

DRUG ABUSE IN MAJOR LEAGUE BASEBALL: A LOOK AT DRUG TESTING IN THE PAST, IN THE PRESENT, AND STEPS FOR THE FUTURE

I. INTRODUCTION

With the onslaught of homeruns¹ and increase in the size of players² over the past few years in Major League Baseball ("MLB"), there erupted a growing concern amongst the league³, owners⁴, and lawmakers⁵ that players were using steroids and other muscle enhancing supplements⁶ to boost production. Making the issue more

1. *Baseball's Battered Image - Steroids threaten integrity of game*, USA TODAY, July 9, 2002, at <http://www.usatoday.com/news/opinion/2002/07/09/edtwof2.htm> (last visited Oct. 9, 2003) [hereinafter "*Baseball's Battered Image*"]. In the first 125 years of professional baseball, only two players hit sixty or more homeruns in a season. *Id.* In the past four years, six players have hit sixty or more homeruns. *Id.* Of the 238 times players have hit at least 40 homeruns in a season, 34% have occurred in the past five years. *Id.*

2. *Caminiti Comes Clean*, at http://sportsillustrated.cnn.com/si_online/special_report/steroids/ (last visited Oct. 9, 2003) [hereinafter "*Caminiti*"]. The average weight of an All-Star increased from 199 pounds in 1991 to 211 pounds in 2001. *Id.*

3. *Statement of Robert D. Manfred, Jr.*, at <http://commerce.senate.gov/hearings/061802manfred.pdf> (last visited Oct. 9, 2003) [hereinafter "*Manfred*"]. He explains that long before anyone was writing about steroids in MLB, the Labor and Human Resource Department for MLB, pursuant to Commissioner Selig's direction, had undertaken a "multi-faceted initiative designed to deal with the related problems of steroids and nutritional supplements." *Id.*

4. *Baseball Players Agree to be Checked for Steroids*, at http://www.cbs.sportsline.com/u/ce/multi/0,1329,5588094_52,00.html (last visited Oct. 9, 2003) [hereinafter "*Baseball Players Agree*"]. The owners proposed a plan in February, 2002 that called for testing three times a year for steroids and other performance-enhancing drugs, and once a year for illegal drugs. *Id.*

5. *Lawmakers Urge Drug Testing in Baseball*, (on file with Seton Hall Journal of Sports and Entertainment Law). In a letter delivered July 12, 2002, more than 100 congressmen and senators asked MLB and its player's union to adopt a policy for mandatory drug testing. *Id.*

6. *See Legal in Baseball*, at http://sportsillustrated.cnn.com/baseball/mlb/news/1998/08/22/mcgwire_supplement/index.html (last visited Oct. 9, 2003). Players, such as Mark McGwire in 1997, are using Androstenedione, a drug that raises the level of the male hormone, builds lean muscle

appealing were the comments of Ken Caminiti⁷ and Jose Canseco⁸ attesting to the rampant use of steroids in MLB. Also, the death of Baltimore Orioles' pitcher, Steve Bechler, raised new concerns surrounding the supplement Ephedra.⁹ Whether or not there actually is a correlation between drug or supplement use and the increase in hitter statistics has yet to be determined¹⁰, regardless, steroids are still illegal and harmful to the body of adults, and children more so.¹¹

However, most performance enhancing supplements are now legal thanks in part to the passage of the Dietary Supplement Health and Education Act of 1994 ("DSHEA").¹² An amendment to the Federal Food, Drug, and Cosmetic Act, the DSHEA sought to make nutritional and dietary supplements more readily available to improve the health status of United States citizens.¹³ Rather than classifying dietary supplements as drugs and subjecting them to FDA scrutiny, the DSHEA classifies certain

mass, and promotes recovery after injury. *Id.* Androstenedione is banned in the NFL, Olympics, and NCAA. *Id.*

7. Caminiti, *supra* note 2. In the June 3, 2002 issue of *Sports Illustrated*, Ken Caminiti told SI's Tom Verducci that, "It's no secret what's going on in baseball. At least half the guys are using [steroids]." *Id.*

8. *Baseball Players Agree*, *supra* note 4. Former MVP, Jose Canseco estimated that up to 85% of all major league baseball players used muscle-enhancing drugs when he played between 1985 and 2001. *Id.*

9. See *Pitcher May Have Been Taking Diet Supplement*, at <http://espn.go.com/mlb/news/2003/0217/1510257.html> (last visited Oct. 9, 2003).

10. *Baseball's Battered Image*, *supra* note 1. The impact steroids have on the power players exhibit is not known because the power could be caused by other things, such as better nutrition and training. *Id.* According to the commissioner of a study produced by the Rand Corporation, there is no scientific proof that Ephedra enhances athletic performance either. See Tom Farrey, *Report: No proof that ephedra enhances performance*, at <http://espn.go.com/mlb/news/2003/0305/1518899.html> (last visited Oct. 9, 2003).

11. *Medical Experts Strongly Oppose Steroid Use By Teenagers*, (on file with Seton Hall Journal of Sports and Entertainment Law) [hereinafter "Medical experts"]. Steroids help the body by increasing muscle mass and strength while also reducing recovery time for muscles after workouts. *Id.* However, the downside of steroids is much worse. Steroids are known to cause hair loss, infertility, severe acne, feminization of men, and masculinization of women. *Id.* More importantly, steroids increase the chance of stroke, heart disease, and liver cancer. *Id.*

12. *Dietary Supplement Health and Education Act of 1994*, Pub. L. No. 103-417, 103rd Cong. (1994), available at <http://www.fda.gov/opacom/laws/dshea.html> (last visited Oct. 9, 2003) [hereinafter "DSHEA"].

13. *Id.* at §2. The DSHEA's findings discuss the use of supplements to prevent chronic diseases, reduce health care expenditures, and prolong life by living healthier. *Id.*

supplements as foods and they therefore are not subject to testing prior to being sold.¹⁴ The broad definition of dietary supplements allows products such as Androstenedione and Creatine, to be purchased over-the-counter.¹⁵ Unfortunately not all products that meet the criteria of a dietary supplement are safe.¹⁶ The only way a product can be removed from the market is if the FDA can prove that the product is adulterated.¹⁷ With a large burden on the FDA to ban supplements from the market, these products are escaping removal and are being used by professional and younger athletes.¹⁸

Finally, thirty-four years after the inaugural collective bargaining agreement in MLB and professional sports¹⁹, the owners and players agreed to implement a policy for testing steroid use as a part of the 2002 collective bargaining agreement²⁰. This comment will focus on: (I)

14. *Id.* at §3.

15. *Id.* at §3. Dietary supplement:

(1) means a product (other than tobacco) intended to supplement the diet that bears or contains one or more of the following dietary ingredients:

(A) a vitamin;

(B) a mineral;

(C) an herb or other botanical;

(D) an amino acid;

(E) a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or

(F) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in clause (A), (B), (C), (D), or (E). *Id.*

16. See *Facts About Dietary Supplements Used by Athletes*, (on file with Seton Hall Journal of Sports and Entertainment Law). Androstenedione is described as having many of the same effects produced by banned anabolic steroids because it is a direct precursor to testosterone. *Id.* Creatine has many short-term effects, such as cramping, tearing, and diarrhea, but the long-term effects of Creatine are unknown. *Id.* Ephedrine has serious side effects, such as causing heart irregularities, seizures, and possibly death. *Id.*

17. *DSHEA*, *supra* note 14, at §4. The standard for proving a product adulterated is very high, requiring a showing of significant or unreasonable risk of illness based on the recommended or suggested use. *Id.*

18. See *Supplements Are Exempt From Food and Drug Laws*, (on file with Seton Hall Journal of Sports and Entertainment Law).

19. *Major League Baseball Players Association*, at <http://bigleaguers.yahoo.com/mlbpa/history.html> (last visited Oct. 9, 2003) [hereinafter "MLBPA"].

20. *Major League Baseball's 2003-2006 Basic Agreement*, at 157-83 [hereinafter "Basic Agreement"]. See also *Four-year Deal Includes Luxury Tax, No Contraction*, at <http://espn.go.com/mlb/news/2002/0830/1425253.html> (last visited Oct. 9, 2002) [hereinafter "Four-year"]. The drug testing policy was one of many issues added as a part of

why the issue of drug testing (including illegal drugs and all supplements) is an important topic; (II) pre-2002 collective bargaining agreements and attempts at drug testing; (III) an explanation of the 2002 collective bargaining agreement and its criticisms; (IV) an overview of drug testing in other major sports; and (V) steps for future collective bargaining agreements in MLB.

II. DRUG TESTING IS AN IMPORTANT ISSUE

A. The Effect on Society

Drug testing in professional baseball is important because of the dramatic effects it could have on society as a whole. More specifically, drug testing in professional baseball has the potential to change the lives of children who look up to professional ballplayers and the lives of those who actually play.²¹ Without question, it can be said that children look up to professional athletes as role models. Therefore, society should be concerned not only for the safety of the professional ballplayers who are using drugs, but also with the children who emulate their role model's lifestyle.

The effects a drug such as steroids can have on young athletes are very serious in nature. For young athletes, steroids "cause hair loss, severe acne, infertility, masculinization of women (deepening of voice, growth of body hair, smaller breasts) and feminization of men (shrunken testicles, enlarged breasts). Steroids are also thought to increase the risk of stroke, heart disease and liver cancer."²² The reason young athletes use steroids can be equated with the notion that young athletes see the success of professional athletes and can be lured into

the 2002 collective bargaining agreement. *Id.*

21. Asa Hutchinson, *Test Baseball Players for Use of Steroids*, (on file with Seton Hall Journal of Sports and Entertainment Law). In a University of California, Los Angeles, study teens said that sports figures ranked second, only to their parents, as their most admired role models. *Id.*

22. *Medical Experts*, *supra* note 11. Despite these harms, a study published in 2000 found that use of steroids by eighth-graders is similar to that of high-school seniors, and that "steroid use continues to rise among youngsters." *Id.*

taking steroids by "big muscles, an athletic scholarship or a pro career."²³ The effect drug testing has then is to represent to younger athletes that success is possible without resorting to illegal drugs or other performance-enhancing supplements.

The effects steroids have on adults and professional baseball players are similar to the results found in younger athletes. However, the upside and the downside are much more obvious when looking at the confessions of former MLB player Ken Caminiti. Caminiti admitted to the use of steroids during the 1996 season, the season he won the National League Most Valuable Player Award.²⁴ The upside of the steroid use showed in his "MVP-earning" statistics for the 1996 season, most notably his homerun total after the All-Star break.²⁵ Although the use of steroids seemed worthwhile in 1996, Caminiti encountered various health problems in the following years. Caminiti admitted that he pulled a lot of muscles, that his tendons and ligaments got all torn up, and that his body stopped producing testosterone.²⁶ These types of health problems have been increasingly present over the past few years in professional baseball.²⁷ In fact, between 1998 and 2001, the number of trips to the disabled list increased 16%, and the period of disability increased nearly 20%.²⁸ The likely result of drug testing in professional baseball will be to increase the health and safety of players and decrease the use of the disabled list.

Although the effects of most performance enhancing supplements are largely unknown, the death of Steve Bechler has brought the supplement Ephedra under

23. *Id.*

24. *Caminiti, supra* note 2. Caminiti said he began using steroids midway through the season after injuring his shoulder. *Id.* Caminiti is the first major leaguer to publicly admit to steroid use. *Id.* Caminiti is also a recovering alcoholic and has pled guilty to cocaine possession. *Id.*

25. *Id.* Caminiti had never hit more than 26 homeruns in a season. *Id.* However, he hit 28 homeruns following the All-Star break in the year he began using steroids. *Id.*

26. *Id.* Caminiti said he gets lethargic, depressed, and he admits "it's terrible." *Id.*

27. *Manfred, supra* note 3. Doctors noticed that different types of injuries were occurring in MLB, most of which involved a significant increase in muscle mass. *Id.*

28. *Id.* Manfred mentioned that the cost of payments to disabled players increased from \$129 million to \$317 million between 1998 and 2001. *Id.*

scrutiny.²⁹ The precise risks of Ephedra are still unclear, however, reports have linked the use of Ephedra to heart attacks, strokes, seizures, and heatstroke.³⁰ According to the FDA, Ephedra or its related compounds is an active ingredient in between 200 and 225 approved supplements.³¹ Finally, according to the consumer watchdog group, Public Citizen, the supplement has been linked to nearly 1,400 adverse reactions and 81 deaths in a seven-year period.³²

B. Integrity of the Game

The issue of drugs in professional baseball calls into question the integrity of the sport. From the fan's perspective, it is hard to reconcile the use of illegal drugs and supplements with the performance-based compensation received by ballplayers.³³ The bigger and stronger players get, and the more records the players break, the more likely they are to receive increased compensation. While it is true that the increase in homeruns or other statistics may bring more fans to the game³⁴, and may raise more money for owners, surely there is a respect for the players who played drug-free and set the longstanding records. Some view the effects of steroids on baseball as a harm in relation to its history, reasoning, "[t]he home run used to be a punctuation, a highlight. . . It has lost its impact. The game has been ripped from its

29. See, e.g., Hal Bodley, *Baseball Needs to Act on Over-the-Counter Drugs*, (on file with Seton Hall Journal of Sports and Entertainment Law); Mike Lopresti, *Baseball Must Deal with Drug Problem*, (on file with Seton Hall Journal of Sports and Entertainment Law); Congressman Calls for Ban on Ephedra Sales, at <http://espn.go.com/mlb/news/2003/0219/1511383.html> (last visited Oct. 9, 2003).

30. Len Pasquarelli, *Ephedrine - The risks*, at <http://espn.go.com/mlb/news/2003/0218/1510930.html> (last visited Oct. 9, 2003).

31. See *Ephedra Crackdown a Step in the Right Direction*, at http://espn.go.com/nfl/columns/pasquarelli_len/1385554.html (last visited Oct. 9, 2003).

32. *Id.*

33. See *Baseball's Battered Image*, *supra* note 1. A USA TODAY/CNN/Gallup Poll found that 78% of fans believe steroids have contributed to the increase in offensive statistics. *Baseball's Battered Image*, *supra* note 1.

34. Caminiti, *supra* note 2. "If you polled the fans, I think they'd tell you, 'I don't care about illegal steroids. I'd rather see the guy hit the ball a mile or throw it 105 miles an hour.'" *Id.*

historical moorings."³⁵ Another problem surrounding the issue of drug testing is the notion of fair play.³⁶ If some players are using drugs and supplements, and others are not, typically there would be an advantage for those who are using illegal steroids and other supplements to get stronger.³⁷

C. Challenges to Drug Testing

Generally, challenges to the issue of drug testing fall into the major category of violations of the United States Constitution. The most noteworthy argument is that drug testing is an unreasonable search or seizure. The Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, an no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."³⁸ Although the issue has never been challenged in professional sports, the Supreme Court has analyzed the constitutionality of drug testing under the Fourth Amendment's search and seizure clause in various other circumstances and created limited exceptions to the need for a warrant and probable cause.

In one line of cases, the Supreme Court analyzed whether taking blood tests of automobile drivers violated the search and seizure clause. In *Breithaupt v. Abram*, the Supreme Court held that it was not unconstitutional for

35. *Steroids Harm Baseball's Long-Standing Records*, (on file with Seton Hall Journal of Sports and Entertainment Law). Bob Costas said, "It's pretty obvious there's a fair amount of steroid use, or use of substances like steroids that enhance." *Id.*

36. See *Manfred*, *supra* note 3. In June 2002, Manfred explained that Commissioner Selig had spearheaded an initiative to address the use of steroids and supplements. He described the initiative:

The goal of the initiative was and is to eliminate the use of steroids and dangerous nutritional supplements in professional baseball for the following reasons: (1) to protect the health of our players, (2) to preserve the integrity of the competition on the field, and (3) to prevent young men from facing the difficult choice between using steroids or facing a competitive disadvantage in pursuing their life-long dream of playing Major League Baseball. *Manfred*, *supra* note 3.

37. See *Baseball's Battered Image*, *supra* note 1.

38. U.S. Const. amend. IV.

police officers to take a blood sample from the driver in an automobile accident while the driver was unconscious and receiving treatment for injuries.³⁹ The Court reasoned that the means of receiving the sample were not "brutal" or "offensive" because they were done in the view of a physician.⁴⁰ The Court also mentioned that, "The blood test procedure has become routine in our everyday life."⁴¹ In *Schmerber v. California*, the Supreme Court held that compelling the driver in an accident to give a sample of blood to determine the driver's blood alcohol level did not violate the Constitution.⁴² The Court concluded that the officer was reasonable in requesting a sample because the delay needed to obtain a warrant may have destroyed evidence.⁴³

In another line of cases, the Supreme Court created an exception to the search and seizure clause when applied to railroad employees. In *Skinner v. Railway Labor Executives Association*, the Supreme Court held that Federal Railroad Administration regulations authorizing the use of blood and urine testing of railroad employees involved in accidents, and which authorized breath and urine testing to railroad employees who violate safety rules, does not violate the search or seizure clause of the Constitution.⁴⁴ The Court began by noting that although the Fourth Amendment does not apply to a search or seizure conducted by a private party, the Amendment does protect "against such intrusions if the private party acted as an instrument or agent of the Government."⁴⁵ The Court concluded that the Federal Railroad Administration regulations implicate the use of the Fourth Amendment.⁴⁶ The Court nevertheless found the regulations did not violate the Fourth Amendment because they were a reasonable exercise of a legitimate governmental interest,

39. *Breithaupt v. Abram*, 352 U.S. 432 (1957).

40. *Id.* at 435.

41. *Id.*

42. *Schmerber v. California*, 384 U.S. 757 (1966).

43. *Id.* at 771.

44. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989).

45. *Id.* at 614.

46. *Id.*

as compared to the individual's Fourth Amendment interest.⁴⁷

In another line of cases, the Supreme Court determined that drug testing of customs officials did not violate the Fourth Amendment when the testing was required for applicants who were promoted to positions involving the interdiction of illegal drugs and the carrying of firearms.⁴⁸ The Court in *National Treasury* gave three reasons for their decision. First, the Court determined that the drug-testing program did not serve law enforcement needs, consequently, the results of the testing could not be used in a criminal prosecution.⁴⁹ Second, the Court noted that the requirement of a warrant in this case would "serve only to divert valuable agency resources from the Service's primary mission. . . , [which] would be compromised if it were required to seek search in connection with routine, yet sensitive, employment decisions."⁵⁰ Third, the Court reasoned that the testing of employees who would be handling illegal drugs and firearms is reasonable, despite the absence of probable cause or suspicion.⁵¹

Finally, in another line of cases, the Supreme Court created an exception to the Fourth Amendment in order to test high school athletes for certain drugs.⁵² The Court noted in *Vernonia* that the ultimate test is reasonableness.⁵³ The Court recognized a special needs exception exists in the public school context to circumvent the need for a warrant or probable cause.⁵⁴ The Court held, "the warrant requirement 'would unduly interfere with the maintenance of the swift and informal disciplinary procedures that are needed,' and 'strict adherence to the requirement that searches be based upon probable cause' would undercut 'the substantial need of teachers and administrators for

47. *Id.* at 633.

48. See *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

49. *Id.*

50. *Id.* at 666.

51. *Id.*

52. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1998).

53. *Id.* at 652. The test for determining reasonableness is a balance of the intrusion on the individual's interest against the legitimacy of the governmental interests. *Id.* at 652-53.

54. *Id.* at 653.

freedom to maintain order in the school.'"⁵⁵ The Court ultimately concluded that the means used to obtain the urine samples were reasonable for both males and females, and that the government's interest was compelling.⁵⁶

Four years after the decision in *Vernonia*, the Court took another step and held a policy that required drug testing of all students participating in extra-curricular school activities to be constitutional.⁵⁷ In *Earls*, the Court first held that a special need existed to circumvent the requirement of probable cause or a warrant.⁵⁸ As in *Vernonia*, the special need was based on the interference that obtaining a warrant and finding probable cause would place on the disciplinary procedures of the school.⁵⁹ Next, the Court noted that students participating in extra-curricular activities have a diminished expectation of privacy.⁶⁰ Like *Vernonia*, the Court determined that the drug testing procedures were minimally intrusive to the student's interests.⁶¹ Finally, the Court in *Earls* held that

55. *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985)). The Court in *T.L.O.* stated that school officials did not need to obtain a warrant before searching their students because the burden of obtaining the warrant was likely to frustrate the purpose of the search. *T.L.O.* 469 U.S. at 340.

56. *Vernonia*, 515 U.S. at 664-65. Testing of males occurs in an empty locker room, where the boy, remaining fully clothed, produces a sample at a urinal while a monitor stands twelve to fifteen feet behind. *Id.* at 650. Testing of females occurs in a closed stall so that they could be heard but not seen. *Id.* The samples are then given to the monitor who checks the sample for temperature and tampering, before placing the urine in a vial. *Id.*

57. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002).

58. *Id.* at 828-29. The students who challenged this policy did not argue that the school needed probable cause before searching the students, but rather, the students argued that the drug testing should be based on individualized suspicion. *Id.* at 829. The Court responded by saying "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." *Id.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

59. See *Earls*, 536 U.S. at 829.

60. *Id.* at 831-32. The Court determined that there is no difference between students participating in athletics and students participating in other competitive extra-curricular activities. *Id.* Whereas students participating in athletics are regularly subjected to physicals and communal undress, students participating in other activities are subject to occasional off-campus travel and communal undress. *Id.* at 832 Further, all extra-curricular activities have specific rules and requirements that don't apply to the school as a whole. *Id.* The Court held that these factors implicate a diminished expectation of privacy. *Id.*

61. *Id.* at 832-33. Under the policy, the monitor waits outside the restroom stall for the student to produce a urine sample. *Id.* at 832. This policy is similar to the policy in *Vernonia*

the drug testing policy effectively served the school's interest of "preventing, deterring, and detecting drug use."⁶²

Applying the cases mentioned, and the general notions of the Fourth Amendment, it is clear that almost any drug-testing program instituted in MLB would not be subject to Constitutional scrutiny. MLB is a predominately private industry, and unlike public schools, would not be subject to the scrutiny of the Constitution. If a court found that MLB, similar to the railroad industry in *Skinner*, was an instrument or agent of the government, the court may be willing to create a special needs or reasonableness exception. However, in the case of MLB, the safety of the player, the safety of young athletes, and the integrity of the game, would serve as a legitimate interest, almost certainly outweighing the individual's interest in privacy.

III. PRE-2002 AGREEMENTS AND DRUG TESTING

A. Major League Baseball Players Association

After failed attempts at organizing labor organizations in the late nineteenth century and early twentieth century⁶³, baseball players made another attempt to organize in 1965.⁶⁴ Recognizing their faults in previous attempts, the players recruited Marvin Miller, an economist for the

except males receive more protection because they are permitted to produce the sample in the stall, rather than the urinal. *Id.* at 832-33.

62. *Id.* at 837. The Court said that the school district had presented sufficient evidence of drug use at the school. *Id.* at 834. The evidence included: teachers saying that they had seen students who appeared under the influence of drugs and heard students talking about using drugs, a drug dog finding marijuana near the school parking lot, the police finding marijuana in the car of a student who participated in extra-curricular activities, and the school board president saying that people had called the school to discuss the drug problem. *Id.* at 834-35.

63. *MLBPA, supra* note 19. The first players' union was founded in 1885, nine years after the creation of the National League, and six years before the creation of the American League. *Id.* The union, created by Montgomery Ward, was established when he and some of his teammates formed the Brotherhood of Professional Ball Players. *Id.* The Brotherhood did not exist long. *Id.* In 1900, 1912, and 1946 players made other attempts to organize, known as the Players' Protective Association, the Fraternity of Professional Baseball Players of America, and the American Baseball Guild, respectively. *Id.*

64. *Id.*

United Steel Workers of America, to help organize the Major League Baseball Players Association ("MLBPA").⁶⁵ Although not formally a union under the National Labor Relations Act, in 1968 the players negotiated their first collective bargaining agreement.⁶⁶ One year later, in *American League of Professional Clubs and Association of National Baseball League Umpires*, the National Labor Relations Board decided that professional baseball was an industry "in or affecting interstate commerce, and as such is subject to Board jurisdiction under the Act."⁶⁷ To date, the MLBPA has negotiated eight collective bargaining agreements on behalf of the players⁶⁸, involving issues such as luxury taxes⁶⁹, revenue sharing⁷⁰, the amateur draft⁷¹, and minimum salaries.⁷²

B. Pre-2002 Collective Bargaining Agreements and Negotiations

In its traditional meaning, a collective bargaining agreement contains the general provisions of the employment relationship, specifically, any collective agreements between management (the League and team owners) and employees (the players).⁷³ This relationship, and thus the corresponding collective bargaining

65. *Id.* Miller helped educate the players on the fundamentals and importance of organizing. *Id.* Miller served as the executive director of the MLBPA from 1966 through 1983. *Id.*

66. *Id.*

67. *The American League of Professional Baseball Clubs and Association of National Baseball League Umpires*, 180 N.L.R.B. No. 30, Case 1-RC-10414 (December 15, 1969).

68. MLBPA, *supra* note 19.

69. *See Four-year, supra* note 20. The luxury tax is a tax to be applied when a team's payroll exceeds a designated threshold. *Four-year, supra* note 20.

70. *See Four-year, supra* note 20. Revenue sharing involves each team contributing a percentage of its profits to a pool to be distributed equally to all teams. *Four-year, supra* note 20.

71. *See Four-year, supra* note 20. Bargaining about the amateur draft includes developing rules for drafting amateur players. *Four-year, supra* note 20.

72. *See Four-year, supra* note 20. Minimum salaries are set for major league players and for minor league players appearing on a 40-man roster. *Four-year, supra* note 20.

73. Mark Rabuano, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. Pa. L. Lab. & Emp. L. 439, 441 (2002). In his comment, Mark Rabuano proposes that drug testing must be a mandatory subject of collective bargaining, therefore, owners and the MLBPA must jointly agree to a program. *Id.* at 461.

agreements were affected by various drug-related events in the early 1980's⁷⁴, forcing the League to try to institute various drug-testing policies. In the spring of 1984, Commissioner Bowie Kuhn attempted to institute the first set of league-wide regulations dealing with drug-related issues.⁷⁵ Team owners were split on the issue; some wanted random mandatory testing, while others wanted a more intermediate approach involving both the players and the MLBPA.⁷⁶

In June 1984, team owners eventually approved a program involving both owners and the MLBPA that provided for treatment and punishment of players who used certain types of drugs.⁷⁷ Although most of the owners considered the joint program watered down, Commissioner Kuhn felt that the program was a "dramatic breakthrough in labor relations and sports."⁷⁸ The program was aimed at the use of illegal drugs, such as cocaine, and excluded marijuana, amphetamines, and alcohol.⁷⁹ The program provided immunity for any player voluntarily seeking help, but also allowed any team having "reasonable cause" to suspect a player of drug use, to ask that player to undergo testing.⁸⁰ Refusal would result in disciplinary action by the Commissioner.⁸¹

Commissioner Kuhn decided to leave office late in 1984

74. *Baseball Drug Suspensions*, at <http://espn.go.com/mlb/news/2000/0228/387204.html> (last visited October 9, 2003) [hereinafter "Baseball Drug Suspensions"]. In 1980 Ferguson Jenkins, a pitcher for the Texas Rangers, was suspended following an arrest in Canada for cocaine possession. *Id.* Following a grievance hearing, Jenkins' suspension was lifted. *Id.* In 1983, three Kansas City Royals and one Los Angeles Dodger were suspended for drug charges. *Id.* Following a grievance procedure, two of the players had their suspensions shortened. *Id.* In 1984, Pascual Perez, a pitcher for the Atlanta Braves, was suspended following his arrest in the Dominican Republic for possession of cocaine. *Id.* Following a grievance hearing, his suspension was lifted. *Id.*

75. Glenn M. Wong & Richard J. Ensor, *Major League Baseball and Drugs: Fight the Problem of the Player?*, 11 Vill. L. Rev. 779, 791 (1987).

76. *Id.*

77. *Id.* at 792.

78. *Id.*

79. Rabuano, *supra* note 73, at 442.

80. *Id.*

81. *Id.*

and the regulations lost support amongst the owners.⁸² Thereafter, Commissioner Peter Ueberroth assumed office and the owners terminated former Commissioner Kuhn's regulations.⁸³ Responding in part to the "Pittsburgh Drug Trials"⁸⁴, Ueberroth instituted his own comprehensive mandatory drug-testing program that "covered League management, League umpires, and all minor league players, for the controlled substances of cocaine, heroin, amphetamines, morphine, and marijuana."⁸⁵ Major League players were not covered by this plan.⁸⁶

After the Pittsburgh Drug Trials concluded, Ueberroth made an attempt to institute voluntary drug testing of all major league players, however, the MLBPA rejected the plan because they believed it presumed guilt on the part of the players.⁸⁷ The MLBPA argued that "this type of plan could not be implemented unilaterally and was indeed a matter suited for collective bargaining."⁸⁸ In 1986, Ueberroth again tried to institute a drug-testing program for all major league players by inserting clauses into player contracts that required mandatory drug testing.⁸⁹ Again the

82. Wong & Ensor, *supra* note 75, at 793.

83. *Id.* at 794-95.

84. See *Baseball Drug Suspensions*, *supra* note 74. In 1986 several players were "suspended for one year with [a] provision that they would still be able to play if they donate 10 percent of their 1986 base salaries to drug-prevention programs, submit to random drug testing and contribute 100 hours of drug-related community service." *Baseball Drug Suspensions*, *supra* note 74. Other players were "suspended for 60 days with [a] provision that they still would be able to play if they donate five percent of their 1986 base salaries to drug-prevention programs and contribute 50 hours of community service." *Id.* All of these suspensions were based on testimony given at a federal drug trial involving Curtis Strong. *Id.*

85. Rabuano, *supra* note 73, at 442.

86. *Id.*

87. Wong & Ensor, *supra* note 75, at 801-02.

88. Rabuano, *supra* note 73, at 443.

89. Wong & Ensor, *supra* note 75, at 805 n.132. The clauses as described by Roberts in his decision were:

Player agrees to submit to any test or examination for drug use when requested by the Club and the failure to do so shall make the guarantee set forth in (the balance of the guarantee provision) null and void. Player is of the opinion that it is vitally important to him and his professional career that his image not be tarnished by the specter of drugs. Therefore, player voluntarily agrees to submit to any test or examination for drug use when requested by the Club. *Id.*

MLBPA rejected the program, and filed a grievance.⁹⁰ The grievance was addressed in the decision of *In the Matter of the Arbitration Between MLB Player Relations Committee and MLBPA*.⁹¹ Arbitrator Thomas Roberts decided that the drug testing clauses "are prohibited by Article II of the Basic Agreement unless first negotiated with the Players' Association."⁹² Therefore, until the League and the MLBPA collectively agreed to a drug-testing program, there would be no testing, as was the case through the 2002 season.⁹³

C. Why Couldn't the Owners Unilaterally Impose Testing?

Federal labor laws play a large role in determining what MLB owners can and can't do. The National Labor Relations Act imposes upon owners and the union the obligation to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."⁹⁴ The Supreme Court in *First National Maintenance Corporation v. NLRB*, construed the phrase "other terms and conditions" broadly so that it is interpreted to fit the specific practices of the industry.⁹⁵ Therefore, classification of an issue as mandatory or permissive can have significant consequences on the bargaining of the issue. For example, management must bargain in good faith over mandatory subject matter, whereas, management can incorporate permissive subject matter into a bargaining agreement without bargaining.⁹⁶

Through a series of cases in the 1960's, courts attempted to distinguish between mandatory and permissive subject matter. For example, in *NLRB v. Wooster Division of Borg-Warner Corporation*, the Supreme Court ruled that a "mandatory subject" qualifies as an issue that significantly affects employees.⁹⁷ Also, in *First National Maintenance*, the

90. *Id.* at 805.

91. *Id.* at 805 n.132.

92. *Id.* at 808.

93. *Baseball Players Agree*, *supra* note 4.

94. 29 U.S.C. § 158(d) (1982).

95. *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 675 (1981).

96. Rabuano, *supra* note 73, at 446.

97. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

Court determined that mandatory subjects are those that have a direct influence on the employer/employee relationship.⁹⁸ The Court held that permissive subjects are those that "have only an indirect and attenuated impact on the employment relationship."⁹⁹

In 1989, the National Labor Relations Board decided two cases that determined drug testing is a mandatory subject of collective bargaining. First, in *Johnson-Bateman Co.*, the NLRB stated, "we find the drug/alcohol testing requirement to be both germane to the working environment, and outside the scope of managerial decisions lying at the core of entrepreneurial control."¹⁰⁰ Secondly, in *Minneapolis Star Tribune*, the NLRB affirmed the decision in *Johnson-Bateman Co.* by holding that the unilateral implementation of a drug-testing program for current employees violates the National Labor Relations Act.¹⁰¹ For this reason, MLB owners could not unilaterally impose a drug-testing program, without first bargaining in good faith with the MLBPA.

IV. 2002 COLLECTIVE BARGAINING AGREEMENT

A. Overview of the Agreement

With the expiration of the 1996 collective bargaining agreement in November 2001 came the next round of negotiations. While the owners were striving for competitive balance¹⁰², the MLBPA assumed its defensive role of protecting players' rights.¹⁰³ With an August 30,

98. *First Nat'l Maint. Corp.*, 452 U.S. at 677.

99. *Id.* at 676-77.

100. *Johnson-Bateman Co.*, 295 N.L.R.B. 180, 182 (1989).

101. *Minneapolis Star Tribune*, 295 N.L.R.B. 543, 543 (1989).

102. Alan Schwarz, *One on One: Bob DuPuy, Baseball America*, at <http://www.baseballamerica.com/today/features/dupuy070102.html> (last visited Oct. 9, 2003). In an interview with *Baseball America*, Bob DuPuy said that all of the League's proposals are directed at competitive balance. *Id.* He thinks, "revenue sharing will get more money to the low-revenue teams so that they can spend more on player development and spend more on payroll and become more competitive." *Id.* He also thinks that the competitive balance tax "should slow down the top-spending clubs, and the minimum club payroll will force the lower-spending clubs up." *Id.*

103. Alan Schwarz, *One on One: Donald Fehr, Baseball America*, at

2002, strike date in place, the owners and the MLBPA agreed in principle to a new collective bargaining agreement that has been described as "fair."¹⁰⁴ At the conclusion of bargaining, many issues had been modified and added. Of most importance are: the luxury tax, revenue sharing, contraction, the worldwide draft, minimum salaries, the benefits plan, the term, and drug testing.¹⁰⁵

The luxury tax issue was resolved by requiring any team with a payroll¹⁰⁶ higher than the year's designated threshold¹⁰⁷ to pay a tax with the rate determined by how many times the team violated the threshold.¹⁰⁸ Revenue sharing increased from \$168 million last season to an average of \$358 million to be shared by lower-revenue-sharing teams.¹⁰⁹ The agreement allows for contraction, but not until the 2007 season, provided the players are notified

<http://www.baseballamerica.com/today/features/fehr070102.html> (last visited Oct. 9, 2003). In an interview with *Baseball America*, Donald Fehr indicated that he believed "that the industry is likely to grow best if we leave the clubs to engage in the kinds of entrepreneurial behavior that entrepreneurs do." *Id.* Mr. Fehr also said that he does not think the aggressive proposals made by the league are good for the industry or players. *Id.*

104. See Barry Bloom, *Fair Deal Reached for Both Sides*, (on file with Seton Hall Journal of Sports and Entertainment Law). "In the end, when the compromises to reach a collective bargaining agreement all were made, the scoreboard was fairly balanced." *Id.*

105. See generally, *Basic Agreement*, *supra* note 20. In addition to the issues mentioned, the agreement addresses the commissioner's discretionary fund, debt, interleague play, free agent draft compensation, allowances, waivers, injury rehabilitation, second medical opinions, and tenders. *Basic Agreement*, *supra* note 20.

106. *Basic Agreement*, *supra* note 20, at 80. Payrolls are described as players on the forty-man roster and include "averages of multiyear contracts; health and pension benefits; club's medical costs; insurance; workman's compensation, payroll, unemployment and Social Security taxes; spring training allowances; meal and tip money; All-Star game expenses; travel and moving expenses; postseason pay; and college scholarships." *Id.*

107. *Id.* The threshold for the competitive balance tax to kick in starts in 2003 at \$117 million, increasing to \$120.5 million in 2004, \$128 million in 2005, and \$136.5 million in 2006. *Id.*

108. *Id.* at 80-81. The first time a team surpasses the threshold, the tax rate will be 17.5% in 2003, 22.5% in 2004 and 2005, and no tax in 2006. *Id.* The second time a team surpasses the threshold the applicable tax rate is 30%. *Id.* The third and fourth times that it is surpassed, the applicable tax rate will be 40%. *Id.*

109. See generally, *Basic Agreement*, *supra* note 20, at 100-15. Revenue sharing will be phased in over the four-year period at \$230 million, \$243 million, \$258 million, and \$301 million, respectively, on a straight-pool basis. *Basic Agreement*, *supra* note 20, at 100-15. The teams will share the base of \$175 million with the Commissioner splitting up the remainder from the central and discretionary funds. *Id.*

by July 1, 2006.¹¹⁰ The agreement also allows for the establishment of a committee to establish rules for a worldwide amateur draft, although the draft may not be in place for the June 2003 draft.¹¹¹ The agreement sets minimum salaries for all major league players and minor league players with split contracts appearing on a 40-man roster for two or more years.¹¹² The benefits plan has been increased with the teams contributing \$114 million to \$115 million annually, as compared to \$70 million in 2002.¹¹³

B. Drug-Testing Program

After pressure from fans, lawmakers, owners, and even players¹¹⁴, for the first time ever, team owners and the MLBPA agreed to implement a drug policy as a part of the collective bargaining agreement.¹¹⁵ The program calls for testing of "Schedule III" anabolic androgenic steroids¹¹⁶

110. *Id.* at 50-51.

111. *Basic Agreement*, *supra* note 20, at 202-04. The teams have proposed a draft of thirty-eight rounds, while the players have proposed 20. *Four-year*, *supra* note 20. Ultimately, the committee will determine the decision. *Id.*

112. *Basic Agreement*, *supra* note 20, at 11-12. The minimum salary for a player in the major leagues in 2003 and 2004 will be \$300,000. *Id.* The split contract player's salary will be \$50,000 in 2003, and \$50,000 in 2004. *Id.* The salaries in 2005 will be the same as the salaries in 2004 plus a one-year cost of living adjustment. *Id.* The salaries in 2006 will be the same as the 2005 salaries plus a one-year cost of living adjustment. *Id.*

113. *See generally*, *Basic Agreement*, *supra* note 20, at 85-86. *See also* *Four-year*, *supra* note 20.

114. *See Baseball Players Agree*, *supra* note 4. USA TODAY reported that it "surveyed 750 players in June and that 79% of those responding supported independent testing for steroid use." *Baseball Players Agree*, *supra* note 4.

115. *See Basic Agreement*, *supra* note 20, at 157-83. "The MLBPA has always believed one should not, absent compelling safety considerations, invade the privacy of someone without substantial reason - i.e. without cause - related to that individual and merely his status as an employed baseball player," says executive direction, Donald Fehr. Alison Knopf, *Steroid Testing for Baseball?*, XVI No. 8 DRUGSWP 4 (2002). He added, "We should take care not to treat unsubstantiated media reports and rumors as if they were proven fact." *Id.*

116. *See* 21 U.S.C. §812 (b)(3) (1970). The Controlled Substance Act defines "Schedule III" as:

The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

The drug or other substance has a currently accepted medical use in treatment in the United States.

Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence. *Id.*

during the life of the agreement.¹¹⁷ Under the program, each player will be given two announced tests within a week of each other during the 2003 spring training or the regular season as part of a survey.¹¹⁸ If more than five percent of the players test positive, mandatory random testing would begin the following season and continue until less than 2.5% test positive in consecutive years.¹¹⁹ A player testing positive the first time would be placed in a treatment program.¹²⁰ Further positive tests would result in longer suspensions without pay.¹²¹

The program does not require for the testing of recreational drugs, such as cocaine, LSD, PCP, marijuana, opiates, or Ecstasy.¹²² However, if a joint union-management health committee agrees that there is "just cause" to test a player, they can be tested.¹²³ More importantly, the program does not test for over-the-counter supplements, such as Androstenedione or Creatine.¹²⁴ However, if more than ten percent of players test positive in a year for an over-the-counter supplement on a first test but negative on a follow-up test, a health committee may prohibit their use.¹²⁵ The program also calls for a zero tolerance policy with respect to players convicted of drug possession. The program sets forth suspensions of 15-to-30 days for a first offense, 30-to-90 for a second offense, an

117. *Basic Agreement*, *supra* note 20, at 161-62.

118. *Id.* at 161.

119. *Id.* The program allows owners to administer up to 240 additional tests if mandatory random testing is conducted in 2004. *Id.* In November 2003, MLB indicated that between five and seven percent of players had test positive, thereby triggering mandatory random testing. See *Mandatory Random Testing to Begin*, at http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_news.jsp?ymd=20031113&content_id=603458&vkey=news_mlb&fext=.jsp (last visited November 18, 2003).

120. *Basic Agreement*, *supra* note 20, at 161. A player may also be placed in a treatment program if he voluntarily admits to a drug problem. *Id.*

121. *Id.* at 168-71. A second positive test results in either a fifteen-day suspension or up to a \$10,000 fine. *Id.* at 169. A third positive test would result in a twenty-five-day suspension, a fifty-day suspension for a fourth positive test, and a one year suspension for a fifth positive test. *Id.* These suspensions would all be without pay. *Id.*

122. See *id.* at 161-63.

123. *Id.* at 163. A majority of the committee must agree there is reasonable cause. *Id.*

124. *Basic Agreement*, *supra* note 20, at 162.

125. *Id.* The joint union-management committee can only prohibit the use of supplements provided the committee's vote is unanimous. *Id.*

automatic one-year suspension for a third offense, and a two-year suspension for a fourth offense.¹²⁶ If a player has been convicted more than five times, the Commissioner will determine the level of discipline.¹²⁷

C. Criticisms of the Drug-Testing Program

Many drug experts, and non-experts, have criticized the MLBPA and MLB's policy, and rightly so, as being "pretty dopey"¹²⁸ and "woefully weak".¹²⁹ The program is described as a "public relations attempt to quell fan distrust."¹³⁰ One of the major criticisms of the program is that MLB will test only for Schedule III steroids, and not for muscle enhancers or over-the-counter-supplements, both of which are banned by the Olympic Committee and the NFL.¹³¹ Another criticism is that MLB will not test during the off-season, giving players the "green light" to use steroids for four months before the beginning of the following season.¹³² The third major criticism with the program is that rather than having an independent agency

126. *Id.* at 169-70.

127. *Id.* at 170. The Commissioner has the option to fine players without pay, rather than suspend the players, if he so chooses. *Id.*

128. See *Baseball's Drug Testing Program Looks Pretty Dopey*, (on file with Seton Hall Journal of Sports and Entertainment Law) [hereinafter "*Baseball's Drug Testing*"]. Dr. Gary Wadler, a New York University School of Medicine professor and a member of the World Anti-Doping Agency research committee says, "It's not a drug test. It's an IQ test. . . . You would have to flunk an IQ test to flunk it." *Id.*

129. See *New Steroid Testing Agreement is Woefully Weak*, (on file with Seton Hall Journal of Sports and Entertainment Law) [hereinafter "*New Steroid Testing*"]. Ross Newhan of the LOS ANGELES TIMES says, "The agreement is strictly window dressing aimed at appeasing fans." *Id.*

130. *Baseball's Drug Testing*, *supra* note 128.

131. See *Baseball's Drug Testing*, *supra* note 128. "The stance of baseball's players union has essentially been that it is extremely reluctant to accept a ban on any substance that an adult may freely purchase at the local drug store or nutrition center." Mark Kreidler, *Baseball Needs to Take a Stand on Ephedra*, at http://msn.espn.go.com/mlb/columns/kreidler_mark/1514258.html (last visited Oct. 9, 2003).

132. See *Baseball's Drug Testing*, *supra* note 128. Since steroids leave the body a couple of weeks after use, a player only needs to stop using a couple of weeks before spring training and may continue after he is tested. See *Baseball's Drug Testing*, *supra* note 128. See also *New Steroid Testing*, *supra* note 129. Players will be able to take steroids during the off-season and just taper off, "maybe take some masking agents, to slip through a urine test in spring training or later in the season." *New Steroid Testing*, *supra* note 129.

handle the testing, MLB's program will be handled by a four-person committee, with two members from each side, including one doctor.¹³³

V. DRUG TESTING IN OTHER MAJOR SPORTS

A. National Football League ("NFL")

The NFL feels that prohibited substances have no legitimate place in football.¹³⁴ In fact, the NFL prohibits the "illegal use of drugs and the abuse of prescription drugs, over-the-counter drugs, and alcohol."¹³⁵ Also, the NFL prohibits the use of "anabolic/androgenic steroids (including exogenous testosterone), human or animal growth hormones, whether natural or synthetic, and related or similar substances."¹³⁶ Steroid testing in the NFL is handled by the NFL Management Council, more specifically, the NFL Advisor for Anabolic Steroids.¹³⁷

Testing is conducted frequently in the NFL, with players being subjected to testing throughout the year. First, in the annual/preseason phase, players are tested at least once a year, either during training camp or whenever they report to camp.¹³⁸ Additionally, players will be subject to random testing during the weeks in which preseason games are

133. *Basic Agreement*, *supra* note 20, at 157. Dr. Gary Wadler says, "Trying to tackle-testing on its own, rather than contracting it out to an independent group like WADA, is baseball's biggest mistake." See also *New steroid testing*, *supra* note 129.

134. *NFL Collective Bargaining Agreement: Steroid Policy*, at <http://www.nflpa.org/media/main.asp?subpage=Steroid+Policy+%2D+Full§ion=ALL> (last visited Oct. 9, 2003) (hereinafter "*NFL Steroid Policy*").

135. *NFL Collective Bargaining Agreement: Substance Abuse Policy*, at <http://www.nflpa.org//shared/drugPolicyPrinter.asp> (last visited Oct. 9, 2003).

136. *NFL Steroid Policy*, *supra* note 134. Appendix A to the steroid policy lists all prohibited substances by the NFL. *Id.* The list is broken down into Anabolic Agents (Anabolic/ Androgenic Steroids, Human or Animal Growth Hormone, Beta-2-Agonists, and Human Chorionic Gonadatropin) and Masking Agents (Diuretics, Epitestosterone, and Probenecid). *Id.*

137. *Id.* The Advisor has the sole discretion regarding steroid-related matters, including testing and medical evaluations. *Id.* The advisor must also "make himself available for consultation with players and team physicians; oversee the development of education materials; participate in research on steroids; and serve as chairman of the League's Advisory Committee on Anabolic Steroids." *Id.*

138. *Id.*

played.¹³⁹ During the regular season phase, players from each team will be randomly selected each week for testing.¹⁴⁰ During the postseason phase, players whose teams are in the postseason will be randomly tested as they were in the regular season.¹⁴¹ Finally, during the off-season phase, players may be tested twice using the same selection procedure as in the regular season.¹⁴² Additionally, reasonable cause testing is available if a player has previously failed a test or if the Advisor believes it is reasonable based on medical or behavioral evidence.¹⁴³

B. National Basketball Association ("NBA")

Just like the NFL, the NBA has an extensive anti-drug program aimed at securing a drug-free environment in the NBA.¹⁴⁴ In fact, the NBA provides testing for Drugs of Abuse (Amphetamine and its analogs, Cocaine, Opiates, and Phencyclidine), Marijuana and its by-products, and Steroids.¹⁴⁵ However, the NBA's policy does not conduct testing for performance enhancing supplements. The agreement between the NBA and the Player's Association states that both parties will jointly select a Medical Director¹⁴⁶, an Independent Expert,¹⁴⁷ and a Prohibited

139. *Id.*

140. *NFL Steroid Policy*, *supra* note 134. Players tested during the regular season will be chosen by a computer program composed of players on the active roster, practice squad, and reserve list. *Id.* Players who are chosen must get tested, regardless of the number of times they have already been tested. *Id.*

141. *Id.*

142. *Id.* All players chosen for testing in the off-season must supply a urine sample at a location acceptable by the Advisor. *Id.*

143. *Id.* Any player with any prior documented steroid involvement must undergo ongoing reasonable cause testing. *Id.*

144. See *NBA Collective Bargaining Agreement Article XXXIII*, at <http://www.nbpa.com/cba/articleXXXIII.html> (last visited Oct. 9, 2003) [hereinafter "*Article XXXIII*"].

145. *NBA Collective Bargaining Agreement Exhibit I-2*, at <http://www.nbpa.com/cba/exhibits/exhibitI-2.html> (last visited Oct. 9, 2003). Exhibit I-2 lists the following steroids as prohibited in the NBA: Bolasterone, Bolderone, Clostebol, Dehydrochlormethyltestosterone, Dromostanolone, Ethylestrenol, Furarebol, Mesterolone, Methandienone, Methandriol, Methenolone, Mibolone, Oxymcatrone, Trenbolone, and Clenbuterol. *Id.*

146. *Article XXXIII*, *supra* note 144, at Section 2(a). The Medical Director has the responsibility for "selecting and supervising the Counselors and other personnel necessary

Substance Committee¹⁴⁸ to carry out the program.¹⁴⁹

Although testing does not occur as frequently in the NBA as it does in the NFL, there are still three situations in which testing may occur. The first type of testing in the NBA is reasonable cause testing, whereby either the NBA or the Player's Association can request a conference with the player and the Independent Expert.¹⁵⁰ Ultimately, the Independent Expert will determine if reasonable cause has been presented and will issue an Authorization of Testing if it has.¹⁵¹ The second type of testing is for first-year players.¹⁵² First-year players may be subjected to testing no more than one time during training camp, and no more than three times during the regular season.¹⁵³ The final type of testing is for veteran players.¹⁵⁴ A veteran player may only be required to undergo testing one time during training camp.¹⁵⁵

C. National Hockey League ("NHL")

Unlike the NFL and NBA, the NHL does not have a strict substance abuse policy. In fact, the NHL does not subject any of its players to random mandatory steroid

for the effective implementation of the Program, for evaluating and treating players subject to the Program, and for otherwise managing and overseeing the Program, subject to the control of the NBA and the Players Association." *Id.*

147. *Id.* at Section 2(b). The Independent Expert has the responsibility for determining when to demand testing in the case of reasonable cause. *Id.* at Section 5(a).

148. *Id.* at Section 2(d). The Prohibited Substance Committee is comprised of one representative of the NBA, one from the Player's Association, and three individuals who are jointly selected by the parties. *Id.*

149. *Id.* at Section 2.

150. *Article XXXIII, supra* note 144, at Section 5(a).

151. *Id.* at Section 5. The Independent Expert will evaluate all the information provided to him or her and make a determination based on his experience in substance abuse detection as to whether to issue an Authorization for Testing. *Id.* An Authorization for Testing is a demand for the player to be tested. *Id.* at Section 5(c).

152. *Id.* at Section 6. A first-year player is defined as "a player under Contract to an NBA Team, who, prior to the then-current Season, has not been on the roster of an NBA Team following the first game of a Regular Season." *Id.* at Section 1(f).

153. *Id.* at Section 6(a). Notwithstanding Section 6(a), players still may be subject to reasonable cause testing under Section 5. *Id.* at Section 6.

154. *Article XXXIII, supra* note 144, at Section 7. A veteran player is defined as "any player who is not a first-year player." *Id.* at Section 1(q).

155. *Id.* at Section 7(a). Notwithstanding Section 7(a), players still may be subject to reasonable cause testing under Section 5. *Id.* at Section 7.

testing.¹⁵⁶ In the NHL, players who have had a problem with illegal drugs will be subjected to testing as part of the NHL's substance abuse policy.¹⁵⁷

D. Olympics

The Olympics, like the NFL and NBA, have rigorous drug testing rules and policies. The Olympic policy, known as the Olympic Movement Anti-Doping Code ("Anti-Doping Code" or "Code"), is dedicated "to ensuring that in sports the spirit of Fair Play prevails and violence is banned. . ."¹⁵⁸ The goal of the Anti-Doping Code is "to prevent endangering the health of athletes."¹⁵⁹ The Anti-Doping Code's list of prohibited substances encompasses Stimulants¹⁶⁰, Narcotics¹⁶¹, Anabolic Agents¹⁶², Diuretics¹⁶³, and Peptide Hormones, Mimetics, and Analogues.¹⁶⁴ The Code provides ratios or concentrations of the substances to define when an offense has occurred.¹⁶⁵

Random testing under the Anti-Doping Code occurs in two instances. First, random testing occurs during

156. Carroll Rogers, *MLB Steroid Policy Unlikely to be as Tough as NFL's*, *Atlanta Journal*, (on file with Seton Hall Journal of Sports and Entertainment Law). The NHL's collective bargaining agreement expires in 2004, indicating that the NHL may be subjected to the same type of scrutiny as MLB. *Id.*

157. *Id.*

158. *Olympic Movement Anti-Doping Code*, at http://www.multimedia.olympic.org/pdf/en_report_21.pdf (last visited Oct. 10, 2003).

159. *Id.* "The Olympic Movement's duty to protect the health of athletes and ensure respect for sports ethics leads it to prohibit doping and to oblige competitors to undergo medical tests and examinations, prescribing to such end the sanctions applicable in the event of a violation of the established rules. . . ." *Id.*

160. *Id.* at Appendix A. Examples of stimulants include: amphetamines, caffeine, cocaine, ephedrine, and related substances. *Id.*

161. *Id.* Examples of narcotics include: diamorphine (heroin), methadone, morphine, and related substances. *Id.*

162. *Olympic Movement Anti-Doping Code*, *supra* note 158. Anabolic Agents include: anabolic androgenic steroids (metandienone, metenolone, nandrolone, androstenedione, testosterone, and other related substances) and beta-2 agonists. *Id.*

163. *Id.*

164. *Id.* This category includes the growth hormone (hGH), insulin-like growth factor (IGF-1), and related substances. See *Olympic Movement Anti-Doping Code*, *supra* note 158.

165. *Id.* For example, "[t]he presence of a testosterone (T) to epitestosterone (E) ratio greater than six (6) to one (1) in the urine of a competitor constitutes an offense unless there is evidence that this ratio is due to a physiological or pathological condition . . ." *Id.*

competition, also referred to as in-competition testing.¹⁶⁶ Appendix C to the Anti-Doping Code describes the procedures for in-competition testing.¹⁶⁷ The second type of testing is out-of-competition testing.¹⁶⁸ Out-of-competition drug tests are usually conducted with no advanced notice to the athlete and may occur at any time.¹⁶⁹ Various other rules and policies may apply to athletes depending on the particular organization that is responsible for the particular event.¹⁷⁰

VI. STEPS FOR FUTURE COLLECTIVE BARGAINING IN MLB

As previously mentioned, MLB's drug testing policy has been the subject of criticism for being a "public relations attempt to quell fan distrust."¹⁷¹ The policy has been criticized for the substances (or lack of) that are prohibited, for the frequency and randomness of testing, and for the punishments proscribed.¹⁷²

A. Prohibited Substances

The 2002 collective bargaining agreement prohibits only the use of "Schedule III" anabolic androgenic steroids.¹⁷³ The MLB's list of prohibited substances is substantively weak when compared to the lists of other major sports. For

166. See *Olympic Movement Anti-Doping Code*, *supra* note 158, at Annex 2 of Appendix B.

167. See *Olympic Movement Anti-Doping Code*, *supra* note 158, at Appendix C. Appendix C describes the procedures for selecting athletes, competitor notification, registration for doping controls, sample-taking procedures, transport, receipt of the samples, and sample analysis. *Olympic Movement Anti-Doping Code*, *supra* note 158, at Appendix C.

168. *Olympic Movement Anti-Doping Code*, *supra* note 158, at Annex 2 of Appendix B. The same procedures used in in-competition testing apply to out-of-competition testing. *Id.* at Appendix C.

169. Jill Pilgrim & Kim Betz, *A Journey Through Olympic Drug Testing Rules: A Practitioner's Guide to Understanding Drug Testing within the Olympic Movement*, at <http://www.thesportjournal.org/Volw3No3/DrugTest.htm> (last visited Oct. 9, 2003).

170. *Id.* "Within the Olympic Movement, the International Olympic Committee (IOC), some International Federations (IF's), the United States Olympic Committee (USOC), and certain other national organizations, by agreement, all conduct drug testing programs and have the ability to drug test U.S. athletes either during competition, out-of-competition, or both." *Id.*

171. *Baseball's Drug Testing*, *supra* note 128.

172. *Id.*

173. *Basic Agreement*, *supra* note 20, at 160-62.

example, the MLB's policy only prohibits certain steroids, but the Olympic Movement's Anti-Doping Code and the NFL's policy, prohibit the use of steroids, and muscle-enhancing supplements that are legal within the DSHEA.¹⁷⁴ Also, unlike the Anti-Doping Code, the NFL, or the NBA, MLB's policy does not test for recreational drugs.¹⁷⁵

Experts argue, and convincingly so, that in order for MLB's policy to be effective, testing must also be conducted for performance-enhancing drugs, such as Androstendione.¹⁷⁶ Although legal within the DSHEA, some performance-enhancing drugs are not safe.¹⁷⁷ It is unknown whether supplements or other drugs contributed to the death of Baltimore Orioles pitcher Steve Bechler; reports suggest that Bechler was taking ephedrine.¹⁷⁸ Unfortunately it is this type of incident that is needed to force MLB to reconsider testing for supplements. Just like the NFL and the Olympic Anti-Doping Code, MLB does not need to wait for Congress to make a drug illegal before it is banned from the sport. Although legal, eliminating performance-enhancing supplements would make the game more fair, bring integrity back to the game, and restore the fan's trust. Also, testing for steroids and supplements would protect the health of players and the health of young athletes who try to emulate MLB players. Testing should also be conducted for other recreational drugs, as is done in

174. *Legal in Baseball*, *supra* note 6.

175. *See Basic Agreement*, *supra* note 20, at 161-62.

176. *See BPA's Steroid Testing Plan* (on file with Seton Hall Journal of Sports and Entertainment Law). BPA argues:

In addition to Androstendione, Creatine, and countless other chemical substances, most of baseball's power hitters and others began their strength programs with anabolic steroids and rigorous weight lifting workout regimens during the off-season. For Creatine and Andro to really work, an athlete has to receive a jumpstart by the use of steroids. During the season, after they get off their steroid cycles, they depend on Creatine and many other "nutritional" supplements."

See also BPA's Challenge to Major League Baseball (on file with Seton Hall Journal of Sports and Entertainment Law).

177. *See Facts About Dietary Supplements Used by Athletes*, *supra* note 16.

178. *Pitcher May Have Been Taking Diet Supplement*, *supra* note 9. The article notes that a bottle of a supplement containing ephedrine was found in Bechler's locker. *Id.* The cause of Bechler's death has been reported as heatstroke. *Id.* The dietary supplement ephedrine has been linked to heatstroke and heart attacks. *See Bechler's Organs Failed as Result of Heatstroke*, at <http://espn.go.com/mlb/news/2003/0217/1510257.html> (last visited Oct. 9, 2003).

other major sports.

B. Testing Procedures

The 2002 collective bargaining agreement calls for survey testing during the 2003 spring training or the regular season.¹⁷⁹ If more than five percent of the players test positive, mandatory random testing begins the following season and continues until less than 2.5% test positive in consecutive years.¹⁸⁰ A player testing positive for the first time is placed in a treatment program.¹⁸¹ Further positive tests result in longer suspensions without pay.¹⁸²

MLB needs to institute "Olympic-style, unannounced, random, and out-of-season testing for anabolic steroids."¹⁸³ Included in this plan should be several unannounced tests throughout the year, starting in the off-season, with the tests counting for more than survey purposes.¹⁸⁴ Players should also take three tests during the year for performance-enhancing drugs, and one test during the year for recreational drugs.¹⁸⁵ Clearly a more stringent form of testing procedures is needed to ensure that MLB is drug-free.

Another step MLB needs to take in the future is to allow an independent agency to administer and monitor the testing.¹⁸⁶ Experts agree that in trying to tackle the problem of testing on its own, MLB made a big mistake.¹⁸⁷ Instead, MLB should use an independent agency that can impose sanctions.¹⁸⁸ More troubling is that MLB had an offer from the United States Anti-Doping Agency, which conducts

179. *Basic Agreement*, *supra* note 20, at 161-62.

180. *Id.* at 161. As previously mentioned, MLB has indicated that between five and seven percent of the players tested have tested positively, thereby triggering mandatory random testing. See *Mandatory Steroid Testing to Begin*, *supra* note 119.

181. *Basic Agreement*, *supra* note 20, at 161.

182. *Id.* at 168-70.

183. *BPA's Steroid Testing Plan*, *supra* note 176.

184. *Id.*

185. *Id.*

186. *Id.*

187. *New Steroid Testing*, *supra* note 129.

188. *Id.*

Olympic drug testing, to handle testing for MLB.¹⁸⁹ As the collective bargaining agreement evidences, MLB did not take advantage of this offer, but instead decided to use a four-person committee composed of two members from each side of the bargaining table, including one doctor.¹⁹⁰

A final suggestion for future collective bargaining agreements is to provide a disciplinary component for providing penalties once random testing begins.¹⁹¹ Allowing a player a "free pass" the first time he tests positive is not effective in carrying out a drug-testing plan. Instead of placing a player in treatment for his first violation, a player should be suspended for a specific number of games.¹⁹² The implementation of a more imminent penalty should deter the use of drugs in MLB.

C. Legal Implications

The legal implications of the new collective bargaining agreement and the proposed steps for future collective bargaining agreements are similar to the legal implications of any drug-testing program. Most important is a balancing of the player's health, the integrity of the game, and the health of young athletes, against the privacy interests of the players in baseball. Clearly any sort of drug testing will infringe upon a person's privacy interest, however, in most situations the government, or in this case, the League's interest in safety and integrity will weigh more heavily in the balancing process of determining reasonableness.

Like any other drug-testing program, players will argue an unreasonable search of their body or a violation of their privacy interest through a breach of confidentiality. However, the search issue and the privacy issue can be pushed aside because MLB and the MLBPA collectively

189. See Dick Patrick, *Baseball Has Offer from Drug-testing Agency*, at <http://www.usatoday.com/sports/baseball/stories/2002-06-14-steroids-testing.htm> (last visited Oct. 9, 2003). Agency CEO Terry Madden said, "USADA would be happy to work with any professional sports in the areas of research, education, and testing." *Id.*

190. *Basic Agreement*, *supra* note 20, at 157.

191. *BPA's Steroid Testing Plan*, *supra* note 176.

192. *Id.*

bargained over these issues. Until a violation of the agreement occurs, such as breaching the confidentiality requirement or imposing penalties not allowed in the agreement, all legal arguments are merely speculative. Only time will tell if any legal issues will arise from the new collective bargaining agreement or any future agreements.

VII. CONCLUSION

After years of criticism and pressure from every angle, Major League Baseball has finally taken a baby step in tackling a big problem. The effects of steroids and other performance-enhancing drugs are becoming known and it is up to society to stop individuals from harming themselves and others. It is also known that children and other youths look up to professional athletes, not just baseball players, as role models. Other sports have taken steps to prevent their players from using illegal drugs and other performance enhancing supplements and hopefully the overall effect will be to decrease the use of drugs by young athletes.

Major League Baseball developed a plan that they thought would ease the critics and bring respect back to the players in MLB. However, critics have likened the plan to a public relations ploy rather than a serious attempt at solving the problem. To show that they are serious about fighting the drug problem in baseball, MLB and the MLBPA need to institute steps to make the plan more effective. Of these steps, the most important is instituting random, mandatory testing for all steroids and performance-enhancing drugs. The effect would be immediate because players would not be able to plan around the testing, as they can do under the current program.

Of course, with the institution of a sweeping drug policy comes concerns for player's rights and other legal issues. However, drug testing is a mandatory subject of collective bargaining, therefore, any program that is instituted must be agreed to by both MLB and the MLBPA. It is time for both sides of the bargaining table to look at the whole picture and sacrifice rights to benefit society and promote

healthy living. It has been done in the NFL, NBA, and the Olympics, so there is no reason for MLB players to be treated any differently.

Scott Danaher