibited-substances.pdf>. Note that "Performance Enhancing Substance" (the equivalent of "PEDs" as used here) is an all-encompassing term, and the MLB banned substances list contains over seventy PEDs. *Id.*

⁷ Dayn Perry, *MLB CBA Negotiations: Four Things to Expect in Coming Weeks Between Players and Owners with Lockout Likely*, CBS SPORTS (Nov. 5, 2021), <https://www.cbssports.com/mlb/news/mlb-cba-negotiations-four-things-to-expect-in-coming-weeks-between-players-and-owners-with-lockout-likely/#:~:text=The%20current%20collective%20bargaining%20agreement,%2C%20expires%20on%20Dec.%201>.

⁸ *Collective Bargaining*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/collective_bargaining (last visited Nov. 9, 2021); see also *About*, MLB PLAYERS ASS'N, <https://www.mlbplayers.com/about> (last visited Nov. 9, 2021). The MLBPA is a union that represents the interests of players in MLB. *About*, *supra* note 8. They serve as the bargaining agent for the players in the collective bargaining process. *Id.*

⁹ 2017–2021 Collective Bargaining Agreement, MLB (2017), <https://www.mlbplayers.com/cba> [hereinafter MLB CBA].

Federal labor law allows the parties to enter into this agreement and gives each side a special tool to create equal bargaining power, where the League is given the ability to lock players out from employment, and the players get the ability to strike (withhold their employment).¹⁰ Simply, the League can keep players from playing, and the players can refuse to play.¹¹ These tools are extremely valuable because they pressure the other side to concede to establishing a CBA and resume play.¹²

Once the CBA is established, players must abide by its terms.¹³ In the event a player violates a term or policy of the CBA, they might be subject to disciplinary action, usually in the form of a fine, suspension, or both.¹⁴ One supplemental agreement to the CBA that players often violate is the Program, which prescribes the suspensions players receive for violating the PED policy by testing positive for any drug from the banned substances list.¹⁵ Although this is a supplemental agreement, the Program's terms must still be agreed upon in the CBA.¹⁶ Despite the suspensions laid out in the Program, the use of PEDs has persisted in the sport since the Program was first created almost twenty years ago.¹⁷ The Program's

¹⁰ Gabe Feldman, *Collective Bargaining in Professional Sports: The Duel Between Players and Owners and Labor Law and Antitrust Law*, OXFORD HANDBOOK AM. SPORTS L. (Feb. 2018), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190465957.001.0001/oxfordhb-9780190465957-e-10>; see also Dayn Perry, *MLB Lockout: A Brief History of Strikes and Lockouts as Baseball Comes to a Halt for the First Time in 26 Years*, CBS SPORTS (Dec. 5, 2021), <https://www.cbssports.com/mlb/news/mlb-lockout-a-brief-history-of-strikes-and-lockouts-as-baseball-comes-to-a-halt-for-first-time-in-26-years/>. Until December 2, 2021, there had not been a player lockout since 1990. Perry, *supra* note 10. In 2021, the League locked the players out after failing to reach an agreement on the terms of the new CBA. *Id.* The last player strike arose when the season began without a CBA in place and the demands of the owners to enact a salary cap, ran from 1994 to 1995, covered 232 games, and resulted in the cancellation of the entire 1994 postseason and 938 regular-season games for the 1994 and 1995 seasons. *Id.*

¹¹ See sources *supra* note 10.

¹² See *id.*

¹³ MLB CBA, *supra* note 9.

¹⁴ *Id.* at 51–52.

¹⁵ Joint Drug Prevention and Treatment Program, MLB (2017), <https://www.mlbplayers.com/jda> [hereinafter MLB Program].

¹⁶ MLB CBA, *supra* note 9, at 347.

¹⁷ Tom Verducci, *The Numbers—and the Truth—About Baseball's PED Problem and Why It May Never Go Away*, SPORTS ILLUSTRATED (May 16, 2017), <https://www.si.com/mlb/2017/05/16/ped-suspensions-home-run-rate>. Although the Program has been in place for nearly twenty years,

current disciplinary measures do not seem substantial enough to appropriately deter players from breaking the policy. Players have far more to gain from breaking the policy and landing a lucrative contract than they have to lose from having an initial positive test.¹⁸ Because parties set these terms through a negotiation process where bargaining chips are used by each side to draw concessions,¹⁹ requiring the Program to go through arbitration might establish more substantial penalties.

The remainder of this article is divided into five parts: Part II discusses the significance of the PED issue and why resolution is necessary; Part III discusses the history of PED use in baseball and the efforts by the League to address it; Part IV proposes the solution of arbitration and explains how the process might work; Part V addresses potential objections to that solution; and finally, Part VI concludes.

II. SIGNIFICANCE

The Program prohibits a long list of banned substances, ranging from PEDs, like testosterone, to “drugs of abuse,” like cocaine.²⁰ If a player tests positive for any of those substances, they will receive the proper suspension based on the number of previous Program violations.²¹ Despite these suspensions, players continue to test positive for PEDs to this day.²²

Why does any of this matter? First and foremost, because PEDs are banned by the League, using them constitutes cheating; in turn, PED-related cheating makes it challenging to keep accurate records of players’ achievements.²³ There really is no way of knowing whether today’s players have accomplished something that players of the past had not.²⁴ Aside from record-keeping, cheating

Section III of this article discusses the changes that it has undergone up to the point of publication of this article. *See id.*; discussion *infra* Section III.

¹⁸ MLB Program, *supra* note 15, at 37. The punishment for the first positive test is only 80 games. *Id.*; *see also id.* at 3 (noting current length of season as 162 games, meaning first positive test results in only half-season suspension).

¹⁹ Feldman, *supra* note 10.

²⁰ MLB Program, *supra* note 15, at 8–14.

²¹ *Id.* at 44.

²² Steroid Suspensions in Major League Baseball, *supra* note 5.

²³ Joshua Z. Lavine, *Juicin’ in the Majors: A History of Steroids in Baseball*, N.Y.U. LOCAL (Feb. 18, 2013), <https://nyulocal.com/juicin-in-the-majors-a-history-of-steroids-in-baseball-d2facd1cbcfb>.

²⁴ *See* Jack Thompson II, *Top 15 Baseball Players Who Will Always Have an Asterisk (*) Next to Their Legacy*, SPORTSTER (Aug. 17, 2016), <https://www.thesportster.com/baseball/top-15-baseball-players-who-will-always-have-an-asterisk-next-to-their-legacy/>. Players like Barry Bonds

makes the game unfair to those who choose to abide by the Program. These drugs enhance the users' physical performance, giving them a clear competitive advantage.²⁵ For the purposes of this article, the word "natural" will be used to describe the athletes that abstain from using PEDs. The most well-known PEDs, like anabolic steroids and human growth hormone (HGH), increase the strength and size of muscle tissue, as well as endurance.²⁶ An increase in strength allows enhanced batters to hit harder and enhanced pitchers to throw faster than their natural counterparts.²⁷ An increase in endurance likely allows the enhanced players to train harder without feeling as fatigued as their natural counterparts, which assists them not only in training but also in playing further into a game without fatigue.

Cheating also creates issues for the cheaters' teammates. Each club allocates its budget toward player salaries, and superstars are unsurprisingly paid more than the average players.²⁸ That means that non-PED-user players are often financially disadvantaged because PED users take more money from the pool.²⁹ MLB does

and Sammy Sosa will forever have an asterisk next to their names in the record books because what they accomplished was likely due to the competitive advantage they received from their drug use. *Id.* These players will also likely never be inducted into the Hall of Fame for that same reason. *Id.*

²⁵ Craig Freudenrich & Kevin P. Allen, *How Performance-Enhancing Drugs Work*, HOW STUFF WORKS, <https://entertainment.howstuffworks.com/athletic-drug-test.htm> (last visited Nov. 9, 2021).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Brett Knight, *Baseball's Highest-Paid Players 2021: A New No. 1 as Mega-contracts Reshuffle MLB's Elite*, FORBES: SPORTS MONEY (July 8, 2021), <https://www.forbes.com/sites/brettknight/2021/07/08/baseballs-highest-paid-players-2021-a-new-no-1-as-mega-contracts-reshuffle-mlbs-elite/?sh=22d2eae816d5>. In 2021, the top three paid players earned \$45.3 million, \$39 million, and \$38.5 million, respectively. *Id.*; see also Diana Velayos, *What Is the Salary of an MLB Baseball Player?*, MLB (Oct. 8, 2021), https://en.as.com/en/2021/10/08/mlb/1633685987_178363.html#:~:text=According%20to%20recent%20data%2C%20MLB,s hows%20a%20totally%20different%20picture.&text=The%20average%20salary%20of%20an,to%20%244.17%20million%20a%20year. The average MLB player in 2021 earned only \$4.17 million and the median salary was \$1.15 million. Velayos, *supra* note 28. Compared to the previous figures of the highest paid athletes, these are substantially lower. *Id.* This disparity in income is likely increased when PED use is at play. *Id.*

²⁹ William A. Swift, Student-Written Material, *The Effects of Using Performance Enhancing Drugs on Major League Baseball Players' Salaries* (May 2018) (B.A. thesis, Colo. Coll.), <https://digitalccbeta.coloradocollege.edu/pid/coccc:29666/datastream/OB>

not have a salary cap or a monetary cap on what may be spent on player salaries, but it instead has a luxury Competitive Balance Tax.³⁰ A club must pay the luxury tax if it surpasses a certain threshold of spending on player salaries.³¹ Teams want to avoid paying this tax, and they also have only a certain amount of money to go around, which means that if they spend a large amount on one player's salary, they will need to balance that out by spending a lower amount on other players' salaries.³² This issue likely arises because although clubs want to avoid the tax, they also want to keep their superstars who are most likely to win championships for them and bring in more revenue. Therefore, clubs will still pay them larger salaries to keep them from playing elsewhere.³³

In addition to the cheating-related implications of PEDs, PED use is inherently dangerous.³⁴ The use of PEDs can be harmful to the player's physical health in a variety of ways.³⁵ For example, the use of exogenous testosterone can result in side effects that include increased risk of tendinitis and tendon rupture, tumors, liver disease, an increase in bad cholesterol, a decrease in good cholesterol, high blood pressure, issues with blood circulation, and mental health issues—just to name a few.³⁶

In addition to side effects on the user, PED use can also be harmful to other players. Although baseball is not necessarily a contact sport, pitchers and other players are sometimes hit with line

J (suggesting use of PEDs increases average player salaries by approximately \$150,000, or 3.35%).

³⁰ *Competitive Balance Tax*, MLB, <https://www.mlb.com/glossary/transactions/competitive-balance-tax> (last visited Nov. 9, 2021).

³¹ *Id.* (explaining current CBA sets 20% tax on all surplus for first consecutive season, 30% tax for two, and 50% tax on three or more consecutive surpluses, with 2021 threshold set at \$210 million).

³² Velayos, *supra* note 28.

³³ Neil Greenberg, *Baseball's Competitive Balance Problem Is Getting Worse*, WASH. POST (Apr. 1, 2022), <https://www.washingtonpost.com/sports/2022/04/01/mlb-payrolls-competitive-balance/>.

³⁴ Mayo Clinic Staff, *Performance-Enhancing Drugs: Know the Risks*, MAYO CLINIC, <https://www.mayoclinic.org/healthy-lifestyle/fitness/in-depth/performance-enhancing-drugs/art-20046134> (last visited Nov. 9, 2021).

³⁵ *Id.*

³⁶ *Id.*; see also Charles Patrick Davis, *Medical Definition of Exogenous*, MEDICINET (Mar. 29, 2021), <https://www.medicinenet.com/exogenous/definition.htm>. Exogenous use means that the testosterone was not created by the body but introduced from outside the body. See *id.*

drives resulting in serious injuries.³⁷ In fact, 1 in 105 pitchers gets hit in the head by a line drive in their career.³⁸ PED use adds to this risk since it can result in an average increase of 4% in exit velocity, or about 2.5 miles per hour.³⁹ Exit velocity is the speed of the baseball as it comes off the bat.⁴⁰ It does not take a physics expert to realize that faster hit balls pose a higher risk of injury. In addition to pitchers getting hit, batters are sometimes hit in the head with pitches.⁴¹ Similar to batters, pitchers' steroid use is estimated to result in an average increase of four to five miles per hour on a fastball.⁴² Again, faster pitches increase the danger to batters.

PED use has arguably worsened another form of cheating: foreign substances. Foreign substances are used by pitchers and,

³⁷ See Frank Pingue, *Oakland Pitcher out of Hospital After Being Hit by Line Drive*, REUTERS (Aug. 18, 2021), <https://www.reuters.com/lifestyle/sports/oakland-pitcher-out-hospital-after-being-hit-by-line-drive-2021-08-18/>. The Oakland Athletics' pitcher was hospitalized after being hit in the head with a line drive. *Id.*; see also *Line Drive*, BASEBALL REFERENCE, https://www.baseball-reference.com/bullpen/Line_drive (last visited Nov. 9, 2021). A line drive is a hard-hit ball that flies in a straight line, rather than a high arch. *Line Drive*, *supra* note 37. A line drive is the fastest type of batted ball in the sport. *Id.*

³⁸ Dan Diamond, *J.A. Happ Hit in Head: Should Pitchers Wear Helmets?*, FORBES (May 7, 2013), <https://www.forbes.com/sites/dandiamond/2013/05/07/j-a-happ-hit-in-head-should-pitchers-wear-helmets/?sh=1be9ce071c80>.

³⁹ R.G. Tobin, *On the Potential of a Chemical Bonds: Possible Effects of Steroids on Home Run Production in Baseball*, AM. ASS'N PHYSICS TCHRS. (Aug. 28, 2007), http://baseball.physics.illinois.edu/Tobin_AJP_Jan08.pdf; see also Russell A. Carleton, *Baseball Therapy: Rage Over Roids*, BASEBALL PROSPECTUS (Aug. 16, 2016), <https://www.baseballprospectus.com/news/article/30131/baseball-therapy-rage-over-roids/> (finding average increase in exit velocity is about 2.5 mph).

⁴⁰ *Exit Velocity (EV)*, MLB, [https://www.mlb.com/glossary/statcast/exit-velocity#:~:text=Exit%20Velocity%20measures%20the%20speed,%2D%20outs%2C%20hits%20and%20errors.&text=Average%20Exit%20Velocity%20\(aEV\)%20is,by%20all%20Batted%20Ball%20Events](https://www.mlb.com/glossary/statcast/exit-velocity#:~:text=Exit%20Velocity%20measures%20the%20speed,%2D%20outs%2C%20hits%20and%20errors.&text=Average%20Exit%20Velocity%20(aEV)%20is,by%20all%20Batted%20Ball%20Events) (last visited Nov. 9, 2021).

⁴¹ Christopher L. Camp, Dean Wang, Alec S. Sinatro, John D'Angelo, Struan H. Coleman, Joshua S. Dines, Stephen Fealy & Stan Conte, *Getting Hit by Pitch in Professional Baseball: Analysis of Injury Patterns, Risk Factors, Concussions, and Days Missed for Batters*, AM. J. SPORTS MED. (May 16, 2018), <https://journals.sagepub.com/doi/full/10.1177/0363546518773048> (five-season study finding 2,920 injuries from being hit by pitch, and players hit in head being ones most likely to suffer injuries).

⁴² Tobin, *supra* note 39.

unlike PEDs, are not drugs.⁴³ They are “anything applied to the baseball that doesn't belong there and that alters the behavior of the ball.”⁴⁴ Players’ foreign substance use is not a novel issue.⁴⁵ It dates back to the early 1900s when pitchers first applied saliva to the baseball, making it slip out of their hand abnormally.⁴⁶ Almost one hundred years later in a 1993 interview, all-time strikeout leader Nolan Ryan stated that he did not consider the use of pine tar to be cheating: “[U]sing pine tar to help your curveball, stuff like that, those are things that are done in the game, that are accepted as part of the game, so I wouldn’t sit here and tell you that ‘No, I wouldn’t do those things.’”⁴⁷ Later, in 2018, Trevor Bauer of the Los Angeles Dodgers claimed that seventy percent of pitchers were using foreign substances.⁴⁸ Bauer even claimed that it gave pitchers a “bigger advantage than steroids.”⁴⁹ Although there is clearly a long history of foreign substance use, the change in type and severity appears to correlate with the increased use of PEDs. Nolan Ryan’s statement shows that pine tar, a particularly sticky substance, was being used in the 1990s, which is around the time PED use was at an all-time high.⁵⁰ Today, pitchers are using substances like spider tack, which is even stickier, that further increase the pitcher’s grip, allowing the ball to spin more times before crossing the plate.⁵¹ When comparing

⁴³ Lavine, *supra* note 23; Gorski, *infra* note 51.

⁴⁴ Dayn Perry, *From the Spitball to Spider Tack: A Brief History of Foreign Substance Use by Pitchers in Baseball*, CBS SPORTS (June 17, 2021), <https://www.cbssports.com/mlb/news/from-the-spitball-to-spider-tack-a-brief-history-of-foreign-substance-use-by-pitchers-in-baseball/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Jacob Bogage, *MLB Pitchers Cheat, Too. They Use Pine Tar Instead of Trash Cans*, WASH. POST (Jan. 17, 2020), <https://www.washingtonpost.com/sports/2020/01/17/mlb-pitchers-cheat-too-they-use-pine-tar-instead-trash-cans/> (quoting 1993 interview by ESPN).

⁴⁸ Jordan Heck, *Trevor Bauer Explains What 70 Percent of MLB Pitchers Are Doing That’s “A Bigger Advantage Than Steroids,”* SPORTING NEWS (Feb. 26, 2020), <https://www.sportingnews.com/us/mlb/news/trevor-bauer-mlb-pitchers-steroids-pine-tar/2qhjxr7i4yrq1t15yl99ysvp2>.

⁴⁹ *Id.*

⁵⁰ Lavine, *supra* note 23. Tom House admitted that some players were using steroids and human growth hormone. *Id.*; see also *The Complete Guide to Pine Tar in Baseball*, MONKEY SPORTS: BASEBALL MONKEY (Apr. 26, 2022), <https://www.baseballmonkey.com/learn/pine-tar>. Pine tar is a tacky substance used to increase grip, unlike saliva, which was used to do the opposite. *The Complete Guide to Pine Tar in Baseball*, *supra* note 50.

⁵¹ Chris Gorski, *The Science Behind Baseball’s Sticky Pitching Problem*, INSIDE SCI. (June 23, 2021), <https://www.insidescience.org/news/science-behind-baseballs-sticky-substance-ban>; see also Josh Katz, Kevin Quealy

the timeline of increased use of PEDs and pitchers' cheating, it appears pitchers began finding more creative ways to cheat in order to keep up with PED use by batters to avoid having their pitches hit.⁵²

Although foreign substance use has not been penalized for the past century, the League eventually cracked down on it in 2021 by requiring mandatory checks on pitchers per game.⁵³ The league requires starting pitchers be checked by umpires before each game, and relievers after the game.⁵⁴ If an umpire makes a positive finding, the League will suspend the player for ten games.⁵⁵ The League's acknowledgment and punishment of the issue shows that, despite Nolan Ryan's 1993 opinion, the League considers foreign substance use to be cheating.

Finally, PED use also sets a poor example for the youth who look up to these players. If young people see their heroes cheating, it might shift their still-developing moral values and lead them to believe that cheating is an acceptable practice so long as they avoid getting caught.

III. BACKGROUND OF PED USE IN MLB

The first documented use of PEDs dates back to 1889, when a player used testosterone that was produced from animals.⁵⁶

& Tyler Kepner, *The Pitchers Whose Spin Rates Fell Most After a Crackdown on Sticky Substances*, N.Y. TIMES (July 19, 2021), <https://www.nytimes.com/interactive/2021/07/19/upshot/major-league-baseball-spin-rate-shift.html#:~:text=An%20increase%20in%20spin%20rate,if%20the%20ball%20is%20rising>. Increase in spin rate allows the ball to move more and break faster, making it harder to hit. Katz, Quealy & Kepner, *supra* note 51.

⁵² Lavine, *supra* note 23.

⁵³ Anthony Castrovince, *New Guidance on Foreign Substances Announced*, MLB (June 15, 2021), <https://www.mlb.com/news/mlb-announces-new-guidance-to-deter-use-of-foreign-substances>; see also Des Bieler, *Umpires Check Joe Musgrove's Ears During Padres' Game 3 Win over Mets*, WASH. POST (Oct. 9, 2022) (recounting how umpires examined San Diego Padres pitcher Joe Musgrove's ears during Game 3 of the 2022 NL Division Series, after it was noted that there appeared to be a shiny substance on those parts of his body; although the umpires found no evidence of a foreign substance and he was not removed from the game, viewers speculated that Musgrove had applied a substance such as petroleum jelly).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Lavine, *supra* note 23.

Steroid use became more commonplace in the 1970s,⁵⁷ and steroid use was rampant by the 1990s.⁵⁸ Most notably, between 1998 and 2001, Barry Bonds, Sammy Sosa, and Mark McGwire collectively hit sixty home runs a combined seven times in only four seasons.⁵⁹ By 2005, the issue was so severe that even Congress got involved.⁶⁰ After many positive results from anonymous drug tests it conducted in 2003, the League began drug testing and implementing suspensions.⁶¹ Thus, the first PED policy was created in 2004, but focused on the treatment aspect and did not actually punish players for their first offense.⁶² The second policy was in place between 2004 and 2006, and implemented a 10-day ban for the first offense, a 30-day ban for the second, a 60-day ban for the third, and a 1-year ban for the fourth.⁶³ A new policy was created in 2006 that lasted until 2013, establishing a 50-game ban for the first offense, a 100-game ban for the second, and a lifetime ban in the event of a third.⁶⁴ Currently, the Program provides an 80-game suspension for the first offense.⁶⁵ The second offense results in a 162-game or 183-day

⁵⁷ *Id.* Tom House admitted that some players were using steroids and human growth hormone. *Id.*

⁵⁸ *Id.* It should also be noted that steroid use was banned in 1991 but testing for steroids and other PEDs did not even begin until 2003. *Id.*

⁵⁹ *Id.* This is in comparison to the seventy years prior to 1998, where only two players had ever hit sixty homeruns in a single season. *Id.*; see also *The Steroids Era*, ESPN (Dec. 5, 2012), https://www.espn.com/mlb/topics/_/page/the-steroids-era. In 1998, Mark McGwire disclosed that he had used a substance that was banned by both the NFL and the NCAA. *The Steroids Era*, *supra* note 59. At the time, the substance was not banned by MLB, because they had yet to implement testing for PEDs. *Id.* Although this was a substance that was clearly identified by at least two other organizations to give an unfair advantage to players that used it, the MLB had yet to even create a system to identify and punish its use. *Id.* Between 1998 and 2009, six of ten additional players hit 500 or more career home runs have admitted to or are suspected of using PEDs. *Id.*

⁶⁰ HouseResourceOrg, *Steroid Use in Baseball: Players*, YOUTUBE (Jan. 7, 2011), https://www.youtube.com/watch?v=Ftq_IwlHmN0&t=2400s (recording of 2005 congressional hearing on use of steroids in Major League Baseball).

⁶¹ Lavine, *supra* note 23.

⁶² Zachary D. Rymer, *Full Timeline of MLB's Failed Attempts to Rid the Game of PEDs*, BLEACHER REP. (June 10, 2013), <https://bleacherreport.com/articles/1667581-full-timeline-of-mlbs-failed-attempts-to-rid-the-game-of-peds>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ MLB Program, *supra* note 15, at 37.

suspension of pay.⁶⁶ If a player tests positive a third time, they will receive a lifetime ban from Major and Minor League Baseball.⁶⁷ However, despite the “lifetime” nature of the ban, there are certain circumstances through which a player may be reinstated.⁶⁸

Because players continue to cheat, the efforts of the League through the Program are evidently not enough deterrence to curb PED use. Contracts in MLB are guaranteed, so if players are able to cheat and lock themselves into a high-paying contract, the risk of missing eighty games is outweighed by the potential monetary reward.⁶⁹

⁶⁶ *Id.* Note that this is the length of one full season. Rob Liebman, *Schedule Changes Since 1876*, SOC’Y FOR AM. BASEBALL RSCH., <https://sabr.org/journal/article/schedule-changes-since-1876/> (last visited Feb. 5, 2023).

⁶⁷ MLB Program, *supra* note 15, at 38; *see also Steroid Suspensions in Major League Baseball*, *supra* note 5. In 2016, New York Mets Pitcher, Jenrry Mejia, became the first and only player to receive a lifetime ban to date. *Steroid Suspensions in Major League Baseball*, *supra* note 5.

⁶⁸ MLB Program, *supra* note 15, at 38. A player may apply to be reinstated a year after the ban was imposed and must serve a minimum of two years under the ban before they may be reinstated. *Id.* The Commissioner then has thirty days to review the application and thirty days to make a determination. *Id.*; *see also* Kyle Newport, *Jenrry Mejia Reinstated by MLB After Lifetime Ban for PEDs*, BLEACHER REP.: N.Y. METS (July 6, 2018), <https://bleacherreport.com/articles/2784836-jenrry-mejia-reinstated-by-mlb-after-lifetime-ban-for-peds>. Although Jenrry Mejia was the only player to ever receive a lifetime ban, his reinstatement application was accepted by Commissioner Rob Manfred in 2018, and he also became the only player to ever be reinstated. Newport, *supra* note 68.

⁶⁹ *Guaranteed Contract*, MLB, <https://www.mlb.com/glossary/transactions/guaranteed-contract> (last visited Oct. 22, 2021); *see also* Sydney Lupkin, *Why Drug Tests Can’t Catch Doping Athletes: Doping Researchers Say Star Athletes Rarely Caught in Drug Tests*, ABC NEWS (Aug. 6, 2013), <https://abcnews.go.com/Health/star-athletes-rarely-caught-steroids-drug-tests/story?id=19887238>; Am. Chem. Soc’y, *Doping by Athletes Could Become Tougher to Hide with New Detection Method*, SCI. DAILY (Apr. 5, 2021), <https://www.sciencedaily.com/releases/2021/04/210405075904.htm>.

Barry Bonds, Alex Rodriguez, and Lance Armstrong all used PEDs, but none of them were caught by a positive drug test. *Id.* That shows that drug tests are not 100% accurate and athletes are still able to find ways to cheat and get away with it. *Id.* If a player knows how to get around these tests, the return on cheating is even greater, meaning that an eighty-game suspension serves as little deterrence to using PEDs. *Id.* This is probably due in part to labs producing new “designer drugs” that no test has been created for. *Id.* Because there is a list of substances banned in the Program, athletes can gain access to one of these designer drugs that are

IV. MLB SHOULD ARBITRATE THE PROGRAM TO CREATE MORE DETERRENCE

As discussed above, the current suspensions under the Program do not create enough deterrence to keep players from using PEDs,⁷⁰ and the issue is determining how the Program can be amended to fulfill its purpose. The proposed solution is to arbitrate the Program to create more appropriate penalties for violations. This section defines arbitration, discusses several models, and finally proposes how the solution could be implemented into the CBA.

Arbitration could be used in the collective bargaining process to establish the particular terms of the Program to create more appropriate penalties and alleviate the PED problem. Arbitration is a form of alternate dispute resolution (ADR), which is a system that is used to resolve a dispute without having to litigate the matter in court.⁷¹ The arbitrator is a neutral third party who makes a binding decision on the matter after weighing the facts and evidence presented by each party.⁷² It functions quite similarly to a trial in the process of the hearing itself, but it offers the parties a host of benefits over litigating the dispute in court.⁷³ The main difference between the two is that arbitration, unlike litigation, is a voluntary process.⁷⁴

Because renegotiating the Program is such a sensitive topic, with strong goals and interests on both sides, the particular model of arbitration must be one that will address these concerns

not listed and avoid being caught altogether. *Id.* With that in mind, the slim chance of testing positive for PEDs and being suspended for eighty games is far outweighed by the potential gain. *Id.*

⁷⁰ See discussion *supra* Section III.

⁷¹ *What Is Arbitration?*, WORLD INTEL. PROP. ORG., <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> (last visited Oct. 19, 2021).

⁷² *Id.*

⁷³ *The Advantages and Disadvantages of Arbitration vs. Court Litigation*, TUCKER L. (Feb. 13, 2015), [https://www.tuckerlaw.com/2015/02/13/advantages-disadvantages-arbitration-vs-court-](https://www.tuckerlaw.com/2015/02/13/advantages-disadvantages-arbitration-vs-court-litigation/#:~:text=Cost,completion%20of%20discovery%20and%20trial.&text=The%20judge%20is%20assigned%20by,whereas%20court%20litigation%20does%20not)

[litigation/#:~:text=Cost,completion%20of%20discovery%20and%20trial.&text=The%20judge%20is%20assigned%20by,whereas%20court%20litigation%20does%20not](https://www.tuckerlaw.com/2015/02/13/advantages-disadvantages-arbitration-vs-court-litigation/#:~:text=Cost,completion%20of%20discovery%20and%20trial.&text=The%20judge%20is%20assigned%20by,whereas%20court%20litigation%20does%20not). Among the many benefits of selecting arbitration over litigation are: (1) a faster resolution; (2) a more flexible set of rules and standards; (3) a reduced cost; (4) a decision-maker with expertise in the field that the matter arises out of; and (5) a limited right to appeal making the decision usually the absolute resolution of the dispute. *Id.*

⁷⁴ *What Is Arbitration?*, *supra* note 71.

appropriately. There are a few different options for arbitrating this type of dispute, and each will be addressed in the following paragraphs.

First, MLB is already very familiar with arbitration, using it to address grievances and salary disputes.⁷⁵ Under the grievance procedure, a player must first discuss the grievance with the proper representative of their club to try to resolve it.⁷⁶ If they are unable to resolve the matter, the player must give a designated representative of the Labor Relations Department (LRD) written notice of the grievance, and the LRD representative then has forty-five days to inform the player of their decision.⁷⁷ After that, the player—or the MLBPA acting on the player’s behalf—has fifteen days to appeal that decision.⁷⁸ If appealed, the appeal is discussed between the representative for the MLBPA and the LRD representative, the latter of whom will issue a decision.⁷⁹ The player has another fifteen days to appeal that decision, and if appealed, the grievance is heard by an arbitration panel.⁸⁰ The panel consists of three arbitrators: one whom the MLBPA selects, one whom the LRD selects, and one impartial arbitrator selected by an agreement of both parties.⁸¹ The process functions similarly to a court hearing.⁸² Each party is represented by counsel who may present evidence, which the arbitration panel chair will determine the relevance and materiality of.⁸³ The parties may also present evidence by examining and cross-examining witnesses who are sworn in under oath.⁸⁴ The hearing closes after the panel asks whether the parties have any other evidence to present or witnesses to examine and receives a negative response from each.⁸⁵ The panel then makes a final and binding decision by majority vote.⁸⁶

The salary arbitration process is similar but has a few slight differences.⁸⁷ Players are eligible for salary arbitration if they have

⁷⁵ MLB CBA, *supra* note 9, at 18, 46.

⁷⁶ *Id.* at 45.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 45–46.

⁸⁰ *Id.* at 46.

⁸¹ *Id.* at 44. If the parties are unable to come to an agreement as to the impartial arbitrator, the American Arbitration Association can provide them with a list of prominent arbitrators and the parties will go back and forth crossing names off the list until only one arbitrator remains. *Id.*

⁸² *Id.* at 355–56.

⁸³ *Id.*

⁸⁴ *Id.* at 356–57.

⁸⁵ *Id.* at 357.

⁸⁶ *Id.* at 46.

⁸⁷ *Id.* at 18.

played in the MLB for at least three years but not more than six.⁸⁸ When players are eligible, they may submit their salaries to arbitration.⁸⁹ Players with only two years of experience are sometimes eligible for arbitration if they meet certain special criteria.⁹⁰ Like grievance arbitration, the decision of the tripartite arbitration panel is final and binding.⁹¹ In the event that the parties reach an agreement before the decision by the arbitration panel, they remove the matter from arbitration.⁹² The parties must agree to all three arbitrators, and if they cannot agree, they use the same process as the grievance procedure arbitrations.⁹³ In a salary arbitration, the parties each have one hour for the initial presentation and thirty minutes for rebuttal.⁹⁴ Cross-examination does not count against the time limitations, which the panel may extend for good cause.⁹⁵ The process starts with the player's initial presentation, followed by the club's initial presentation.⁹⁶ Then, the player and the club each get a chance for rebuttal and summation.⁹⁷ Finally, the player gets a short surrebuttal to address issues raised by the club's rebuttal, and at the panel's discretion, the club may do the same.⁹⁸ Neither party has the burden of proof in salary arbitration hearings.⁹⁹

The benefit to using either the salary or grievance arbitration model is that the League is already familiar with the processes, unlike the other models discussed in the following paragraphs. However, a key difference between grievances and salary disputes and the negotiation of the Program is that the former could be litigated in court while the latter could not, which means that the model should be modified to more accurately suit the needs of the negotiation. Be that as it may, arbitration would still be a suitable form of dispute resolution for this context because there is actual evidence of the efficacy of the Program for an arbitrator to weigh.

Second, there are independent arbitration organizations, like the Court of Arbitration for Sport (CAS), who have their own set of rules and procedures for arbitration hearings.¹⁰⁰ CAS mostly

⁸⁸ *Id.* at 18–19.

⁸⁹ *Id.* at 19.

⁹⁰ *Id.*

⁹¹ *Id.* at 19–20.

⁹² *Id.*

⁹³ *Id.* at 20.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 21.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Louise Reilly, *An Introduction to the Court of Arbitration for Sport (CAS) & the Role of National Courts in International Sports Disputes*, 2012 J. DISP. RESOL. 63, 64 (2012); see also *Comprehensive Arbitration*

arbitrates international sports disputes, like those that arise in the Olympic Games.¹⁰¹ However, it does handle domestic disputes as well, particularly those involving a grievance or an appeal with a decision made by a governing body in sport.¹⁰² Most of CAS's caseload moves through its Appeals Arbitration Division, which often involves appeals of disciplinary sanctions in sports doping cases.¹⁰³ In such an Appeal case, a tripartite arbitration panel is chosen from a closed list of CAS members.¹⁰⁴ Each member is required to be fully legally trained and also be well-versed in sports law with high general competency in sports.¹⁰⁵ This list is voted on every four years by all stakeholders in sport, including the governing bodies.¹⁰⁶ A potential issue with a process under an independent organization like CAS is that there is a risk that the closed list might become a group of arbitrators that are actually not all that independent because the governing bodies themselves contribute to the selection process. However, such a selection process also ensures that competent arbitrators with a vast knowledge of the particular field and type of issues will be selected. Each party to the appeal selects one arbitrator to sit on the panel, and the third arbitrator—who is to serve as the president of the panel—is selected

Rules & Procedures, JUD. ARB. & MEDIATION SERVS., <https://www.jamsadr.com/rules-comprehensive-arbitration/> (last visited Apr. 25, 2023) [hereinafter JAMS Arbitration Rules]; *Rules, Forms & Fees*, AM. ARB. ASS'N (AAA), <https://www.adr.org/Rules> (last visited Apr. 25, 2023) [hereinafter AAA Rules]. Unlike litigation, there is not a set of universal procedural rules proscribed by jurisdiction, so these rules govern the procedure for arbitration hearings conducted by these organizations. *See generally* Reilly, *supra* note 100; JAMS Arbitration Rules, *supra* note 100; AAA Rules, *supra* note 100; *see also* JAY FOLBERG, DWIGHT GOLANN, THOMAS J. STIPANOWICH & LISA A. KLOPPENBERG, *ARBITRATION: THEORY, PRACTICE AND LAW* 578–79 (Erwin Chemerinsky, Richard A. Epstein, Ronald J. Gilson, James E. Krier, Richard K. Neumann Jr., Robert H. Sitkoff & David Alan Sklansky eds., custom ed. 2016) [hereinafter *ARBITRATION*]. Drafters of an arbitration clause also have the ability to adopt the rules of each of these organizations for their arbitration hearings. *ARBITRATION*, *supra* note 100, at 578–79.

¹⁰¹ *History of the CAS*, CT. OF ARB. FOR SPORT, <https://www.tas-cas.org/en/general-information/history-of-the-cas.html> (last visited Jan. 13, 2022).

¹⁰² Reilly, *supra* note 100, at 64–65.

¹⁰³ *Id.* at 65.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

by the President of the Appeals Arbitration Division.¹⁰⁷ As with any arbitration, CAS rules require that all arbitrators on the panel be independent and lack any conflicts of interest with the parties.¹⁰⁸ One controversial independence issue is the “repeat player” effect (where an arbitrator may often be used in multiple disputes for the same party), because the arbitrator’s incentive is to make the most money they can by arbitrating as many cases as possible and so they may feel pressured to give a positive outcome to their repeat players to secure future employment.¹⁰⁹ This might be especially problematic in the current context because MLB is a party to many salary and grievance disputes, while individual players may only be a party to an arbitration hearing once, which might necessarily give rise to the repeat player effect.¹¹⁰ Additionally, CAS awards are appealable by the parties, which could present an issue in the present context because the goal of utilizing arbitration here is to reach a final and binding decision.¹¹¹

Third, there are hybrid forms of arbitration known as “Med-Arb” or “Arb-Med,” where aspects of mediation and arbitration are combined into one dispute resolution mechanism.¹¹² Med-Arb allows the mediator of a dispute to “switch hats” and become the arbitrator if an agreement cannot be reached in mediation,¹¹³ which

¹⁰⁷ *Frequently Asked Questions: How Are Arbitrators Chosen?*, CAS, <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html> (last visited Jan. 13, 2022).

¹⁰⁸ *Id.*

¹⁰⁹ Thomas J. Crane, *Arbitration Favors the Repeat Player*, SAN ANTONIO EMPL. L. BLOG (Apr. 6, 2016), <https://www.sanantoniemploymentlawblog.com/2016/04/articles/contracts/arbitration-favors-the-repeat-player/>.

¹¹⁰ *Id.*

¹¹¹ Bibek Das, *Salary Arbitration and the Effects on Major League Baseball and Baseball Players*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 55 (2003); *Frequently Asked Questions: How Are Arbitrators Chosen?*, *supra* note 107.

¹¹² Taylor Brisco, *Med-Arb and Professional Sports: Could Med-Arb Work as an Effective Dispute Resolution Process in Professional Sports?*, 29 MARQ. SPORTS L. REV. 505, 512 (2019); *see also What Is Mediation?*, FINDLAW, <https://www.findlaw.com/adr/mediation/what-is-mediation-.html> (last visited Jan. 14, 2022). Mediation is another form of alternate dispute resolution where a mediator facilitates a negotiation between the parties and does not issue a final binding decision. *What Is Mediation?*, *supra* note 112. The mediation ends with an agreement between the parties, or their dispute remains in effect. *Id.* Mediation is characterized by goodwill and a desire to reconcile the dispute in amicable terms. *Id.*

¹¹³ Brisco, *supra* note 112, at 513; *see also* ARBITRATION, *supra* note 100, at 786. Note that the parties select one neutral for Med-Arb and Arb-Med, instead of a tripartite panel that is common for most arbitration hearings. ARBITRATION, *supra* note 100, at 786.

can be particularly beneficial for the sake of time and money because the mediator is already adequately informed on the matter to be able to make a decision, and the parties are not required to educate two third parties about their dispute.¹¹⁴ Med-Arb could be particularly useful in the present context because the MLB and the MLBPA recently concluded a lockout after failing to reach an agreement on the terms of a new CBA.¹¹⁵ If the parties utilize a system like Med-Arb and resolve some of the bigger issues in mediation, the mediator could arbitrate some of the smaller issues that they fail to reach an agreement on, which might include changes to the Program. Additionally, Med-Arb is said to be most beneficial for disputes with many interrelated complex issues, and where a long-drawn-out arbitration hearing is anticipated.¹¹⁶ The main critique of Med-Arb is that allowing the neutral to wear two hats might jeopardize their ability to be impartial in the arbitration portion of the process.¹¹⁷ After attempting to help the parties reach their settlement point in mediation, the neutral might have a settlement range in mind but must still determine an arbitration award by weighing the evidence.¹¹⁸ If the award falls outside of the potential settlement range, one party might feel that the neutral failed to be impartial.¹¹⁹

Arb-Med is the inverse of Med-Arb, where a neutral third party arbitrates the dispute, and after deciding on an award, will seal it away from the parties and switch hats to mediate the dispute.¹²⁰ Under this approach, a final resolution is reached regardless of whether the parties agree to settle in mediation or the arbitration award is revealed to the parties.¹²¹ Like Med-Arb, it offers the benefit that the neutral would already be informed about the dispute, which saves the parties the time and money required to use a separate mediator.¹²² There are some potential downsides to Arb-Med, which include: (1) the expenses associated with paying for both arbitration and mediation; (2) the difficulty in mutually agreeing on a neutral who is well-versed in both processes; and (3) the trust and goodwill associated with mediation—which can be

¹¹⁴ Brisco, *supra* note 112, at 514.

¹¹⁵ Perry, *supra* note 7. The MLB lockout lasted ninety-nine days, starting on December 2, 2021, and ending on March 10, 2022. *Id.*

¹¹⁶ ARBITRATION, *supra* note 100, at 786.

¹¹⁷ Brian Pappas, *Med-Arb: The Best of Both Worlds May Be Too Good to Be True—A Response to Weisman*, 19(3) DISP. RESOL. MAG. 42, 43 (2013).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ ARBITRATION, *supra* note 100, at 792.

¹²¹ *Id.*

¹²² *Id.*

difficult to achieve after a particularly adversarial arbitration hearing.¹²³ For those reasons, Arb-Med is not as widely used as Med-Arb.¹²⁴

Because a party cannot be compelled to arbitrate without a contract, an arbitration clause should be added to the CBA to implement an arbitration process for the negotiation of the Program. Arbitration clauses are not a new concept for the MLB, as one of these clauses already exists in the CBA, which is why players are required to submit to arbitration for grievances and salary disputes.¹²⁵ Drafting this clause is the most paramount piece of this solution because the drafter of the clause has the power to adopt the rules to govern the hearing, dictate how arbitrators are to be selected and how many, define what is to be arbitrated, select the model or procedure, and define the steps necessary to bring a dispute to arbitration.¹²⁶ To draft the most effective clause, the drafter should consider the goals and objectives of the arbitration hearing, which include: (1) a final and binding resolution; (2) a fair and neutral process; (3) predictability and consistency of the result; and (4) a fully reasoned award.¹²⁷

Considering those goals and the type of dispute at hand, fully adopting any of the models detailed above might fail to expedite a favorable result. The proposed clause would first define that the issue to be arbitrated is the negotiations for setting the rules and stipulations of the Program. Next, it should elect for a set of prescribed rules, like those of the CAS, which would allow for a predictable procedural process and likely expedite consistent results. A tripartite panel, like the CAS and the MLB utilize, would be preferable for creating a fair and neutral process. With three arbitrators, a majority vote is required to issue an award,¹²⁸ and it would be less likely for the losing party to believe that an entire panel made a mistake than it might if only one arbitrator conducted the hearing. The best selection process would likely be that of the CAS model, especially considering that the arbitrators from the closed list are knowledgeable and experienced. Each party—the League and the MLBPA—would have the opportunity to select one arbitrator of their choosing, and those elected arbitrators would select the third arbitrator, who would serve as the chief arbitrator, which would minimize the potential for the repeat player effect.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ MLB CBA, *supra* note 9, at 347.

¹²⁶ ARBITRATION, *supra* note 100, at 574, 578–79, 588.

¹²⁷ *Id.* at 576.

¹²⁸ *Commercial Arbitration Rules and Mediation Procedures*, AAA (2022), https://www.adr.org/sites/default/files/Commercial_Rules-Web.pdf.

Unlike the salary arbitration model, this clause should not place time limits on the hearing since amending the Program is such a complex issue that affects all players in the League, and it is vital that the panel be fully informed to create a well-reasoned award. Because this is more of a negotiation and not a litigable dispute, neither party should have the burden of proof, which would create a far more equitable process. Considering the benefits of Med-Arb and Arb-Med, the parties should also be given the option of electing for either of those approaches, and if they cannot agree, then the default arbitration hearing would remain in effect. The other logistics would remain the same in that a tripartite panel would still conduct the arbitration hearing, as well as the mediation. Either of these hybrid approaches would secure a final and binding result, but they would also give the parties more control over the agreement and prepare them for settlement. In addition, the clause should specify how often the Program may be arbitrated, which should probably coincide with the frequency of the CBA negotiations, which usually occur every five to ten years.¹²⁹ That length of time should be long enough to gather data and evidence as to the efficacy of the current Program. Lastly, to avoid re-arbitrating an efficacious Program, there should be an opt-out clause for years subsequent to the initial hearing that would allow the parties to agree to enforce the previous period's Program, absent extenuating circumstances.

This proposal is not a proposition to arbitrate every issue of the CBA, but instead only the Program. The Program is a supplemental agreement to the CBA, so isolating it in the negotiation process should not present a severability issue.¹³⁰ Put simply, this agreement is already separate from the CBA, so creating a separate process would not be a matter of concern.

Allowing a neutral third party to decide the terms would likely lead to a less lenient policy with more deterrence from violating it. If the League is serious about preventing PED use, then they will desire a stronger policy and advocate for it in arbitration. They responded to the foreign substance problem with a very strong policy, so they clearly have an interest in ridding the game of cheating.¹³¹ MLB Commissioner Rob Manfred said in a statement:

¹²⁹ See Gabe Lacques, *MLB Lockout Inevitable on Dec. 1: What Is in Dispute and How Long Will It Last?*, USA TODAY, <https://www.usatoday.com/story/sports/mlb/2021/11/29/mlb-lockout-imminent-whats-dispute-and-how-long-last/8794626002/> (Nov. 29, 2021, 5:48 PM ET).

¹³⁰ MLB CBA, *supra* note 9, at 347.

¹³¹ Anthony Castrovince, *New Guidance on Foreign Substances Announced*, MLB (June 15, 2021), <https://www.mlb.com/news/mlb-announces-new-guidance-to-deter-use-of-foreign-substances>.

After an extensive process of repeated warnings without effect, gathering information from current and former players and others across the sport, two months of comprehensive data collection, listening to our fans and thoughtful deliberation, I have determined that new enforcement of foreign substances is needed to level the playing field. I understand there's a history of foreign substances being used on the ball, but what we are seeing today is objectively far different, with much tackier substances being used more frequently than ever before. It has become clear that the use of foreign substance has generally morphed from trying to get a better grip on the ball into something else—an unfair competitive advantage that is creating a lack of action and an uneven playing field.¹³²

If that is the view of the League on foreign substances, they likely have a similar view on PED use. Assuming the League does advocate for a similar position, an arbitrator would likely find that stronger penalties for violations of the Program would be warranted and beneficial in light of the issues discussed in this article.

Because CBAs are negotiated in other industries besides sports, the dispute resolution mechanisms from those CBA negotiation processes can be taken into account and possibly applied to this context as well. In other industries, CBAs are sometimes taken to arbitration to avoid strikes and lockouts.¹³³ In the case of a severe strike or lockout, or a labor dispute that the parties are unable to resolve on their own, a lawsuit is sometimes the result.¹³⁴ Nevertheless, these lawsuits are often resolved in arbitration or another form of alternate dispute resolution before going to court.¹³⁵ The League might be avoiding arguments for a stronger policy over fears of a player strike, but by using arbitration they can advocate their position with a reduced level of fear.

V. POTENTIAL OBJECTIONS

As with any proposal, there are likely to be several objections to the implementation of this approach. Below are a few

¹³² *Id.*

¹³³ *Collective Bargaining and Arbitration*, ABC7 CHIC. (Feb 24, 2011), <https://abc7chicago.com/archive/7977603/>.

¹³⁴ *Module 5: Labor Disputes*, L. SHELF EDUC. MEDIA, <https://lawshelf.com/videocourses/moduleview/labor-disputes-module-5-of-5> (last visited Jan. 13, 2022).

¹³⁵ *Id.*

examples of potential objections, with arguments addressing the validity of each.

Arbitration must be agreed upon by both parties, meaning that they cannot be forced to arbitrate without consent.¹³⁶ Although the League will likely consent, getting the players to do so might pose more of a challenge. However, as mentioned, players in MLB are already required to consent to arbitration for salary disputes and grievances with the League, so arbitration for the negotiations of the Program could just as easily be added to that list in the CBA.¹³⁷ Like the arbitration clauses in the CBA that the MLB employs for grievances and salary disputes, other industries also utilize arbitration agreements within their CBAs.¹³⁸ These agreements are created by the employers, and the employees must agree to them to be employed by the company,¹³⁹ which further evidences how the MLB could add a similar provision to the arbitration agreement already present in the CBA.

If the players do not agree to add that clause into the CBA, they might still agree to a nonbinding arbitration or mediation.¹⁴⁰ By removing the risk of an arbitrator binding the players to a

¹³⁶ Candace Alnaji, *What Is Forced Arbitration? Here's What to Know if You're Asked to Sign This Clause*, MUSE, <https://www.themuse.com/advice/forced-arbitration-clause> (last visited Jan. 10, 2022). Of course, the players could be compelled to arbitrate if they have agreed to an arbitration provision in their contracts. *Id.* Such agreement in the contract would effectively act as their consent to arbitrate. *Id.*

¹³⁷ MLB CBA, *supra* note 9, at 347.

¹³⁸ *Module 5: Labor Disputes*, *supra* note 134.

¹³⁹ *Id.*

¹⁴⁰ See Katie Shonk, *How Mediation Can Help Resolve Pro Sports Disputes: Sports Disputes Could Be Settled Much More Efficiently Through Mediation, According to a New Article*, HARV. L. SCH.: PROGRAM ON NEGOT. DAILY BLOG (Oct. 26, 2021), <https://www.pon.harvard.edu/daily/mediation/how-meditation-can-help-resolve-pro-sports-disputes/>. Two of the other big four professional sports, namely the NFL and NHL, have used mediation to resolve lockouts when the CBA could not be agreed to by the parties. *Id.* Not only would this be an option for MLB to utilize, but it also suggests that other alternate dispute resolution mechanisms—like arbitration—could be used in professional sports for CBA negotiations. *Id.*; see also *Binding and Non-binding Arbitration—What Is the Difference?*, EXPERT EVIDENCE (Apr. 3, 2017), <https://expert-evidence.com/binding-and-non-binding-arbitration-what-is-the-difference/>. Nonbinding arbitration functions exactly like a binding arbitration, with one key difference: The arbitrator still makes a decision on the dispute, but they cannot issue an enforceable award. *Binding and Non-binding Arbitration—What Is the Difference?*, *supra* note 140. The parties still have the opportunity to accept or reject the decision in the end. *Id.*

decision, the players will have little to lose.¹⁴¹ Using either of these mechanisms would likely still lead to a result that is more favorable to the League than the current Program provides because it is isolated from the rest of the CBA negotiations, and the heightened formality of the process might be enough to get the players to concede on their position. Additionally, not every player is using PEDs, so natural players might be more likely to agree to harsher penalties to deter others from cheating when the issue is isolated from other CBA negotiations in this manner. Moreover, by isolating the issue from the other CBA negotiations, the Program no longer functions as a bargaining chip, which means the parties will be more likely to focus on the Program, and the players are more likely to become divided in their positions.

In the alternative, the MLBPA might agree to implement arbitration into the Program itself for determining particular player suspensions. Using arbitration to determine the suspensions for individual players would be an effective way to weigh the evidence in each player's case and determine what the appropriate length of their suspension should be based on the totality of the circumstances. Further, holding an arbitration hearing for each violator would not overburden the League because in the past few years only about four to six players have tested positive.¹⁴²

Another potential objection is that drug tests can bring about false positives,¹⁴³ and a severe suspension or ban for a false positive could greatly hurt or even end a player's career. Most recently, in 2021, an Olympic athlete tested positive for a banned substance that she claimed she ingested in trace amounts by eating a pork burrito.¹⁴⁴ Although these false positives are possible, players do still have the right to appeal a positive result and the Commissioner's Office has the burden of proof in such cases.¹⁴⁵ That means that the League must jump the hurdle of showing why

¹⁴¹ *Frequently Asked Questions: How Long Does CAS Arbitration Last?*, *supra* note 107. One of the main costs associated with arbitrating and not reaching a deal would be the time invested. *Id.* An arbitration with the CAS can take about six months to a full year. *Id.*

¹⁴² *Steroid Suspensions in Major League Baseball*, *supra* note 5 (based on data spanning from 2019 to 2021).

¹⁴³ Charlene Laino, *Drug Tests Often Trigger False Positives*, WEBMD (May 28, 2010), <https://www.webmd.com/drug-medication/news/20100528/drug-tests-often-trigger-false-positives#:~:text=Drug%20tests%20generally%20produce%20false,of%20cases%2C%20new%20research%20shows>.

¹⁴⁴ Bill Chappell, *An Olympic Hopeful Blames a Burrito for Her Positive Drug Test*, NPR (June 15, 2021), <https://www.npr.org/2021/06/15/1006622129/an-olympic-hopeful-says-her-burrito-is-to-blame-for-her-positive-drug-test>.

¹⁴⁵ MLB Program, *supra* note 15, at 50.

the results of the test were accurate, which is easier on the players than if they had to prove that the test was inaccurate.¹⁴⁶ In addition to these favorable procedures for the athletes, the MLB already has measures in place to avoid false positives.¹⁴⁷ To test for PEDs, the League collects urine samples from each player.¹⁴⁸ The League first divides the urine sample into two.¹⁴⁹ They then test the first sample, and if it comes back positive, they will test the second sample.¹⁵⁰ Because the probability of two false positives would be very low, this reduces the opportunity for them to occur.¹⁵¹

VI. CONCLUSION

In 1936, MLB's first Hall of Fame class included Ty Cobb, Honus Wagner, Christy Mathewson, Walter Johnson, and Babe Ruth.¹⁵² Each of these players accomplished very successful careers, setting multiple records along the way.¹⁵³ The absence of

¹⁴⁶ Ben Crump, *What Is Burden of Proof and Why Is It Important?*, BEN CRUMP: FREQUENTLY ASKED QUESTIONS, <https://bencrump.com/faqs/what-is-burden-of-proof-and-why-is-it-important/> (last visited Jan. 13, 2022). The burden of proof is the requirement for that party to present enough evidence to persuade the factfinder. *Id.* The other party—that is, the party without the burden of proof—need not establish any evidence to advocate their side. *Id.* For that reason, the party without the burden of proof has a much easier challenge than the party with the burden of proof. *Id.*

¹⁴⁷ *False Positives in NCAA/MLB Drug Testing*, CORNELL UNIV., <https://blogs.cornell.edu/info2040/2014/11/04/false-positives-in-ncaamlb-drug-testing/> (last visited Jan. 3, 2022).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (noting probability for second result would be probability of first result squared, effectively making likelihood much lower).

¹⁵² *Class of 1936*, NAT'L BASEBALL HALL OF FAME, <https://baseballhall.org/hall-of-famers/past-inductions/1936-1939> (last visited Jan. 14, 2022).

¹⁵³ *See Babe Ruth Class of 1936 Right Fielder*, NAT'L BASEBALL HALL OF FAME, <https://baseballhall.org/hall-of-famers/ruth-babe#:~:text=Ruth%20retired%20in%201935%20after,342%20batting%20average%2C%20a%20> (last visited Jan. 14, 2022) (recounting how Babe Ruth ended his career with over 700 homeruns and just over one hundred hits shy of 3,000); *Honus Wagner Obituary: The Obituary of Honus Wagner*, BASEBALL ALMANAC, https://www.baseball-almanac.com/deaths/honus_wagner_obituary.shtml#:~:text=Wagner's%20records%20that%20still%20are,and%20most%20total%20bases%2C%204%2C878 (last visited Jan. 14, 2022) (recounting how Honus Wagner played the most games of any player and had a whopping 3,430 career hits).

investigations into alleged cheating via the use of PEDs by these players—despite their many feats—suggests this was not a prevalent issue of that time.

Unfortunately, times have changed, and that is no longer the world we live in. However, one could still imagine a world where the validity of records and major wins in MLB no longer have to undergo questioning for cheating with PEDs.¹⁵⁴ Records could be compared across over a century of play to see how the game has evolved and players have improved as a class over the years. A stringent PED policy would be in place to ensure that players would not be able to get away with long-term use because violations would result in lengthy suspensions, and the benefits of cheating would finally be outweighed by the risks of being caught and potentially banned from the game for life. This change would benefit not only the record books but also the safety of the sport as a whole. There would be a reduced risk of serious injury or death from on-field play, and in addition, the longevity of elite players' careers may be extended if they are able to remain healthy and not be affected by potential PED side effects. Lastly, there would be more equity in the pay to players, as no player's performance would be enhanced beyond their natural capabilities, and the natural players could finally receive the pay they rightfully deserve.

Although there is the Program in place, it is currently not the type that the previous paragraph describes. Despite the Program,

¹⁵⁴ See WORLD ANTI-DOPING AGENCY, ANTI-DOPING RULES, at 24–25 (2016). Compare MLB to the Olympics, which is not known to have a significant drug problem because the World Anti-doping Agency (WADA) has created a stringent drug testing and sanction program to keep the Games clean. *Id.* The Anti-doping Policy for the Olympics has a longer list of banned substances, and much more severe penalties for violations. *Id.* The sanctions for violations are decided by a CAS panel and may result in disqualification from the Games. *Id.* Additionally, if more than one member on a team tests positive for a banned substance, the entire team may be disqualified from the Games. *Id.* MLB could learn from the WADA policy and adjust its own Program to feature some similarly stringent sanctions for violations of the policy. *See id.* If entire MLB teams were sanctioned when more than one player on a team tested positive for PEDs, it could have a significant impact. Teammates would be more likely to keep each other from threatening their eligibility to play, which would create another policing mechanism. *See also* Associated Press, *WADA Rips MLB's Drug Policy*, ESPN (Aug. 16, 2010), <https://www.espn.com/mlb/news/story?id=5468558>. In 2010, the WADA Chief, John Fahey, said that the validity of the game of baseball would soon be questioned for their poor testing program. Associated Press, *supra* note 154. He also mentioned that WADA had attempted to meet with the MLB regarding use of human growth hormone in the sport, but the League ignored the requests. *Id.*

PED use continues to be a prevalent issue in the game of baseball.¹⁵⁵ Not only is that cheating, but it is also dangerous to both the players that use PEDs and the natural players on the opposing side of the field. Because the Program is negotiated as a supplement to the CBA, the League has not been able to establish enough deterrence from breaking the policy. Utilizing arbitration or another alternative dispute resolution mechanism, like mediation, would likely facilitate a Program with proper penalties. Doing so may be the catalyst for cleaning up the sport and re-establishing it as a game of integrity.

¹⁵⁵ Verducci, *supra* note 17.