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They Aren't Who We Thought They Were: The Importance of Genetic Testing in Major League Baseball to Prevent the Falsification of Players' Ages

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THEY AREN'T WHO WE THOUGHT THEY WERE: THE IMPORTANCE OF GENETIC TESTING IN MAJOR LEAGUE BASEBALL TO PREVENT THE FALSIFICATION OF PLAYERS' AGES

I. INTRODUCTION

Miguel Sano (Sano), a highly touted shortstop from the Dominican Republic, told Major League Baseball (MLB) clubs that he was sixteen years old.¹ However, with the recent trend of Latin American baseball players falsifying their ages to appear younger than they are, any interested team was not going to take Sano's word for it.² In fact, Sano consented to DNA testing to verify his age.³ DNA testing of all baseball players is necessary for MLB to reduce the amount of players who successfully defraud the league. Age fraud seems to happen more frequently with players from Latin American countries, especially the Dominican Republic,⁴ but it is possible for any player to lie about his age to various MLB teams. As of now, more than 300 players in MLB have signed with a team after presenting the team with a false birth certificate.⁵

Professional sports are dependent on the integrity and honesty of its participants.⁶ Recently, the credibility of professional baseball players took a hit when it was discovered that many superstars took steroids during their prime playing years;⁷ therefore, it is important for MLB to thwart any further credibility issues by preventing players from defrauding teams and fans by lying about their ages and identities. It is especially important for MLB teams

1. Michael S. Schmidt & Alan Schwarz, *Baseball's Use of DNA Raises Questions*, N.Y. TIMES, July 22, 2009, at A1.

2. *Id.*

3. *Id.*

4. Diana L. Spagnuolo, Comment, *Swing for the Fence: A Call for Institutional Reform as Dominican Boys Risk Their Futures for a Chance in MLB*, 24 U. PA. J. INT'L ECON. L. 263, 276 (2003).

5. Schmidt & Schwarz, *supra* note 1.

6. Jeffrey A. Durney, *Fair or Foul? The Commissioner and MLB's Disciplinary Process*, 41 EMORY L.J. 581, 623 (1992).

7. Holli N. Heiles, Comment, *Baseball's "Growth" Problem: Can Congress Require MLB to Test Its Athletes for Human Growth Hormone? A Proposal*, 62 ARK. L. REV. 315, 324 (2009).

to know the true ages of prospective players because, on July 2 of each year, teams may sign sixteen-year-old international free agents, and some of these players command millions of dollars.⁸ It is important for teams to know exactly who, and how old, a player is before they agree to pay that amount of money. In order for a team to know that the player they are signing is the age and person he claims to be, mandatory DNA testing is necessary. Therefore, MLB should implement mandatory league wide testing of its players.

Part II of this Comment will discuss the background of the age falsification issue in baseball and provide examples of its prevalence in MLB. Part III will discuss the definitions of and procedures for genetic testing, as well as current testing procedures in MLB. Part IV will address the issues that genetic testing will face at the federal level. This part will include analysis of the Genetic Information Nondiscrimination Act (GINA) and private association implications that MLB may face. Part V will provide a discussion of the fears associated with genetic testing of baseball players and why this will serve as an impediment to implementing a successful testing policy. Part VI will provide suggestions for how MLB can legally subject players to genetic testing while relieving the fears of the players. Finally, Part VII of this Comment will conclude that MLB should implement mandatory genetic testing of its players.

II. AGE ISSUES IN BASEBALL

MLB does not impose limitations on the amount of international players that can play in the league,⁹ and thus, the presence of international players in baseball is abundant.¹⁰ Between 1987 and 2005, the number of Dominican players alone ballooned from 50 players to 1,443.¹¹ In 2007, thirty percent of all MLB players and forty percent of all minor league players were from

Latin America.¹² Over time, MLB has had its share of age fraud among these players.

For example, in 1999, the Los Angeles Dodgers signed Adrian Beltré (Beltré) who claimed to be seventeen years old.¹³ In reality, Beltré was only

8. Melissa Segura, *In International Market, MLB Teams are Buying Costly Lottery Tickets*, SI.COM, July 2, 2009, <http://sportsillustrated.cnn.com/vault/article/web/COM1157488/index.htm>.

9. N. Jeremi Dutu, *This Field is Our Field: Foreign Players, Domestic Leagues, and the Unlawful Racial Manipulation of American Sport*, 84 TUL. L. REV. 613, 614 (2010).

10. *Id.* at 669.

11. Vanessa Marie Zimmer, *Dragging Their Devotion: The Role of International Law in MLB's Dominican Affairs*, 4 NW. J. INT'L HUM. RTS. 418, 419 (2005).

12. Dutu, *supra* note 9, at 669-70.

13. Spagnuolo, *supra* note 4, at 270.

fifteen years old.¹⁴ The Dodgers faced a fifty-thousand dollar fine because they signed an underage player and were forced to suspend operation of the team's Dominican Republic training camp for one year.¹⁵ Tommy Lasorda, former Senior Vice-President of the Dodgers, claimed that the team's actions were "nothing out of the ordinary" and that teams signed players illegally (by MLB standards) all the time.¹⁶ In fact, teams use their own resources to sign younger-than-allowed players,¹⁷ such as dating documents in advance so that the documents appear to be signed when the player was eligible.¹⁸ For example, the Cleveland Indians violated MLB rules by dating a fifteen-year-old's documents a year in advance so that they would appear to be signed after the player had turned sixteen.¹⁹

Although a portion of the illegally-signed players, like Beltr , pretend to be seventeen when in reality they are too young to sign with a team, the majority of illegally signed baseball players have pretended they are younger than they really are so that teams remain interested.²⁰ A discovery of this phenomenon came when individuals from Houston Astros Miguel Tejada's (Tejada) hometown community said that Tejada was at least two years older than he had claimed when he signed his rookie contract.²¹ Because teams are primarily interested in young prospects, it is not uncommon for international players to falsify birth certificates in order to be signed.²² According to members of Tejada's community, most Dominican players in the major leagues are older than they allege.²³ For instance, the Washington Nationals (Nationals) were faced with this issue when the recipient of the franchise's largest international signing bonus was discovered to be four years older than he claimed.²⁴ The Nationals gave a player named Esmilyn Gonzalez, who claimed to be nineteen years old, a \$1.4 million signing bonus in 2006 only to discover he was actually twenty-three-year-old Carlos Alvarez Daniel Lugo (Lugo).²⁵ Although the Nationals could not be punished for signing Lugo, as

14. *Id.*

15. *Id.*

16. *Id.*

17. See Zimmer, *supra* note 11, at 421.

18. *Id.*

19. *Id.*

20. Spagnuolo, *supra* note 4, at 276.

21. *Id.*

22. *Id.*

23. *Id.*

24. Melissa Segura, *Nationals Prospect Falsified Identity*, SI.COM, Feb. 17, 2009, <http://sportsillustrated.cnn.com/2009/baseball/mlb/02/17/nats.gonzalez/>.

25. *Id.*

he was old enough to play in the majors, the disclosure of Lugo's true age immediately reduced his supposed value as a major league player.²⁶

Likewise, a Dominican shortstop had contracted for an \$850,000 signing bonus with the New York Yankees (Yankees) before they discovered that he was older than he alleged and that he had falsified his identity.²⁷ The difference in just a few years of age can be immense in baseball,²⁸ and it can affect the perceived value of a player. This is detrimental to a team, especially those small market clubs with less money, because MLB contracts are guaranteed;²⁹ thus, if a player is guaranteed a large amount of money based solely on his perceived value because of his young age, a team will suffer when it pays that money to a player who is older than he says and, as such, cannot remain viable on the team. While it is unclear how old the Yankees' shortstop really was,³⁰ if an individual named Esmailyn Gonzalez actually exists, or how Lugo falsified his documents, the players' perceived skills were based on the fact that he was playing against younger men with less experience.³¹

Unfortunately for these players, who are often manipulated by agents and scouts looking to make money by providing false documents, a player who misrepresents his age or identity cannot sign with another baseball team for one year.³² In Lugo's case, the revelation of his real age diminished his value as a player.³³ It is also hard to prevent age fraud from happening as verifying some players' ages by a birth certificate is often impossible because birth documentation in Latin American countries, for example, is more informal than documentation procedures in other countries.³⁴ In order to allow players without proper documentation to sign with a major league team, procedures must be in place to verify the age of the player. Then, the team will know the correct age of the person it is signing and paying to play, and players will not suffer unnecessary damage to their reputations. These procedures are

26. *Id.*

27. Melissa Segura, *Source: MLB Nixes Yanks Signing of Player with Fraudulent Identity*, SI.COM, July, 16, 2009, <http://sportsillustrated.cnn.com/2009/baseball/mlb/07/16/yankees.signing/index.html>.

28. Schmidt & Schwarz, *supra* note 1.

29. See Matthew J. Mitten, *Health Law Symposium: Team Physicians as Co-Employees: A Prescription that Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 ST. LOUIS U. L.J. 211, 221 n.61 (2005).

30. See Segura, *supra* note 27.

31. See Segura, *supra* note 24.

32. Segura, *supra* note 27.

33. Segura, *supra* note 24.

34. Spagnuolo, *supra* note 4, at 276.

necessary to prevent deceit by both the players and various teams.

III. THE IMPORTANCE OF GENETIC TESTING

Genetic testing is a procedure that MLB must undertake to prevent age and identity fraud. Although becoming more common, genetic testing is still in its early stages and must be carefully considered by MLB before it is uniformly implemented.³⁵ Currently, MLB's testing is limited,³⁶ but a better understanding of the process may make the league more inclined to implement the procedure.

A. Definitions and Explanations of Genetic Testing

Technological advances in science have created an increased fascination with genetic information—especially information about the genetic makeup of athletes and whether they are prone to injury.³⁷ There are two options that can be used to determine the age or identity of a person: genetic testing and bone scans. First, the United States was introduced to genetic testing with the Human Genome Project, a project “undertaken to distinguish each of the approximately 35,000 human genes with the goal of understanding the roles of genes in health and disease.”³⁸ This project opened the door to “legal, moral, and ethical implications of openly discernable genetic information.”³⁹

Genetic testing is defined as “a test for determining the presence or absence of an inherited genetic characteristic in an individual, including tests of nucleic acids such as DNA,” and genetic testing can have many different functions and purposes.⁴⁰ Testing can be simple for the patient because physicians need only a blood or tissue sample.⁴¹ The testing itself is done at a separate lab.⁴²

35. Michael S. Blackwell, Comment, *Insurance, Employment, and the Genetic Information Nondiscrimination Act of 2008*, 55 LOY. L. REV. 125, 126 (2009).

36. Schmidt & Schwarz, *supra* note 1.

37. Barry D. Jordan, *Genetic Susceptibility to Brain Injury in Sports: A Role for Genetic Testing in Athletes?*, 26(2) PHYSICIAN AND SPORTSMEDICINE 25 (1998).

38. Paul D. Trumble, Comment, “Knicker” and Dime Issues: *An Unexplored Loophole in New York’s Genetic Discrimination Statute and the Viability of Genetic Testing in the Sports Employment Context*, 70 ALB. L. REV. 771, 774 (2007).

39. *Id.*

40. David C. Bonnin, Comment, *The Need for Increased Oversight of Genetic Testing: A Detailed Look at the Genetic Testing Process*, 4. HOUS. J. HEALTH L. & POL’Y 149, 151 (2003).

41. *Id.* at 149.

42. *See id.*

Genetic data can expose intimate details about a person.⁴³ Moreover, genetic testing is in its early stages and does not guarantee the onset of future diseases and medical conditions.⁴⁴ Furthermore, genetic, or DNA, testing does not identify the age of a person, but it can identify whether a person is the child of his or her claimed parents.⁴⁵ Parentage can be determined because these tests analyze genetic traits that are present in a child and the supposed parents.⁴⁶ The fundamental theory of DNA testing for parentage is that all genetic information passed to the child from the parents will be found in the child's DNA.⁴⁷ As a result, DNA tests can conclusively determine a child's parentage.⁴⁸ This aids MLB because players have found families that are willing to lend birth certificates so that a player may appear younger.⁴⁹ Verifying that a player's alleged parents are, in fact, his real parents can prevent speculation that the player is using a different family's younger child's birth certificate.⁵⁰

Second, to determine the age of a person, bone scans may be performed.⁵¹ Bone scans are nuclear scanning tests that can determine the age of a person.⁵² Because a bone scan is a nuclear scan, "the source of radiation is inside [the] body and travels to the surface, where a camera detects it."⁵³ Although this will not verify a person's identity, it will verify the age range of the person.⁵⁴

B. Current MLB Age-Testing Practices

Due to the pervasiveness of age falsification and the development of genetic testing in recent years, MLB began conducting DNA tests on prospects

43. Patricia Alten, Note, *GINA: A Genetic Information Nondiscrimination Solution in Search of a Problem*, 61 FLA. L. REV. 379, 383 (2009).

44. Blackwell, *supra* note 35, at 126.

45. Schmidt & Schwarz, *supra* note 1.

46. Alan R. Davis, Comment, *Are You My Mother? The Scientific and Legal Validity of Conventional Blood Testing and DNA Fingerprinting to Establish Proof of Parentage in Immigration Cases*, 1994 BYU L. REV. 129, 129 (1994).

47. *Id.* at 136.

48. *Id.* at 142.

49. Schmidt & Schwarz, *supra* note 1.

50. *See id.*

51. Schmidt & Schwarz, *supra* note 1; *see* Mayo Clinic Staff, *Bone Scan: Definition*, MAYOCLINIC.COM, <http://www.mayoclinic.com/health/bone-scan/MY00306> (last visited Mar. 11, 2010).

52. Mayo Clinic Staff, *supra* note 51.

53. *Id.*

54. Schmidt & Schwarz, *supra* note 1.

and their parents in very limited situations.⁵⁵ In July 2009, the Yankees were able to void the signing of a prospect from the Dominican Republic after a DNA test proved that the player had lied about his identity.⁵⁶ Additionally, MLB has used bone scans in the past as an investigation tool to determine age ranges of players.⁵⁷ Currently, MLB claims it will use DNA tests only in rare instances and only on a consensual basis.⁵⁸ A player must pay for the tests, and if the results verify the player's stated age, the player will be reimbursed.⁵⁹ Current tests are strictly for age verification, but scouts and medical experts fear that the testing will eventually be used to predict the medical history and medical future of the athletes.⁶⁰ However, regardless of the reason for genetic testing, MLB will have to comply with federal and state laws as the regulation of genetic testing grows.

IV. FEDERAL LAW AND PRIVATE ASSOCIATION LAW ISSUES

A professional sports team and its league can create internal rules and regulations but are still subject to the constraints of federal and state law.⁶¹ MLB, as well as other professional sports leagues, has a commissioner model of governance.⁶² This allows the league to self-govern, as long as it follows the law of a private association.⁶³ However, MLB is still subject to federal laws, such as federal labor laws,⁶⁴ contract laws,⁶⁵ and various federal statutes.⁶⁶ Although MLB may create its own genetic testing policy, it still must abide by any federal statute regulating genetic information in the workplace if the specific provisions of the statute apply to the league.⁶⁷

A. Genetic Information Nondiscrimination Act (GINA)

Genetic testing in MLB may be the first instance of testing since GINA

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 172 (1995).

62. MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION* 403 (2d ed. 2009).

63. *Id.* at 610-11.

64. *Id.* at 404-05.

65. *Id.* at 406.

66. *Id.* at 437.

67. See *id.* at 406; Schmidt & Schwarz, *supra* note 1.

was passed.⁶⁸ Passed in 2008, GINA officially took effect on November 21, 2009.⁶⁹ GINA prohibits employers from asking for DNA or basing employment decisions on a person's DNA or the DNA of a person's family members.⁷⁰ GINA's definition of genetic information includes, but is not limited to, information about an employee's DNA tests and family history.⁷¹ Family is defined as dependents and any other individual who is a first-, second-, third-, or fourth-degree relative.⁷² However, the definition of genetic information does not include the sex or age of an employee.⁷³ GINA was enacted to prevent employers from asking for and receiving the type of information DNA testing can provide, including a prospective employee's risk of developing a certain medical condition.⁷⁴ GINA "forbids employers from refusing to hire, or discharging, any employee on the basis of genetic information."⁷⁵ However, it does contain an exception for genetic information that is provided under the employee's consent, as long as an employee provides consent before the employers request the information.⁷⁶

In addition to GINA, states are beginning to introduce their own legislation regarding genetic testing in the workplace.⁷⁷ Although inconsistency among state statutes can change the protections and limitations provided,⁷⁸ MLB must remain aware of the statutes. In fact, professional sports have already faced an issue concerning a state genetic testing law.⁷⁹ In the National Basketball Association, a basketball player with a heart condition was traded to the New York Knicks (Knicks).⁸⁰ At the time, there was a New York state law prohibiting genetic testing for a person's employment; because the Knicks wanted to avoid a challenge under the state law, the team did not require the player to undergo genetic testing to determine if he was fit to play

68. Schmidt & Schwarz, *supra* note 1.

69. *The Genetic Information Non-Discrimination Act (GINA) Takes Effect*, BINGHAM.COM, Dec. 10, 2009, <http://www.bingham.com/Media.aspx?MediaID=10028> [hereinafter *GINA Takes Effect*].

70. Schmidt & Schwarz, *supra* note 1.

71. Genetic Information Non-Discrimination Act, 42 U.S.C.A. § 2000ff(4)(A)(i)-(iii) (2010).

72. *GINA Takes Effect*, *supra* note 69.

73. § 2000ff(4)(A)(i)-(iii).

74. Schmidt & Schwarz, *supra* note 1.

75. *MLB Confirms Use of Genetic Testing on Latin American Prospects*, <http://sports-law.blogspot.com/2009/07/mlb-confirms-use-of-genetic-testing-on.html> (July 23, 2009) [hereinafter *MLB Confirms*].

76. *Id.*

77. Trumble, *supra* note 38, at 779-80.

78. *Id.*

79. *Id.*

80. Morse Hyun-Myung Tan, *Advancing Civil Rights, the Next Generation: The Genetic Information Nondiscrimination Act of 2008 and Beyond*, 19 HEALTH MATRIX 63, 76 (2009).

and simply allowed him to play.⁸¹

Because MLB has not yet tested any players that are already playing in the league, it is unclear whether MLB's use of DNA testing would fall within GINA's provisions pertaining to employees.⁸² However, MLB's use of testing would likely not apply to GINA as "this particular type of testing does not fall under the 'traditional category of genetic discrimination' concerned with predicting medical problems."⁸³ Additionally, it is possible that the Equal Employment Opportunity Commission (EEOC)—the organization responsible for promulgating regulations concerning GINA—could determine that DNA testing for the purpose of age and identity can be excluded from limitation under GINA.⁸⁴ This would be possible if the EEOC decides that age and identity do not represent "genotypes, mutations, or chromosomal changes," as mentioned in GINA, which would "exclude [age] testing from GINA's definition."⁸⁵ If age is excluded from GINA⁸⁶ and if MLB tested only for age and not for medical conditions, the testing may not fall under GINA. Furthermore, prospective MLB players may voluntarily consent to DNA testing to make themselves more desirable to MLB clubs.⁸⁷ In fact, Robert Plummer, Sano's agent, thinks that GINA will not affect MLB because players will not want to be known as the one player who does not consent to a test.⁸⁸

Additionally, because of the legal and social complexities of the sports industry, laws—such as GINA—designed for individuals in society may not be sufficient to regulate athletes.⁸⁹ Unlike employees in other aspects of society, the "athlete-employee's failure to perform . . . has far-reaching organizational and financial consequences for sports employers that are not shared by ordinary employers."⁹⁰ First, a sports employer's success is based

81. *Id.*

82. Antony Blackburn-Starza, *MLB Involved in DNA Testing*, BIONEWS.COM, Aug. 3, 2009, http://www.bionews.org.uk/page_46052.asp.

83. *Id.*

84. Dan Vorhaus, *MLB Genetic Testing Program at the Plate Again*, GENOMICSLAWREPORT.COM, <http://genomicslawreport.com/index.php/2009/07/28/mlbs-genetic-testing-program-at-the-plate-again/> (last visited Mar. 11, 2010).

85. *Id.*

86. *Id.*

87. *MLB Confirms*, *supra* note 76.

88. Shaun Assel, *Genetic Property: A New Law Protecting Genetic Information Could Butt Heads with MLB Policy*, ESPN.COM, Oct. 7, 2009, <http://insider.espn.go.com/espn/insider/news/story?id=4537203>.

89. Trumble, *supra* note 38, at 771.

90. *Id.* at 788.

on wins and losses, which can be significantly harmed by the absence of a single athlete.⁹¹ Second, a sports employer has a greater sense of financial dependence on its employees.⁹² If an athlete has a guaranteed contract, that athlete will retain a percentage of his salary by merely entering into a contract, even if he does not render all of the services under the contract.⁹³ This means that the sports employer can lose money if the athlete no longer plays for the team because the player will keep a portion of his guaranteed salary, regardless of how long he played with the team.⁹⁴ Furthermore, ticket and memorabilia sales for the team are linked to the performances of the athletes.⁹⁵ If a player lies about his age, he may not have the longevity that a sports employer—the MLB team—was counting on or may be more prone to injuries earlier in his career and could cost the team money if he had to quit playing. Because an employer is so dependent on the athlete, there is a more significant need for genetic testing in sports than in the ordinary workplace. However, as this need is not addressed in GINA, a provision for professional athletes may need to be included directly in the statute, or professional sports associations should be exempt from the statute. This point will be addressed more in-depth in the Part VI below. While it is unclear at this time whether the federal law would impose restrictions on MLB, it is helpful to analyze possible claims under private associations law.

B. Private Association Law

Traditionally, most sports leagues and associations are subject to the restraints of private association law.⁹⁶ Likewise, MLB is a self-governing private association with an internal disciplinary structure.⁹⁷ An overarching principle of private association law is “that courts will hesitate to interfere with internal disputes involving members of a private association.”⁹⁸ For example, if a player has been disciplined by a league and seeks review from a court after exhausting all internal remedies as provided by his contract and the collective bargaining agreement, the court may still defer to the rules of the

91. *Id.* at 789.

92. *Id.* at 789-80.

93. *Id.* at 789.

94. *Id.*

95. *Id.* at 789-90.

96. Christopher J. McKinny, Comment, *Professional Sport Leagues and the First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS. L. REV. 223, 232-33 (2003).

97. Durney, *supra* note 6, at 581.

98. Stiglitz, *supra* note 61, at 174.

league.⁹⁹ The courts are careful not to question a league's rules because the courts consider the league or team to have more expertise as to how a league should be regulated to function properly.¹⁰⁰ Absent illegal actions, an inconsistent application of the rules, or instances where the league does not follow its own rules, most courts allow private associations to self-govern to achieve their purposes.¹⁰¹ Likewise, MLB develops and enforces its own internal regulations, which are given tremendous deference by the courts.¹⁰²

Because MLB is not a state actor, it faces limited judicial review of its internal actions, and a court will normally not involve itself in determining whether a decision by the league was proper.¹⁰³ For example, in *Finley v. Kuhn*, the Seventh Circuit Court of Appeals determined that it would defer to the commissioner of baseball to determine whether any "act, transaction or practice is 'not in the best interests of baseball,' and upon such determination, to take whatever preventive or remedial action [the commissioner] deems appropriate"¹⁰⁴ The court stated that allowing the judiciary system to make and enforce the rules of the league would be a complicated task because the courts are not involved in the formation of the complex rules of the game.¹⁰⁵ The court further solidified MLB's status as a private association by explaining that, as long as the commissioner acted in good faith that was "'determined to be in the best interests of baseball,'" judging the right and wrong of the league's rule were "'beyond the competence'" of the courts.¹⁰⁶

The courts will defer to the internal structures of an association because it has the flexibility to organize itself in a way that is most beneficial to the organization.¹⁰⁷ In fact, the court will likely not intervene unless enforcement of the rule set forth by the league is arbitrary or against public policy.¹⁰⁸ If a claim is brought to the courts concerning a genetic testing rule, the courts will apply the arbitrary and capricious standard to determine if the rule is valid and should be enforced.¹⁰⁹ Because MLB is concerned with the integrity of the

99. *Id.* at 174-75.

100. Durney, *supra* note 6, at 598, 624.

101. *Id.* at 597, 624.

102. Zimmer, *supra* note 11, at 425.

103. McKinny, *supra* note 96, at 232-33.

104. *Finley v. Kuhn*, 569 F.2d 527, 539 (7th Cir. 1978).

105. *Id.*

106. *Id.*

107. Durney, *supra* note 6, at 597.

108. *Id.* The courts will intervene if the league violates federal law, such as Title IX or the Americans with Disabilities Act. See Stiglitz, *supra* note 61, at 172-75. However, those laws are outside the scope of this article.

109. MITTEN ET AL., *supra* note 62, at 612.

league,¹¹⁰ a court will not likely consider a rule requiring DNA testing to verify the ages and identities of players to be arbitrary as long as the rule is applied properly—especially because the current trend of players falsifying names and ages establishes the need for all players to be tested.

This deferential treatment by the courts solidifies the league as a private actor with power over the athlete.¹¹¹ When a player enters into a contract with an MLB team, the player agrees to the rules of the association.¹¹² Players can challenge the actions of the association only if a clause of the contract, or rule, exceeds the authority of the league or violates federal law.¹¹³ Courts will often only require that the association has complied with its rules but will not release a player from contractual obligations.¹¹⁴ Therefore, because professional sports employers enjoy private sector status, labor unions must be used to protect and advance the players' interests,¹¹⁵ which will be addressed in Part VI.

V. PROBLEMS WITH TESTING

Recent events have introduced society to the need for increased privacy against genetic testing and genetic discrimination in the workplace.¹¹⁶ For example, in *Equal Employment Opportunity Commission v. Burlington and Santa Fe Railway Co.*, employees were subjected to surprise genetic testing to test for carpal tunnel syndrome.¹¹⁷ The court did not reach a decision on this case for reasons not relevant to this Comment, but the lawsuit has brought genetic discrimination by employers to the forefront of the legal field.¹¹⁸

If MLB wants to implement a procedure for testing the DNA of its athletes, the league will have to address the privacy issues that will arise from testing and address the players' fears about the process. First, players have privacy rights based on common law,¹¹⁹ and GINA does not preempt these

110. Durney, *supra* note 6, at 597.

111. Janine Young Kim & Matthew J. Parlow, *Sports and Criminal Law: Off-Court Misbehavior: Sports Leagues and Private Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 573, 583 (2009).

112. Durney, *supra* note 6, at 597.

113. Stiglitz, *supra* note 61, at 175.

114. Durney, *supra* note 6, at 597.

115. McKinny, *supra* note 96, at 233-34.

116. Trumble, *supra* note 38, at 792.

117. *Id.*

118. *Id.*

119. June Mary Z. Makdisi, *Genetic Privacy: New Intrusion a New Tort?*, 34 CREIGHTON L. REV. 965, 979 (2001).

laws.¹²⁰ Genetic information is personal and private because it is unique to an individual.¹²¹ Because GINA does not preempt state privacy laws, the genetic testing of an athlete could be seen as an invasion of privacy under the privacy tort “intrusion upon seclusion.”¹²² In order to fall under intrusion upon seclusion, the intrusion must be highly offensive.¹²³ However, if a player’s genetic privacy is weighed against the employer’s right to know,¹²⁴ as in the case of MLB players, genetic testing would likely not be highly offensive. Because the integrity of the game is so important and because there has been a recent trend in falsifying ages, there is a legitimate need for teams to know the true age of a player. This concern would likely outweigh a player’s privacy right, as long as the intrusion was reasonable under private association law.

Second, under the Fourth Amendment, the courts attempt to balance the legitimate state interest of the search with the individual’s right of privacy.¹²⁵ Although MLB is not subject to the Fourth Amendment,¹²⁶ the fears that DNA testing will be intrusive and will allow private medical information to be disseminated to the public are similar to the fears that have been addressed in cases where the Fourth Amendment does apply.¹²⁷

*United States v. Comprehensive Drug Testing*¹²⁸ is a case more on target with DNA testing. In *Comprehensive Drug Testing*, the court discussed the problems associated with private information taken during a drug test.¹²⁹ This case also applies to the problems and fears associated with DNA testing, such as the “information and test results . . . of [] baseball players” being disseminated to unauthorized personnel.¹³⁰ In *Comprehensive Drug Testing*, files were kept electronically because of the important benefits of storing data electronically,¹³¹ which would most likely be the case with DNA testing. The court explained that it is not possible to know what is in an electronic file without opening it, and therefore, in efforts to locate particular information, a

120. See Kevin P. McGowan, *Discrimination: Employer Advocates Remain Wary of New Bias Law’s Potential Effects*, 99 DLR C-1 (2008).

121. Makdisi, *supra* note 119, at 1020.

122. *Id.* at 983.

123. See DANIEL J. SOLOVE & PAUL M. SCHWARTZ, *INFORMATION PRIVACY LAW* 78 (2009).

124. See Makdisi, *supra* note 119, at 1026.

125. *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1019 (9th Cir. 2009).

126. See *Breithaupt v. Abram*, 352 U.S. 432 (1957) (holding that a private entity would not be subject to Fourth Amendment restrictions).

127. *Id.* at 434.

128. See *Comprehensive Drug Testing, Inc.*, 579 F.3d at 989.

129. *Id.* at 995.

130. *Id.*

131. *Id.* at 1004.

person will have to examine several other files to find the information.¹³² This uncensored access to information contributes to the players' fear that their sensitive medical information will be available to anyone who looks at their file, regardless if that is the information for which a person may be looking.¹³³

Additional fears relate not only to the lack of privacy surrounding electronic files but what leaked information could do to a player's career or even to his life. Genetic testing has great benefits, but if the procedure is done poorly or the results are not handled properly, it can cause great harm.¹³⁴ Players fear that, if they are tested for their DNA, these tests will also be used by teams to determine the abilities of players, whether they are injury prone, or how long they will be able to stay in the league and compete at the highest level.¹³⁵ Athletes fear that they may be forced to subject themselves to testing to determine the likelihood of an illness.¹³⁶ Knowledge of potential illnesses and injuries could hinder an athlete's potential for bargaining power with different teams,¹³⁷ or it could limit trade options if the testing determines that an athlete has a susceptibility to injuries like sprains or tissue damage.¹³⁸ This type of genetic testing technique is called predictive genetic testing.¹³⁹ Players fear that, armed with this predictive information, teams will lower contract prices for the athletes, limit trade options, lower or eliminate signing bonuses, or worse—refuse to sign the players at all.¹⁴⁰

Furthermore, an athlete could be fearful that his genetic information would not be kept private.¹⁴¹ Public knowledge of an athlete's medical or family history could compromise his career. At this time, there is no DNA test that can determine a player's specific age.¹⁴² Instead, the tests determine if the player is the person he claims and, therefore, is not using a false birth certificate.¹⁴³ To discover if the player's identity is valid, testing will match his DNA with that of his alleged parents.¹⁴⁴ However, this information could

132. *Id.* at 1027.

133. *See id.*

134. Bonnin, *supra* note 40, at 155-56.

135. *See* Trumble, *supra* note 38, at 787.

136. *Id.*

137. Jordan, *supra* note 37, at 26.

138. Trumble, *supra* note 38, at 787.

139. Bonnin, *supra* note 40, at 149.

140. Trumble, *supra* note 38, at 787.

141. Jordan, *supra* note 37, at 26.

142. Schmidt & Schwarz, *supra* note 1.

143. *Id.*

144. *Id.*

possibly disrupt a family if the player is not lying about his age but the identity of his parents was not what he had previously believed.¹⁴⁵ This information could destroy a family and impose an emotional and psychological burden on the athlete if not afforded the utmost protection.¹⁴⁶ Furthermore, the reliability of genetic testing is still in question, so it is difficult to determine if the findings are worth the consequences.¹⁴⁷ Because of the negativity surrounding DNA testing, especially with GINA attempting to limit its use, MLB must consider possible solutions to stifle the genetic debate.

VI. SOLUTIONS

If MLB continues with its current testing practices, and especially if it enhances its procedures by testing every player, there are options the league can pursue in order to prevent legal problems in the future. In order to justify a request for a baseball player to undergo a DNA test, MLB must establish that the request for DNA is reasonable.¹⁴⁸ That way DNA tests can be collectively bargained for, regulated by Congress, or MLB can come up with procedures to ease the fears of the players.

A. Collective Bargaining and the National Labor Relations Act

The National Labor Relations Act (NLRA) gives individuals the right to organize to form unions and bargain with their employers regarding issues such as wages, hours, and other terms and conditions of employment.¹⁴⁹ This is referred to as collective bargaining.¹⁵⁰ The legal requirements for collective bargaining are (1) the notification of one party to another of the intent to bargain and (2) the good faith of both parties.¹⁵¹ Like other sports organizations, MLB is unionized and “must engage in collective bargaining under the [NLRA].”¹⁵² MLB’s players union is called the MLB Players Association (MLBPA), which was formed in 1954.¹⁵³ A testing policy that MLB would implement could be collectively bargained for between the league, the Commissioner, and the MLBPA, similar to the current drug testing

145. See Jordan, *supra* note 37, at 26.

146. *Id.*

147. *Id.*

148. Ben Sellenger, *Genetic Testing: The Future of Athlete Selection?*, 2 VA. SPORTS & ENT. L.J. 207, 217 (2003).

149. Nat’l Labor Relations Act, 29 U.S.C. 158(d) (2010).

150. TERRY L. LEAP, COLLECTIVE BARGAINING AND LABOR RELATIONS 298 (1991).

151. *Id.*

152. Heiles, *supra* note 8, at 328.

153. GEORGE W. SCULLY, THE BUSINESS OF MLB 34 (1989).

policy that was agreed upon by MLB and the MLBPA.¹⁵⁴ The current collective bargaining agreement prohibits the use of drugs of abuse, performance enhancing drugs, and stimulants.¹⁵⁵ The agreement also establishes procedures for in-season testing, random testing, and reasonable cause for testing.¹⁵⁶

Likewise, if MLB wanted to implement mandatory DNA testing of its athletes, the MLBPA and the MLB would have to collectively bargain over the specifics of genetic testing regulations and procedures because terms of employment are a mandatory subject of collective bargaining.¹⁵⁷ This way, the league could not impose a DNA testing program without first bargaining with the MLBPA.¹⁵⁸ Because the MLBPA would have concerns for the players' privacy and fears about the unreliability of testing of any sort, it will likely be difficult to get the MLBPA to agree on a broad genetic testing policy.¹⁵⁹ However, because of the need for MLB to regain its integrity after the steroid revelations, it is likely that, if the players and MLB can work together to come up with an effective, unobtrusive test, the union will agree to include a testing provision in the agreement. MLB must agree to look at only the test results that help determine the age of a player and not look for possible predisposition to certain injuries. MLB must also agree to have the testing done by a private, independent party who can be held accountable for the tests so that they could not be leaked to the public.

If the MLBPA cannot agree to a testing procedure, MLB could require minor league players to be tested for their age and identity because minor leaguers are not unionized and, therefore, have no bargaining power.¹⁶⁰ Because most players will play for a minor league team before coming to the major leagues, players could be tested at that level first.

B. Congressional Regulation

Taking a cue from international legislation, Congress could draft a sports-

154. Heiles, *supra* note 7, at 324.

155. MLB'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM 5-8, <http://mlbplayers.mlb.com/pa/pdf/jda.pdf> (last visited Nov. 22, 2009) [hereinafter MLB'S JOINT DRUG PREVENTION].

156. *Id.*

157. *See id.*

158. Scott Danaher, Comment, *Drug Use in Major League Baseball: A Look at Drug Testing in the Past, in the Present, and Steps for the Future*, 14 SETON HALL J. SPORTS & ENT. L. 305, 320 (2004).

159. *See* MITTEN ET AL., *supra* note 62, at 605.

160. *Id.*

specific statute that sets the regulations and limits on genetic testing in the sports workplace. Australia has a genetic discrimination statute tailored specifically to sports employers “to protect the employers from an athlete’s inability ‘to perform the actions reasonably required in relation to the sporting activity’ and situations involving an athlete’s inability to ‘effectively compete.’”¹⁶¹ Similarly, Italy has a statute that allows genetic testing of athletes before they are cleared to play their respective sports.¹⁶²

Congress stepped in to regulate steroids by introducing legislation¹⁶³ designed to fight steroid use and promote the health, safety, and integrity of professional sports.¹⁶⁴ Because identity and age falsification also has the potential to destroy the integrity of MLB and because discrimination of employees based on their DNA is an important issue, Congress may choose to regulate genetic testing among baseball players. Although it is the Latin American players that have brought this issue to the forefront, because age falsification can damage the integrity of the league, testing all players would likely be upheld. Elements of possible legislation could be straightforward and easy to follow. For example, possible statutory language could include prohibiting testing for anything but identity fraud, requiring a reasonable suspicion of fraud, exhausting less invasive methods first, and allowing all test results to be controlled by an independent party.¹⁶⁵ These conditions would prevent misuse of the information and lessen the players’ fears that the results would affect their futures based on their medical conditions.

C. Other Solutions

Additional solutions are available to MLB that would provide the league with the necessary genetic information without disrupting the lives of the players through accidental disclosure of sensitive, confidential medical information. First, in order to prevent litigation, testing should be used only when there are reasonable grounds to suspect a player is older—or younger—than he claims to be.¹⁶⁶ Next, the testing procedures must be related to the information that is necessary to obtain and not be excessively intrusive.¹⁶⁷

Another suggestion is to allow an independent, qualified party to conduct

161. Trumble, *supra* note 38, at 790.

162. *Id.*

163. See Anabolic Steroids Control Act of 2004, 21 U.S.C.S. § 801 (2006).

164. Heiles, *supra* note 7, at 324.

165. William Saletan, *Baseball and DNA*, SLATE.COM, July 23, 2009, <http://www.slate.com/blogs/blogs/humannature/archive/2009/7/23.aspx>.

166. *Burbank v. Canton Bd. of Educ.*, 2009 Conn. Super. Ct. LEXIS 2524, at *12-13 (2009).

167. Saletan, *supra* note 165.

the DNA testing.¹⁶⁸ Currently, the drug testing agreement among the players and MLB that specifies that an independent party, not affiliated with MLB, the Commissioner's office, or the MLBPA, will be in charge of testing.¹⁶⁹ A neutral party is essential for DNA testing as well. This way, members of the league will not have access to the results; therefore, the results of the testing cannot affect the players, outside of determining their appropriate age. There will not be a member of the league attempting to get further information about individual players for purposes of determining medical conditions. The independent party would be fully responsible for the testing and keeping any results, with the exception of the age determination, from the league.

Along with a qualified party conducting the test, the testing should take place in a high quality facility.¹⁷⁰ Following the Clinical Laboratory Improvements Amendments of 1988, laboratories where genetic testing for MLB occurs should disclose information about the specialists performing and supervising the examinations, permit inspections of the facility, make operational records available for inspection, and maintain quality assurance and control¹⁷¹ for the peace of mind of the league and the players submitting samples.

Furthermore, genetic information should be kept in files treated as confidential medical records,¹⁷² and if the file containing a player's information is to be utilized for any reason in the future, an independent party must then again be the only individual who may see the file.¹⁷³ Additionally, the procedures set forth by the league should be designed to allow only that information that is necessary—in this case, information that can determine age—to be discovered.¹⁷⁴ While it is possible that additional aspects of a player's medical history can be revealed through a basic DNA test, any information that would require further testing must be off limits to the league. For example, the federal Health Insurance Portability and Accountability Act, which provides “federal protections for personal health information . . . and gives patients an array of rights with respect to that information,”¹⁷⁵ will shield information from being tested and can prevent inappropriate uses of the

168. *Id.*

169. MLB'S JOINT DRUG PREVENTION, *supra* note 155.

170. Bonnin, *supra* note 40, at 173-74.

171. *Id.*

172. Tan, *supra* note 80, at 116.

173. *Unites States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1000 (9th Cir. 2009).

174. *Id.*

175. U.S. Dept. of Health and Human Services, *Understanding Health Information Privacy*, HHS.GOV, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/index.html> (last visited Nov. 9, 2010).

results.¹⁷⁶ Finally, the league should face infractions if a player's medical history is disseminated without his permission. Holding the league accountable will help to ease the minds of the players who are excited to play baseball in America but who are worried about the information that could be leaked to the public if they are subjected to genetic testing.

VII. CONCLUSION

The integrity of baseball is essential,¹⁷⁷ and cheating the system by lying about one's age is not appropriate behavior of MLB players. Fortunately for Sano, the DNA tests submitted by him and his family confirmed his parenthood, and thus his identity, and bone scans confirmed that he was between sixteen and seventeen years old.¹⁷⁸ However, Sano's agent agrees that, until there is another foolproof way to determine ages, DNA testing of baseball players is necessary.¹⁷⁹ Because testing is essential to protect the integrity of the game, clear rules must be established in order to protect the privacy of the players and the reputation of the league.¹⁸⁰ As such, testing all players when they are drafted by a major league team will protect the finances of a team and the integrity of the sport.

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176. See generally U.S. Dept. of Health and Human Services, *Summary of the HIPAA Privacy Rule*, HHS.GOV, <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/index.html> (last visited Nov. 9, 2010).

177. Durney, *supra* note 6, at 623.

178. Enrique Rojas, *Sano's Work Visa Completes Twins Deal*, ESPN.COM, Dec. 5, 2009, <http://sports.espn.go.com/mlb/news/story?id=4716455>.

179. Blackburn-Starza, *supra* note 82.

180. *Unites States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1006 (9th Cir. 2009).

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