

12-1-2008

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George T. Stiefel III
University at Buffalo School of Law (Student)

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Recommended Citation

George T. Stiefel III, *Hard Ball, Soft Law in MLB: Who Died and Made WADA the Boss?*, 56 Buff. L. Rev. 1225 (2008).

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COMMENT

Hard Ball, Soft Law in MLB: Who Died and Made WADA the Boss?

GEORGE T. STIEFEL III†

INTRODUCTION

If you have read a newspaper or watched the news within the last five years, you have probably drawn an immediate association between steroids and Major League Baseball (MLB). Even though MLB had a policy banning the use of steroids, “the use of steroids in [MLB] was widespread.”¹ Many people have voiced the view that the use of certain performance-enhancing drugs in professional sports is intolerable.² Conventional wisdom suggests that

† J.D. Candidate, State University of New York at Buffalo Law School, Class of 2009; B.S. Clarkson University. I would like to thank my parents for their continued support. I would also like to thank my family, friends, teachers, professors, and scout leaders for their guidance throughout the years. Much of the success I have achieved can be attributed to the influence and inspiration that each of you has provided through leading by example.

1. GEORGE J. MITCHELL, DLA PIPER US LLC, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL SR-35 (2007), <http://files.mlb.com/mitchrpt.pdf>.

2. See Brent D. Showalter, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 MARQ. SPORTS L. REV. 651, 661 (2007) (discussing bills introduced in Congress in 2005 and noting

MLB needs to crack down on performance-enhancing drug use with a strict policy that carries severe sanctions.³ This Comment proposes that “soft law” can help MLB “get tough” without jeopardizing the fundamental American values that other solutions are willing to sacrifice.

In response to the steroid controversy, various non-governmental organizations have acted in ways that required them to balance competing private interests—such as health and fair play against the privacy rights of individuals—and there has been a seemingly inconsistent battle between the “integrity of the game” and the “integrity of [the] legal system.”⁴ In today’s world, sports—even baseball, America’s national pastime—have become subject to international influences and constraints.⁵ The World Anti-Doping Agency (WADA) has developed an

the common justifications for these bills were to protect the “integrity and value of sports and . . . reduc[e] performance enhancing [drug] use by youth” (quoting COMM. ON ENERGY AND COMMERCE, DRUG FREE SPORTS ACT, H.R. REP. NO. 109-210, pt. 1, at 4 (2005)); David M. Wachutka, Comment, *Collective Bargaining Agreements in Professional Sports: The Proper Forum for Establishing Performance-Enhancing Drug Testing Policies*, 8 PEPP. DISP. RESOL. L.J. 147, 150 (2007) (“Major League Baseball’s records for the most home runs hit in a single season, and for the most home runs hit in a career, are arguably the most cherished records in sports. . . . Since 1998, the mark set by Maris [in 1961] has been surpassed [six times] The breaking of this historic record brought the issue of performance-enhancing drugs into the public spotlight. Baseball fans rejected the idea of unnatural players breaking historic records and tarnishing the integrity of America’s pastime.”).

3. See, e.g., Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 81, 88 (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (“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.”).

4. See *United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915, 979 (9th Cir. 2006) (Thomas, J., dissenting in part), *withdrawn and reh’g granted*, 513 F.3d 1085 (9th Cir. 2008); cf. Elizabeth Rocco, Note, “*Inequality in the Game*” vs. “*Inequality in the Legal System*”: *The Constitutionality of Searches and Seizures in United States v. Comprehensive Drug Testing*, 15 VILL. SPORTS & ENT. L.J. 33 (2008) (discussing whether the government violated the Fourth Amendment when it seized data from the laboratory that conducted drug testing for MLB).

5. Cf. Jeffrey P. Gleason, Comment, *From Russia with Love: The Legal Repercussions of the Recruitment and Contracting of Foreign Players in the National Hockey League*, 56 BUFF. L. REV. 599, 600 (2008) (“[P]rofessional sports have followed the same path as nations, individuals, and economies in taking on an increasingly international character, one that no longer exists solely in Olympic competition.”).

international code, the World Anti-Doping Code (the Code), to control performance-enhancing drugs in sports and harmonize drug testing internationally. WADA, Congress, the media, and fans have placed pressure on MLB to adopt policies that conform to the stringent standards of the Code. Congress has held several hearings and has considered passing legislation to regulate performance-enhancing drug testing in professional sports. On the other hand, others have advocated for respect of the collective bargaining process and our free-market economy. The Mitchell Report, a private investigation on the use of performance-enhancing drugs in MLB, took a position somewhere in the middle by recognizing that the MLB Players Association (MLBPA) has a right to control drug testing through the collective bargaining process, but maintaining that the program needs to be "independent."

This Comment explores the influence that WADA has had on MLB's steroid policy. Throughout this exploration, this Comment seeks to address two questions. First, why is WADA the authoritative figure in this area? In other words, who died and made WADA "the boss"? Second, would it be feasible and effective for MLB to sign the code? Part I discusses the history and policies of MLB and WADA. Part II discusses a field of study in the context of international law that has been coined "soft law." Part III addresses legal pluralism and how multiple legal actors coexist. Part IV proposes that a soft law agreement with an independent actor would improve MLB's performance-enhancing drug policy without implicating the sovereignty costs and legal concerns associated with signing the Code or becoming regulated by federal legislation.⁶

While exploring many of the proposed solutions to the steroid crisis, this Comment references some constitutional protections. While the Constitution may not directly apply

6. Cf. Robyn R. Goldstein, Comment, *An American in Paris: The Legal Framework of International Sport and the Implications of the World Anti-Doping Code on Accused Athletes*, 7 VA. SPORTS & ENT. L.J. 149, 168 (2007) ("In the end, the Code must find a balance to provide both a rigorous testing system, while also protecting the rights of the individual athletes. At least one athlete has argued that there must be adherence to the 'fundamental moral code that protects human rights in a democratic society,' so that the bureaucracy of sport does not overtake the individual athletes that fuel the competition." (citations omitted)).

to the circumstances because of issues such as state action, the fundamental rights contained in the Bill of the Rights represent principles and values that are at the core of American society and should be respected accordingly. The Constitution should, at the very least, be a persuasive authority in these circumstances. By noting certain constitutional principles, this Comment hopes to spur public discourse that is cognizant of the rights which are at stake—even if they are not implicated in a pure legal sense. In reading this Comment, please keep the following hypothetical situation in mind, without attempting to assert technical defenses: Suppose you are attending a local little league game and, to combat rowdy and overzealous parents from dampening the spirit of the game for the young athletes, one of the team's coaches requires all parents in attendance to submit to a drug and alcohol test to ensure they are not under the influence of alcohol or drugs which could impair their judgment and cause them to ridicule the opposing team, the umpires, or the coaches. Would you eagerly hold out your arm for a blood sample? Would it be justified if the intent was to prevent the parents from embarrassing themselves? Will our eagerness to subject MLB players to drug testing have repercussions, such as indicating that society no longer has a reasonable expectation of privacy when it comes to drug testing? While WADA's goal of global integration is laudable, this Comment argues that the cost of effective anti-doping regulation does not have to be the values that lie at the core of our Constitution.

While MLB has received much criticism in the media, this Comment actually calls upon MLB for action because MLB and the MLBPA have recently demonstrated that they are more committed than other American professional sports in their ambition to eliminate performance-enhancing drugs from their sport. In response to the Mitchell Report and coercion from Congress, MLB and the MLBPA have agreed to reform their performance-enhancing drug policy in ways similar to the proposal in this Comment. If anything, this Comment should be interpreted as advocating for WADA to change its ways, to become more cognizant of American values, and to establish a system that is respectful of the diverse circumstances that exist in different sports leagues by focusing on coordination, rather than harmonization.

I. THE "PLAYERS"

The major organizations in the performance-enhancing drug policy debate are WADA and American professional sports leagues. The inherent differences in the structure of American professional sports leagues and WADA have played a significant role in the performance-enhancing drug policies these organizations have been able to implement.⁷ While WADA was formed through the Olympic Movement and has been accepted by various national governments through their ratification of international declarations, athletes in the four major American professional sports leagues are unionized employees. The players' unions negotiate, on behalf of the players, with the league and team owners over the terms and conditions of employment—which is called collective bargaining. The end result of this process is a collective bargaining agreement. The National Labor Relations Act (NLRA) governs the collective bargaining process.⁸ The National Labor Relations Board has held that drug testing of employees is a mandatory subject of collective bargaining.⁹

A. *MLB*

MLB's performance-enhancing drug policies have received much attention and scrutiny from Congress and the public. Prior to 2002, when the Bay Area Laboratory Cooperative (BALCO) investigation began,¹⁰ the MLBPA refused to collectively bargain over a mandatory random drug testing policy on the basis that it "invaded the players'

7. See, e.g., Allan H. "Bud" Selig with Robert D. Manfred, Jr., *The Regulation of Nutritional Supplements in Professional Sports*, 15 STAN. L. & POL'Y REV. 35, 44-48 (2004). Indeed, in 2001, the Commissioner unilaterally imposed mandatory random drug testing throughout MLB's minor league system, which is not unionized. MITCHELL, *supra* note 1, at 42-46.

8. 29 U.S.C. §§ 151-69 (2000); see, e.g., Am. League of Prof'l Baseball Clubs, 180 N.L.R.B. 190, 192 (1969).

9. Johnson-Bateman Co., 295 N.L.R.B. 180, 182 (1989). In addition, MLB arbitrators have recognized that drug testing for any substance is a mandatory subject of collective bargaining. MITCHELL, *supra* note 1, at 3.

10. See *infra* text accompanying notes 190-93.

privacy and 'was an abuse of human rights.'"¹¹ While the owners and Commissioners proposed drug testing programs prior to 2002, they gave the issue "lower priority in bargaining than economic issues."¹²

However, contrary to popular belief, MLB historically had some tools to combat performance-enhancing drug use. In 1971, MLB promulgated a written policy that prohibited the use, possession, or distribution of any prescription medication without a valid prescription; however, the primary focus of this policy was "drugs of abuse," such as cocaine, as opposed to performance-enhancing drugs, such as steroids.¹³ This policy required that baseball personnel comply with federal and state drugs laws.¹⁴ In 1991, steroids were expressly incorporated in MLB's drug policy when the Anabolic Steroids Control Act of 1990 reclassified anabolic steroids as a Schedule III controlled substance.¹⁵

In addition, the MLB Commissioner has had broad power under the "best interest of the league" clause in the league's official rules, which grants him or her with the power to take any actions that are in the "best interest" of the sport.¹⁶ This authority does not extend to matters that are related to the collective bargaining process, such as imposing mandatory random drug testing.¹⁷ Under this

11. Showalter, *supra* note 2, at 658 (quoting Barry M. Bloom, *Mandatory Steroid Testing to Begin*, MLB.com, Nov. 13, 2003, http://mlb.mlb.com/news/article.jsp?ymd=20031113&content_id=603458&vkey=news_mlb&fext=.jsp&c_i_d=mlb).

12. MITCHELL, *supra* note 1, at SR-3.

13. *See id.* at SR-10, 18, 25-27.

14. *Id.* at 27 (citing Memorandum from Major League Baseball Office of the Comm'r to Admin. Officials of Major League Baseball Re: Drug Educ. and Prevention Program 2 (Apr. 5, 1971)).

15. *Id.* at 18, 41.

16. *Id.* at 1.

17. The Commissioner's authority under this power was further limited under the Ferguson Jenkins arbitration decision in 1980. *Id.* at 29-30. Jenkins, a MLB player, was arrested in Canada for possession of marijuana, hashish, and cocaine, and was subsequently suspended by the Commissioner for declining to cooperate with the Commissioner's investigation. *Id.* at 29. The MLBPA challenged the suspension and the arbitration panel overturned it, holding that neither an arrest nor the refusal to comply with an internal investigation provided "just cause" for the suspension. *Id.* at 29-30. The panel held that Jenkins must be presumed innocent until proven guilty and that the

power, the Commissioner has had the authority to discipline players for “just cause” based on non-analytical evidence—evidence of a violation other than a positive test result—of the possession, use, or distribution of prohibited drugs.¹⁸ However, prior to 2002, no player was ever disciplined for steroid use.¹⁹

Since 1984, MLB has also had a limited drug testing policy when there was “reason to believe” a player was using drugs of abuse.²⁰ This program did not expressly include steroids or amphetamines on the schedule of prohibited substances and, in addition, a three-member arbitration panel had to unanimously determine whether reasonable cause existed.²¹ Apparently, in practice, the arbitration panel was not used and testing was conducted merely after consent from the MLBPA, but this policy was “informal and unwritten.”²² Because the policy required consent of the MLBPA or an arbitration ruling, tests were administered long after evidence of use was discovered, which gave players advance notice that testing might occur.²³ As a condition of its consent, the MLBPA generally required that the testing be kept “strictly confidential,” that no discipline be imposed for a first positive test, and that the Commissioner’s Office forfeit its investigatory interview

internal investigation was “compelling Jenkins to jeopardize his defense in court.” *Id.* at 30. Three years later, in 1983, the Commissioner suspended three players for a full year without pay who pled guilty to misdemeanor cocaine possession. *Id.* at 31-32. The MLBPA filed a grievance on behalf of two of the players, and the arbitrators stated that “[t]raditional notions of industrial discipline support the conclusion that an employer may respond to drug-related misconduct with severe measures” and held that “‘just cause’ existed for a suspension,” but a one-year suspension was “too severe to be squared with the just-cause requirement.” *Id.* at 32.

18. *Id.* at SR-11, -34.

19. *Id.* at SR-11. Since 2002, MLB has used this non-analytical positive system (finding a violation without having a positive drug test) to discipline players. *See id.* at SR-13 to -16. For example, Jason Grimsley was suspended after admitting to federal investigators that he used steroids and human growth hormone (HGH). *Id.* at SR-13 to -14.

20. *Id.* at 34-35, 47-50.

21. *Id.* at 34.

22. *Id.* at 47.

23. *Id.* at 25-26, 48.

rights used to discipline players based on non-analytical evidence.²⁴

In 2002, the Collective Bargaining Agreement (CBA) finally included mandatory random drug testing.²⁵ Other than the amendments discussed below, this policy is the most current collective bargaining agreement between MLB and the MLBPA. The policy prohibits the use, possession, distribution, or sale of numerous substances, including all steroids listed on Schedule III of the Controlled Substances Act and any substances subsequently added to Schedules II and III of the Controlled Substances Act.²⁶ The policy also allows players to be interviewed by baseball officials about the alleged use of performance-enhancing drugs, but the MLBPA is entitled to advance notice and has resisted efforts to interview players.²⁷

The 2002 CBA did not originally provide for permanent, random drug testing. Instead, MLB and the MLBPA agreed to a policy that would implement "survey testing" for 2003.²⁸ Each player was tested twice and there were no punishments for a positive test; however, "[i]f more than five percent of players tested positive, then mandatory testing for the following seasons would be implemented until positive tests were under two and one-half percent in consecutive years."²⁹ In the 2003 season, between five and seven percent of the players tested positive, and mandatory testing was implemented during the 2004 season.³⁰ In 2005, MLB and the MLBPA voluntarily agreed to modify the performance-enhancing drug policy on two separate occasions.³¹ The first modification provided that all players would be subjected to random testing for forty-five substances at least once during the season.³² It also provided that the penalties for a positive test of steroids

24. *Id.* at 48.

25. *Id.* at 53.

26. *Id.* at 54.

27. *Id.* at 87.

28. *Id.* at 54.

29. Showalter, *supra* note 2, at 658; *see also* MITCHELL, *supra* note 1, at 54.

30. Showalter, *supra* note 2, at 658.

31. MITCHELL, *supra* note 1, at 57-58; Showalter, *supra* note 2, at 659.

32. Showalter, *supra* note 2, at 659.

included a ten day suspension for the first violation, a thirty day suspension for the second, a sixty-day suspension for the third, and a one year suspension for the fourth.³³ Based on the second set of modifications in 2005, MLB's current policy tests all players for steroids and amphetamines once during spring training and at least once during the season.³⁴ In addition, random testing on an individual can occur at any time during the season and out-of-season.³⁵ However, the aggregate number of tests is limited.³⁶ The first positive test for steroids results in a fifty game suspension (approximately 31% of the 162 game season), one hundred games for the second (62% of the season), and a lifetime ban for the third positive test.³⁷

In March 2006, MLB hired former Senate Majority Leader George Mitchell to conduct an investigation on the use of performance-enhancing drugs in baseball.³⁸ Mitchell and others spent over a year and a half conducting interviews and collecting evidence related to use of performance-enhancing drugs in MLB with the goal of making conclusions as to the cause(s) of this epidemic and making recommendations.³⁹ Senator Mitchell concluded that MLB's anti-performance-enhancing drug policy since 2002, as amended, has been effective for detectable substances, but still falls short of current best practices in testing.⁴⁰ The Mitchell Report recommended that MLB improve its policy in three principal ways: (1) by vigorously investigating the use of performance-enhancing drugs through non-analytical evidence, enhancing cooperation with law enforcement authorities, and establishing a department of investigations; (2) by improving the player education program; and (3) by implementing a "state-of-the-

33. *Id.*

34. *Id.* at 659-60; see also MITCHELL, *supra* note 1, at 267.

35. Showalter, *supra* note 2, at 660.

36. MITCHELL, *supra* note 1, at 267.

37. Showalter, *supra* note 2, at 660.

38. ESPN.com, *Mitchell Report Due to be Released Next Week*, ESPN, Dec. 7, 2007, <http://sports.espn.go.com/mlb/news/story?id=3145958>.

39. *Id.* For a more detailed explanation of the goals and process of the investigation, see MITCHELL, *supra* note 1, at SR-5 to -7.

40. See MITCHELL, *supra* note 1, at SR-1, -23.

art drug testing program.”⁴¹ Senator Mitchell criticized the MLB program for not providing the program administrator with enough independence.⁴² Under the 2002 joint drug program, the program was administered by a “Health Policy Advisory Committee” of four people—with the Commissioner’s Office and the MLBPA each appointing two representatives.⁴³ In Senator Mitchell’s opinion, the administrator needs to be given exclusive authority over the program’s structure and administration.⁴⁴ The Mitchell Report notes that MLB and the MLBPA should give up control over: (1) the number of tests administered; (2) determination of what substances are prohibited; (3) selection and retention of entities responsible for collecting and testing samples; (4) determination to order “reasonable cause” testing; (5) investigating and determining whether a test is considered positive; and (6) the administrator or administrating body should not be able to be removed except for good cause.⁴⁵

In the wake of the Mitchell Report, the Commissioner implemented all recommendations, most notably, the enhanced department of investigations, which could be unilaterally implemented.⁴⁶ MLB and the MLBPA subsequently agreed to re-open the CBA and amend their anti-doping policy to increase the frequency of testing and the authority of the program’s independent administrator.⁴⁷ Under these amendments to the Joint Drug Program, the parties agreed to disband the Health Policy Advisory

41. *Id.* at 285-86. The Mitchell Report notes that the recommendations related to the investigations and educational programs can be unilaterally implemented by the Commissioner; however, the recommendations related to the testing program are subject to the CBA, upon which the parties would have to agree to reopen negotiations. *Id.*

42. *Id.* at 263-64.

43. *Id.* at 263.

44. *Id.* at SR-31.

45. *See id.* at 264, 303-04.

46. Press Release, Major League Baseball, MLB Establishes Department of Investigations (Jan. 11, 2008), http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20080111&content_id=2343802&vkey=pr_mlb&fext=.jsp&c_id=mlb.

47. Press Release, Major League Baseball, MLB, Players Association Modify Joint Drug Agreement (Apr. 11, 2008), <http://mlbplayers.mlb.com/pa/releases/releases.jsp?content=041108a>.

Committee and appoint an individual with the title “Independent Program Administrator” (IPA).⁴⁸ The IPA was appointed for a three-year term and “can be removed only if an independent arbitrator confirms that he has acted in a manner inconsistent with the Program or has engaged in other misconduct that affects his ability to function as the IPA.”⁴⁹ The IPA has authority to issue an annual report summarizing aggregate details of the testing process, audit test results, review performance of the collection company and laboratory, conduct up to 375 off-season tests over the three-year term, and develop a mandatory educational program in consultation with the league and the MLBPA.⁵⁰ The IPA is also part of an “annual review process” along with the league, the MLBPA, the collection company, and the laboratory.⁵¹ MLB believes these modifications provide sufficient independence, transparency, and flexibility.⁵² MLB and the MLBPA also agreed to increase the amount of testing and added to the list of prohibited substances.⁵³ Even after these amendments, however, some experts have argued that even though “Major League Baseball’s new anti-doping agreement . . . is arguably the strongest testing program in professional sports. . . . [O]n the day it [went] into effect, it already [was] all but obsolete.”⁵⁴

B. *The Olympics and WADA*

In the 1950s, the International Olympic Committee (IOC) recognized a problem with doping and passed a

48. *Id.* Dr. Smith, who was part of the Health Policy Advisory Committee, was selected to fulfill this role. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Press Release, Major League Baseball, Joint Drug Agreement Addresses Mitchell Recommendations (Apr. 11, 2008), http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20080411&content_id=2515767&vkey=pr_mlb&fext=.jsp&c_id=mlb.

53. Press Release, *supra* note 47.

54. T.J. Quinn & Mark Fainaru-Wada, *U.S. Pro Sports Leagues Still Trail in Drug-Testing Arms Race*, ESPN, May 23, 2008, <http://sports.espn.go.com/espn/print?id=3408399&type=story> (discussing blood testing and longitudinal analysis, or a blood sample “passport,” but noting that “[b]oth USADA’s pilot and WADA’s system are untested in court and unquestionably invasive”).

resolution that created the IOC Medical Commission.⁵⁵ In 1968, the IOC began testing for a limited range of stimulants and, in 1976, began testing for anabolic steroids.⁵⁶ After initial success, detection rates dropped but there was still a perception that doping existed and, between 1976 and 1999, the IOC created various organizations to oversee its performance-enhancing drug policy.⁵⁷ In 1999, the IOC, still believing its program needed to be improved, created WADA as an independent agency.⁵⁸ “WADA was set up as a foundation under the initiative of the IOC with the support and participation of intergovernmental organizations, governments, public authorities, and other public and private bodies” to promote and coordinate the fight against doping in sports internationally.⁵⁹ This reform in international doping control was primarily in response to the doping problems that arose in cycling during the summer of 1998 and the discussions that ensued at the 1999 World Conference on Doping in Sport, which produced the Lausanne Declaration on Doping in Sport.⁶⁰

The purposes of the Code and the World Anti-Doping Program are to protect the athletes’ “fundamental right to participate in doping-free sport and thus promote health, fairness and equality for *Athletes* worldwide, and; [t]o ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.”⁶¹ To achieve this noble goal, the “World Anti-Doping Program

55. Paul H. Haagen, *The Players Have Lost That Argument: Doping, Drug Testing, and Collective Bargaining*, 40 NEW ENG. L. REV. 831, 836 (2006).

56. *Id.*

57. *Id.* at 836-37; see also Andrew Goldstone, *Obstruction of Justice: The Arbitration Process for Anti-Doping Violations During the Olympic Games*, 7 CARDOZO J. CONFLICT RESOL. 361, 367 (2006).

58. Haagen, *supra* note 55, at 837. Commentators have asserted that WADA is not truly independent. See, e.g., Selig with Manfred, *supra* note 7, at 45 n.58 (noting that the IOC paid \$25 million towards establishing WADA and provided for 50% of its annual operating budget).

59. World Anti-Doping Agency, WADA History, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=253> (last visited Aug. 28, 2008).

60. *Id.*

61. WORLD ANTI-DOPING CODE 11 (World Anti-Doping Agency 2009), available at http://www.wada-ama.org/rtecontent/document/code_v2009_En.pdf.

encompasses . . . optimal harmonization and best practice in international and national anti-doping programs” by producing the Code, International Standards, and Models of Best Practice and Guidelines.⁶² The International Standards cover technical and operational procedures associated with implementing the Code’s provisions and compliance with these standards is mandatory for compliance with the Code.⁶³ For example, the International Standards dictate detailed procedures for testing, notifying athletes of the test, preparing for the sample collection session, security and post test administration, and the transporting of samples and documentation.⁶⁴ The International Standards are incorporated into the Code by reference, but are not expressly set forth in the Code to enable experts and the WADA Executive Committee to make timely changes without having to amend the Code.⁶⁵ The Models of Best Practice and Guidelines are optional recommendations that provide rules and regulations that WADA tailors to the needs of each major group of signatories.⁶⁶

WADA promulgated the Code, which was adopted at the World Conference on Doping in Sport in Copenhagen in March 2003.⁶⁷ WADA has made extensive revisions to the Code, which will become effective in 2009.⁶⁸ The Code contains four parts: “Doping Control;” “Education and Research;” “Roles and Responsibilities;” and “Acceptance, Compliance, Modification and Interpretation.”⁶⁹ Signatories

62. *Id.* at 12.

63. *Id.*

64. *See generally* INTERNATIONAL STANDARD FOR TESTING (World Anti-Doping Agency 2003) (version 3.0), http://www.wada-ama.org/rtecontent/document/testing_v3_a.pdf.

65. WORLD ANTI-DOPING CODE cmt. at 12.

66. *Id.* cmt. at 13.

67. Haagen, *supra* note 55, at 837.

68. WORLD ANTI-DOPING CODE art. 25.1, at 123.

69. *See generally id.*

of the Code include over 350 organizations that are part of the Olympic movement and 200 non-Olympic signatories.⁷⁰

Prior to the recent amendments, the Code obligated each government to, among other things, support national anti-doping programs, take affirmative measures to control the problem of nutritional supplements that contain undisclosed prohibited substances, and withhold “some or all financial support from sport organizations and participants that are not in compliance with the Code.”⁷¹ Furthermore, the Code stated that “all other governmental involvement with anti-doping will be brought into harmony with the Code.”⁷² The 2009 version of the Code now provides that “[e]ach government’s commitment to the Code will be evidenced by its signing the Copenhagen Declaration on Anti-Doping in Sport of March 3, 2003 and by ratifying, accepting, approving or acceding to the UNESCO Convention.”⁷³ The Code then sets forth what WADA believes is each Signatory’s “expectations” of governmental involvement; these expectations include duties similar to what the 2003 version of the Code mandated from governments.⁷⁴

70. This list includes the National Olympic Committees of all Olympic Nations and International Federations for particular sports—from the International Bobsleigh and Tobogganing Federation and the Badminton World Federation to the International Federation of Associated Wrestling Styles and the International Chess Federation, including the International Baseball Federation and the World Confederation of Billiards. World Anti-Doping Agency, Code Acceptance, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=270> (last visited Oct. 6, 2008). The Code also has over 200 signatories from outside of the Olympic movement—this number includes 161 National Paralympic Committees. *See id.* This group of signatories includes the World Minigolfsport Federation, the International Federation of Sleddog Sports, and the International Table Soccer Federation. *Id.*

71. WORLD ANTI-DOPING CODE art. 22.1, at 59 (World Anti-Doping Agency 2003) (to be amended 2009) (italics omitted), available at http://www.wada-ama.org/rtecontent/document/code_v3.pdf.

72. *Id.* art. 22.2, at 60 (italics omitted).

73. WORLD ANTI-DOPING CODE art. 22 introductory cmt. at 113 (World Anti-Doping Agency 2009) (italics omitted).

74. *See id.* art. 22.1-.4, at 113-14. The Code further penalizes a government for its failure to ratify or to comply with the UNESCO Convention. *Id.* art. 22.6, at 114. In a comment to Article 22, the Code recognizes that “[m]ost governments cannot be parties to, or be bound by, private non-governmental instruments such as the Code.” *Id.* at 114.

The Code seeks universal harmonization of core anti-doping elements and provides that all provisions of the Code are “mandatory in substance and must be followed,” but while some provisions must be adopted verbatim, other areas of the Code permit flexibility on how the anti-doping principles are implemented.⁷⁵ While noting that “[h]armonization of sanctions has been one of the most discussed and debated areas of anti-doping,” WADA believes harmonization of disciplinary penalties is necessary and has expressly rejected arguments that the penalty should be based on the circumstances of a particular sport—such as the average career length or salary.⁷⁶ Thus, WADA endorses a view that it is necessary to sanction a true amateur under the same guidelines as an athlete who makes twenty-five million dollars a year. WADA responds to these concerns by noting that

[a] primary argument in favor of harmonization is that it is simply not right that two Athletes from the same country who test positive for the same Prohibited Substance under similar circumstances should receive different sanctions only because they participate in different sports. In addition, flexibility in sanctioning has often been viewed as an unacceptable opportunity for some sporting organizations to be more lenient with dopers. The lack of harmonization of sanctions has also frequently been the source of jurisdictional conflicts between International Federations and National Anti-Doping Organizations.⁷⁷

The Code imposes a strict liability regime when a prohibited substance is found in the athlete’s body; intent, fault, negligence, or knowledge of use on the athlete’s part

75. *Id.* introduction at 16. The Code mandates that many articles must be accepted by a signatory “without substantive change,” and these articles include: Article 1 (Definition of Doping); Article 2 (Anti-Doping Rule Violations); Article 3 (Proof of Doping); Article 4.2.2 (Specified Substances); Article 4.3.3 (WADA’s Determination of the Prohibited List); Article 7.6 (Retirement from Sport); Article 9 (Automatic *Disqualification* of Individual Results); Article 10 (Sanctions on Individuals); Article 11 (*Consequences* to Teams); parts of Article 13 (Appeals); Article 15.4 (Mutual Recognition); Article 17 (Statute of Limitations); Article 24 (Interpretation of the *Code*); and the definitions section. *Id.* art. 23.2.2, at 117-18. However, WADA does not represent that adopting the Code is sufficient for an organization; rather, WADA advises that signatories will still need to have their own comprehensive rules. *Id.* introduction at 16.

76. *Id.* cmt. to art. 10.2, at 52.

77. *Id.*

need not be demonstrated to show a violation.⁷⁸ In the 2003 version of the Code, the drafters noted that the strict liability test is

likely in some sense to be unfair in an individual case But it is also in some sense “unfair” for an Athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. . . . The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or the negligence of unaccountable Persons, which the law cannot repair.

Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently.⁷⁹

Penalties under the Code are more stringent, in terms of the period of ineligibility, than those imposed by MLB. The general penalty for a first violation is a two year period of ineligibility.⁸⁰ The 2009 version will add a provision where aggravating circumstances may increase the period of ineligibility up to a maximum of four years.⁸¹ It appears that WADA intends for this provision to be liberally applied to many hackneyed situations.⁸² When a person is convicted of a second violation, the 2003 version—the version that some members of Congress and others have advocated for—

78. *Id.* art. 2.1.1, at 19. WADA notes that there is a difference between strict liability to show a violation and the imposition of a fixed period of ineligibility when strict liability is involved. *Id.* cmt. to art. 2.1.1, at 19.

79. WORLD ANTI-DOPING CODE cmt. 2.1.1, at 8-9 (World Anti-Doping Agency 2003) (to be amended 2009) (quoting *USA Shooting & Quigley v. UIT*, CAS 94/129 (Ct. Arb. Sport 1995)).

80. WORLD ANTI-DOPING CODE art. 10.3.1, at 53 (World Anti-Doping Agency 2009).

81. *Id.* art. 10.6, at 65. Athletes can avoid the aggravating circumstances provision by “admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation” *Id.*

82. *See id.* cmt. to art. 10.6, at 65 (providing a non-exclusive list of aggravating circumstances, such as: whether the violation occurred as part of a doping plan or scheme, either individually or in conspiracy with others; whether the athlete used or possessed multiple prohibited substances or used a prohibited substance on multiple occasions; and whether the athlete engaged in deceptive or obstructive conduct to avoid detection or adjudication).

imposed a lifetime ban.⁸³ The 2009 version eliminates this automatic “two strikes and you’re out rule” and provides a table to determine the sanction for an athlete convicted of multiple violations.⁸⁴ The period of ineligibility is determined by a grid based on whether the first and second violations were reduced under the Specified Substance provision,⁸⁵ whether they were because of a filing failure or missed test, whether they were reduced for “No Significant Fault or Negligence,” whether the standard sanction is applicable or whether aggravating circumstances were present, and whether one or both of the violations were for trafficking or administration of prohibited substances.⁸⁶ Under the 2009 version, a third violation will generally result in a lifetime ban.⁸⁷

The Code also provides for the “Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances.”⁸⁸ Under this section, if athletes can establish how a “Specified Substance”⁸⁹ entered their body or came into their possession and that the Specified Substance was not intended to enhance their performance or mask the use of a performance-enhancing substance, then the period of ineligibility may be reduced.⁹⁰ In addition, the hearing

83. WORLD ANTI-DOPING CODE arts. 10.2, 10.4.1, at 27-28 (World Anti-Doping Agency 2003) (to be amended 2009).

84. WORLD ANTI-DOPING CODE art. 10.7.1, at 66 (World Anti-Doping Agency 2009).

85. *See infra* text accompanying notes 88-92.

86. WORLD ANTI-DOPING CODE art. 10.7.1, at 66. When an athlete falls into the No Fault or Negligence provision, the conduct is not considered a violation for the purpose of determining a sanction. *Id.* art. 10.5.1, at 56.

87. *Id.* art. 10.7.3, at 68. The exceptions to this rule are where the third violation qualified under Article 10.4—the safe harbor for specified substances—or is based on a violation for failing to file whereabouts information and/or a missed test; however, even in these circumstances, the ban will range from eight years to a lifetime. *Id.*

88. *Id.* art. 10.4, at 54 (italics omitted).

89. “Specified Substances” are defined as all Prohibited Substances except for anabolic agents, hormones, stimulants, and hormone antagonists. *Id.* art. 4.2.2, at 31.

90. *Id.* art. 10.4, at 54-55 (italics omitted). For example, the first violation can be reduced to “[a]t a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.” *Id.*

panel must be “comfortably satisfied” by the objective evidence—rather than the athlete’s mere assertions—that the athlete did not intend to enhance his or her performance.⁹¹ WADA notes that the substances that qualify under the list of “Specified Substances” are “not necessarily less serious agents for purposes of sports doping than other Prohibited Substances;” however, “there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation.”⁹²

The Code also affords some leniency for exceptional circumstances where the athlete proves “*No Fault or Negligence*” or “*No Significant Fault or Negligence*.”⁹³ If an athlete can prove “*No Fault or Negligence*” for the doping violation and, if the violation was based on a positive test, how the prohibited substance entered his or her system, the period of eligibility will be eliminated.⁹⁴ If the athlete can establish “*No Significant Fault or Negligence*,” the period of ineligibility may be reduced up to one-half of the otherwise applicable sanction—or, if the ban is lifetime, no less than eight years.⁹⁵ However, the Code warns that these exceptions are to be narrowly construed.⁹⁶ An example of “*No Fault or Negligence*” occurs where the athlete can “prove that, despite all due care, he or she was sabotaged by a competitor.”⁹⁷ “*No Fault or Negligence*” does not exist where: (a) a positive test results from a mislabeled or contaminated vitamin or nutritional supplement, since athletes are responsible for what they ingest under Article 2.1.1 of the Code; (b) administration of a prohibited substance by the athlete’s physician or trainer without

91. *Id.* art. 10.4 & cmt. to art. 10.4, at 54-55 (italics omitted).

92. *Id.* at 54.

93. *Id.* art. 10.5, at 56-57. The Code also encourages athletes to provide substantial assistance to anti-doping organizations, criminal authorities, or professional disciplinary bodies in establishing or discovering an anti-doping violation of another person, or in helping convict or sanction the other person by reducing the period of ineligibility for a convicted athlete. *Id.* art. 10.5.3, at 58-59.

94. *Id.* art. 10.5.1, at 56.

95. *Id.* art. 10.5.2, at 57.

96. *Id.* cmt. to arts. 10.5.1-.2, at 56-57.

97. *Id.* at 56.

disclosure to the athlete, since athletes are responsible for their choice of medical personnel; and (c) sabotage of the athlete's food or drink by a spouse, coach, or other person within the athlete's "circle of associates," since athletes are responsible for what they ingest and for the actions of persons allowed access to their food and drink.⁹⁸ "However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence."⁹⁹

To maximize the effect of sanctions, the Code calls for reciprocity. During the period of ineligibility, the Code provides that the athlete may not even participate in non-Signatory leagues or events or, if the athlete does, "the results of such participation shall be *Disqualified* and the period of *Ineligibility* which was originally imposed shall start over again as of the date of the violation."¹⁰⁰ In addition, the Code requires Signatories to recognize the actions of non-Signatories if the rules of the non-Signatory are consistent with the Code.¹⁰¹ For example, if a non-Signatory's process of establishing a violation is consistent with the Code and the non-Signatory establishes a violation but provides for a shorter period of ineligibility, "then all Signatories should recognize the finding of an anti-doping rule violation and the Athlete's National Anti-Doping Organization should conduct a hearing . . . to determine whether the longer period of Ineligibility provided in the Code should be imposed."¹⁰²

98. *Id.* at 56-57.

99. *Id.* at 57.

100. *Id.* art. 10.10.2, at 75 (emphasis in original). It is unclear how WADA would disqualify such results of an organization it has no control over.

101. *Id.* art. 15.4.2, at 94.

102. *Id.* cmt. to art. 15.4.2, at 94.

The Code provides for “non-analytical positive[s]” where violations are demonstrated without a positive test.¹⁰³ Even athletes who confess to an anti-doping rule violation before they are notified of an up-coming test are subject to discipline under the Code.¹⁰⁴ However, if the confession is the only reliable evidence of the violation at the time, the period of ineligibility may be reduced up to one-half of the otherwise applicable sanction.¹⁰⁵

The Code requires each anti-doping organization to conduct an “effective number” of in-competition and out-of-competition tests.¹⁰⁶ The Code also provides that there shall be no advance notice for out-of-competition testing and requires signatories to make “target testing” a priority.¹⁰⁷ WADA believes target testing is preferred over random testing because it is more effective in ensuring that appropriate athletes will be tested.¹⁰⁸ For example, “world-class Athletes, Athletes whose performances have dramatically improved over a short period of time, [and] Athletes whose coaches have had other Athletes test positive” should be singled out and tested; this standard does not require any reasonable suspicion or probable cause requirement for non-random, target testing.¹⁰⁹ Apparently, under this profiling rule, being a great athlete is—in itself—probable cause of being a cheater. The Code provides that samples shall be analyzed to establish violations or to

103. See Cameron A. Myler, *Resolution of Doping Disputes in Olympic Sport: Challenges Presented by “Non-Analytical” Cases*, 40 NEW ENG. L. REV. 747, 749 (2006). Under the Code, these non-analytical positives include attempted use, admissions, third party testimony, missing a sample collection, violating the out-of-competition availability requirements, tampering with any part of doping control, possession of prohibited substances and methods—including possession by athlete’s support personnel—trafficking, administration or attempted administration of a prohibited substance or method to any athlete, and assisting, encouraging, aiding, abetting, covering up, or any other type of collusion involving an anti-doping rule violation or any attempted violation. WORLD ANTI-DOPING CODE arts. 2.2-8, at 21-25 (World Anti-Doping Agency 2009).

104. WORLD ANTI-DOPING CODE art. 10.5.4, at 61.

105. *Id.*

106. *Id.* art. 5.1.1, at 37.

107. *Id.* arts. 5.1.2, 5.1.3, at 38.

108. *Id.* cmt. to art. 5.1.3, at 38.

109. *Id.*

assist the anti-doping organization in creating a profile for the athlete.¹¹⁰

Under the Code, WADA has the sole authority to create, publish, and revise the list of prohibited substances, and signatories are not permitted to exempt substances.¹¹¹ WADA also monitors compliance with the Code and signatories are required to report to WADA on its compliance and explain reasons for non-compliance every two years.¹¹²

As the foregoing illustrates, the Code is comprehensive, particularly in light of the fact that this Comment significantly condensed or omitted several parts of the Code and barely addressed the mandatory International Standards. This precision is a major impediment to MLB adopting the Code. However, there is a solution: soft law.

II. WHAT IS SOFT LAW?

A. *What is Soft Law?*

“Soft law” is a recent field of study developed by legal scholars. “Hard law” typically denotes “legally binding obligations that are precise . . . and that delegate authority for interpreting and implementing the law.”¹¹³ At the other end of the legalization continuum is no law or purely political arrangements.¹¹⁴ Soft law has been used to refer to the gap between hard law and political arrangements.¹¹⁵ It has been noted that soft law is a vague term and the “only common thread” among arrangements that have been labeled as soft law is that they are not formally binding.¹¹⁶

110. *See id.* art. 6.2, at 39.

111. *Id.* art. 4.1, at 29.

112. *Id.* art. 23.4.1-.2, at 118-19.

113. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421 (2000).

114. *See id.* at 422.

115. *Id.*

116. David M. Trubek et al., “Soft Law,” “Hard Law,” and European Integration: Toward a Theory of Hybridity 1 (Univ. of Wis. Law Sch. Legal Studies Research Paper Series, Paper No. 1002, 2005), available at <http://ssrn.com/abstract=855447>.

Some commentators have defined soft law as legal agreements that are weakened in terms of their obligation, precision, and/or delegation.¹¹⁷ Others have defined soft law as arrangements lacking other characteristics that are common in state laws, such as "obligation, uniformity, justiciability, sanctions, and/or an enforcement staff."¹¹⁸ Yet another definition of soft law refers to "rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects."¹¹⁹

Soft law should not be confused with a hard legal agreement that is under-inclusive or "weak" in a substantive sense. For example, legalization in this field has intentionally been defined in terms of characteristics of rules—not in terms of effects, nor its substantive content.¹²⁰ In evaluating which legalization strategy is proper for MLB, this Comment seeks only to discuss the form of legalization—not what the substance of MLB's policy should contain. When one does not conflate a soft legalization strategy with a law that is "soft" in the conventional sense, the benefits of a soft law may be more fully appreciated. With this in mind, by altering the level of obligation, delegation, and precision, soft legalization arrangements are flexible and can be tailored to fit the circumstances of a particular situation.

Obligation means that actors "are bound by a rule or commitment."¹²¹ Obligation is often associated with "legal responsibility"—agreements that cannot be disregarded as preferences change.¹²² In this sense, legal obligation does not refer to "obligations" merely "resulting from coercion, comity, or morality."¹²³ One effect of an agreement high in obligation is that, because the actors are legally bound,

117. See, e.g., Abbott & Snidal, *supra* note 113, at 422. In this model, legal obligation is accorded the most weight, followed by delegation, and then precision. See also Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 405 (2000).

118. See, e.g., Trubek et al., *supra* note 116, at 1.

119. *Id.* at 1-2 (quoting Francis Snyder, *The Effectiveness of EC Law, in IMPLEMENTING EC LAW IN THE UK* (T. Daintith ed., 1995)).

120. Abbott et al., *supra* note 117, at 402.

121. *Id.* at 401.

122. See *id.* at 408-09.

123. *Id.* at 408.

their behavior “is subject to scrutiny under the general rules, procedures, and discourse of international law.”¹²⁴ Therefore, if a dispute subsequently arises, the parties will not be able to assert a defense based on their sovereignty, interests, or power; they are confined to defenses based on the “text, purpose, and history of the rules, their interpretation, admissible exceptions, applicability to classes of situations, and particular facts.”¹²⁵

Delegation refers to a third party’s dispute resolution authority and the third party’s rule-making and implementation authority.¹²⁶ Factors that impact the degree of delegation include the power of an enforcing body to monitor compliance, the enforcing body’s independence from the actors, and the enforcing body’s ability to reach and enforce a binding solution.¹²⁷ Complete delegation has been defined as granting third parties the authority to “implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.”¹²⁸ Third party interpretation and application of rules has been considered essential to legal institutions.¹²⁹

Precision refers to the level of detail in the agreement.¹³⁰ A precise agreement narrows an actor’s flexibility to interpret the agreement in a manner favorable to his or her interests by “unambiguously defin[ing] the conduct [it] require[s], authorize[s], or proscribe[s].”¹³¹ As previously discussed, an agreement that is “soft,” because it is low in precision, should not be conflated with a weak or less effective agreement. The effectiveness of a legal agreement largely hinges on how those who are bound by the rule will interpret it.¹³² “[A] rule saying ‘drive slowly’ might yield slower driving than a rule prescribing a speed limit of 55 miles per hour if the drivers in question would

124. *See id.* at 401.

125. *See id.* at 409.

126. *Id.* at 416 tbl.4.

127. *See* Abbott & Snidal, *supra* note 113, at 424 n.9.

128. Abbott et al., *supra* note 117, at 401.

129. *Id.* at 406.

130. *See id.* at 401.

131. *Id.* at 401, 412.

132. *See id.* at 412 n.26.

normally drive 50 miles per hour and understand 'slowly' to mean 10 miles per hour slower than normal."¹³³

B. *Benefits of Soft Law*

Some debate in this field has centered on whether soft law is merely an interim step toward harder law and therefore, a "second best" solution that results when negotiations fail.¹³⁴ After discussing the arguments on both sides, Abbott and Snidal conclude that soft law is a deliberately chosen form of legalization because of the unique advantages it offers.¹³⁵ Under either view, soft law can be used in the short term as a bridge to implementing a harder, more binding legal arrangement.¹³⁶ Thus, soft law is a great tool to "break a deadlock in negotiations where disparities in wealth, power, and interests make binding agreements impossible."¹³⁷ Factors such as "transaction costs, uncertainty, implications for national sovereignty, divergence of preferences, and power differentials" influence the level of legalization.¹³⁸

Some authors have recommended that hard legalization should be strategically used to increase the credibility of legal commitments when: (1) "the benefits of cooperation are great but the potential for opportunism and its costs are high;" (2) "noncompliance is difficult to detect;" and (3) a party wishes to form an alliance but only with others who are "sincerely committed" to compliance.¹³⁹ Hard law reduces the transaction costs, which may arise in maintaining and enforcing the agreement, by limiting

133. *Id.*

134. *See, e.g.,* Abbott & Snidal, *supra* note 113, at 422-23; Trubek et al., *supra* note 116, at 29, 31-32 (noting that some view soft law as a second best solution, but asserting that further information and analysis could show that "soft law might be a desirable alternative rather than simply a second best solution or a way station towards hard law").

135. *See, e.g.,* Abbott & Snidal, *supra* note 113, at 423.

136. *See id.*

137. Trubek et al., *supra* note 116, at 11-12.

138. Abbott & Snidal, *supra* note 113, at 423.

139. *Id.* at 429.

future conflicts to legal, rather than political and policy, arguments.¹⁴⁰

Commentators have discussed the European Employment Strategy and the soft law regime it employs in the Open Method of Coordination (OMC).¹⁴¹ The European Employment Strategy was developed in the late 1990s to combat the economic problems European Union (EU) Member States were facing.¹⁴² Member States were reluctant to transfer policy-making power to the EU, but agreed to a process that allowed the EU to monitor their economic policies; this peer review and the corresponding recommendations encouraged the Member States to “pursue the difficult and politically controversial policies that would be necessary.”¹⁴³

“The OMC is based upon at least six general principles: participation and power sharing, multi-level integration, diversity and decentralization, deliberation, flexibility and revisability, and experimentation and knowledge creation.”¹⁴⁴ This model “accommodates diversity, facilitates mutual learning, spreads good practices, and fosters convergence toward EU goals.”¹⁴⁵ Proponents of this model point out that “soft law processes are appropriate when the gap between the aspired norm and existing reality is so large that hard regulatory provisions will be meaningless. Soft mechanisms allow minimum levels of adherence to be established and formalize progressive advancement toward higher standards.”¹⁴⁶ It is also argued that “softer forms of governance such as the OMC increase the social basis of legitimacy of the EU by allowing stakeholders to participate in the policy process and thereby facilitating knowledge diffusion and engendering a feeling of enfranchisement and investment in the system.”¹⁴⁷ The OMC is able to “change

140. *Id.* at 430, 433.

141. *See generally* Trubek et al., *supra* note 116, at 14-21.

142. James S. Mosher & David M. Trubek, *EU Social Policy and the European Employment Strategy*, 41 J. COMMON MKT. STUD. 63, 67 (2003).

143. *Id.*

144. Trubek et al., *supra* note 116, at 15.

145. *Id.*

146. *Id.* at 16.

147. *Id.* at 16-17.

and channel behavior" through: (1) shaming; (2) diffusion through mimesis; (3) diffusion through discourse; (4) networking; (5) deliberation; and (6) learning.¹⁴⁸ Commentators have praised the OMC because of its acceptance of diversity and the overall democratic process that it embraces, concluding that

[t]he OMC is an appropriate tool to use in situations when common problems exist across Europe but conditions make uniform policies impossible and there is great uncertainty as to the best way to deal with problems. In such situations, a learning-producing system that engages multiple levels, promotes dialogue, cuts across traditional boundaries, and fosters local experimentation could produce better results than directives or other binding and more or less uniform solutions.¹⁴⁹

Soft law has other benefits that have made it a deliberately chosen legalization strategy.¹⁵⁰ Soft law can reduce the negotiation, contracting, and other transaction costs that arise from vigorous debate over policy issues.¹⁵¹ Hard legalization increases the cost of violation, which means that actors are more prone to exercise due diligence when negotiating and will want to leave room for self-protection when drafting a hard legal agreement.¹⁵² The International Labor Organization has changed its legalization strategy from aiming for hard law, via draft conventions that were ratified at low rates, to creating non-binding recommendations and codes of conduct that reduce the costs of national ratification.¹⁵³

Soft law also limits the autonomy a party loses by entering into a legal relationship with another actor.¹⁵⁴ Through soft law, a party is able to learn about the consequences of the agreement through a trial and error process, which can facilitate the move to harder

148. *Id.* at 17-18.

149. Mosher & Trubek, *supra* note 142, at 63, 84.

150. Abbot & Snidal, *supra* note 113, at 433.

151. *Id.* at 434.

152. *See id.*

153. *Id.*

154. *Id.* at 435.

legalization.¹⁵⁵ For example, the General Agreement on Tariffs and Trade (GATT), which was originally a form of soft law, led to the World Trade Agreement as states saw the possible benefits of hard legalization.¹⁵⁶ Hard law, particularly when delegation is high, involves significant sovereignty and autonomy costs.¹⁵⁷ Abbott and Snidal suggest that “[s]overeignty costs are at their highest when international agreements impinge on the relations between a state and its citizens.”¹⁵⁸ By using soft legalization strategies, an agreement can be drafted in a manner that respects each actor’s autonomy:

Soft legalization allows states to adapt their commitments to their particular situations rather than trying to accommodate divergent national circumstances within a single text. This provides for flexibility in implementation, helping states deal with the domestic political and economic consequences of an agreement and thus increasing the efficiency with which it is carried out. Accordingly, soft law should be attractive in proportion to the degree of divergence among the preferences and capacities of states¹⁵⁹

In sum, soft law can facilitate compromise, reduce transaction costs, and can operate as a bridge to further legalization by allowing actors to learn the consequences of their legal commitments. Most importantly, soft law is an effective tool in social and economic context because it respects diversity and limits the intrusion upon an organization’s autonomy.

155. *Id.*

156. *Id.* at 436 (discussing how the GATT was originally adopted provisionally, included a withdrawal clause, and created only “skeletal institutions”).

157. *Id.* at 436.

158. *Id.* at 437.

159. *Id.* at 445.

III. LEGAL PLURALISM: WHO DIED AND MADE WADA “THE BOSS”?

A. Overview

The issue of performance-enhancing drugs in professional sports leagues creates an unusual clash of interests between the NLRA, the role of federal and state legislation prohibiting (or choosing not to prohibit) the possession or distribution of certain substances, the WADA Code, and the interests of fans and society. Legal pluralism has been premised on two theories. First, multiple legal entities can co-exist in the same territory.¹⁶⁰ Second, non-state actors can create law.¹⁶¹

One area of study has been on the legal obligations that arise out of social relationships.¹⁶² Recent commentary, in the wake of globalization, has considered the movement, diffusion, and expansion of legal relations from a local level with local implications to worldwide levels and implications.¹⁶³ In this area, “autonomous non-state legal order[s] with special rules and special adjudicating [and in particular arbitral] bodies” have arisen.¹⁶⁴ In the sports law field, this has been discussed as “*lex sportiva*

160. Marc Hertogh, *What is Non-State Law? Mapping the Other Hemisphere of the Legal World*, in *THE STATE LEGISLATURE AND NON-STATE LAW* (J. van Schooten & J.M. Verschuuren eds., forthcoming 2008) (manuscript at 4, available at <http://ssrn.com/abstract=1008451>).

161. *Id.*

162. *Id.* (manuscript at 5). An example of this form of governing relevant to MLB is the issue of unwritten rules of baseball that were “cited” to criticize Alex Rodriguez for yelling “Hah!” or “Mine!” to make a fielder drop a routine pop-up. Dave Sheinin, *It’s Okay to Steal Signs and Bases—Except When It’s Not*, WASH. POST, June 10, 2007, at E14 (noting and discussing how “the Unwritten Rules are constantly shifting, according to the customs of the time and the nature of the game”). Rodriguez was criticized for making a “bush league” play and accused of violating conduct players know not to engage in, but that is technically allowed by the rules of the game. *See id.*

163. Hertogh, *supra* note 160 (manuscript at 14).

164. *Id.* (manuscript at 15) (second alteration in original) (quoting Ralf Michaels, *The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1219 (2005)).

internationalis.”¹⁶⁵ For example, during the 2004 Turin Winter Olympic Games, which were the first games under the WADA Code, the IOC persuaded Italy to not enforce its criminal anti-doping laws, as the IOC was concerned that athletes who tested positive would face criminal charges.¹⁶⁶

Sport associations create their own “laws” by developing rules that govern on and off the field conduct and eligibility. These rules can have an impact on society as a whole. For example, the rules may be incorporated into amateur and social sporting events, fans may find the rules incompatible with their interests as a fan, and the rules may be implemented into our tort system.¹⁶⁷ By nature, some of these rules are necessarily arbitrary and give certain individuals an advantage over others—indeed, an advantage that can affect a person’s chances of becoming a professional athlete.¹⁶⁸

B. Governmental Action

In the realm of drug testing, many of the performance-enhancing substances that fans are concerned about are illegal under federal law.¹⁶⁹ Congress criminalized many drug offenses by enacting the Controlled Substances Act in 1970.¹⁷⁰

In 1973, Congress conducted a study on the use of illegal and dangerous drugs in sports.¹⁷¹ The subcommittee

165. *Id.* (manuscript at 15).

166. Gordon A. Martin, Jr., *How it All Began: The Move to Drug Testing*, 40 *NEW ENG. L. REV.* 705, 709-10 (2006).

167. *Cf. Morgan v. State*, 685 N.E.2d 202, 207 (N.Y. 1997) (“The balance struck at the threshold duty stage of responsibility and adjudication [in sports-related assumption of risk cases] is that the tort rules support a social policy to ‘facilitate free and vigorous participation in athletic activities.’” (quoting *Benitez v. N.Y. City Bd. of Educ.*, 541 N.E.2d 29, 33 (N.Y. 1989))).

168. *See, e.g., Greg Spira, The Boys of Late Summer*, *SLATE*, Apr. 16, 2008, <http://www.slate.com/id/2188866> (theorizing that the cut-off date little leagues have selected for eligibility has impacted which athletes play professional baseball).

169. *See generally* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended in scattered sections of 21 U.S.C.).

170. *Id.*

171. MITCHELL, *supra* note 1, at 28.

report concluded that “the degree of improper drug use—primarily amphetamines and anabolic steroids—can only be described as alarming.”¹⁷² The subcommittee’s chairperson advised leagues to adopt “stringent penalties for illegal use, i.e., fines, suspension or even barring for life, if warranted.”¹⁷³

Steroid use in American professional sports has received considerable attention from Congress since 1999.¹⁷⁴ During March 2004 hearings, Congress “treated every deviation from the WADA model as a sign of a weak commitment to dealing with performance-enhancing drugs [sic].”¹⁷⁵ Senator John McCain told the MLBPA’s Executive Director:

Your failure to commit to addressing this issue straight on and immediately will motivate this committee to search for legislative remedies. . . . I can tell you and your players that you represent the status quo is not acceptable. And we will have to act in some way unless the players at Major League Players Association act in affirmative and rapid fashion. . . . [T]he integrity of the sport, and the American people, demand a certain level of adherence [to] standards that, frankly, is not being met at this time.¹⁷⁶

Congress was back in action in 2005, when the House of Representatives’ Government Reform Committee subpoenaed and questioned several MLB players.¹⁷⁷ Thomas M. Davis III, the chairman of the committee, stated that “the problem of steroids has been systematic

172. *Id.* (quoting source omitted).

173. *Id.* (quoting Press Release, Office of Congressman Harley O. Staggers (May 11, 1973)).

174. See *Restoring Faith in America’s Pastime: Evaluating Major League Baseball’s Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov’t Reform*, 109th Cong. 307 (2005); *Steroid Use in Professional Baseball and Anti-Doping Issues in Amateur Sports: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Sci., and Transp.*, 107th Cong. 7 (2002); *Effects of Performance Enhancing Drugs on the Health of Athletes and Athletic Competition: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 106th Cong. 54 (1999).

175. Haagen, *supra* note 55, at 843.

176. MITCHELL, *supra* note 1, at 56 (citing *Effectiveness of Drug Testing in Preventing Steroid Use: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 108th Cong. 73 (2004)).

177. See generally *Restoring Faith in America’s Pastime*, *supra* note 174.

throughout baseball.”¹⁷⁸ Eventually, six bills were introduced in Congress to regulate performance-enhancing drugs.¹⁷⁹ Commentators noted that the proposed bills were considerably more stringent than the policies that currently existed in professional sports.¹⁸⁰ All of the bills incorporated WADA’s prohibited substance list.¹⁸¹ The Senate Commerce, Science, and Transportation Committee also held hearings regarding two bills in 2005.¹⁸² Each bill would have forced the leagues to adopt standards and penalties at least as stringent as the WADA Code; however, according to a commentator, the bills were not drafted in response to international pressure.¹⁸³

Once again, perceiving that the collective bargaining process is still ineffective in American professional sports leagues, Congress brought American professional sports back to Capitol Hill in 2008.¹⁸⁴ Representative Bobby Rush, the subcommittee’s chairperson, noted that the issue of performance-enhancing drugs presents public policy concerns as steroids are “a serious public health problem” requiring much “congressional scrutiny.”¹⁸⁵ During these hearings, Congress continued to praise the Olympic model and even labeled it the “gold standard.”¹⁸⁶ One Representative stated that it had become “more and more

178. Paul A. Fortenberry & Brian E. Hoffman, *Illegal Muscle: A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports’ CBAs that Led to the Steroid Controversy*, 5 VA. SPORTS & ENT. L.J. 121, 128 (2006) (citing Dan Jung, *Congressional Hearing on Steroids in Baseball*, WASH. POST, Mar. 16, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A41366-2005Mar16.html>).

179. Showalter, *supra* note 2, at 660.

180. *Id.* at 664.

181. *Id.*

182. Haagen, *supra* note 55, at 831.

183. *Id.* at 831-32.

184. See *Drugs in Sports: Compromising the Health of Athletes and Undermining the Integrity of Competition: Hearing Before the H. Subcomm. of Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 110th Cong. (Feb. 27, 2008) (LEXIS) [hereinafter *Drugs in Sports Hearing*].

185. *Id.* at *2 (statement of Rep. Bobby L. Rush, Chairperson, H. Subcomm. on Commerce, Trade, and Consumer Protection).

186. *Id.* at *31 (statement of Rep. Lee Terry, Member, H. Subcomm. on Commerce, Trade, and Consumer Protection).

clear” that federal legislation is needed.¹⁸⁷ On the other side, another Representative stated that this issue is a private business issue between MLB and its fans that should be resolved by the marketplace and it is up to MLB whether or not they want to become an entertainment spectacle like professional wrestling.¹⁸⁸ In addition, at a hearing pertaining to the International Convention Against Doping in Sport, Senator Joseph Biden stated: “I believe that we should have the same code for all sport in America. It should be as tough as the Olympic standards, and it is not, whether it’s professional sports or amateur sport.”¹⁸⁹

In regard to enforcement of laws that Congress has enacted, the most renowned governmental effort has been the BALCO investigation. BALCO created a designer steroid that was originally undetectable by drug testing.¹⁹⁰ The BALCO investigation, which began in 2002, has led to the criminal investigation of, charges against, and convictions of several well-known athletes.¹⁹¹ As part of this investigation, federal investigators executed search warrants for two private firms involved in MLB’s 2003 survey testing to obtain drug testing records and samples for ten MLB players connected with the BALCO investigation.¹⁹² The investigators seized data that enabled them to identify the MLB players who tested positive

187. *Id.* at *3 (statement of Rep. Janice Schakowsky, Member, H. Subcomm. on Commerce, Trade, and Consumer Protection).

188. *Id.* at *6 (statement of Rep. Anthony Weiner, Member, H. Subcomm. on Commerce, Trade, and Consumer Protection).

189. *The International Convention Against Doping in Sport: Hearing Before S. Comm. on Foreign Relations*, 110th Cong., at *3 (May 22, 2008) (LEXIS) (statement of Sen. Joseph R. Biden, Jr., Chairman, S. Comm. on Foreign Relations).

190. Showalter, *supra* note 2, at 652; *see also* Posting of Rick Karcher to Sports Law Blog, Open Letter to Bud Selig, <http://sports-law.blogspot.com/search?q=polygraph> (July 14, 2006, 7:30:00 EST) (arguing for MLB to use polygraph tests to catch the cheaters in MLB instead of the traditional drug tests).

191. *See, e.g., Marion Jones Released from Texas Federal Prison*, Sept. 5, 2008, <http://sports.espn.go.com/oly/trackandfield/news/story?id=3570875> (discussing Marion Jones’s release from prison after serving a six-month sentence for perjury, which she committed during the BALCO investigation).

192. MITCHELL, *supra* note 1, at 58.

during the 2003 anonymous survey testing.¹⁹³ Circumstances such as this implicate player privacy rights and support the MLBPA's insistence that proper safeguards are contained in the policy.

C. Major League Baseball Players

A threshold question is: How have the players associations had so much power? Contrary to popular belief, unions have not been granted ultimate veto authority. After a deadlock or impasse in bargaining, an employer has some power to unilaterally implement terms and conditions of employment, if further collective bargaining would be futile.¹⁹⁴ However, this policy does not apply to partial or "piecemeal" impasses and, therefore, the owners would be risking a strike or lock-out.¹⁹⁵ In addition, the union would surely challenge the league's actions as an unfair labor practice for failing to attempt to bargain in good faith.¹⁹⁶

According to some studies, the majority of MLB players do not support the use of performance-enhancing substances and feel cheated by those who use them.¹⁹⁷ One source indicates that seventy-nine percent of active players in 2002 were in favor of implementing a drug testing policy.¹⁹⁸ In addition, the Mitchell Report notes that some players initially refused to participate in the 2003 survey testing to increase the number of positive tests, so that the

193. *Id.* at 59. The MLBPA petitioned a federal court to have the seized data returned and to quash grand jury subpoenas. *Id.* The Ninth Circuit Court of Appeals reversed the district court's decision granting these motions; however, the opinion was withdrawn and a rehearing was granted in 2008. *United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915, 943 (9th Cir. 2006), *withdrawn and reh'g granted*, 513 F.3d 1085 (9th Cir. 2008); *see also* Rocco, *supra* note 4 (discussing Fourth Amendment concerns involved in the case related to players who were not part of the BALCO investigation).

194. *See generally* 25 AM. JUR. PROOF OF FACTS 2D *Bargaining Impasse* § 4 (1981).

195. *See id.* § 1.

196. *See id.* § 2.

197. *See* MITCHELL, *supra* note 1, at 14-15 (citing various studies indicating MLB players felt cheated by those who use performance-enhancing substances and were in favor of testing).

198. *Id.* at 15 (citing Mel Antonen, *Steroids: Are They Worth It?*, USA TODAY, July 8, 2002, at A1).

five percent threshold would be exceeded and random testing would be implemented in 2004.¹⁹⁹

This begs the question as to why this putative silent majority of players are being held captive by the minority who desire to cheat and/or wish to be free from what they consider an intrusive invasion into their privacy. Are our unions running on a tyranny by the *minority* system? The fundamental concept of unions is that they operate by the will of the majority.²⁰⁰ The members of a union act through a representative—much like our political system—who has the power to create and restrict the rights of union members and other non-member employees.²⁰¹ If the majority does not like the actions the union takes, the majority can rely on the traditional democratic process to remove the union officials.²⁰² By deduction, it may be argued that the majority of players do not want stringent drug testing imposed upon players, but they have been able to pass the culpability on to the union.²⁰³ Such a conclusion is collaborated by the anecdotal evidence that a majority of players use performance-enhancing substances.²⁰⁴

If the players who favor drug testing are actually in the minority, they are likely without a remedy. Under the NLRA, the Supreme Court has held that an “employee may disagree with many of the union decisions but is bound by

199. *Id.*

200. 29 U.S.C. § 159(a) (2000); *NLRB. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180-81 (1967).

201. *See* § 159(a); *Allis-Chalmers*, 388 U.S. at 180.

202. *See* § 159(a).

203. Of course, there are alternative explanations for the players' inaction. For example, their support of the union's other actions outweigh their anti-doping preferences and, therefore, they want to keep the same leaders in place. Alternatively, the players may wish to hang on to an anti-testing position as a bargaining chip to obtain concessions from the owners in other collective bargaining issues. Others have noted that while athletes appreciate drug testing because it fights cheating, they are also apprehensive about testing because of the strong presumption of guilt that arises after a positive drug test. Goldstein, *supra* note 6, at 164. Goldstein also notes that “[a]thletes are forced to put their entire career on the line through a blind faith belief that the testing done at the accredited labs will be proper and the specimens turned over will be properly handled and not contaminated to cause an undeserved adverse finding.” *Id.* at 170.

204. *See, e.g., MITCHELL, supra* note 1, at 60-61.

them. "The majority-rule concept is today unquestionably at the center of our federal labor policy."²⁰⁵ Since the NLRA provides that a union is the exclusive representative of the employees—which prevents employees from individually negotiating agreements with the employer—the Supreme Court has implied that there is a containment statutory duty upon unions "to represent all members fairly."²⁰⁶ This duty is known as the duty of fair representation and has developed to protect the rights of workers who are in the minority from being oppressed.²⁰⁷

[T]he duty of fair representation requires a union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." . . . [A] union breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.²⁰⁸

"[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' as to be irrational."²⁰⁹ "A union's discriminatory conduct violates its duty of fair representation if it is 'invidious.' Bad faith requires a showing of fraud, or deceitful or dishonest action."²¹⁰

205. *Allis-Chalmers*, 388 U.S. at 180 (quoting Harry H. Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1333 (1958)).

206. *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

207. *Breinger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 79 (1989) (noting that the duty of fair representation "is an essential means of enforcing fully the important principle that 'no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers'" (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971)); *Vaca*, 386 U.S. at 182 ("[T]he duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress.")).

208. *Marquez*, 525 U.S. at 44 (quoting *Vaca*, 386 U.S. at 177).

209. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67 (1991) (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)) (citation omitted).

210. *Teamsters Local Union No. 435 v. NLRB*, 92 F.3d 1063, 1070 (10th Cir. 1996) (quoting *Aguinaga v. United Food & Comm. Workers Int'l Union*, 993 F.2d 1463, 1470 (10th Cir. 1993)).

In hearing a breach of fair representation claim, courts will review the substantive aspects of a bargaining representative's conduct.²¹¹ However, bargaining representatives are allowed to exercise discretion and courts should be "highly deferential" to the representative's decisions; therefore, the representative's decisions will be reviewed only to determine whether they fall within a "wide range of reasonableness," even if those judgments are ultimately wrong.²¹² The Court has also noted that

[a]ny authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.²¹³

The Supreme Court has held that the wide latitude and authority that this standard grants to union representatives even allows the union representative to engage in a form of self-dealing to the detriment of the other members.²¹⁴

Under this standard, a player who favors drug testing would face a daunting battle to establish that the union's conduct breached the duty of fair representation by not agreeing to a stringent drug testing plan. The MLBPA's discretion in balancing the various interests during negotiations would likely be respected by a court.²¹⁵ The

211. See *Air Line Pilots*, 499 U.S. at 75-76; *Vaca*, 386 U.S. at 181.

212. *Marquez*, 525 U.S. at 45-46.

213. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953).

214. See *Ford Motor Co.*, 345 U.S. at 339 (citing *Aeronautical Indus. Dist. Lodge v. Campbell*, 337 U.S. 521 (1949)).

215. *But see Teamsters Local Union No. 435*, 92 F.3d at 1071-72 ("The union is not authorized to assume what terms would be acceptable to the majority of its membership; rather, such determinations are 'matter[s] for the bargaining table.' The union acted arbitrarily by taking upon itself the task of determining what the majority would accept, rather than promoting the interests of the various units and letting the democratic process resolve the issues. Through its actions, the union, rather than its membership, determined that the consolidation should favor [one group, the majority, of employees over a smaller group of employees]." (quoting *Teamsters Local Union No. 42 v. N.L.R.B.*, 825 F.2d 608, 613 (1st Cir. 1987))). Even if a player were to successfully challenge

players have various interests involved in this subject, such as competing in a clean sport; being able to take products that the government does not prohibit them from taking; and their medical privacy interest. Most importantly, the union has been limiting the intrusion upon a right so fundamental that we have decided to protect it under our Bill of Rights when governmental action is involved: the freedom from unreasonable searches and seizures.²¹⁶

At the other end of the spectrum, some may assert we should not be allowing unions to forfeit this fundamental, individual right on behalf of players. However, courts have held that a union can voluntarily consent to drug testing that would otherwise violate a public sector employee's Fourth Amendment rights.²¹⁷ One court noted "[i]f individual public employees may litigate such questions despite the resolution reached through collective bargaining, the utility of collective bargaining with respect

the drug testing policy, the remedy would most likely be limited. The remedy for a breach of the duty of fair representation "must vary with the circumstances of the particular breach." *Vaca v. Sipes*, 386 U.S. 171, 195 (1967). Remedies under the National Labor Relations Act should be "limited to carrying out the policies of the [National Labor Relations] Act" and "[o]ne of these fundamental policies is freedom of contract." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (footnote omitted). "Thus, the [National Labor Relations] Board[, the ordinary adjudicative body for claims arising under the NLRA,] cannot dictate the terms of a labor contract, which should be decided upon by the give and take of collective bargaining." *Teamsters Local Union No. 435*, 92 F.3d at 1072-73.

216. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Chandler v. Miller*, 520 U.S. 305 (1997).

217. See, e.g., *Bolden v. Se. Pa. Transp. Auth.*, 953 F.2d 807, 824, 826-28 (3d Cir. 1991) (en banc); *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 119 (1st Cir. 1988) ("[An employee's] cognizable expectation of privacy depend[s] to a great extent upon the concessions the union made regarding working conditions during collective bargaining."); *Util. Workers of Am. Local 246 v. S. Cal. Edison, Co.* 852 F.2d 1083, 1086 (9th Cir. 1988) ("To the best of our knowledge, . . . no court has held that the right to be free from drug testing is one that cannot be negotiated away, and we decline to make such a ruling here."); see also *Am. Postal Workers Union v. USPS*, 871 F.2d 556, 557 (6th Cir. 1989) (rejecting a Fourth Amendment challenge to searches of employee lockers partly because the searches were authorized by the collective bargaining agreement).

to drug testing in the public sector would be greatly diminished.”²¹⁸

However, by enacting the NLRA, Congress has given the power to unions to do something that it could not do itself—override the Constitution’s guarantee against unreasonable searches and seizures.²¹⁹ The protection of constitutional guarantees is why the Supreme Court first implied the duty of fair representation.²²⁰ Judge Nygaard, in a concurring and dissenting opinion in the Third Circuit’s decision in *Bolden*, argued that the Fourth Amendment is an “*individual* right [that] is enshrined in our Constitution just so [an employer and a union] cannot *collectively*

218. *Bolden*, 953 F.2d at 828; see also *Ford Motor Co.*, 345 U.S. at 337 (“[The NLRA] exempts the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of appropriate units of employees.”).

219. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80 (1803) (“It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.”); see also *Chandler*, 520 U.S. at 309 (holding that suspicionless drug testing was an unreasonable search under the Fourth Amendment). Of course, even this argument only applies where the testing would be an unconstitutional search and seizure. *Bolden*, 953 F.2d at 833 (Nygaard, J., concurring in part, dissenting in part).

220. See *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 198 (1944). From this decision, the duty of fair representation has also been implied in the National Labor Relations Act. See *Vaca*, 386 U.S. at 177; see also *Bolden*, 953 F.2d at 834 (Nygaard, J., concurring in part, dissenting in part) (“If federal or state regulations and statutes cannot force employees to be tested in the absence of reasonable circumstances, there is no principled reason to find, as the majority does, that a union whose authority derives from statutes has actual authority to waive the constitutional rights of its members by ‘contractually’ binding them to unreasonable searches and seizures.”). Accordingly, the Court held that “the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.” *Steele*, 323 U.S. at 202. The Court also noted that petitioner was claiming a right under the Constitution. *Id.* at 204. In a concurring opinion, Justice Murphy noted: “While such a union is essentially a private organization, its power to represent and bind all members of a class or craft is derived solely from Congress. . . . [I]t cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution.” *Id.* at 208 (Murphy, J., concurring).

compromise . . .” it.²²¹ Judge Nygaard urged that a preference for collective bargaining does not justify ignoring individual rights.²²² Indeed, the Constitution is the supreme law of the land and constitutional safeguards should prevail over a statutory scheme such as the NLRA.²²³ Judge Nygaard further reasoned that

Fourth Amendment rights are guaranteed to individuals. Unions do not have inherent actual authority to waive such constitutional rights; else individual rights would be sacrificed for some perceived collective good as unions negotiate to get economically related benefits for their members as a whole. The Bill of Rights is predicated on the notion that minority or individual rights must be protected from assault by the majority.²²⁴

This led Judge Nygaard to conclude that constitutional rights should not be “relegated . . . to the status of a bargaining chip . . . [where] the individual possessing the right chooses not to give it up but instead to stand upon it.”²²⁵ However, *Bolden* involved a union’s agreement with a public sector employer and, accordingly, the Constitution’s protection was implicated. Since MLB is a private employer, the constitutional rights are not directly implicated.²²⁶ Although the *Steele* decision implied that a union’s action under their statutory authority constituted state action, similar contentions have been discredited under modern standards of state action, unless the state or

221. *Bolden*, 953 F.2d at 832 (Nygaard, J., concurring in part, dissenting in part). In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45, 51-52 (1974), the Supreme Court made a similar distinction between a union’s ability to waive collective and individual statutory rights in holding that an employee’s statutory right to a trial under Title VII was not forfeited despite a binding arbitration provision in a collective bargaining agreement.

222. *Bolden*, 953 F.2d at 835 (Nygaard, J., concurring in part, dissenting in part).

223. *Marbury*, 5 U.S. (1 Cranch) at 176-80.

224. *Bolden*, 953 F.2d at 837 (Nygaard, J., concurring in part, dissenting in part); see also *Stoner v. California*, 376 U.S. 483, 488 (“The rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of ‘apparent authority.’”).

225. *Bolden*, 953 F.2d at 839 (Nygaard, J., concurring in part, dissenting in part).

226. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349-50 (1974) (discussing the “state action” requirement).

federal government actively participates in the constitutional violation.²²⁷ Furthermore, not allowing a union that represents private sector employees to consent to drug testing would create an anomaly where the private employer could bargain with employees to agree to random drug testing, on an individual basis, when the employees are non-unionized; however, the employer would be precluded from doing so simply because these private sector employees have decided to unionize. The NLRA is based on the belief that individual employees would likely lose their rights, but, when acting collectively, they are able to fight to protect their rights.²²⁸ Accordingly, players who oppose drug testing that the MLBPA agrees to are also without a remedy. As the foregoing situations show, our legal system strongly supports unions having wide latitude in collectively bargaining over a drug testing program.

D. *Public Interest and Supra-Government Regulators*

The public has expressed a desire for clean sports to watch and freedom from having to resort to the health risks of performance-enhancing drugs to compete.²²⁹ To be sure, parents have a strong interest in the health of their children and professional athletes often serve as role models. For example, the father of a child who committed suicide after abusing anabolic steroids testified to Congress during the 2005 hearings:

I believe the poor example being set by professional athletes is a major catalyst fueling the high usage of steroids amongst our kids. Our kids look up to these guys. They want to do the things the pros do to be successful. . . . Our youngsters hear the message loud

227. *Id.* at 358-59 (holding that actions of private utility did not constitute state action where the state legislature conferred upon the private utility a monopoly and extensively regulated the utility); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (holding that no state action existed where the state merely granted a private club a liquor license).

228. 29 U.S.C. § 151 (2006).

229. *But see* Darryl C. Wilson, "Let Them Do Drugs"—A Commentary on Random Efforts at Shot Blocking in the Sports Drug Game, 8 FLA. COASTAL L. REV. 53 (2006) (arguing against regulation or at least for significant reform that focuses on education, disclosure of use, and allows performance-enhancing drug users and non-users to compete against each other, but with a bifurcated award system).

and clear, and it's wrong. If you would want to achieve your goal, it's OK to use steroids to get you there, because the pros are doing it. It's a real challenge for parents to overpower the strong message that's being sent to our children by your behavior.²³⁰

Moreover, a basic tenet is that participation in sports will be beneficial to one's health. However, while at least part of the public has developed a belief that there is no place for certain performance-enhancing drugs in sports, such fans do not have the traditional democratic political process to represent their interests, because MLB is a non-state actor.²³¹ These fans could send a message to MLB and the MLBPA by boycotting games, but they have not done so effectively.²³²

Despite the private autonomy that is an integral part of our free market society, many legal and political policies are driven by private individuals and groups who seek to further their interests and values by taking actions that go beyond lobbying legislatures.²³³ These actors have been discussed as "supragovernmental regulators."²³⁴

230. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 118-19 (2005) (statement of Donald M. Hooton, President & Dir., Taylor Hooton Foundation).

231. Not everyone is in accord and some other commentators have written in favor of no regulation. See, e.g., Hector Del Cid, *Winning at All Costs: Can Major League Baseball's New Drug Policy Deter Kids from Steroids and Maintain the Integrity of the Game?*, 14 *SPORTS LAW. J.* 169, 193-94 ("The public can use erectile function and libido drugs, have plastic surgery to enhance breast and penile size, and use liposuction to lose fat that a quality diet would remove and maintain. Then we tell our athletes to perform at superhuman levels without any means of superhuman recovery. . . . If clean competition is what is desired in baseball, the only solution would be a complete ban of any performance enhancer. A complete ban would mean no pain medication, no lasix eye surgery, no eye glasses, and no diabetics who take insulin could be a part of the sport. The question is: How far are we willing to go for clean competition?").

232. See Press Release, Major League Baseball, Commissioner's Statement (Dec. 13, 2007), http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20071213&content_id=2325226&vkey=pr_mlb&fext=.jsp&c_id=mlb.

233. See Abbot & Snidal, *supra* note 113, at 451.

234. See generally Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 *CHI. J. INT'L L.* 513 (2008) (discussing how non-governmental organizations are able to leverage themselves and establish power).

Supragovernmental regulators often compete against each other as well as against state regulatory programs.²³⁵ The democratic responsiveness and legitimacy of supragovernmental regulators may be crucial to their success.²³⁶ One example is the Forest Stewardship Council (FSC).²³⁷ By protesting outside of Home Depot Stores²³⁸ and gaining consumer support, the FSC, an entity devoted to forestry management and sustainable logging that created certification standards, forced retailers to sell only lumber that the FSC certified. The FSC's certification standards exceeded state forest management regulations, as state legislatures were subjected to undue political influences from loggers.²³⁹ Winning over retailers and consumers was not the only challenge the FSC faced. The FSC also had to deal with timber companies that were reluctant to apply for certification due to the autonomy and independence they would lose while under FSC scrutiny.²⁴⁰

WADA is one organization that has embraced the belief that there is no place for certain performance-enhancing drugs in sports and has placed itself in a position of authority to police this belief. In 2003, the Chairman of WADA, Dick Pound, indicated he was considering urging the IOC to treat the United States as an "international sports pariah" and to pressure all of the member federations to remove their international sports competitions from the United States.²⁴¹ WADA was upset over the cut in funding the United States provided to WADA and by the refusal of professional sports leagues in the United States to sign the Code.²⁴² As one commentator notes, it "would probably be more accurate to say that the American sports leagues did not so much refuse to sign on to the WADA anti-doping campaign as ignore it

235. *Id.* at 518-19.

236. *Id.* at 522-23.

237. *See generally id.* (discussing the FSC's role as a supragovernmental regulator).

238. *Id.* at 525.

239. *See Brock Evans, Chop Now, Pay Later*, 13 F. FOR APPLIED RES. & PUB. POL'Y, Summer 1998, at 18, 18-23.

240. DAVID SUZUKI & HOLLY DRESSEL, GOOD NEWS FOR A CHANGE 18 (2002).

241. Haagen, *supra* note 55, at 840.

242. *See id.*

altogether.”²⁴³ However, U.S. Deputy Director of the Office of National Drug Control Policy, Scott Burns, foresees American professional sports leagues signing the Code someday.²⁴⁴ Burns stated: “They don’t want to sign on right now, because it’s tough and it’s specific. And there are consequences and it can be monitored, and people will be caught and cheaters will be punished.”²⁴⁵ Burns further believes that American professional sports leagues and their unions have not signed onto the Code because the high conviction rate of WADA (ninety-eight percent of the cases prosecuted by WADA Signatories have resulted in conviction) creates a perception that the process is unfair.²⁴⁶ The International Olympic Committee has also placed similar pressure on MLB. In 2005, the IOC voted to eliminate baseball and softball from the schedule for the 2012 Olympics.²⁴⁷ This was the first time a sport was cut from the Olympics since 1936.²⁴⁸ IOC President Jacques Rogge has asserted that the decision was partially influenced by a desire to motivate MLB to improve its anti-doping policy and to spur MLB to allow its players to participate in the Olympics.²⁴⁹ Such contentions have been discredited as the true motive.²⁵⁰

243. *Id.*

244. See Eddie Pells, *Deputy Drug Czar Sees Day When U.S. Pro Leagues Will Accept World’s Standards*, ASSOCIATED PRESS, Nov. 20, 2007 (on file with the Buffalo Law Review).

245. *Id.*

246. See *id.* (noting that all cases involving American athletes that the USADA has brought to arbitration since it was founded in 2000 have resulted in drug sanctions being upheld).

247. See Alan Abrahamson, *IOC Drops Softball, Baseball*, L.A. TIMES, July 8, 2005, at D1.

248. See *id.*

249. See James Mulligan, *Rogge: Baseball Still Has Work to Do Before Olympic Return*, JAPAN TIMES, Oct. 20, 2006, at 13.

250. See, e.g., Mark Zeigler, *Olympic Ax Could Fall Today on Baseball and Softball*, SAN DIEGO UNION-TRIB., Nov. 29, 2002, at C1 (noting that critics have asserted it is a matter of European politics, as Europeans traditionally have dominated the Olympics and are attempting to reestablish their roots). Indeed, this reasoning also explains why softball was also cut. In addition, the IOC did not eliminate the NBA, which has an anti-doping policy that many consider to be considerably weaker than MLB’s and which allows its athletes to participate in the Olympics. Quinn & Fainaru-Wada, *supra* note 54 (noting that numerous experts say that the NBA’s policy is “effectively useless”). If the IOC wants

E. *Authority of the Government and Supragovernmental Regulators in the Steroid Controversy*

The clashing interests in this situation provide several different solutions to regulating performance-enhancing drugs in American professional sports that have various advantages and disadvantages. The federal government has two major options. First, it can increase its criminal investigation efforts under existing laws. In addition, it can enact legislation that regulates drug testing in American professional sports. Supragovernmental regulators, such as WADA, offer a third solution for MLB to improve its performance-enhancing drug policy and restore its credibility and trust among fans.

First, instead of having Congress delegate responsibility to MLB, the U.S. government can increase its investigatory efforts to fight illegal drug users. If this is an issue that society wants to control, the entire blame should not be placed on private actors. Since the BALCO investigation gets the credit for bringing this issue to the forefront of our government's attention, continued efforts by the government to enforce its laws and prevent steroid use and distribution via the Controlled Substance Act could be an effective solution. However, the policy of the U.S. Department of Justice "is to prosecute the manufacturers, importers, and distributors of performance enhancing substances, not the athletes who use them."²⁵¹ It has also been argued that the Anabolic Steroid Act of 1990 is perpetuating this problem and needs to be repealed or significantly revised.²⁵²

During 2008 Congressional hearings, MLB Commissioner Selig noted that the issue of performance-enhancing drugs has become a "societal problem" and

clean athletes, it should be happy that MLB does not allow its players, whom the IOC assumes are doping, to compete in the games.

251. See MITCHELL, *supra* note 1, at 292.

252. See Rick Collins, *The Anabolic Steroid Control Act: The Wrong Prescription* (2005), <http://mesomorphosis.com/articles/collins/wrong-prescription.htm>. *But see* Selig with Manfred, *supra* note 7, at 36 (discussing how a lack of federal regulation of nutritional supplements has hurt American professional sports and, if such substances were regulated by Congress, American professional sports leagues would be able to address the issue during collective bargaining).

neither American professional leagues nor the Olympic Movement has the legislative authority to address the problem.²⁵³ Accordingly, Commissioner Selig urged Congress to consider proposed bills that address the problem of the widespread availability of controlled substances on the internet.²⁵⁴ The MLBPA Executive Director similarly urged Congress to consider legislation that requires chemical markers to be placed in prescription human growth hormone (HGH) so that drug testing is able to detect it, to consider legislation attacking internet sales, to investigate other legislation addressing the widespread availability of these substances, and further requested it to look into whether the Dietary Supplement Health and Education Act is being adequately enforced.²⁵⁵ The point that steroid use is a societal problem is buttressed by the fact that studies have shown that teenage girls have reported increased use of anabolic steroids for body-enhancing or self-protection reasons, not to improve athletic performance.²⁵⁶ During these hearings, Donald Fehr noted:

I don't think it's terribly likely that teenage girls are using steroids because they want to turn into major league pitchers or to linebackers. There's got to be something else that's going on there, where you have a circumstance in which the product seems to be widely available, easy to find, you have massive advertising, you have online sales, you have pharmacies that according to the press reports dispense drugs without individual doctor's examinations. Those are the kinds of things that no matter what we do, that's the environment we can't solve. . . . And I think personally—this is not a statement on behalf of the players, this is simply a personal opinion, that if we maintain a culture in which every time a potential junior high school or high school or potentially college athlete goes in to see the coach, complete with all the pressures for scholarships, and the message is, you're just not big enough, you're just not strong enough, you're just not fast enough, and that message is repeated ad nauseum, people are going to look for ways to get bigger and stronger and faster. And that—by the time they

253. *Drugs in Sports Hearing*, *supra* note 184, at 9 (statement of Allen H. Selig, Witness, Comm'r, Office of the Comm'r of Baseball).

254. *Id.*

255. *Id.* at 10 (statement of Donald Fehr, Executive Dir., Major League Baseball Players Ass'n).

256. *See id.* at 22 (statement of Rep. Michael C. Burgess, Member, H. Subcomm. on Commerce, Trade, and Consumer Protection).

get to the pros, whatever message they have in that regard, they already have. So that's why I suggested in my testimony that we need some help from the Congress in a lot of these other areas. And it's going to be tough; you know, it's taken us 40 years to make meaningful impacts on discouraging tobacco use, but we got a start.²⁵⁷

It was also noted that recent studies have indicated that steroid use by high school students has declined since 2003.²⁵⁸

Next, a more controversial solution that has been considered is federal legislation that imposes testing standards for American professional sports. However, while many people have advocated for federal legislation to protect "the integrity of the game," it has also been asserted that "the integrity of our legal system" must not be compromised.²⁵⁹ It has been asserted that federally mandated drug testing raises constitutional concerns related to player privacy rights.²⁶⁰

For practical reasons, federal legislation would likely be ineffective. Amendments to the legislation would be timely, costly, and divert governmental resources. In the constant "game" between those who use performance-enhancing drugs and those who are trying to eradicate the same, which has been compared to the constant struggle between "cops and robbers,"²⁶¹ the inflexibility of legislation makes this option inefficient and ineffective.

257. *Id.* at 22 (statement of Donald Fehr, Executive Dir., Major League Baseball Players Ass'n).

258. *See id.* at 32-33 (statement of Robert Kanaby, Executive Dir., Nat'l Fed'n of State High School Ass'ns).

259. *See United States v. Comprehensive Drug Testing, Inc.*, 473 F.3d 915, 979 (9th Cir. 2006) (Thomas, J., dissenting in part), *withdrawn and reh'g granted*, 513 F.3d 1085 (9th Cir. 2008).

260. Compare Joshua Peck, Note, *Last Resort: The Threat of Federal Steroid Legislation—Is the Proposed Legislation Constitutional?*, 75 *FORDHAM L. REV.* 1777 (2006) (arguing that a form of the proposed legislation would be constitutional under the "special needs" exception) with Tiffany D. Lipscomb, Note, *Can Congress Squeeze the "Juice" Out of Professional Sports? The Constitutionality of Congressional Intervention into Professional Sports' Steroid Controversy*, 69 *OHIO ST. L.J.* 303 (2008) (arguing that a proposed form of the legislation would be unconstitutional).

261. *See infra* text accompanying notes 270-73.

Furthermore, federal legislation in this area could stifle the competition for credibility between MLB and WADA by setting a minimum standard of responsibility for MLB—a legal shield. MLB could use this standard to avoid scrutiny and thus become complacent with its policy. While it may appear beneficial for policymakers with authority to take action to protect society's interest, this type of action can have negative impacts in the long-run.²⁶² Even though the long-run takes time to reach, policymakers often best serve society by allowing competition to run its course.²⁶³ By stepping in and imposing their will, policymakers dampen competition and may set a standard that is flawed, but society will never realize this because the competition for better solutions has been shut down.²⁶⁴ Competition between supragovernmental regulators can play a significant role in achieving reform.

As the Mitchell Report recognizes, testing programs, including the system the Olympics has implemented, have evolved through trial and error.²⁶⁵ Since drug programs must be continuously updated to address new problems and concerns in this continuous struggle between cops and robbers, competition for legitimacy between American professional sports and WADA could result in the best practices evolving more quickly and, hopefully, in a

262. *Cf. Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 507-09 (1989) (discussing how states with inferior corporate codes will only hurt themselves in the long-run because organizations needing to raise funds will incorporate in other states where investors are more protected and, therefore, more willing to invest).

263. *See id.* at 507-08 ("The long run takes time to arrive, and it is tempting to suppose that courts could contribute to investors' welfare by eliminating laws that impose costs in the short run. The price of such warfare, however, is a reduction in the power of competition among states. Courts seeking to impose 'good' rules on the states diminish the differences among corporate codes and dampen competitive forces. . . . Early economic studies may mislead, or judges (not trained as social scientists) may misinterpret the available data or act precipitously. Our Constitution allows the states to act as laboratories; slow migration (or national law on the authority of the Commerce Clause) grinds the failures under. No such process weeds out judicial errors, or decisions that, although astute when rendered, have become anachronistic in light of changes in the economy. Judges must hesitate for these practical reasons—and not only because of limits on their constitutional competence—before trying to 'perfect' corporate codes.") (citation omitted).

264. *See id.*

265. MITCHELL, *supra* note 1, at 258.

preemptive manner.²⁶⁶ Some may counter that this has not happened. However, MLB has responded well to the criticism and hopefully over time may strive to exceed WADA's standards—with the appropriate guidance that this Comment proposes under Part IV. This is especially true if the marketplace enforces its message for wanting clean sports by actually acting upon this belief and boycotting games. Moreover, competition for credibility has in fact existed between American professional sports leagues and WADA. For example, these parties have attacked each other about the validity of their HGH testing, which has led to significant research and development in this area.²⁶⁷ In addition, the National Football League and the National Football League Players Association have been diligent in staying ahead of designer steroids, as reflected when they banned the use of some performance-enhancing drugs before Congress and the Food and Drug Administration took action.²⁶⁸

WADA has gained advocates by providing a competing policy that has become a benchmark for others to compare MLB against. Concerns over WADA's legitimacy and MLB's "sovereignty" have made it difficult for these entities to reach an agreement. In the end, WADA may prevail because it is viewed as the "good guy," whereas MLB has become the "bad guy" for not having an effective anti-doping policy. If this theory is true, then all MLB players have been stripped of their presumption of innocence, at least in

266. *See id.*

267. *See infra* text accompanying notes 274-79.

268. *See* Showalter, *supra* note 2, at 657. According to NFL spokesman Greg Aiella, the NFL currently works "closely with WADA and USADA in several ways, but [the NFL] . . . do[es] not expect the full WADA code to be adopted." Pells, *supra* note 244. Further, he stated that the NFL believes that its

current policy allows for a tailored approach that addresses the specific issues relating to professional football. For example, [the NFL has] . . . been able to add new substances to [its] . . . prohibited list more quickly than would be the case under WADA, and [it] . . . can adjudicate appeals in a more expeditious way.

Id. MLB has also voluntarily relied upon some WADA criteria in administering its policy. *See* MITCHELL, *supra* note 1, at 273, 275.

the court of public opinion,²⁶⁹ and fans have placed their interest in the integrity of the game over each player's individual rights. Therefore, to prove their innocence, MLB players should be subjected to the vigorous standards of the WADA Code.

Furthermore, concerns related to the effectiveness of WADA's testing procedures and the Code's impingement on fundamental American values call into question whether society should accept WADA's power to pressure American professional sports leagues. Some commentators have argued that "[a]t most, drug testing is a second best alternative."²⁷⁰ Drug testing in general, whether conducted by WADA or MLB, does not appear to be effective. The historic attitude of athletes who want to use performance-enhancing drugs has been that "when . . . [doping authorities] get a test for that [new doping substance] we'll find something else. It's like cops and robbers."²⁷¹ For example, some MLB players switched to using HGH²⁷² when the mandatory drug testing program was implemented, even though they doubted whether HGH actually improved performance.²⁷³ American professional

269. See Quinn & Fainaru-Wada, *supra* note 54 (noting that American Olympic athlete Dara Torres, who made a return to swimming at the age of 41, felt compelled to volunteer for the USADA's longitudinal testing pilot program to prove her innocence, stating "[a]ctually, right now, you're guilty 'til proven innocent. You have to prove it.").

270. See, e.g., Haagen, *supra* note 55, at 846. Senator Mitchell recognized that "no testing program, standing alone, is enough," and quotes another unnamed expert as stating that "testing only scratches the surface." Accordingly, the Mitchell Report recommends that MLB establish a Department of Investigation to work with law enforcement. MITCHELL, *supra* note 1, at SR-29, 287-90.

271. Richard H. McLaren, *WADA Drug Testing Standards*, 18 MARQ. SPORTS L. REV. 1, 3 (2007) (quoting Jan Todd & Terry Todd, *Significant Events in the History of Drug Testing and the Olympic Movement: 1960-1999*, in *DOPING IN ELITE SPORT: THE POLITICS OF DRUGS IN THE OLYMPIC MOVEMENT* 65, 69 (Wayne Wilson & Edward Derse eds., 2001)).

272. The distribution of HGH is regulated under federal law. See 21 U.S.C. § 333(e) (2000); MITCHELL, *supra* note 1, at 20. While HGH "has never been approved by the FDA for cosmetic, anti-aging, or athletic performance purposes, [it is] . . . not included with steroids as a Schedule III controlled substance [and, therefore,] . . . there is no criminal penalty for simple possession of HGH." See *id.* at 13 (footnote omitted). However, several states have regulated HGH as a controlled substance. *Id.*

273. See MITCHELL, *supra* note 1, at SR-21.

sports leagues only test for performance-enhancing drugs via urine samples—which have been unable to detect HGH.²⁷⁴ The players unions have refused to allow their players to be blood tested.²⁷⁵ MLB and the NFL have worked together to discover viable testing methods for HGH.²⁷⁶ In fact, in 2008, MLB and the NFL combined forces with the United States Olympic Committee as the key contributors to a four-year, \$10 million research coalition—the Partnership for Clean Competition—with the goal of establishing more effective and cheaper drug testing techniques.²⁷⁷ The utility of WADA's HGH testing has also come into question, particularly because no athletes have tested positive during the four years during which it has been used and research indicates WADA's test can only detect HGH use within the last twenty-four to forty-eight hours.²⁷⁸ Nevertheless, the United States Anti-Doping Agency (USADA) was adamant during congressional hearings that its HGH test is effective.²⁷⁹

As mentioned above, the BALCO investigation uncovered steroid use that testing was not detecting. Writers have noted that many athletes implicated in the BALCO investigation were not athletes of American professional sports leagues, but were athletes who repeatedly tested negative under international

274. See McLaren, *supra* note 271, at 18-19. In 2006, the MLB Commissioner funded a three year study to develop a urine test for HGH. MITCHELL, *supra* note 1, at 275-76. In July 2008, private researchers believed they discovered a viable urine test for HGH. See A.J. Perez, *Detecting HGH Just the Beginning: Researchers Hope to Create Better Tests for Cancer*, USA TODAY, July 23, 2008, at C8.

275. See Quinn & Fainaru-Wada, *supra* note 54.

276. Press Release, *supra* note 232.

277. Juliet Macur, *United Antidoping Program is Formed*, N.Y. TIMES, May 16, 2008, at D5. The United States Anti-Doping Agency, the National Basketball Association, National Hockey League, and the Professional Golf Association of America also joined the partnership but did not contribute as much capital. *Id.*

278. Amy Shipley, *Straight Dope Remains Elusive: Lack of Positive Tests Seen as Both a Sign Of Progress, Failure*, WASH. POST, Aug. 24, 2008, at D1; Perez, *supra* note 274. The Mitchell Report recognized that an approved blood test for HGH exists, but the practical utility of this test is doubtful. MITCHELL, *supra* note 1, at 275-76.

279. *Drugs in Sports Hearing*, *supra* note 184 (statement of Travis T. Tygart, Chief Executive Officer, United States Anti-Doping Agency).

standards.²⁸⁰ Criminal investigations were also used to bring down the Festina cycling team and the East German doping program—not the international testing that failed to detect these cases.²⁸¹ Thus, some have noted that “WADA is not definitively more effective in ridding sport of performance-enhancing drugs [sic], which warrants a serious debate about whether the costs associated with this program are worthwhile in the context of American professional sports.”²⁸² Indeed, another commentator has compared WADA’s methods to witch-hunting.²⁸³

Assertions that WADA is not even following the Code have been raised. For example, there have been some allegations that WADA has been unfairly attempting to influence the outcome of conviction proceedings,²⁸⁴ but the Code mandates that each athlete should be afforded a fair and impartial hearing.²⁸⁵ It has also been noted that the regime that WADA created allows the anti-doping agency to “serve as prosecutor, judge and jury for an athletes’ [sic] case” and that the Code’s structure interferes with—or even denies—an accused’s evidentiary discovery rights,²⁸⁶ which would likewise undercut the duty to provide a fair and impartial trial. WADA has created a conviction process based on a system where everyone must assume WADA is

280. Haagen, *supra* note 55, at 845-46; Quinn & Fainaru-Wada, *supra* note 54.

281. Haagen, *supra* note 55, at 846.

282. *Id.* (noting invasions of privacy and false positives as significant costs of WADA).

283. Goldstein, *supra* note 6, at 152, 169, 172-73.

284. *Id.* at 170.

285. WORLD ANTI-DOPING CODE art. 8.1, at 48 (World Anti-Doping Agency 2009).

286. Goldstein, *supra* note 6, at 171-72 (noting that American cyclist Floyd Landis “requested documentation on the testing procedures used to find his guilt. The response received from the USADA stated, ‘After extensive review by us of your voluminous requests, I am writing to inform you that we will not be providing *any* documents or other information in response to your requests.’ Yet, there is uncontested proof that the lab that tested the backup sample of Landis had mistakenly labeled the specimen. Additionally the lab used admitted problems with computer hackers.” (quoting Letter from Travis T. Tygard, General Counsel of the USADA to Howard L. Jacobs, Attorney for Floyd Landis (Nov. 3, 2006), *available at* http://ia331303.us.archive.org/1/items/Floyd_Landis_2006_Case_Documents_9/03-nov-06-from-usada-re-document-request.pdf (footnotes omitted)).

right.²⁸⁷ There have also have been many challenges to the scientific reliability of WADA's test procedures.²⁸⁸ This led to intense and expensive legal battles. For example, the United States Anti-Doping Agency spent more than \$2 million dollars to establish a conviction and defend against the athlete's (cyclist Floyd Landis) appeals.²⁸⁹

An additional concern with the Code that has been raised by the MLBPA is that many substances banned by WADA can legally be purchased over-the-counter and use of some of these legal supplements could result in positive tests for steroids because of the FDA's failure to effectively regulate nutritional supplements.²⁹⁰ Thus, Congress could impose Code-like standards on athletes without fulfilling obligations under the Code²⁹¹—which are presumably expected of the government because of the strict liability standard under the Code.

In sum, the court of public opinion appears to have rendered a judgment against MLB. If MLB does not voluntarily take action now, the marketplace may eventually force MLB to turn drug testing over to WADA. However, it should be noted that the public has not enforced its decision; MLB revenue and attendance have continued to increase despite the negative publicity the league has received.²⁹² Because of the lingering questions concerning the utility of drug testing, the Code's impingement upon fundamental American values and WADA's despotic mentality, continued competition between these supragovernmental regulators will encourage both the American Professional Sports Leagues and WADA to

287. *See id.* at 174-75 ("The growing perception among athletes . . . is that because of lack of discovery, the burden of proof, closed laboratories, immense legal costs, questions of neutrality among judges, and various other problems, a fair hearing is very difficult to attain. The procedure is stacked against the athlete's innocence.").

288. *See McLaren, supra* note 271.

289. *Rogge Against Boycott of Beijing Games*, WASH. POST, Mar. 16, 2008, at D2. Another barrier to drug testing is that it is also very expensive. Blood testing can cost between \$50 to \$1000 per test and it costs approximately \$400 to conduct a urine sample. *Macur, supra* note 277.

290. MITCHELL, *supra* note 1, at 24.

291. *See supra* text accompanying notes 71-74.

292. *See Press Release, supra* note 232.

fight for legitimacy and, in the process, lead to the further development of drug testing methods.

IV. WILL SOFT LAW HELP MLB GET TOUGH?

A. *Is an Agreement Between MLB and WADA Feasible?*

By enacting some form of performance-enhancing drug policy, MLB and the MLBPA have indicated their intent to fight the use of these substances in baseball and, thus, they share a common goal with WADA. Even the MLBPA has expressed its concern in preventing performance-enhancing drug use, as the Executive Director, Don Fehr, has declared: "Simply put, [the] Major League Players Association does not condone or support the use by players, or by anyone else, of any unlawful substance . . ." ²⁹³ MLB Commissioner Bud Selig has also noted that the league will not become complacent by merely adhering to the recommendations in the Mitchell Report. ²⁹⁴

As the Mitchell Report recognizes, there are some aspects of a drug testing program that the MLBPA has a strong interest in negotiating over. For example, Senator Mitchell asserted that

[i]t is likely, and understandable, that the Players Association will not agree to relinquish authority over the length of penalties to an independent program administrator. Delegation of that aspect of the program might not be necessary, however, given that the penalties now in effect under the joint program are the strongest of any major professional sports league in the United States. ²⁹⁵

293. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 307 (2005) (statement of Donald Fehr, Executive Dir., Major League Baseball Players Ass'n).

294. Press Release, *supra* note 232 ("As we implement the Senator's recommendations, we will do even more. We will not rest. Major League Baseball remains committed to this cause and to the effort to eliminate the use of performance-enhancing substances from the game.")

295. MITCHELL, *supra* note 1, at 304.

Due to the MLBPA's interest in—or even duty to—negotiating these aspects of a drug testing policy, a hard legalization arrangement with WADA seems improbable at this point. However, soft law can bring these organizations and a third-party together. Even if soft law is only considered a second-best solution, the possibility of soft legalization would be the starting point for discussions between WADA and MLB.²⁹⁶ This starting point for discussion would be critical to the development of both organizations. As the Chief Forester of a timber company going through the Forest Stewardship Council certification process remarked:

[I]t forced me to rub elbows with environmentalists working on this mutual goal of sustainability; it expanded both our understanding of each other. At the internal meeting of the Forest Stewardship Council, who are the certification folks, I sat across the table with the co-founder of Greenpeace. I never would've done that! Neither would he! But that way, we were forced to listen to each other. If people talk face to face, it's amazing what they can agree on. Any kind of dialogue generates some level of trust. You have to vent back and forth, but you learn.²⁹⁷

As far as MLB is concerned, an agreement with WADA or another party could have significant benefits. Legal arrangements that reduce self-serving interpretation can send a message to third parties that an actor's commitments to a given policy are credible.²⁹⁸ By signing an agreement with an outside actor, MLB would be sending a message to current players, society, and young athletes that MLB is committed to fighting performance-enhancing drugs. A legal agreement would also result in a beneficial combination of resources to develop testing methods and to educate athletes and the public about the risks associated with performance-enhancing drugs. In addition, working with WADA would reduce legal challenges by players. When a change is made in a drug testing policy or a new testing procedure is used, an athlete accused of violating

296. See Trubek et al., *supra* note 116, at 12 (noting that soft law can induce participation of the least committed actors).

297. SUZUKI & DRESSEL, *supra* note 240, at 18.

298. See Abbot & Snidal, *supra* note 113, at 426-27 (noting that the Mexican government signed NAFTA in part to increase the credibility of its economic policies in the eyes of foreign investors).

the policy is likely to challenge the policy.²⁹⁹ If MLB and WADA work together, such challenges will not have to be fought as vigorously after one entity successfully establishes the validity of the procedure.

As far as WADA is concerned, breaking from its harmonization policy could also be beneficial. As a supragovernmental regulator, WADA lacks the inherent authority of most policymakers. Any form of agreement with MLB would lead to increases in the perception of WADA's democracy, credibility, and legitimacy. Furthermore, soft law fosters goal convergence by creating conditions in which people will steer themselves to reach the common goal, instead of directly imposing their view, which may generate hostility.³⁰⁰

However, signing on to the Code would be impinging on the relationship between MLB and its players, which is a significant reason why soft law is commonly used for employment and social policy issues.³⁰¹ Thus, adopting the Code would have significant "sovereignty costs" for MLB. The MLBPA is rightfully skeptical about subjecting its players to the jurisdiction of a non-state actor, which has engaged in strong arm tactics indicating it is out to get MLB and which has established procedures that have been compared to witch-hunting.³⁰² In addition, MLB and the MLBPA are governed by their collective bargaining agreement. There are substantial differences in how drug testing policies can be implemented in sports that are subject to collective bargaining and those that are not.³⁰³ After all, protection of employee rights is why the NLRA was established.³⁰⁴ While it may not be in the best interest of players to have the union protect the illegal use of drugs, there are many other considerations and interests the MLBPA must consider in negotiating a policy. The MLBPA

299. See generally McLaren, *supra* note 271 (discussing challenges to various drug testing procedures).

300. Class Discussion with Errol E. Meidinger, Vice Dean, State University of New York, University at Buffalo Law School, in Buffalo, N.Y. (Sept. 12, 2007).

301. See Trubek et al., *supra* note 116, at 15.

302. See *supra* text accompanying notes 241-50, 283-89.

303. MITCHELL, *supra* note 1, at 258.

304. See 29 U.S.C. § 151 (2000).

also has a duty to protect the interests, rights, and privacy of its players, so that the innocent are not stripped of their rights simply because strong public disdain has arisen. The Constitution's safeguards—although not directly implicated in this context—were guaranteed to avoid this type of tyranny from the majority.³⁰⁵ As MLB Commissioner Selig has noted, “[g]iven that positive drug tests can lead to fines, suspensions without pay, or both, it is not at all surprising that unions resist agreements containing broad prohibitions and requiring extensive testing.”³⁰⁶ Indeed, the MLBPA has noted “that major league players rely on baseball for their livelihood while many athletes in Olympic and other sports do not.”³⁰⁷ The MLBPA's Executive Director has also noted that the fact that Congress has decided that “certain substances are []legal . . . and may be purchased by children” makes it difficult for the MLPBA to tell players they have agreed to ban the substance for MLB players and that is why MLB's “prohibited substance list is pegged to U.S. law.”³⁰⁸

WADA's drive for harmonization also means that other diversity factors which exist in sports organizations are ignored. For example, the MLBPA may have a persuasive argument that a two-year suspension for a ten million dollar MLB player is much more severe than a two year suspension for an amateur athlete subjected to the same mandatory penalty under the Code.³⁰⁹ Others have criticized WADA for its “one size fits all” strategy in other areas, such as the prohibited substance list.³¹⁰ WADA

305. See *Bolden v. Se. Pa. Transp. Auth.*, 953 F.2d 807, 837 (1991) (Nygaard, J., concurring in part, dissenting in part).

306. Selig with Manfred, *supra* note 7, at 35. However, bargaining over drug testing can also be used as leverage in other areas of negotiations. As the current commissioner of MLB has noted “through collective bargaining, parties attempt to achieve gains in certain core areas (such as payroll regulation), often as a trade-off for, or at the expense of, not making ground in other important areas (such as nutritional supplement regulation).” *Id.* at 57.

307. MITCHELL, *supra* note 1, at 259.

308. *Drugs in Sports Hearing*, *supra* note 184, at 20 (statement of Donald Fehr, Executive Dir., Major League Baseball Players Ass'n).

309. See Haagen, *supra* note 55, at 847-48 (discussing that because of the economic interests of MLB players, a less severe penalty can achieve the same deterrence level).

310. Goldstein, *supra* note 6, at 162.

asserts that the Code's "rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport."³¹¹ However, the comments from these various international stakeholders will inevitably conflict based on the differences in fundamental values each culture shares. The Open Method of *Coordination*—as opposed to harmonization—has worked for the European Employment Strategy and deserves consideration by WADA.

B. *Elements of an Effective Performance-Enhancing Drug Policy*

The importance of "independence" has been highlighted as an integral part of an effective performance-enhancing drug policy. Experts have noted that a sports body is often motivated to protect the public image of its athletes and its sport by "leniently dealing with violators" when it is able to govern itself.³¹² The IOC recognized the benefits of delegation in making WADA an independent organization. WADA has been able to use its independence "to garner the trust and respect of the athletes while exercising its authority to police the various sports bodies, ensuring that they are adhering to the Code and complying with their responsibilities."³¹³ Travis Tygart, CEO of the USADA, has promoted the Code because he believes "the checklist of independence and transparency found in the WADA code provides for the most effective programs."³¹⁴

The Mitchell Report noted that the following characteristics are widely recognized as essential to an effective performance-enhancing drug policy: (1) independence of the program administrator; (2) transparency and accountability; (3) effective, year-round, unannounced testing; (4) flexibility so that the program is responsive to best practices and new challenges as they develop; (5) respect for player privacy and due process rights; (6) adequate funding; and (7) a robust education

311. WORLD ANTI-DOPING CODE introductory cmt. at 18 (World Anti-Doping Agency 2009).

312. Goldstone, *supra* note 57, at 365.

313. *Id.* at 366.

314. Pells, *supra* note 244.

program.³¹⁵ The Mitchell Report states that “[t]ransparency is essential to demonstrate the integrity of any drug testing program” and will help to ensure accountability.³¹⁶ The report views transparency as “disclosure of sufficient information about the operation of the program to ensure that it is operated fairly and in accordance with the expectations of interested parties, including fans.”³¹⁷ Transparency can be achieved by issuing periodic reports on the program’s operations and aggregate test results, and by submitting to regular audits to avoid any tendency for “results management” practices.³¹⁸ Article 14 of the Code attempts to balance “[t]he principles of coordination of anti-doping results, public transparency and accountability and respect for the privacy interests of individuals alleged to have violated anti-doping rules.”³¹⁹ Under the Code, anti-doping organizations are allowed to publicly disclose the identity of an athlete alleged to have violated an anti-doping rule after notifying the athlete or other person of the alleged violation.³²⁰ Within twenty days of an anti-doping rule violation conviction, the Anti-Doping Organization is required to publicly report the disposition of the anti-doping matter.³²¹ For statistical reporting purposes, under the Code Anti-Doping Organizations are allowed to publish reports showing the name of each athlete tested and the date of the testing.³²² The Code further provides:

315. MITCHELL, *supra* note 1, at 262, 305-06. A 2000 Columbia University commission recommended that drug testing programs include the following characteristics: (1) administration by a truly independent organization with broad authority over testing and sanctioning; (2) comprehensive year-round unannounced testing; and (3) continued research regarding performance-enhancing drugs and more effective testing methods designed to address changes in doping techniques. THE CASA NAT’L COMM’N ON SPORTS & SUBSTANCE ABUSE, THE NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUM. UNIV., WINNING AT ANY COST: DOPING IN OLYMPIC SPORTS 3-4 (2000).

316. MITCHELL, *supra* note 1, at 265, 304.

317. *Id.* at 265.

318. *Id.* at 265, 304.

319. WORLD ANTI-DOPING CODE art. 14 introductory cmt. at 84 (World Anti-Doping Agency 2009).

320. *Id.* art. 14.2.1, at 86.

321. *Id.* art. 14.2.2, at 86.

322. *Id.* art. 14.4, at 88.

Each Signatory shall establish rules and procedures to ensure that all Athletes or other Persons under the authority of the Signatory and its member organizations consent to the dissemination of their private data as required or authorized by the Code. . . . These sport specific rules and procedures aimed at enforcing anti-doping rules in a global and harmonized way are distinct in nature from and are, therefore, not intended to be subject to or limited by any national requirements and legal standards applicable to criminal proceedings or employment matters. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport.³²³

However, the Code also requires Anti-Doping Organizations to comply with applicable data protection and privacy laws.³²⁴ If forced into an anti-doping policy, the MLBPA and players may react hostilely and assert rights under federal and state medical privacy laws to keep positive test results private. Although players would become noticeably absent if they were suspended, the public would never truly know if the player tested positive or missed games for other reasons. Ultimately, fans and the media would not get the result they want—knowing who is cheating.

C. *MLB's Soft Law Answer*

This Comment proposes that MLB and the MLBPA agree to be monitored by an independent party that operates similar to an outside consulting agency. This organization would have the following responsibilities: (1) to serve as a mediator to establish goals, benchmarks, and guidelines for MLB's performance-enhancing drug policy; (2) to attempt to get the other American professional sports leagues to join the alliance; (3) to establish a research and development program to determine emerging trends of performance-enhancing drug users and develop testing practices to combat such trends; (4) to propose best practices to MLB and the MLBPA; (5) to facilitate

323. *Id.* introduction at 17-18 (italics omitted).

324. *Id.* art. 14.6, at 89.

discussions and conferences between WADA, other anti-doping organizations, and American professional sports leagues; (6) to periodically meet with MLB and the MLBPA to review progress towards the goals, benchmarks, and guidelines; (7) to monitor MLB and the MLBPA's compliance with the collectively bargained performance-enhancing drug policy; and (8) to periodically update the public regarding MLB's compliance. To establish the relationship, the parties should execute a general agreement that outlines the mission and vision statements of the consulting agency and broadly defines its responsibilities. MLB and the MLBPA should also agree to make good faith efforts to adhere to the agreement and all proposals by the consulting agency as a guide during the collective bargaining process. The agreement should specifically address terms which MLB and the MLBPA are allowed to collectively bargain over and whether the consulting agency will have any rule-making authority.

While this agreement would be non-binding, the consulting agency would operate similar to accreditation, seal of approval, and certification organizations. The benchmarking should be done by establishing a publicly available rating or "report card" system to compare the performance-enhancing drug policies in American professional sports leagues and international sports. Like the current Independent Program Administrator, MLB and the MLBPA should not be able to terminate the relationship unless an independent arbitrator finds adequate cause to do so. The organization should have a board of directors composed of representatives from a broad array of constituencies, such as: fans, league, team, and player sponsors, medical experts, legal experts, and amateur athletes. MLB and the MLBPA should agree to have the initial board of directors selected by an outside body, such as a congressional committee.

The effectiveness and obligation under this policy will lie in the consulting agency's ability to make normative statements and its surveillance of the MLB's program. The consulting agency's power to report to the public and mediate discussions between MLB and the MLBPA will provide it with power similar to Congress's ability to coerce MLB to improve its policy. One of the reasons "independence" has become the buzz word for an effective anti-doping policy is the accountability and scrutiny

associated with third party review.³²⁵ This is also why “soft law” can still serve as an effective legal arrangement that recognizes diversity, despite the apparent flaw that the commitment is non-binding. As this alliance grows and other leagues join, the forces of discourse, mimesis, networking, deliberation, and mutual learning will facilitate progression. Indeed, true to its athletic and competitive nature, MLB is proud to say it now has the most stringent policy of all American professional sports. This “voluntary” compliance and support of drug testing may even send a more powerful message to the youth—a direct message from their role models that there is no place for performance-enhancing drugs in the sport—which may be more effective than governmental regulation.

This arrangement would allow MLB and the MLBPA to continue to negotiate their collective bargaining agreement while still retaining the benefit of delegation that can create credibility in the eyes of fans and athletes. As the parties develop their relationship and learn of the consequences of such an agreement, they may eventually adopt a harder form of legalization that provides for even more delegation. If none of the American professional sports are willing to agree to such a proposal, this organization could arise independently by establishing accreditation criteria, leveraging itself with fans, league, and player sponsors, and uniting them to pressure MLB and the MLBPA to subject themselves to the accreditation criteria.³²⁶

325. See SUZUKI & DRESSEL, *supra* note 240, at 18 (quoting the owner of a timber company that subjected itself to FSC certification who said: “[W]e found ourselves being asked some challenging questions by a third party. Then we started to realize we could do better. It’s really revitalized our practices.”).

326. See Quinn & Fainaru-Wada, *supra* note 54 (quoting sports marketing consultant Marc Gains, who noted “[y]ou may find that for certain sports, this kind of aggressive drug testing may wind up becoming a standard in all new endorsements contracts”). This proposed organization may be able to convince companies who seek athletes for endorsement deals to only accept athletes from leagues that comply with certain testing standards. Alternatively, they may be able to convince these companies to provide drug testing clauses in the endorsement contract. There would be many difficulties and inefficiencies with having such a clause. First, it would be a particularly decentralized approach that would be costly for testing and defending against player challenges. Second, it could drive top athletes to go to the company’s competitors. Third, there would be public relations problems if the player tested positive, particularly because the company’s name would be tied to the positive test in media coverage. Fourth, if the company’s competitors are endorsing players who

CONCLUSION

In conclusion, MLB may find significant benefits in finally reaching a soft law agreement with another party that allows it to continue bargaining over the substantive issues of the performance-enhancing policy. To many people, this may not be the perfect solution, but it would be a step in the right direction and it would respect American values. The compelling reason for signing onto the Code seems to be the benefits that arise from having an independent and impartial administrator. This independence does not have to be to WADA. In fact, it may be better if another independent agency for American professional sports leagues is created, so that the competition between these supragovernmental organizations drives further advancement and improvements in the field as the organizations fight for credibility and legitimacy.

In today's international environment where the world is flat³²⁷—it may be fitting that even America's pastime is subject to the jurisdiction of a non-state, international actor. On the other hand, it seems perverse that MLB should start singing "for it's one, two, [] strikes, you're out, [of] the old ball game."³²⁸

take performance-enhancing drugs, the success of the player using performance-enhancing drugs will benefit the competitor. However, the endorsing company's stance against performance-enhancing drugs could translate into a competitive advantage. For these reasons, the new drug testing organization could begin to leverage itself with companies within a particular market niche where the product or service the player would be endorsing is not directly linked to athletic performance and the company's consumers are more committed to the anti-doping campaign than loyalty to athletes. This may be true for certain types of cereals and health foods that athletes endorse.

327. See generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (2005).

328. Cf. JACK NORWORTH, *Take Me Out to the Ball Game* (York Music Co. 1908).