

**MAJOR LEAGUE BASEBALL & DRUG TESTING: A LEGAL CRITIQUE OF THE CURRENT
POLICY AND A LOOK AT THE FUTURE OF DRUG TESTING IN THE MLB**

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I. INTRODUCTION

“Baseball must ascend and aspire to the highest principles – of integrity, of professionalism, of performance, of fair play within its rules.”¹ Spoken by Bart Giamatti, former Commissioner of Major League Baseball (hereinafter “MLB”), that sentiment seems consistent with most public comments made by the MLB administration, team owners, union representatives and players. More specifically, the integrity issue often arises in public efforts to justify and/or promote drug testing within baseball. In a 1997 memorandum on drug policy, prevention and testing, addressed to all MLB clubs, current MLB Commissioner (then chairman) Bud Selig wrote, “[a]s in the past, the health and welfare of those who work in baseball will continue to be our paramount concern. No less compelling, however, is the need to maintain the integrity of the game.”²

Drug testing in baseball has been established in order to protect and promote the health and welfare of the players, to guard the integrity of the game, and to encourage professionalism in a sport that is a career for many. But does the current MLB drug testing policy actually address these concerns? Does the policy, along with its consequences, act as enough of a deterrent in order to achieve the goals it was implemented to accomplish? As Commissioner Selig and others push for a drug testing

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¹ ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 151 (Temple University Press 1998).

² Memorandum from Bud Selig, Commissioner of Major League Baseball, to all Major League Baseball teams, owners and players on the Drug Policy and Prevention Program (May 15, 1997) (on file with the Office of the Commissioner of Major League Baseball).

policy with more severe punishments, more and more criticisms arise that threaten to make the 2006 collective bargaining an imposing challenge for all parties involved. In general, many say that current drug testing does not deter drug use in the MLB. Some players and the Major League Baseball Players Association (hereinafter “MLBPA”) assert that drug testing merely serves as a bargaining tool between the owners and the union.³

This paper explores the validity of these criticisms in regard to the current MLB drug testing policy and will take into account the historical progression of drug testing in the MLB. The future of the MLB drug testing policy and what it will entail remains unclear, but the numerous criticisms and concerns certainly will be pertinent when the parties review the policy.⁴ The current hype surrounding recent admissions and allegations of steroid use in the MLB already has caused the MLB and MLBPA to examine its performance-enhancing drug rules. That represents a step in the right direction. However, to achieve real effectiveness, the entire drug testing policy needs examination and revision.

II. PARTIES INVOLVED

One must know the parties involved in the MLB collective bargaining to fully understand the MLB drug testing policy and its flaws. As will be discussed later in more

³ ESPN.COM NEWS SERVICES, PITCHER: OWNERS CAN'T BE TRUSTED TO HANDLE JOB, *at* <http://sports.espn.go.com/mlb/news/story?id=1761707> (last visited April 1, 2005). Boston Red Sox outfielder and union player representative Johnny Damon said, “The owners know that we are divided, with some players wanting the testing and other players not...they know that’s a very key issue, especially...going into the next bargaining session...”

⁴ Barry M. Bloom, *Owners Approve New CBA, 29-1, at* http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_news.jsp?ymd=20020905&content_id=121870&vkey=news_mlb&fext=.jsp (last visited April 1, 2005). The current collective bargaining agreement, of which the current drug testing policy is a part of, runs through December 2006.

detail, much of the power struggle in arriving at an agreement on this matter is related to the relative authority positions of the individuals and organizations involved.

Each MLB team (or “club”) enters into a collective bargaining agreement (hereinafter “CBA”) with the MLBPA; the last session culminated in September 2002.⁵ The CBA contains the Uniform Player’s Contract that sets standards for player contracts and other rules to which the league, union, clubs, and players must adhere.⁶ The bargaining takes place between the MLB (on behalf of, and representing, the desires of all of the clubs respectively) and the MLBPA (acting for the players collectively).⁷

The MLBPA formed as a result of a long struggle for unionization in baseball, and in professional sports in general.⁸ Founded in 1954,⁹ the MLBPA began after the National Labor Relations Board (hereinafter “NLRB”) made baseball eligible for protection under the National Labor Relations Act (hereinafter “NLRA”).¹⁰ In fact, due to its effect on commerce, the sports industry as a whole qualified for protection under the NLRA.¹¹ Since unionization and collective bargaining in baseball, the NLRB has recognized the MLBPA as the “exclusive bargaining representative” for all MLB players.¹²

The commissioner is the key authoritative figure in the MLB. His powers are “agreed to by the members of the league through their constitutions and bylaws and the

⁵ MARTIN J. GREENBERG, SPORTS LAW PRACTICE § 5.02 (2d ed. 1993).

⁶ *Id.*

⁷ *Id.*

⁸ WALTER T. CHAMPION, JR., SPORTS LAW IN A NUTSHELL 41 (2d ed. 2000).

⁹ Michael J. Haupert, *The Economic History of Major League Baseball*, University of Wisconsin/La Crosse, at <http://eh.net/encyclopedia/?article=haupert.mlb> (last visited April 1, 2005).

¹⁰ CHAMPION, *supra* note 8, at 41.

¹¹ *Id.*

¹² *Id.* at 42.

players association through the CBA.”¹³ He is “in charge of administering, interpreting and enforcing the rules and the discipline of the sport and league.”¹⁴ Additionally, the collective bargaining agreement almost always includes a “best interest provision” that authorizes the commissioner to “take any action he considers to be in the best interest of [baseball].”¹⁵ Entrusted with “ensur[ing]... orderly operation and integrity,” the commissioner exercises vast power, however, the extent of the power is often vague.¹⁶ Regardless, at a minimum, league provisions require procedural due process in disciplinary actions.¹⁷ Also, the Fourteenth Amendment to the federal constitution and the modern body of antitrust law both check the Commissioner’s power.¹⁸

Of course, agents and club owners also participate in the collective bargaining, but in regards to the drug testing policy, the MLB and the MLBPA are the main players; they are the parties to the final CBA which binds all of their members. Once the parties agree to the terms of the CBA, the MLB administers and regulates the policy and the MLBPA polices that administration on behalf of the players.¹⁹

III. MLB DRUG TESTING POLICY

A. MLB Commissioners and the MLB Drug Testing Policy in Recent History

The history of the MLB’s drug policy over recent decades reveals numerous attempts by league commissioners to implement drug testing policies in various forms and to deal with the rising social issue of drugs in baseball. The same struggle has endured between the MLB and the MLBPA in the push for a drug testing policy that all

¹³ GREENBERG, *supra* note 5, § 11.07.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

parties could agree upon and that would accomplish the goals articulated by all of those concerned.

1. *Commissioner Bowie Kuhn (1969-1984)*

The later years of Kuhn's administration as MLB Commissioner constituted a significant period in examining the historical progression of drugs and drug testing in baseball. In 1983, four current and former players from the Kansas City Royals (Willie Aikens,²⁰ Jerry Martin, Vida Blue and Willie Wilson) pleaded guilty to misdemeanor charges of attempted cocaine possession, and each received a three-month jail sentence and a fine.²¹ In baseball's history, they became the first active MLB players to serve jail time.²² Commissioner Kuhn suspended Aikens, Martin, Blue and Wilson from baseball for a year without pay for "illegal use of drugs."²³ However, some of the sentences were later modified in arbitration.²⁴ One club owner even stated in approval of the original suspensions that, "Baseball and illegal drugs are not compatible, and we will not tolerate the use of them by any of our employees."²⁵ That same year, after finishing drug rehabilitation prior to the 1983 season, Steve Howe of the Los Angeles Dodgers twice failed drug tests, and was suspended both times.²⁶

²⁰ Mike Fish, *From Big Time to Big House*, at http://sportsillustrated.cnn.com/2003/writers/mike_fish/12/19/aikens/ (last visited April 1, 2005). Willie Aikens currently is serving his ninth year of a twenty-year federal prison sentence for selling 2.2 ounces of crack. Under federal sentencing guidelines, the sentence is equivalent to selling fifteen ounces of cocaine.

²¹ Richard J. Ensor & Glenn M. Wong, *Major League Baseball and Drugs: Fight the Problem or the Player?*, 11 NOVA L. REV. 779, 785 (1987).

²² Fish, *supra* note 20.

²³ Ensor & Wong, *supra* note 21, at 786.

²⁴ *Id.* at 787.

²⁵ *Id.* at 786 (statement by Los Angeles Dodgers President Peter O'Malley).

²⁶ *Id.* at 785.

In 1984, police arrested Atlanta Braves pitcher Pascual Perez in his native Dominican Republic on drug-related charges.²⁷ Perez served a three-month prison sentence for a misdemeanor cocaine possession.²⁸ Upon Perez's release from prison, Commissioner Kuhn suspended him from baseball for one month, stating that "[w]hen players violate the law and baseball's drug rules, discipline must follow."²⁹ Perez filed a grievance and the arbitration panel overturned his suspension because they did not believe that the evidence from the Dominican Republic was persuasive or credible enough to warrant the penalty.³⁰

After serving three-months in prison and paying a five-thousand dollar fine, authorities released Kansas City Royal Vida Blue from prison in March 1984 at which time he sought employment with the San Francisco Giants.³¹ Commissioner Kuhn allowed Blue to sign with the Giants, but the MLBPA filed a grievance that asserted that Blue could not sign with any team until after an investigation into his conviction.³² After the investigation, Commissioner Kuhn then suspended Blue through the 1984 season and "imposed a two-year probationary period that included mandatory drug testing."³³ This time a grievance against Commissioner Kuhn and the MLB failed, and Blue's suspension/discipline was upheld.³⁴

In response to the increasing number of drug-related problems in the MLB during 1983-1984, Commissioner Kuhn implemented the first MLB regulations and policies that

²⁷ *Id.* at 788.

²⁸ *Id.* (the initial charge was possession of half a gram of cocaine with intent to distribute the substance).

²⁹ *Id.* at 788 (quoting *Braves' Perez is Suspended Until May*, USA TODAY, April 18, 1984, at C3).

³⁰ Ensor & Wong, *supra* note 21, at 788.

³¹ *Id.* at 789.

³² *Id.* at 791

³³ *Id.*

³⁴ *Id.* at 790.

dealt specifically with drug-related issues.³⁵ MLB owners eventually approved the new policy in June 1984 as “a joint management-union program for the treatment and punishment of players who used certain types of drugs.”³⁶ The policy, which Kuhn called a “dramatic breakthrough in labor relations and sports” and which most MLB owners considered too “watered down,” contained the following key provisions: (1) Although the program excluded marijuana, amphetamines and alcohol, the commissioner would still be able to act in regards to players found abusing these substances; (2) Players voluntarily coming to a drug program would receive full pay for the first thirty days of treatment and half pay for the next thirty days.³⁷ Any absence from the team roster due to a drug program after sixty days meant that the player would be paid the minimum MLB salary of \$60,000/year.³⁸

Although not effective and somewhat vague,³⁹ Commissioner Kuhn’s attempt at some sort of drug policy in MLB began progression in the right direction. His ideas for how to counteract the rising problem of drugs in baseball created a foundation for the incoming commissioner, Peter Ueberroth.

2. *Commissioner Peter Ueberroth (1984-1989)*

Executive Director of the 1984 Los Angeles Olympic Games, Peter Ueberroth was anxious to “solve the league’s drug-related issues” when he took office in October 1984.⁴⁰ At a press conference early in his tenure, Ueberroth declared, “Baseball has a

³⁵ *Id.* at 791.

³⁶ *Id.* at 792.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 795 (“Former Commissioner Kuhn’s efforts to initiate and develop the joint drug program between the MLB and the MLBPA were deemed insufficient in October 1985 by the owners who dropped the program.”).

⁴⁰ *Id.* at 794.

responsibility to fight drugs, not to fight players.”⁴¹ “The Ueberroth Era” began in June 1985 when Commissioner Ueberroth outlined the league’s first formal drug testing policy.⁴²

The notorious “Pittsburgh Drug Trials”⁴³ of 1985 elicited a crisis of significant proportion in MLB. In that series of trials, Curtis Strong, a former caterer with the Philadelphia Phillies, was convicted of eleven counts of cocaine distribution.⁴⁴ Throughout discovery and investigation surrounding the trials, more than twenty current and former MLB players were called to testify.⁴⁵ Many players admitted to cocaine use and the MLB fell under intense scrutiny as the drug problem in baseball became public.⁴⁶

In reaction to the “Pittsburgh Drug Trials,” Commissioner Ueberroth pushed for voluntary, random drug-testing.⁴⁷ His first set of regulations to this affect articulated that, for 1985, drug testing would be in effect from August – November. Starting in 1986, testing would commence in March and continue through October for “all affected [MLB] personnel.”⁴⁸ Two California physicians specializing in sports medicine and pharmacology administered and supervised the program.⁴⁹ The program tested the

⁴¹ *Id.* at 795.

⁴² *Id.*

⁴³ *See* U.S. v. Curtis Strong, 775 F.2d 504 (3rd Cir. 1985).

⁴⁴ David Schoenfield, *Court is in Session*, at <http://sports.espn.com/espn/page2/story?page=trials> (last visited April 1, 2005).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Mark M. Rabuano, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439, 443 (2002).

⁴⁸ Ensor & Wong, *supra* note 21, at 796-97 (“Major League players are not covered by the program and will not be participating in it.”).

⁴⁹ *Id.* (quoting Memo from Peter V. Ueberroth, Commissioner, Office of Commissioner, Major League Baseball, to all Major League Clubs, Re: Baseball’s Drug Education and Prevention Program (June 18, 1985) (on file with the Office of the Commissioner of Major League Baseball)).

players for cocaine, amphetamines, marijuana, heroin and morphine.⁵⁰ No mention was made of steroids.⁵¹

In Ueberroth's plan, the samples were divided into two containers, one for analysis and one for a confirmatory test (if needed).⁵² If a player tested positive, the confirmatory sample was tested to safeguard against error on the first round of analysis.⁵³ All collection samples were coded to keep results confidential.⁵⁴ If a player tested positive, he entered evaluative and/or rehabilitative treatment, in cooperation with the MLB Employee Assistance Program (hereinafter "EAP").⁵⁵ All MLB players who agreed to the program were tested in July 1985.⁵⁶

The program did not cover MLB players who rejected the testing plan (it did cover minor league players),⁵⁷ despite the "mounting evidence that drug abuse had in the near past affected player performances in the field."⁵⁸ However, at the end of the Pittsburg Drug Trials, Commissioner Ueberroth took further action and implemented "conditional punishment for those players involved in the trial including mandatory testing for continued player eligibility and a renewed push for voluntary drug testing by all MLB players."⁵⁹

The various MLB players involved in the trials were given options in regards to their form of punishment, ranging from suspension to drug testing for the remainder of

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 797

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* (quoting *Players Balk at Drug Test*, USA TODAY, May 9, 1985, at A1).

⁵⁸ Ensor & Wong, *supra* note 21, at 798. See also *Baseball and Cocaine: A Deepening Problem*, N.Y. TIMES, August 19, 1985, at A1, C6; *Cocaine Disrupts Baseball from Field to Front Office*, N.Y. TIMES, August 21, 1985, at A21, A23.

⁵⁹ Ensor & Wong, *supra* note 21, at 801.

their career in the MLB.⁶⁰ Regardless, owners praised the punishments and player representatives found them appropriate.⁶¹

The Office of the Commissioner gained control of substance testing via the 1986 revised “Drug Policy & Prevention Program” that forbade random and unannounced drug testing and allowed for mandatory testing “only for players who have either admitted to drug use or are detected of using illegal drugs.”⁶² Commissioner Ueberroth issued a memorandum at the end of the 1986 season that reiterated the importance of “prevention and rehabilitative assistance” and further asserted the MLB’s intent to continue to levy “appropriate” discipline for repeat offenders or those that refuse to follow treatment courses.⁶³

Drug use in baseball became a legitimate cause for concern in the 1980’s, and Commissioner Ueberroth and his predecessors attempted to address that issue. However, real changes did not take place until the 1990’s, when drug use (including steroid use) really became public.

3. Commissioner A. Bartlett “Bart” Giamatti (1989)

⁶⁰ *Id.* at 801-803: “Seven players were given the choice of either being suspended for one year, or instead donating 10% of their salaries for one season to a drug prevention program in their hometown, agree to random drug testing for the remainder of their careers, and contribute 100 hours of community service for each of the next two seasons. Four players were given the option of a 60-day suspension at the start of the 1986 season, or instead donate 5% of their salary for one year, submit to random drug testing for the rest of their careers, and contribute 50 hours of community service for each of the next two years. Ten other players were given the option of facing suspension or submitting to drug testing.”

⁶¹ Ensor & Wong, *supra* note 21, at 804 (New York Yankees owner George Steinbrenner stated that, “[a]nyone who knocks this decision as too tough or too soft should have his head examined.”).

⁶² Edward Rippey, *Contractual Freedom over Substance-Related Issues in Major League Baseball*, 1 SPORTS LAW J. 143, 151 (1994) (quoting former MLB Commissioner Fay Vincent).

⁶³ Ensor & Wong, *supra* note 21, n.107.

A former president of Yale University and of baseball's National League, Bart Giamatti's tenure as MLB commissioner was, unfortunately, short-lived.⁶⁴ Little documentation exists about his feelings on drug testing, and in his short time as commissioner, no significant drug cases arose. Rather, Giamatti is known as the commissioner who banned Pete Rose from baseball for life because of gambling.⁶⁵ Just weeks after imposing the ban, Bart Giamatti died from a heart attack.⁶⁶

4. Commissioner Francis "Fay" Vincent (1989-1992)

Commissioner Vincent's most significant hour in regard to MLB's drug testing policy came when he banned Steve Howe from baseball for life on June 8, 1992, following multiple drug-related pleas, convictions, and suspensions.⁶⁷ Characterizing the punishment, Commissioner Vincent said that "[s]evere sanctions must be imposed in order to maintain a meaningful deterrent that will protect baseball from the kind of threat represented by individuals who cannot deal with the temptations of... substance abuse."⁶⁸ In any event, Howe's ban was later overturned for being "without just cause" by arbitrator George Nicolau. Vincent's tenure as commissioner, though characterized by a strict take on drugs in the MLB, was merely a glimpse of what was to come in the remainder of the 1990's and beyond.

5. Commissioner Allan H. "Bud" Selig (1992-Present)

⁶⁴ Steve Holtje, *Bart Giamatti*, at http://www.baseballlibrary.com/baseballlibrary/ballplayers/G/Giamatti_Bart.stm (last visited April 1, 2005).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *In re* Arbitration Between Major League Baseball Players Association and the Commissioner of Major League Baseball (Grievance 92-7)–Suspension of Steve Howe, Panel Decision 94.

⁶⁸ PAUL C. WEILER, *LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS* 61 (2000).

Notorious for his “zero tolerance” approach to drugs and his attempts to further effectuate a strong drug testing policy in the MLB, current Commissioner Bud Selig is surprisingly sympathetic to the delicate relationship between the MLB and the MLBPA when it comes to agreeing on a drug testing policy.⁶⁹ Commissioner Selig believes that an effective drug testing policy is necessary for baseball to “live up to its social responsibility.”⁷⁰

Selig’s recent years as commissioner have been preoccupied by regulation of player use of nutritional supplements and steroids.⁷¹ The league reported that between five and seven percent of players tested positive for steroids during the 2003 MLB season.⁷² The recent BALCO scandal is again bringing to the forefront the problem with steroids, specifically, in baseball and with the indictments of various people in this matter (including Barry Bonds’ trainer), Commissioner Selig is dealing with increased scrutiny from not only the American public, but also from Congress.⁷³ Additionally, accusations of steroid use by prominent MLB players (past and current) promise to further the nightmare that Commissioner Selig and the MLB face in regard to drug testing in general.

⁶⁹ Allan H. “Bud” Selig, *Selig Addresses Drug Testing*, MLB.com, at http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_news.jsp?ymd=20040301&content_id=643497&vkey=sp12004news&fext=.jsp (last visited April 1, 2005).

⁷⁰ KNIGHT RIDDER NEWSPAPERS, SELIG VOWS TO TOUGHEN STEROID POLICY, Sports Columbia Dailey Tribune, at <http://archive.columbiatribune.com/2004/jun/20040606spor020.asp> (last visited April 1, 2005).

⁷¹ Robert D. Manfred, Jr. & Allan H. Selig, *The Regulation of Nutritional Supplements in Professional Sports*, 15 STAN. L. & POL’Y REV. 35 (2004). Former Baltimore Orioles pitcher, twenty-three-year-old Steve Belcher died in an incident linked to ephedra in February 2003.

⁷² *Id.* at 53.

⁷³ ASSOCIATED PRESS, CONGRESS TO BASEBALL: GET DRUG FREE OR ELSE, available at <http://www.foxnews.com/story/0,2933,113809,00.html> (last visited April 1, 2005).

B. Current drug testing policy

The MLBPA and the MLB entered into a CBA in September 2002 that permitted random, suspicionless drug testing of players under the MLB's Joint Drug Prevention and Treatment Program (hereinafter "Program") for the first time league history.⁷⁴ The current policy, which will last until the 2006 collective bargaining, states as its purposes: (1) "to educate players on the Major League Clubs' 40-man rosters on the risks associated with using prohibited substances; (2) to deter and end the use by players of prohibited substances; and (3) to provide for, in keeping with the overall purposes of the Program, an orderly, systematic and cooperative resolution of any disputes that may arise concerning the existence, interpretation, or application of this agreement."⁷⁵ The following sub-sections summarize the current drug testing policy from the 2002 CBA; the organization and characteristics follow the policy's actual organization.

1. Health Policy Advisory Committee

The Program established a Health Policy Advisory Committee (hereinafter "HPAC") to "administer and oversee the Program," which consists of two licensed physicians (specializing in diagnosis/treatment of chemical use and abuse) and two attorneys. The MLBPA and the Office of the Commissioner each place one physician and one attorney on the HPAC.⁷⁶ Duties and responsibilities of the HPAC include, but are not limited to, administration of the Program's testing requirements and protocols, the establishment of uniform guidelines for each MLB club's Employee Assistance Program

⁷⁴ Manfred & Selig, *supra* note 72, at 50.

⁷⁵ See Major League Baseball, Joint Drug Prevention and Treatment Program (2003) (also referred to as Attachment 18 of the 2003-2006 Basic Agreement, starting at page 157) [hereinafter *Program*].

⁷⁶ *Id.* § 1(A).

(hereinafter “EAP”), and the creation of individualized programs for players involved in a treatment program coupled with the supervision of their progress.⁷⁷

2. *Prohibited Substances – Drugs of Abuse & Steroids*

In general, the bottom-line rule of the Program is that “all players shall be prohibited from using, possessing, selling, distributing, or facilitating the sale or distribution of any Drug of Abuse and/or Steroid (collectively referred to as “Prohibited Substances”).”⁷⁸ Drugs of Abuse are Schedule I and Schedule II drugs including, cocaine, LSD, marijuana, opiates (i.e. heroin, codeine, and morphine), Ecstasy, GHB, and PCP.⁷⁹ Steroids prohibited by the Program are those anabolic androgenic steroids outlawed by Congress,⁸⁰ or those not included in Schedule III, but nonetheless can only be unlawfully obtained.⁸¹

Prohibited Substances may be added to the Program by two methods: (1) by a unanimous vote of the HPAC, and (2) when Congress adds a new substance to the Code of Federal Regulations’ Schedule of Controlled Substances.⁸² The MLB and the MLBPA agreed to “encourage Congress to revisit the question of whether androstenedione⁸³ should be categorized as a Schedule III substance.”⁸⁴

3. *Survey Testing & Program Testing*

⁷⁷ *Id.* § 1(D)(1).

⁷⁸ *Id.* § 2.

⁷⁹ *Id.* § 2(A); see also 21 C.F.R. §§ 1308.11-1308.12 (2004).

⁸⁰ *Id.* § 2(B); see also 21 C.F.R. § 1308.13 (2004).

⁸¹ *Program*, *supra* note 76, § 2(B).

⁸² *Id.* § 2(C)(1).

⁸³ ASSOCIATED PRESS, *BASEBALL BANS ANDROSTENEDIONE*, *at*

http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_news.jsp?ymd=20040626&content_id=780770&vkey=news_mlb&fext=.jsp (last visited April 1, 2005). Baseball banned the use of androstenedione after the FDA did so on April 12, 2004.

⁸⁴ *Program*, *supra* note 76, § 2(C)(2).

The Program dictates that all players would be subject to two tests during the 2003 MLB season (including spring training, but not including the post-season) at unannounced times solely for the presence of Schedule III steroids.⁸⁵ That “Survey Testing” consisted of one initial test and another follow-up test conducted anywhere from five to seven days after the initial test.⁸⁶ Additionally, the Office of the Commissioner could, at its discretion, randomly select up to 240 players to take additional Survey Testing in 2003.⁸⁷

If more than five percent of players tested positive for steroids in 2003, all players would be subject to two unannounced tests (an initial test and a follow-up test) during the 2004 season. The MLB implemented that “Program Testing” for the 2004 season after five to seven percent of players tested positive for steroids in 2003.⁸⁸ Program Testing will “continue for each season until less than 2.5% of players tested test positive for steroids for two consecutive seasons combined.”⁸⁹

4. Over-the-Counter Supplements

The Program dictates that at the initial test the collector will “inform the player that he should cease using any over-the-counter supplements for at least seven days.”⁹⁰ If the player tests positive at the follow-up test, they cannot dispute the result due to an alleged use of an over-the-counter supplement because of the notice.⁹¹ In regard to over-the-counter supplements, if a player tests positive in the initial test (in either Survey or Program Testing) and the positive result cannot be attributed to over-the-counter

⁸⁵ *Id.* § 3(A)(1).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Manfred & Selig, *supra* note 72, at 52.

⁸⁹ *Program*, *supra* note 76, § 3(A)(2). *See also* § 3(A)(6) (“In all seasons covered by the Basic Agreement, there will be a minimum of Survey Testing.”).

⁹⁰ *Id.* § 3(A)(4).

⁹¹ *Id.*

supplement use, the MLB will uphold the positive result of the initial test even if the follow-up test returns a negative result.⁹²

5. Reasonable Cause Testing

Players are not subject to any kind of testing for Drugs of Abuse, unless this testing falls under “Reasonable Cause Testing.”⁹³ If any member of the HPAC receives information giving him or her reasonable cause to suspect “that a [p]layer has, in the previous 12-month period, engaged in the use, possession, sale or distribution of a Prohibited Substance,” the member must immediately share this information with the other HPAC members.⁹⁴ Upon a majority vote by the entire HPAC that reasonable cause exists, the player is subject to immediate testing within 48 hours of the vote.⁹⁵

6. Clinical Track & Administrative Track

A player that enters the program by testing positive will be placed on a Clinical Track of treatment.⁹⁶ A player automatically moves to the other course of treatment (the Administrative Track) if during his treatment on the Clinical Track he tests positive for steroids, or gets convicted or enters a guilty plea in a drug-related charge.⁹⁷ The Clinical Track is where the HPAC maintains exclusive control of the players’ treatment program, rehabilitation schedule, etc., whereas, in the Administrative Track, the Office of the Commissioner “administers” the players’ program (this is a more serious and scrutinized process). “[I]n all other events, HPAC shall have the discretion to transfer a [p]layer

⁹² *Id.* §3(A)(5); *see also* § 3(B) (If more than 10% of players in a given year test positive during the initial test, but negative during the follow-up test, the HPAC can unanimously make a recommendation to the Office of the Commissioner addressing the usage of over-the-counter supplements by the players).

⁹³ *Id.* § 3(C).

⁹⁴ *Id.* § 3(D).

⁹⁵ *Id.*

⁹⁶ *Id.* § 4(A)(1).

⁹⁷ *Id.* § 4(A)(2) and (3).

from the Clinical Track to the Administrative Track.”⁹⁸ In a somewhat vague gesture, the Program next dictates that a transfer from the Clinical to the Administrative Track does not constitute discipline, but upon such a transfer the player “may be subject to immediate discipline.”⁹⁹

Additionally, a player may skip the Clinical Track altogether for a conviction or guilty plea in a drug-related charge, for not cooperating in his Initial Evaluation (discussed below), or for not cooperating in his Treatment Program (discussed below).¹⁰⁰ When placed on the Administrative Track, a player is required to sign a release of Treatment Program history.¹⁰¹

7. Initial Evaluation & Treatment Program

After a referral to HPAC for either the Clinical or Administrative Tracks, a player will undergo an initial evaluation with the HPAC physicians to determine the most effective treatment program.¹⁰² The HPAC physicians may consult with other physicians/experts in the field, but “unless HPAC decides otherwise.” The physician may not disclose the name of the player with whom they consult.¹⁰³ A player must be informed of the initial duration of the Program, which may include counseling, in-patient treatment, out-patient treatment and/or follow-up testing, however, depending on the player’s progress, the HPAC physicians may change the duration and scope at their discretion.¹⁰⁴ Administration of the Program may be delegated to other medical

⁹⁸ *Id.* § 4(A)(4) (“The parties agree...that HPAC shall not move a player to the Administrative Track solely on the basis that the Player is in an in-patient treatment program.”).

⁹⁹ *Id.* § 4(A)(5).

¹⁰⁰ *Id.* § 4(B).

¹⁰¹ *Id.* § 4(C); see also *Program, supra* note 76, Addendum B (“Authorization for the Release of Treatment History” form).

¹⁰² *Program, supra* note 76, § 6(A)(1).

¹⁰³ *Id.* § 6(B).

¹⁰⁴ *Id.*

professionals, including an MLB club EAP or team physician, but the HPAC medical representatives must maintain overall supervision.¹⁰⁵

8. Confidentiality & Disclosure of Information

Section seven of the Program addresses the confidentiality of a player's participation in evaluations and the treatment program, which is explained as being "essential to the Program's success."¹⁰⁶ Under this section, "the Office of the Commissioner, the Association, HPAC, Club personnel, and all of their members, affiliates, agents, consultants and employees, are prohibited from publicly disclosing information about the player's test results, initial evaluation, diagnosis, treatment program (including whether a player is on either the Clinical or Administrative Track), prognosis or compliance with the Program."¹⁰⁷

Section eight details the exceptions to the confidentiality rule. Sub-section (A)(1) addresses Clinical Track confidentiality exceptions. Each club "is prohibited from disclosing any information regarding a player's participation in the Program to either the public, the media or other Clubs."¹⁰⁸ A player's prior written consent and release of treatment program history permits his club to disclose information regarding his progress with another MLB club interested in acquiring him.¹⁰⁹ Sub-section (A)(2) addresses "any and all information relating to an Administrative Track Player's involvement in a

¹⁰⁵ *Id.* § 6(B).

¹⁰⁶ *Id.* § 7.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* § 8(A)(1).

¹⁰⁹ *Id.*; see also *Program, supra* note 76, Addendum B (authorization forms for the release of treatment history on the Administrative and/or Clinical Tracks pursuant to the *Program* by the EAP or team physician, and/or the Medical Representatives of HPAC of "all relevant medical information relating to or stemming from...[a player's] tenure" on the Administrative or Clinical Track "only to the EAP Director, physician and General Manager[s]" of the player's club and of any club that expresses an interest in acquiring the player's contract or the Major League Club that has acquired or may acquire...[the player's] services as a professional baseball player (the "Acquiring Club")).

Treatment Program.”¹¹⁰ The rule requires that “the fact or the results of any Prohibited Substance testing to which the player may be subject, the details of his Treatment Program and his progress there-under, and any disciplinary fines imposed upon the player by the Commissioner” all remain strictly confidential.¹¹¹

If the commissioner disciplines a player for failure to comply with the Program, testing positive for steroids, conviction for the use of prohibited substances, and/or participation in the sale or distribution of a prohibited substance, then “the suspension shall be entered in the Baseball Information System as a suspension for a specified number of days for a violation of th[e] Program.”¹¹² The only comment from the club or the Office of the Commissioner available to the public “shall be that the [p]layer was suspended for a specified number of days for a violation of th[e] Program.”¹¹³

Finally, HPAC “may, without the suspended [p]layer’s consent, disclose the [p]layer’s status on the Administrative Track and the reason for any discipline imposed on the [p]layer to the General Manager of the [p]layer’s [c]lub.”¹¹⁴ All information authorized by section eight “shall be provided either in person or by conference call, provided that at least one HPAC member representing each party is in attendance or on the call.”¹¹⁵ Information released to a general manager shall be kept confidential, except that only he may disclose it “to the General Manager of a Club that has expressed an interest in acquiring such [p]layer’s contract via assignment.”¹¹⁶

¹¹⁰ *Program*, *supra* note 76, § 8(A)(2).

¹¹¹ *Id.*

¹¹² *Id.* § 9(A)-(D).

¹¹³ *Id.* § 8(A)(2); *see also* ASSOCIATED PRESS, D-RAYS HAMILTON SUSPENDED FOR SEASON: OUTFIELDER VIOLATED DRUG TREATMENT, PREVENTION PROGRAM, MSNBC News, *at* <http://www.msnbc.msn.com/id/4563103> (last visited April 1, 2005).

¹¹⁴ *Program*, *supra* note 76, § 8(A)(2).

¹¹⁵ *Id.* § 8(B).

¹¹⁶ *Id.* § 8 (A)(2).

9. *Salary Retention*

The Program provides for salary retention for the first thirty days when a player is required by the terms of his treatment program to be away from his club for inpatient or outpatient treatment.¹¹⁷ “A [p]layer shall be entitled to [half] salary retention for the [thirty-first] through [sixtieth] days.”¹¹⁸ For any duration beyond the sixtieth day a player is not entitled to salary retention.¹¹⁹

10. *Discipline*

Under section nine of the Program, the commissioner may discipline by suspension, and/or a fine, and in specific circumstances, at a level determined consistent with the concept of progressive discipline.¹²⁰ As outlined in Table 1 below, discipline follows when a player fails to comply with the treatment program, tests positive for steroids, is convicted for the use of prohibited substances, participates in the sale or distribution of prohibited substances, or is involved in the use, possession, sale, or distribution of marijuana.¹²¹ The Program deals with marijuana offenses by players less harshly than other drug offenses. “A player on the Administrative Track for the use or possession of marijuana shall not be subject to suspension... [and fines] shall not exceed \$15,000.”¹²² However, if a player who participates in the sale or distribution of marijuana will be subject to large fines or long suspensions, which the table details below under “Sale/Distribution.”

¹¹⁷ *Id.* § 5.

¹¹⁸ *Id.*

¹¹⁹ *See id.*

¹²⁰ *Id.* §§ 9(A)(1)(e), (C)(5), and (D).

¹²¹ *Id.* §§ 9(A)-(E).

¹²² *Id.* § 9(E) (the Program fails to define the meaning of “progressive”).

Table 1

	Failure to Comply ¹²³	Positive Steroid Test ¹²⁴	Conviction ¹²⁵	Sale/ Distribution ¹²⁶	Marijuana
1 st	15 to 25 days or up to \$10,000	Player placed on Clinical Track	15 to 30 days or up to \$10,000	60 to 90 days and up to \$100,000	N/A
2 nd	25 to 50 days or up to \$25,000	15 days or up to \$10,000	30 to 90 days or up to \$50,000	2 years	N/A
3 rd	50 to 75 days or up to \$50,000	25 days or up to \$25,000	1 year or up to \$100,000		N/A
4 th	1 year or up to \$1000,000	50 days or up to \$50,000	2 years		N/A
5 th		1 year or up to \$100,000			N/A

11. Costs

The current policy provides that “[a]ny costs for the treatment and testing of [p]layers on either the Clinical...or the Administrative Track[s],...not covered by the [MLB] Players Benefit Plan..., shall be borne by the Club then holding title to the [p]layer’s contract.”¹²⁷ When a club unconditionally releases a player on a treatment program, it “shall be responsible for any costs of such Program...not covered by the Plan through the season in which the” release took place.¹²⁸ The Office of the Commissioner provides for the costs of the survey testing and any Program testing.¹²⁹ Furthermore, the Office of the Commissioner and the MLBPA share all other costs related to HPAC “in proportion to each [p]arty’s exercise of HPAC responsibilities.”¹³⁰ Finally, “the [t]esting facility utilized in the Program shall be jointly selected by the [p]arties and, upon

¹²³ *Id.* §§ (A)(1)(e), at 169 (“[a]ny subsequent failure...shall result in the Commissioner imposing further discipline..., the level of [which] will be determined consistent with the concept of progressive discipline.”).

¹²⁴ *Id.* § 9(B).

¹²⁵ *Id.* § 9(C) (“[a] player who is convicted or pleads guilty (including a plea of *nolo contendere* or similar... but not including an adjournment contemplating dismissal or a similar disposition) to the use of any Prohibited Substance (including a criminal charge of conspiracy or attempt to possess or use) shall be subject to the...discipline” as described in this subsection); *see also* § 9(A)(1)(e).

¹²⁶ *Id.* §§ 9(D)(1)-(2); *see also* § 9(A)(1)(e).

¹²⁷ *Id.* § 10.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

selection, shall be equally responsible to each of the [p]arties in the conduct of its affairs.”¹³¹

12. Collection Procedures

The Program requires that all testing be conducted in compliance with the applicable specimen collection procedures and testing protocols.¹³² The collector will be male and will have a list of all players to be tested, each will have an identifying number.¹³³ At the time of testing, players provide the collector with identification.¹³⁴ The collector indicates on the Group Collection Log when a player does not have photo ID, and will have a club representative positively identify the player.¹³⁵ “[I]f the collection is for Survey Testing, the [c]ollector invites the [p]layer to affix the assigned identifying number to the specimen vial.”¹³⁶ The collector must explain to the player what the purpose for affixing the number to the specimen vial prior to sample collection,¹³⁷ the specimen collector does so in the following manner:

First, “[t]he test is being taken as part of a survey only, and is without any disciplinary consequences[.]”¹³⁸ Second, “[t]he survey requires two tests of the same Player, in order to rule out positives attributable to legal nutritional substances only, and this is the first of those two tests; the second will be administered in 5 to 7 days[.]”¹³⁹

Third, “[y]ou must refrain from taking any nutritional supplements until after the second

¹³¹ *Id.*

¹³² *Id.* § 3(E); *see also Program, supra* note 76, Addendum A (“[a]ll [c]ollectors must adhere to the...collection procedures.”).

¹³³ *Program, supra* note 76, Addendum A § 1.

¹³⁴ *Id.*

¹³⁵ *Id.* (a club representative may be a trainer or a coach).

¹³⁶ *Id.* § 2.

¹³⁷ *Id.*

¹³⁸ *Id.* § (2)(i).

¹³⁹ *Id.* § (2)(ii).

test is conducted.”¹⁴⁰ When the results of the tests have been determined, all test results including any identifying characteristics will be destroyed in a procedure supervised by both the Office of the Commissioner and the MLBPA.¹⁴¹

The vague nature of the drug testing policy text combined with the obvious lack of enforcement of the drug policy rules and regulations highlight the flaws in the current system. The following section will address those flaws and offer suggestions for improvement and increased effectiveness of the MLB drug testing policy.

IV. LEGAL CRITIQUE OF THE CURRENT MLB DRUG POLICY

As President George W. Bush said in his 2005 Presidential State of the Union Address, “[t]he use of performance-enhancing drugs like steroids in baseball... is dangerous, and it sends the wrong message — that there are shortcuts to accomplishment, and that performance is more important than character. So tonight I call on team owners, union representatives, coaches, and players to take the lead, to send the right signal, to get tough, and to get rid of steroids now.”¹⁴² It follows from President Bush’s statements that the MLB must make significant changes to its drug testing policy to decrease drug use by players.

A. The Policy Does Not Effectively Deter Drug Use

Deterrence is “the act or process of discouraging certain behavior, particularly by fear.”¹⁴³ Commonly used in criminal law, but applicable to this analysis, deterrence rests upon the basic notion that if any punishment exceeds the anticipated benefit from a crime, an individual will not commit the crime. Classic criminology theory dictates

¹⁴⁰ *Id.* § (2)(iii).

¹⁴¹ *Id.* § (2)(iv).

¹⁴² President George W. Bush, *State of the Union Address: 2005*, available at <http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html> (last visited April 1, 2005).

¹⁴³ BLACK’S LAW DICTIONARY 481 (8th ed. 2004).

several prerequisites for deterrence: (1) *severity* — the “punishment must appear roughly proportionate in severity to the original” violation; (2) *certainty* — the “punishment must be perceived as highly or absolutely certain to follow” the violation; and (3) *swiftness* (or *celerity*) — the “punishment must appear to follow the commission of the crime with swiftness.”¹⁴⁴ Commentators criticize the MLB drug testing policy because it does not deter player drug use.¹⁴⁵

Often called “general prevention,” deterrence prevents further wrongdoings by instilling fear in potential wrongdoers who monitor the punishments levied on those who violate the rules.¹⁴⁶ The theory of “simple” or “direct” deterrence is that “threats can reduce crime by causing a change of heart, induced by the unpleasantness of the specific consequences threatened.”¹⁴⁷ Alternatively, “special deterrence” only deters a specific individual because he/she has actually experienced punishment as a result of past crimes/violations.¹⁴⁸ The punishment itself is not the threat — it is merely what is levied when the threat has failed.¹⁴⁹ Logically, it follows that “in order to keep the threat credible authorities must punish those whom break the law.”¹⁵⁰

One of the main goals of the MLB Program is “to deter and end the use by players of prohibited substances.”¹⁵¹ However, due to the lack of severity, certainty, and swiftness, the MLB’s drug testing policy illustrates an ineffective program for drug use deterrence. As outlined above in Table 1, the penalties lack proportionality to the

¹⁴⁴ Rudolph J. Gerber, *Economic and Historical Implications for Capital Punishment Deterrence*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y, 437, 440 (2004).

¹⁴⁵ Rabuano, *supra* note 47, at 443.

¹⁴⁶ WAYNE R. LAFAVE & DAVID C. BAUM, *SUBSTANTIVE CRIMINAL LAW* § 1.5(a)(4) (2d ed. 2003).

¹⁴⁷ FRANKLIN E. ZIMRING, *PERSPECTIVES ON DETERRENCE* 3 (1971).

¹⁴⁸ JOHANNES ANDENAES, *PUNISHMENT AND DETERRENCE* 175 (1974).

¹⁴⁹ *CONTEMPORARY PUNISHMENT* 93 (R. Gerber & P. McAnany eds. 1972).

¹⁵⁰ LAFAVE & BAUM, *supra* note 146, § 1.5(a)(4).

¹⁵¹ *Program*, *supra* note 76.

violations, and do not dictate the severity needed to outweigh the benefit a player anticipates by violating the drug rules.¹⁵² Additionally, the MLB drug policy lacks specific guidelines with respect to the discipline; the commissioner does not punish all violators, he “often lets repeat offenders come back repeatedly.”¹⁵³ It is that type of uncertainty that emasculates the MLB drug testing policy.¹⁵⁴ Finally, punishment for policy violations must be swifter, the policy must demand that players pay the requisite fine or serve the dictated suspension in a more reasonable amount of time. Table 2 sets out the chronology of a grievance and illustrates how the procedure slows down swift punishment.

Table 2

Step 1	Step 2	Step 3
Player must first discuss issue with designated team representative.	Player may appeal to MLB Labor Relations Department (LRD) within 15 days of receiving team representative’s decision.	Player may appeal to Arbitration Panel Chairman within 15 days.
Player must give written notice of grievance to team representative within 45 days of occurrence at issue.	LRD and MLBPA must discuss grievance within 2 days in attempts to reach settlement.	The Panel must hold a grievance hearing within 5 days.
Team representative must give player (and MLBPA) written notice of decision within 2 days of receiving grievance.	LRD must notify player and MLBPA of decision within 2 days of LRD/MLBPA discussion.	The Panel must notify the player and MLBPA of their decision, which is final, within 5 days of the hearing.

Former MLB players Steve Howe and Dwight Gooden illustrate how the drug testing policy has failed to deter in the past.

1. Steve Howe

¹⁵² Gerber, *supra* note 144, at 446.

¹⁵³ CHARLES E. QUICK, SPORTS AND THE LAW: MAJOR LEGAL CASES 82 (1996).

¹⁵⁴ Gerber, *supra* note 144, at 445.

Steve Howe was a left-handed pitcher who began his career with the Los Angeles Dodgers in 1980.¹⁵⁵ Howe stayed with the Dodgers through part of the 1985 season when he was released and picked up by the Minnesota Twins.¹⁵⁶ The Twins released him later that year and between 1985 and 1991, Howe spent time with the Texas Rangers, a Mexican League team, and in unemployment.¹⁵⁷ In 1991 he was signed to a minor league deal with the New York Yankees, where he stayed until the completion of his pitching career in 1996.¹⁵⁸

Players and fans remember Howe more for his unprecedented seven drug-related suspensions rather than his 1982 All-Star appearance and his career win/loss record of 47-41.¹⁵⁹ Howe's record is certainly extensive, but the key point is that he was allowed to return to the league even after violating the drug policy seven times.¹⁶⁰ His story demonstrates that the MLB's drug testing policy has not acted as a special deterrent, nor has it generally deterred because the lack of severity in punishment in Howe's case does little to discourage others from offending the policy.

2. Dwight "Doc" Gooden

Another poignant, yet unfortunate example of the drug testing policy's failure to deter is Dwight "Doc" Gooden. The New York Mets made Gooden a first-round draft

¹⁵⁵ THE IDEA LOGICAL COMPANY, INC., BALLPLAYERS: STEVE HOWE, *at* http://www.baseballlibrary.com/baseballlibrary/ballplayers/H/Howe_Steve.stm (last visited April 1, 2005).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* His first suspension occurred in September 1983 when he refused to take a urinalysis test. 1983 marked another suspension for drug related conduct. After testing positive for cocaine three times in November 1983, Commissioner Kuhn suspended Howe for the entire 1984 season. Howe allegedly relapsed in July 1985 and was again suspended. He signed with the San Jose Bees of the Class A California League in May 1986 and was suspended for a "drug test discrepancy" later that year. In 1987, the Texas Rangers released Howe from the organization for violating his aftercare treatment program. In June 1992, the MLB banned Howe for life (a ban which was later overturned) after he attempted to purchase two grams of cocaine in Montana.

pick selection in 1982.¹⁶¹ He was Rookie of the Year in 1984, won the Cy Young Award in 1985, and was an integral part of the Mets' 1986 World Series victory.¹⁶²

Gooden's documented troubles began in 1986 when he allegedly missed the post-World Series Broadway parade in New York City due to a "massive hangover."¹⁶³ In 1987, he tested positive for cocaine and entered a drug rehabilitation program.¹⁶⁴ Although Gooden did not test positive or get suspended for drugs until 1994, rumors circulated around the league that his career had effectively deteriorated because of his drug use.¹⁶⁵ After serving suspensions for the 1994 and 1995 seasons, the New York Yankees contracted Gooden for a "second chance" in 1996.¹⁶⁶ He continued to play in the MLB with four different clubs until 2001 (New York Yankees, Cleveland Indians, Houston Astros and Tampa Bay Devil Rays), but Gooden's pitching lacked the quality that teams expected of him due to his early success.¹⁶⁷

Like Howe, the MLB repeatedly readmitted Gooden after drug test violations, suspensions, and stints at drug rehabilitation centers. Howe's and Gooden's cases demonstrate that baseball's drug testing policy never has been an efficient specific deterrent, nor is there any credible evidence that it acts as a general deterrent. Although both Howe and Gooden were not subject to the current policy, their experiences in the system evidence the MLB's historical lack of effective deterrence of player drug use.

B. The Parties Inappropriately Use the Policy as a Bargaining Tool

¹⁶¹ ABRAMS, *supra* note 1, at 168-169.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ From 1996-2001, Dwight Gooden posted a 37-27 win/loss record (win percentage of approximately 58%) with approximately 630 innings pitched. Compare this with the first 6 seasons of his career where he posted a 100-39 win/loss record (win percentage of approximately 72%) with approximately 1290 innings pitched.

The MLB drug testing policy is a mandatory part of collective bargaining and a common debating point between the MLB and MLBPA.¹⁶⁸ According to Commissioner Selig, “progress on the issue of drug testing during collective bargaining has been difficult.”¹⁶⁹ Selig’s comment understates the issue. Each year during collective bargaining, the MLB and MLBPA fight over different subjects like player salaries, taxes and season schedules. Introduction of the drug testing policy merely serves as a bargaining chip by the MLBPA to avoid losing ground on the above negotiations.

Enacted in 2002, the current collective bargaining agreement came from “lopsided negotiations between a players’ union philosophically opposed to drug testing and owners deeply fearful of provoking a strike.”¹⁷⁰ Historically, the MLBPA pushed for a lenient and almost non-existent drug testing policy while the owners and the MLB strove to make the drug testing policy as strict and all-inclusive as possible.¹⁷¹ For example, the testing scheme agreed upon in the latest CBA includes one random drug test (specifically geared toward steroids) with a follow-up test five to seven days later.¹⁷² The MLB originally wanted four random tests, three for steroids and one for drugs of

¹⁶⁸ The National Labor Relations Act (NLRA) governs unionized industries, such as MLB. It requires that employers and collective-bargaining representatives bargain “in good faith with respect to wages, hours, and other terms and conditions of employment.” *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 348-349 (1958) (citing 29 U.S.C. §§ 158(a)(5), (d) (1951)). Furthermore, the National Labor Relations Board (NLRB) has often found that a drug policy that includes testing of employees is a mandatory subject of collective bargaining because such a policy can have “the potential to affect the continued employment of employees who become subject to it.” *In re Johnson-Bateman Co.*, 295 N.L.R.B. 180, 183 (1989).

¹⁶⁹ Allan H. “Bud” Selig, *Selig Addresses Drug Testing*, MLB.com, at http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_news.jsp?ymd=20040301&content_id=643497&vkey=sp_t2004news&fext=.jsp (last visited April 1, 2005).

¹⁷⁰ TAMPA BAY SPORTS NET, *DISTANT VOICES: THE SAD TRUTH BEHIND MLB’S STEROID POLICY*, at http://www.tbsports.net/tbsnews/2003/1223_distant_voices_sad_truth_mlb_steroid_policy.htm (last visited April 1, 2005) (originally published at www.sportsbusinessnews.com August 10, 2004).

¹⁷¹ *Id.*

¹⁷² *Id.*

abuse.¹⁷³ The drug testing policy is such a sensitive issue between the MLB and the MLBPA that the MLB will settle for less than it wants just to avoid a player strike.

The MLBPA, more so than the MLB, appears to use the drug testing issue as an inappropriate bargaining tool. The MLB drug testing policy should be something implemented to promote the health of the players and the well-being of baseball as a sport and career provider. It should not be “a matter of negotiation.”¹⁷⁴ Bargaining in a unionized industry is supposed to be conducted “in good faith.”¹⁷⁵ Understandably, both sides negotiate until they obtain the most favorable contract possible for their side, however, when it comes to a policy governing drug testing, the health and welfare of baseball and its players should transcend the negotiation process entirely. Both the league and the players should be concerned with curbing the problem of drug use and strive together for the most comprehensive and effective drug testing policy possible. Unfortunately, that is not the case in the present labor arrangement, where drug testing is used as a “pawn,” valued more for its bargaining power than its potential worth to the league, players, and the game of baseball.

Commissioner Selig has expressed a desire to remove the regulation of drugs (he includes “unsafe nutritional supplements” in this category) from the collective bargaining process.¹⁷⁶ However, he understands the limitation of his desire, “[p]layers’ associations hold different views on the relative importance of protecting players from the dangers of these products as compared to their interest in safeguarding players’ privacy rights.”¹⁷⁷ The MLB and the MLBPA have not achieved an effective drug testing policy that

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. at 348-349.

¹⁷⁶ *Manfred & Selig*, *supra* note 72, at 57.

¹⁷⁷ *Id.*

protects the rights of the players through collective bargaining, and the likelihood of that happening is slight. Thus, the implementation, execution and administration of the drug testing policy in MLB should be the Office of the Commissioner's responsibility because the MLBPA will not facilitate a drug testing policy that works due to their privacy concerns.¹⁷⁸ Until the power is taken away from the MLBPA to bargain inappropriately for a weak policy, a strong policy that works to promote the health and welfare of the players will never materialize.

The union and the league should not be able to barter with a policy that promotes health and welfare to negotiate against subjects like salaries, revenue sharing, and season schedules. Although the NLRB considers drug testing a mandatory topic of collective bargaining in all industries, perhaps the MLB (of its own accord) could obtain some sort of exemption. Specifically, the NLRB could assign regulation of the drug testing policy to the league, or, better yet, to some impartial third-person group that would design a policy to promote health and protect credibility.

It would be beneficial to the MLB and the MLBPA to achieve the most comprehensive and effective drug testing policy possible. A policy that deters drug/steroid use while protecting the credibility of the MLB as a sport and as a profession is the most desirable objective for all parties. Even as the MLB moves toward stricter policies on steroids, MLB officials recognize that stricter scrutiny for substance abuse in the MLB is "too late coming."¹⁷⁹ However, until the parties stop using the drug testing policy as a bargaining tool, the MLB will not realize a truly effective policy.

¹⁷⁸ *Id.*

¹⁷⁹ Mark L. Bowman, *GM Views Steroids Test as Progress*, MLB.com, at http://mlb.mlb.com/NASApp/mlb/news/article.jsp?ymd=20050302&content_id=955039&vkey=news_mlb&fext=.jsp&c_id=mlb (last visited April 1, 2005).

V. CONCLUSION

Drastic changes must be made to MLB's drug testing policy. In order to deter drug use and involvement by players, the most important of these changes must be stricter enforcement and harsher penalties. John P. Walters, director of the White House Office of National Drug Control Policy stated that "[t]here's a way to handle this problem, that's been proven that works, and that's drug testing, serious drug testing. If you don't address it now, you'll have to address it later. And if you don't address it now or later the sport becomes a fraud."¹⁸⁰

The MLB has taken a step in the right direction with the new steroid policy. It will include tougher penalties for those that test positive for steroids for the first time, including a ten day suspension without pay and the public revelation of that player's name.¹⁸¹ March 2005 marked the date for implementation of the new policy.¹⁸²

Baseball is under a deadline to create an effective drug testing policy because the U.S. Congress gave the MLB an ultimatum. Senator John McCain, chairman of the Senate Commerce Committee, chastised MLBPA executive director Donald Fehr for the union's failure to incorporate a comprehensive drug testing policy like the one already in place in the National Football League. Senator McCain warned, "[y]our failure to commit to addressing this issue straight on and immediately will motivate this committee to search for legislative remedies. I don't know what they are. But I can tell you, and the

¹⁸⁰ TAMPA BAY SPORTS NET, DISTANT VOICES: THE SAD TRUTH BEHIND MLB'S STEROID POLICY, *at* http://www.tbsports.net/tbsnews/2003/1223_distant_voices_sad_truth_mlb_steroid_policy.htm (last visited April 1, 2005) (originally published at www.sportsbusinessnews.com August 10, 2004).

¹⁸¹ Barry M. Bloom, *Union Close to Ratifying Drug Policy*, MLB.com, *at* http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_news.jsp?ymd=20050227&content_id=951838&vkey=news_mlb&fext=.jsp (last visited April 1, 2005).

¹⁸² ASSOCIATED PRESS, OFFICIALS STILL DRAFTING NEW AGREEMENT, ESPN.com, *at* <http://sports.espn.go.com/mlb/news/story?id=2002139> (last visited April 1, 2005).

players you represent, the status quo is not acceptable. And we will have to act in some way unless the major league players union acts in the affirmative and rapid fashion.”¹⁸³

On March 17, 2005, Congress subpoenaed seven current and former MLB players (Mark McGwire, Sammy Sosa, Rafael Palmeiro, Jason Giambi, Jose Canseco, Curt Schilling, and Frank Thomas) to appear before it to address the “dangers and suspected widespread use of steroids by major league ballplayers.”¹⁸⁴ Whether Congress fashions a legislative remedy to the deficiencies of the MLB drug policy is yet unknown at the time of this article’s publishing. In any event, only a drug testing policy with severe and swift punishments — uncompromised by a hostile negotiation process — will satisfy the concerns of the interested parties. As the MLB takes steps to address the public scandal surrounding recent allegations of steroid abuse, hopefully it will institute the stricter type of drug testing policy discussed in this article as a solution to substance abuse in Major League Baseball.

¹⁸³ ASSOCIATED PRESS, CONGRESS TO BASEBALL: GET DRUG FREE OR ELSE, FOXNews.com, *at* <http://www.foxnews.com/story/0,2933,113809,00.html> (last visited April 1, 2005).

¹⁸⁴ ASSOCIATED PRESS, SEVEN PLAYERS SUBPOENAED: CANSECO, GIAMBI, MCGWIRE ASKED TO TESTIFY, SI.com, *at* <http://sportsillustrated.cnn.com/2005/baseball/mlb/03/09/bc.bbo.steroids.ap/> (last visited April 1, 2005).