

# Fordham Intellectual Property, Media and Entertainment Law Journal

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Volume 12 *Volume XII*  
Number 2 *Volume XII Book 2*

Article 2

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2002

## Regulations Governing Drugs and Performance Enhancers in Sports

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### Recommended Citation

Edward Jurith, Adolpho A. Birch, Robert Housman, and Ronald Klempner, *Regulations Governing Drugs and Performance Enhancers in Sports*, 12 Fordham Intell. Prop. Media & Ent. L.J. 337 (2002).

Available at: <https://ir.lawnet.fordham.edu/iplj/vol12/iss2/2>

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## Panel II: Regulations Governing Drugs and Performance Enhancers in Sports

Moderator: Edward Jurith<sup>1</sup>  
Panelists: Adolpho A. Birch III<sup>2</sup>  
Robert Housman<sup>3</sup>  
Ronald Klempner<sup>4</sup>  
Maidie Oliveau<sup>5</sup>

MS. COHEN: Our second panel is “Regulations Governing Drugs and Performance Enhancers in Sports.” I will provide a brief background of the issues.

In the highly competitive world of professional and Olympic competition, many athletes are tempted to increase their competitive edge on the field through the use of performance enhancers.<sup>6</sup> In an effort to foster fair athletic competition and present positive role models, our governing bodies, including the Office of National Drug Control Policy,<sup>7</sup> professional sports leagues, and other organizations

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<sup>6</sup> James B. Jacobs & Bruce Samuels, *The Drug Testing Project in International Sports Dilemmas in an Expanding Regulatory Scheme*, 18 HASTINGS INT’L & COMP. L. REV. 557, 562 (1995) (explaining that since the 1960s athletes have increased their use of drugs); Richard H. McLaren, *The Court of Arbitration For Sport: An Independent Arena For The World’s Sports Disputes*, 35 VAL. U. L. REV. 379 (2001) (recognizing that the focus of sports is about winning, therefore the temptation to partake in enhancing athletes’ performance with drugs is stronger than ever).

<sup>7</sup> The White House Office of National Drug Control Policy [hereinafter ONDCP] was established by the Anti-Drug Abuse Act of 1988. The ONDCP is a component of the Executive Office of the President. The principal purpose of ONDCP is to establish policies, priorities and objectives for the Nation’s drug control program. See ONDCP, at <http://www.whitehousedrugpolicy.gov/about/index.html> (last visited Jan. 11, 2002).

have sought to develop a system of anti-drug regulations.<sup>8</sup> In addition, they have struggled to find ways to enforce these drug policies.<sup>9</sup> In this effort to keep sports drug-free, it is important that we understand the issues of personal privacy that are implicated by any system of drug testing.

Our second panel will discuss the national and international anti-drug movements, as well as the personal privacy issues that accompany mandatory drug testing policies and legislation.

Our Moderator for this panel is Mr. Edward Jurith. Mr. Jurith is the General Counsel in the Office of the President, Office of National Drug Control Policy (hereinafter "ONDCP"). This Office is responsible for the development of the Athletic Initiative Against Drugs.<sup>10</sup> In addition, the ONDCP has created, by Executive Order of the President, the White House Task Force on Drug Use in Sports.<sup>11</sup> Mr. Jurith has been responsible for ensuring compliance of the ONDCP with federal, state, and local laws and regulations, reviewing agency contracts, personnel actions, Freedom of Information Act and Privacy Act requests, Equal Employment Opportunity actions, agency compliance with security and classification requirements, analysis of drug-related legislation, scheduling of controlled substances, professional and government ethics, and serving as general legal advisor to the Director of the Office of National Drug Control Policy.<sup>12</sup>

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<sup>8</sup> Jacobs & Samuels, *supra* note 6, at 562 (noting that the increase in athlete drug use led to increased drug regulations).

<sup>9</sup> Charles A. Palmer, *Drugs vs. Privacy: The New Game in Sports*, 2 MARQ. SPORTS L.J. 175, 202 (1992) (applying the reasonableness test to determine who is subject to testing makes it difficult to enforce drug policies and it requires consideration of the athlete's expectation of privacy in relation to the specific sport).

<sup>10</sup> The Athletic Initiative Against Drugs has been renamed Play Clean. *See* Play Clean: Promoting Anti-Doping Policies and Preventing Youth Drug Use through Sports, at <http://www.playclean.org> (last visited Jan. 11, 2002).

<sup>11</sup> *See* Exec. Order, Creation of the White House Task Force on Drug Use in Sports, Aug. 9, 2000, available at [http://www.playclean.org/updates/executive\\_order.html](http://www.playclean.org/updates/executive_order.html) (last visited Jan. 18, 2002).

<sup>12</sup> The Director of the ONDCP ensures that the ONDCP efforts complement state and local anti-drug activities. The Director also advises the President of any changes to federal agencies that might affect the U.S. anti-drug campaign. In addition, the Director oversees federal agency compliance with their obligations under the ONDCP strategy. *See* ONDCP,

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As if that is not enough, Mr. Jurith also served as both Counsel and Staff Director for the Select Committee on Narcotics Abuse and Control for the United States House of Representatives.<sup>13</sup> In that role, he dealt with the issues related to federal drug abuse policy, including budget, drug policy recommendations from the Administration, and pending drug abuse legislation.

Mr. Jurith is a graduate of American University where he earned his Bachelor's degree and he earned his Juris Doctorate at Brooklyn Law School.

And now to our second panel. Mr. Jurith, thank you.

MR. JURITH: Thank you, Jessica. It is a pleasure to be here today.

In addition to my responsibilities as General Counsel to ONDCP, with the change in Administration, I am also serving as the Acting Director of the Agency pending the nomination of somebody by President Bush to be the Director.<sup>14</sup>

I have been involved in drug policy in D.C. since 1981, so I joke sometimes, saying that I've been doing drugs for twenty years now and am still trying to figure out exactly where our policies are taking us.

Drugs and sports, it is an interesting topic. It is a topic that I have dealt with frequently over the years. I think that is indicative of the

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at [http://www.whitehousedrugpolicy.gov/about/about\\_b.html](http://www.whitehousedrugpolicy.gov/about/about_b.html) (last visited Jan. 11, 2002).

<sup>13</sup> Mr. Jurith started his career in narcotics control in 1982 when he worked as counsel for Congressman Leo Zefferetti, chairman of the House Select Committee on Narcotics Abuse and Control. See Clem Richardson, *Lawyer's Addiction: Work Acting Drug Policy Chief Pushes Rehab Over Imprisonment*, N.Y. DAILY NEWS, Feb. 12, 2001, at 3.

<sup>14</sup> On December 7, 2001, John P. Walters was sworn in as Director of the ONDCP. Prior to Mr. Walters, Mr. Barry McCaffrey served as the nation's "drug czar" until January 10, 2001. Between Mr. Walters and Mr. McCaffrey, Mr. Jurith served as Acting Director of the ONDCP from January 10, 2001 until December 7, 2001. See ONDCP, at [http://www.whitehousedrugpolicy.gov/about/director\\_bio/html](http://www.whitehousedrugpolicy.gov/about/director_bio/html) (last visited Jan. 15, 2002); see also Press Release, Office of National Drug Control Policy, Edward H. Jurith Named Acting Director of White House Office of National Drug Control Policy (Jan. 10, 2001), available at <http://www.whitehousedrugpolicy.gov/news/press01/011001.html> (last visited Jan. 11, 2002).

fact that it has waxed and waned in importance in the public drug policy debate.

Where does it fit? What exactly is the role of government in dealing with the relationship between unions and players, the owners and players? What is the role of government in regulating the amateur sporting arena?

What is the role of government vis-à-vis the Olympics, particularly the federal government? As you all know, the U.S. Government is very unique.<sup>15</sup> We do not have a ministry of sports, like most other nations do.<sup>16</sup> The issue of sports governance does not fit neatly into the U.S. Government structure.<sup>17</sup> At ONDCP, we led an initiative in the last Administration working with other nations and the International Olympic Committee (hereinafter "IOC") to create the World Anti-Doping Agency (hereinafter "WADA"),<sup>18</sup> and working with the U.S. Olympic Committee (hereinafter "USOC") in the creation of the U.S. Anti-Doping Agency (hereinafter "USADA").<sup>19</sup>

But again, I think questions need to be asked. I would like the panel to think about this in their deliberations and their presentations today: What do you think the proper federal, as well as maybe state and local, governmental role should be in these areas? How should

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<sup>15</sup> Edwin C. Moses, *Backtalk; McCaffrey Must Not Stop With Andro*, N.Y. TIMES, May 23, 1999, § 8, at 13 (describing the uniqueness of the United States among western democracies in not having a ministry of sport because Americans tend to believe that less government is good and that private organizations and the market can be trusted).

<sup>16</sup> *Id.*

<sup>17</sup> Julie Cart, *International Cooperation Essential Standardized Drug Tests Difficult to Administer; Series: Drugs in Sports: A Race the Athletes Are Winning*, L.A. TIMES, July 20, 1988, available at 1988 WL 2233314 (illustrating the difference in the United States position on drug policy in sports from the rest of the world because of the legal protections afforded by the U.S. Constitution and its regard for due process).

<sup>18</sup> The World Anti-Doping Agency [hereinafter WADA] was formed on November 10, 1999 to promote and coordinate the fight against doping in sport at an international level. WADA works with public and private organizations fighting against doping in sport. See World Anti-Doping Agency, at <http://www.wada-ama.org> (last visited Jan. 11, 2002).

<sup>19</sup> The United States Anti-Doping Agency [hereinafter USADA] was formed as a result of the recommendations by the United States Olympic Committee's Select Task Force on Externalization in 2000. It has full authority for testing, education, research and adjudication for U.S. Olympic, Pan Am and Paralympic athletes. See United States Anti-Doping Agency, at <http://www.usantidoping.org> (last visited Jan. 11, 2002).

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government interact with the sports world in the regulation not only of illicit substances but also of performance-enhancing substances?

What I am going to ask my panel to do real quickly is to take a minute or so to introduce themselves, and then we will open it up for questions from myself and then the audience.

Adolpho, I will turn it over to you for a quick introduction.

MR. BIRCH: I am Adolpho Birch. I am Labor Relations Counsel at the National Football League, since 1997.

By way of background, I am one of the lawyers at the Management Council for the NFL. We basically handle the “football side of football,” I like to call it, and that includes player and team issues, salary cap–related things, grievances by players under the collective bargaining agreement, and as it relates to this particular panel, one of the things I do is handle the player policies, including the policy on anabolic steroids and related substances.<sup>20</sup>

What we need to do, in response to your initial query, from a governmental standpoint is to worry about the pharmaceutical side of drugs and sports, particularly regulation of the products and substances themselves.<sup>21</sup> Beyond that, I am not sure that there is a universal way that you can address some of the problems that each individual sports league would have.

MR. JURITH: Rob?

MR. HOUSMAN: My name is Rob Housman. I am Counsel to the law firm of Bracewell & Patterson. From 1997 to January 20, 2001, I served in the Clinton Administration as Assistant Director of the Office of National Drug Control Policy for Strategic Planning, where I headed up most of our work on sports.

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<sup>20</sup> National Football League: Policy and Procedures for Anabolic Steroids and Related Substances (May 15, 2001) [hereinafter NFL Steroid Policy] (on file with author).

<sup>21</sup> See Joshua H. Beisler, Note, *Dietary Supplements and Their Discontents: FDA Regulation and the Dietary Supplement Health and Education Act of 1994*, 511 RUTGERS L.J. 511, 512 (2000) (noting that the Dietary Supplement Health and Education Act of 1994 decreased the FDA’s regulatory power); Veronica Henry, *Problems With Pharmaceutical Regulation in the United States*, 14 J. LEGAL MED. 617 (1993) (explaining that the United States government has focused on regulating access to specific drugs).

As we think about roles, I think it is also important to realize there are other significant players that are working hard. In fact, as we speak here today, I think that is something we all should bear in mind, we need to go beyond the federal role and look at the role of all the organizations at the table, but also those outside the room.<sup>22</sup>

MR. JURITH: Ron?

MR. KLEMPNER: My name is Ron Klempner. I am a lawyer at the National Basketball Players Association. I am involved in all aspects of what we do over at the Union, including the drug policy.<sup>23</sup> I have some involvement with the drug policy, the negotiation of it and the day-to-day administration of it. We do not have a large staff at the Players Association and we have a lot of issues that we cover, so we all have our hands in the different pies, but I have had a fair amount of involvement, and certainly we look to champion the players' rights when it comes to all issues related to drugs.

MR. JURITH: Maidie?

MS. OLIVEAU: I am Maidie Oliveau. I have been on the business side, more than the drug side, of sports for twenty years.<sup>24</sup> As an independent expert in sports, I was appointed to the Court of Arbitration for Sport (CAS)<sup>25</sup> as an arbitrator and I served on the Panel of Arbitrators that sat at the Ad Hoc Division of the Court of

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<sup>22</sup> Organizations not represented on the panel, include but are not limited to WADA, USADA, and the IOC.

<sup>23</sup> The National Basketball Association – National Basketball Players Association Collective Bargaining Agreement, Article XXXIII: Anti-Drug Program, at 236-65 (Jan. 20, 1999) [hereinafter NBA Drug Policy], available at <http://www.nbpa.com/cba> (last visited Jan. 20, 2002).

<sup>24</sup> For some of Maidie Oliveau's recent transactions including working with Pacific Bell to negotiate its \$50 million naming rights deal of the San Francisco Giants' Pacific Bell Park, see <http://www.lawsports.com> (last visited Jan. 11, 2002)

<sup>25</sup> RECUEIL DES SENTENCES DU TAS/DIGEST OF CAS AWARDS 1986-1998 561 (Matthieu Reeb ed., 1998) [hereinafter CAS Book]. In 1981, then-President of the IOC, H.E. Juan Antonio Samaranch had the idea of creating a sports-specific jurisdiction. *Id.*

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Arbitration for Sport<sup>26</sup> in Sydney, Australia during the 2000 Olympic Games.<sup>27</sup>

The Court of Arbitration for Sport is the arbitral tribunal that is the resolution body for any disputes, drugs or otherwise, that arise during the Olympic Games. The court sits a panel of arbitrators that are there on-site, and their commitment is to receive an appeal from a decision that was made during the Olympic Games, to conduct a hearing, to investigate a claim and render a decision within twenty-four hours, because of the demands of the Olympic Games.<sup>28</sup>

MR. JURITH: Adolpho, why don't you tell us a little bit about the NFL's approach to this issue of doping in sports from both an illicit drug control point of view as well as the performance enhancement issue?

MR. BIRCH: Sure. The League split our drug policies into two different policies. First, there is the Policy on Anabolic Steroids and Related Substances, which obviously governs performance enhancers.<sup>29</sup> Second, we have a separate Policy on Substances of

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<sup>26</sup> In 1996 the Ad Hoc Division of CAS was established by the International Council of Arbitration for Sport (ICAS) to handle disputes arising during the Olympic Games. Typical disputes handled by the Ad Hoc Division include athlete eligibility and drug-testing rules. See Court of Arbitration for Sport, at <http://www.tas-cas.org/english/guide/textes/avantpropos.htm> (last visited Jan. 11, 2002). The Ad Hoc Division was provided for in Rule 74 of the Olympic Charter. McLaren, *supra* note 6, at 390.

<sup>27</sup> See *Los Angeles Attorney Oliveau Is One of 12 Worldwide Named to XXVII Olympiad Arbitration Council*, Jan. 14, 2000, at <http://www.lawsports.com/news.html#January%2014%20Release%20Anchor> (last visited Jan. 11, 2002) (announcing that Oliveau was chosen to serve on the Ad Hoc Division for CAS for the Sydney Olympics). Ms. Oliveau was also appointed to serve on the Ad Hoc Division of the CAS for the Salt Lake 2002 Olympics Arbitration Council. Out of the twelve attorneys who served in a similar position at the Summer Olympics in Sydney, Australia, she is one of three invited back to join the panel. See *Maidie Oliveau Is One of the Nine Attorneys Worldwide Named to Salt Lake City Olympics Arbitration Council*, May 31, 2001, at <http://www.lawsports.com/news.html#May%2031%202001%20Release%20Anchor> (last visited Jan. 11, 2002).

<sup>28</sup> McLaren, *supra* note 6.

<sup>29</sup> See NFL Steroid Policy, *supra* note 20.

Abuse, which are more what you would call “street drugs,” such as cocaine and that sort of thing.<sup>30</sup>

Our objectives are fairly simple. First, we want to protect the health and safety of our players and maintain the fairness of the competition on the playing field.<sup>31</sup> Second, we probably are most interested in intervention and treatment, particularly on the street drug side.<sup>32</sup> Third, we want to make sure that we send the right message to the public at large and, in particular, the youth who are following the examples of our players with, I would say, an alarming lack of judgment sometimes.<sup>33</sup> And finally, we want to reduce the pressure on other players to use these substances, many of which can have severe adverse effects.<sup>34</sup> That particularly comes into play with the substances such as performance enhancers and other steroids.

So with those objectives, what we try to do is design two different policies that meet each of those objectives as it relates to that policy. On the street drug side, our position is that, the fairness of competition is not particularly an issue.<sup>35</sup> You do not have to worry about someone who is on cocaine and how that will affect their performance, relative to other players, particularly out on the field. It is not a major concern to us. So, on the drugs of abuse side, the principal goal is to treat players. Our tests and our policies reflect that, based on not only how we test but also the penalties for violations of those particular policies, which I assume we will get

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<sup>30</sup> National Football League: Policy and Program For Substances of Abuse (June 28, 1999) [hereinafter NFL Substances of Abuse Policy] (on file with author).

<sup>31</sup> See Moses, *supra* note 15 (explaining that drug use in sport is a fraud on the public because there is an implicit promise of clean competition).

<sup>32</sup> See Don Pierson, *Distrust Foils NFL Drug Plan*, CHI. TRIB., May 25, 1990, Sports, at 6 (quoting Paul Tagliabue, Commissioner, National Football League, about the purpose of the drug policy, “deterrence and rehabilitation are primary aims of the NFL substance-abuse policy, but that discipline must remain as a key element of the program when necessary.”).

<sup>33</sup> See Moses, *supra* note 15 (illustrating that athletes have a strong influence on behavior of children).

<sup>34</sup> See Cart, *supra* note 17 (explaining that the pervasiveness of drug use in sports causes athletes to feel enormous pressure to take drugs to keep up with the competition).

<sup>35</sup> Tim Dahlberg, *Basketball, Hockey Players Will Now Face Random Drug Testing for Year Prior to Olympics*, AP SPORTS, Feb. 26, 2001 (quoting Rich Young, General Counsel for a doping agency, “If they are taking amphetamines or cocaine on January 1 it has no bearing on how they compete in July. We’re looking for drugs that will enhance performance.”).

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into probably a little bit later.<sup>36</sup>

On the steroids side, the main goal outside of our concern for the players' health is the fairness of competition.<sup>37</sup> Our immediate concern is to remove any advantage that a player might have by having utilized substances which are prohibited under our policy.<sup>38</sup> So if you notice on that side of the policy, it is strictly "get the guy off the field as soon as is humanly possible." So, you will see that in the way that violations are treated, it is an immediate suspension sort of thing.<sup>39</sup>

I guess overall, however, our objectives are, and I think Ron will probably be able to jump in from the basketball side of things, to make sure we have consistently communicated our policies and that everybody understands, particularly the players, and can follow without much consternation, because frankly, there is a lot to all of these policies and there are very few people who truly know the ins and outs of them.<sup>40</sup> So it is our job, I think, to effectively communicate what exactly is allowable behavior, what exactly are allowable substances, and to make sure that that is the case so when something happens, there will be no questions that come up in hindsight.

MR. JURITH: I am going to skip over to Ron Klempner to give us the NBA's, but also the players', perspective on this issue.

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<sup>36</sup> See Pierson, *supra* note 32; Don Pierson, *Why It's One-and-Out for Bears' Miller*, SPORTING NEWS, Dec. 2, 1999 (noting that the use of street drugs such as cocaine, marijuana, and alcohol does not carry an inherent competitive problem), available at <http://www.sportingnews.com/nfl/articles/19991216/196904.html> (last visited Jan. 11, 2002).

<sup>37</sup> *Id.* (explaining that the performance enhancement policy is crucial because performance enhancers affect competition).

<sup>38</sup> *Id.*

<sup>39</sup> See NFL Steroid Policy, *supra* note 20 ("The first time a player violates this Policy by testing positive, or by violation of law, he will be suspended without pay for a minimum of four regular and/or postseason games."). Additionally, before a player can be reinstated, he must test negative for all prohibited substances and be approved for play. *Id.*

<sup>40</sup> See, e.g., Fred Mitchell, *Artest Seeks More Clarity on NBA Drug Policy*, CHI. TRIB., Dec. 2, 1999, Sports, at 3 (stating that NBA player, Ron Artest, is unclear about the NBA substance abuse policy).

MR. KLEMPNER: I am glad you put it that way, because the players' perspective is often much different from the NBA's. Personally, I am tempted to come in as the zealot that oftentimes we at the Union are and must be on behalf of the players.

I have a lot of concerns with drug regulations, drug testing, and drug policies in general. You know, our players are not transporting people, and they are not operating heavy machinery. Oftentimes, the issues that we are concerned with in the NBA are not ones of performance enhancement either. Instead, they involve illicit street drugs such as marijuana and cocaine.<sup>41</sup>

And so, I have a lot of concerns generally as an individual and somewhat of a libertarian. I am concerned with the humiliation, the degradation, and the embarrassment that any individual has to suffer when they have to urinate while being watched.<sup>42</sup> I am especially concerned if you look at the way that the USOC has proposed we now test the Dream Team players,<sup>43</sup> where a stranger will come to their house and walk them into their bathroom, past their families and children, and stand over them while they disrobe and relieve themselves into a cup.<sup>44</sup>

I am concerned not just with the procedure, but with the privacy concerns that one has by revealing things about themselves, their own beliefs, through the process of taking this test. I am not sure that someone who goes behind closed doors and takes a drug like marijuana, that is almost legal in many states and is not

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<sup>41</sup> Between 1984 and 1999, the NBA drug policy did not prohibit any performance enhancers because it was never really an issue.

<sup>42</sup> *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 658 (Cal. Sup. Ct. 1994) (stating that, "[o]bservation of urination and disclosure of medical information may cause embarrassment to individual athletes"); see also Alan Abrahamson & David Wharton, *Behind The Rings: Inside the Olympic Movement No Quick Fix in War on Sports Doping*, L.A. TIMES, Aug. 20, 2000, available at 2000 WL 2271459.

<sup>43</sup> The "Dream Team" is the nickname that has been given to the Olympic USA Basketball team, originally referring to the 1992 team. See USA Basketball, at <http://www.usabasketball.com/usab/men/index.html> (last visited Jan. 11, 2002) for more information.

<sup>44</sup> Abrahamson & Wharton, *supra* note 42. "The routine is called 'knock and pee.' It begins when a field tester pays a visit to the track or pool or an athlete's home. Next comes a trip to the bathroom. The athlete must undress from the waist down and, in full view of the tester, give a urine sample." *Id.*

“performance enhancing,” causes damage to the integrity of the game or to anything else.<sup>45</sup> I am not sure if what that person does behind closed doors affects anyone, except of course the player himself, who has had his privacy and human dignity compromised by the intrusion. So I have concerns when groups of citizens have to disclose about themselves issues that are private to them, what they themselves do behind closed doors.

I have concerns about abuses by management. I do not trust management. I think that management could, if they sign a bad contract with a player, attempt to use certain terms of a drug program in order to get out of that contract if the player is not performing. They could use the drug program as a subterfuge. They could use it as a stick. They could, in the worst case, facilitate the player getting involved with a drug and then potentially go and have the contract terminated under the drug policy. We have seen instances in the past that could suggest that that would be coming if you had the right opportunity.

I am concerned with abuses of confidentiality, and, hopefully, later I will be able to talk a little bit about a case on confidentiality that we just had this past year in the Southern District of New York, which was a travesty of a decision.<sup>46</sup> We have had leaks in the last couple of years about results of drug tests, and again, I do not know that I trust everyone who is involved with drug programs to keep the results of the tests confidential as they have agreed to do.<sup>47</sup>

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<sup>45</sup> In ten states, possession of a small amount (less than one ounce) is punishable by a fine rather than a jail term. See LYNN ZIMMER & JOHN P. MORGAN, *MARIJUANA MYTHS, MARIJUANA FACTS: A REVIEW OF THE SCIENTIFIC EVIDENCE* 42 (1997). Dante Marrazzo, *Athletes and Drug Testing: Why Do We Care If Athletes Inhale?*, 8 MARQ. SPORTS L.J. 75, 79 (1997) (implying that, unlike steroids, there is no higher justification for testing an athlete for marijuana than for testing any other employee in America); James C. McKinkley, Jr., *Guessing the Score: Open Secret—A Special Report: Steroid Suspicions Abound in Major League Dugouts*, N.Y. TIMES, Oct. 11, 2000, at A1 (quoting Robert Manfred, labor relations official for MLB, “At the end of the day, the guy who’s smoking marijuana at home has less impact on the integrity of the game.”).

<sup>46</sup> In re Federation Internationale de Basketball, for a Subpoena Pursuant to 28 U.S.C. 1782, 117 F. Supp. 2d 403 (S.D.N.Y. 2000).

<sup>47</sup> Armen Keteyian, *Backtalk: The NBA’s Drug Program Is Nothing More Than A Masquerade*, N.Y. TIMES, Oct. 31, 1999, § 8, at 17 (referring to an article written by Mike Wise in *The New York Times* on October 20, 1999, raising concerns about the

I am concerned with stigma. I think that if you are a marginal player, the tenth or eleventh guy on a team, and you are a rookie, and you make a mistake as a young player, I do not know that you are getting a job next time around.<sup>48</sup> If you are a 6'2" point guard, and they are a dime a dozen, and you've got this stigma of having tested positive, I just do not know that the player deserves the treatment coming to him in future years, when certainly management will choose the player who does not have this kind of a stigma over him.

I have concerns with severe punishments for acts that are unknowing and unintentional.<sup>49</sup> We have seen players whose games do not focus on strength, but are skill players, who have taken drugs that they thought were going to help with their knee rehabilitation and have found out that those drugs contain banned substances.<sup>50</sup> We had a player who got very sick a year or two ago because he took a nutritional supplement and it contained something that he did not know that it contained.<sup>51</sup> If that substance happened to be a banned substance in the NBA, which thankfully it was not, then he would be mentally as well as physically sick if he learned later that he violated the drug policy.

I am concerned with false-positives, I am concerned with poppy seed muffins, and I am concerned with inhaling marijuana at parties.<sup>52</sup> I have a lot of concerns. It is a wonder that I sleep at night, I guess. I do sleep, thankfully, and the reason that I sleep is because

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confidentiality requirements of the drug testing program when other reporters learned of a half-dozen players who tested positive for marijuana in October 1999).

<sup>48</sup> After testing positive, Jay Edwards, a rookie, has never played another NBA game. Edwards said, "Marginal players with drug problems rarely get so many chances." Daniel Golden, *NBA's Drug Policy Questioned; Critics Wonder Whether Substance Abuse Program Is Too Weak and Arbitrary*, BOSTON GLOBE, Apr. 28, 1995, Sports, at 1.

<sup>49</sup> See *infra* note 52.

<sup>50</sup> For example, Don MacLean was suspended for five games for violating the league's substance abuse policy when he took a drug for knee rehabilitation even though he claimed that he did not know it was on the banned-substance list. Ira Winderman, *Heat Team Report*, SPORTING NEWS, Dec. 2, 2000, available at <http://tsn.sportingnews.com/nba/teams/heat/20001202.html> (last visited Jan. 18, 2002).

<sup>51</sup> Luke Cyphers, *Cops: Janikowski Found Incoherent*, N.Y. DAILY NEWS, Oct. 10, 2001, available at 2001 WL 17983576. Tom Gugliotta of the Phoenix Suns nearly died after taking a GHB precursor as a sleep aid in 1999.

<sup>52</sup> Keteyian, *supra* note 47 (asserting that one can reach the unacceptable level of THC simply by being in a room through passive inhalation).

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of this champion of institutions, and that is the collective bargaining process.<sup>53</sup>

I am fortunate enough to be involved in an industry where we, on behalf of our players, can voice our concerns. We have a say in what is decided. If we want to go and limit the intrusion on one's privacy and try to make sure that we do not have false-positives and take away some of these dangers, we can do that through the process of collective bargaining.<sup>54</sup>

We have done that, I think, through our collective bargaining agreement, which has a drug policy that has been in effect since 1983.<sup>55</sup>

These are of course my own views, and I often struggle as to whether my concerns are now and have been the same as the position and concerns of our organization. I have to give that disclaimer, because I am, frankly, not quite sure that it is.

In researching what exactly our doping and drug regulations position has been at the National Basketball Players Association, I came across a wonderful, golden nugget document from 1983, an article in *The New York Times*.<sup>56</sup> The NBA drug policy was instituted in 1983. It was the first drug policy in the major sports.<sup>57</sup>

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<sup>53</sup> Jay Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 168 (1995) (explaining that a collective bargaining agreement entered into between the league and the union governs all terms and conditions and employment).

<sup>54</sup> Marrazzo, *supra* note 45, at 87 n.78. In professional sports leagues, arbitrators tend to require the parties to use the collective bargaining process for the implementation of drug policies. Arbitrators have found that unilateral attempts by a league to implement a drug testing program conflicted with the collective bargaining process. *Id.* at 87 nn.78-83.

<sup>55</sup> See NBA Drug Policy, *supra* note 23.

<sup>56</sup> Bob Lanier, *The Player's War on Drugs*, N.Y. TIMES, Oct. 16, 1983.

<sup>57</sup> PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW: TEXT, CASES, PROBLEMS* 54 (2d ed. 1998) (stating that the NBA players and owners "pioneered" in developing and agreeing to a program for testing its players for drugs); Sam Goldaper, *NBA Will Ban Drug Users*, N.Y. TIMES, Sept. 28, 1983, at B19 (stating that the "innovative [drug] program" is the "strongest stance taken by any professional sport.").

It was innovative.<sup>58</sup> The focus was on treatment, but, at the same time, there is a disciplinary aspect certainly to it.<sup>59</sup>

Bob Lanier, who many of you know as one of the most intimidating players, a Hall of Fame player, was the President of our Players Association at the time.<sup>60</sup> Now, coincidentally, Bob works as one of David Stern's chief assistants, and you might see him in many of the public service announcements, the "Team Up" ads. He tries to focus on player image and putting a positive spin on what the players do on and off the court. In 1983, Bob Lanier wrote an editorial for *The New York Times* explaining why the players did what they did.<sup>61</sup>

Whether or not the players shared my zealous advocacy and concerns, the editorial is very telling and very indicative of how the players really do feel when push comes to shove about the drug policies. I will read you just a couple of paragraphs of what Bob wrote, he said:

But the decision to take what appears to be a tough stance towards offenders was not directed toward receiving 'good press'. The officers of the players' group made a hard choice because of our belief that the time had come to stand up and make hard decisions. If we were not to be the leaders in attacking illegal drug use now, we

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<sup>58</sup> Selena Roberts, *NBA's Uncontrolled Substance: Marijuana Use Goes Unchecked, Many in the League Say*, N.Y. TIMES, Oct. 26, 1997, Sports, at 7. The unsavory image of cocaine use in the NBA led union leaders Quinn Buckner, Bob Lanier and Junior Bridgeman, in efforts with the league to implement "what was then considered the toughest drug policy in sports." *Id.*

<sup>59</sup> *Id.* (the policy called for an immediate ban of any player who tests positive, or is convicted of a crime involving cocaine or heroin).

<sup>60</sup> For more information on Bob Lanier, who was inducted into the National Basketball Association's Hall of Fame on May 11, 1992, see NBA History: *Bob Lanier*, at [http://global.nba.com/history/lanier\\_bio.html](http://global.nba.com/history/lanier_bio.html) (last visited Jan. 11, 2002).

<sup>61</sup> Lanier, *supra* note 56.

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would be faced with reacting later, and in the process letting our members and others get severely damaged.<sup>62</sup>

What were our concerns? First, we as a group were being tarnished with the brush of ‘all being hopheads.’<sup>63</sup> The overwhelming number of players are not users of drugs, and once and for all we want to be able to convince the public. This not only makes it easier for me and others in the league to hold our heads high when appearing in public, but also helps our sport.<sup>64</sup>

I genuinely believe that this is one of the principal things that goes through the players’ minds. They believe, justifiably, that ninety-eight percent of the players do not use any drugs,<sup>65</sup> and they want the public to know that ninety-eight percent of the players do not use drugs, and so they agree to these policies and procedures. Generally, the people who you find in union leadership are your most responsible players; that is why they get involved with the union, and their view is: “If I could stay clean, why can’t everybody else,” and so they will agree to these policies and procedures and they think that it is important to do that.<sup>66</sup> Just the last two points that Bob gives and then I will pass on:

Second, the players share in at least fifty-three percent of all revenues earned in our League. With the attack on illegal drug use and, it is hoped, the end of negative media, I believe professional basketball will prosper. Better attendance, higher TV ratings, more endorsement opportunities all lead to more revenues for the players to

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<sup>62</sup> *Id.* § 5, at 2, col. 1, ¶ 5.

<sup>63</sup> This is slang for drug addicts.

<sup>64</sup> Lanier, *supra* note 56.

<sup>65</sup> See Burt Graeff & Mary Schmitt Boyer, *NBA Seeks To Start Marijuana Testing; Players Union Opposes Random Check*, THE PLAIN DEALER, Oct. 28, 1998, at 1D, available at 1998 WL 4161380. NBA players Scott Brooks and Shawn Kemp went on record stating that very few guys use marijuana but the stereotype was created because a few players got caught and it was highly publicized. *Id.*

<sup>66</sup> Lanier, *supra* note 56.

share. Tied with this is the fan perception that the players will be playing at all times at their highest possible skill level. We cannot and will not allow the contrary type of publicity to continue.<sup>67</sup>

This is the absolute key reason that the NBA would give for negotiating the drug policy: that our sport is a business and we need to make sure that the business does not suffer.<sup>68</sup> And, this helps us, the players, because the salary cap system is one of revenue sharing.<sup>69</sup> We share in every dollar that the owners make. And so, if those dollars suffer as a result of the perception, we all suffer collectively.<sup>70</sup> So we need to have this policy in place.

Third, the reports of large increases in drug use in professional sports, as well as in society in general, over the last several months proved shocking to our Executive Board. We all felt we had a responsibility, as role models, to change the trend. Eighty percent of our players are black. The kids in the inner cities idolize NBA players and we felt it critical that these children hear our message loud and clear: NBA players won't use drugs, and if they do, they will be kept out of the League.<sup>71</sup>

The article was written in 1983.<sup>72</sup> It could have been written in 2001. We had a player come out recently and talk about sixty percent of the players are using marijuana,<sup>73</sup> irresponsibly saying that, and I think that when you have this perception out there,

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<sup>67</sup> *Id.* ¶ 7.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Lanier article, *supra* note 56, at ¶ 8.

<sup>72</sup> *Id.*

<sup>73</sup> Charles Oakley commented about the NBA drug-testing program, "you got guys out there playing high every night. You got 60 percent of your league on marijuana." Mike Wise, *Trading Talent Today for a Better Tomorrow*, N.Y. TIMES, Feb. 25, 2001, Sports, at 3; Doug Smith, *Here's Straight Dope From Oakley: Raptor Suggests Pot-smoking in NBA Widespread*, TORONTO STAR, Feb. 23, 2001, at SP04, available at 2001 WL 11946398 (quoting Charles Oakley, a forward for the Toronto Raptors, as saying that sixty percent of NBA players smoke pot).

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whether it is by the media or by players in general, you have to do what you can do to put in place a good and fair policy.

What I would also add as a justification—and this is something that I think Adolpho mentioned—is a concern with uniformity. We do not want a Wild West out there. We want to make sure that there is one policy, there is one piece of discipline, that it is not twenty-nine teams doing things all over the place. We have a focused, single policy that we all sit down beforehand in a civilized manner and agree to, as opposed to the Wild West of “anything could happen.”

Those, I think, are the principal reasons why we as a union would agree to a drug policy and why we have done so in the past.

I am sorry for dragging on for so long.

MR. JURITH: Thank you, Ron. I think you raised a number of interesting issues—privacy, First Amendment rights, and so forth—that I am sure we will get to in our discussion.

You know, you learn something new every day. I didn’t realize that 6’2” point guards were a dime a dozen. I find that an interesting observation. So I can continue to tell my sons there is still hope for them in the NBA.

Rob, if you could, please address the issue of how the Olympic Movement and an amateur sports league grapples with these delicate issues.

MR. HOUSMAN: Sports have always evolved. I went back last week, I was watching some old game films from the NFL on one of the shows, and it was pre—forward pass, up the middle, one-two-three-four, that was basically it. If you look at the old NBA films prior to the jam being popular, it was a different game, you did the four-corner stall, you went in, you shot a basket, you went back, and you could live almost a quarter on that. Sports have evolved over a long period of time.

I think we are facing the next big evolution in sports right now. I think it is a brave new world that most of us have never even thought about. You laid out how the processes work through collective

bargaining, how this has actually occurred, how we ended up with these rules.

Now, the leading edge of this effort is not taking place between the leagues and the players. The leading edge of this effort occurred in Lausanne. It was the meeting of the new World Anti-Doping Agency, and it is being led by governments and by the Olympic Movement and by sports leadership at the international level.<sup>74</sup>

In the United States, we think we are home to sports, and we are. I am a big U.S. sports fan, obviously. But we have Major League Baseball which is played in a total of three countries, Mexico, Canada, and the United States.<sup>75</sup> Baseball is also played in Cuba and Japan.<sup>76</sup> But we are almost jingoistic in our love for U.S. sports, that we do not look beyond our borders.

Outside there is a brave big world of people playing sports, and they are off and running in terms of regulating sports. At first, it looked like it was not going to have a tremendous impact on the

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<sup>74</sup> The World Conference on Doping in Sport, held in Lausanne in February 1999, produced the Lausanne Declaration on Doping in Sport. This document provided for the creation of WADA, an independent international anti-doping agency. See <http://www.fiq.org/organization/select.cfm?type=doping&section=lausanne> (last visited Jan. 11, 2002) (explaining the details of the Lausanne Declaration).

<sup>75</sup> Major League Baseball plays games throughout North America, in Mexico, Canada, and the United States. Major League Baseball plays some games in Mexico. See *Rays Lose To Pirates In Mexico* (Mar. 17, 2001), at [http://www.mlb.com/NASApp/mlb/mlb/news/mlb\\_news\\_story.jsp?article\\_id=tb\\_20010317\\_springtrainingindex\\_news&team\\_id=tb](http://www.mlb.com/NASApp/mlb/mlb/news/mlb_news_story.jsp?article_id=tb_20010317_springtrainingindex_news&team_id=tb) (last visited Jan. 11, 2002). Major League Baseball has two teams in Canada. See *Toronto Blue Jays*, at <http://bluejays.mlb.com> (last visited Jan. 11, 2002); *Montreal Expos*, at <http://expos.mlb.com> (last visited Jan. 11, 2002). The other twenty-eight teams are based in the United States. See *Major League Baseball, List of Teams*, at [http://www.mlb.com/NASApp/mlb/mlb/team/mlb\\_team\\_index.jsp](http://www.mlb.com/NASApp/mlb/mlb/team/mlb_team_index.jsp) (last visited Jan. 11, 2002).

<sup>76</sup> In Cuba, the highest level of play is for the Cuban National Team. See Bruce Brown, *Cuban Baseball*, ATLANTIC MONTHLY, June 1984 (detailing the rich history of Cuban baseball), available at <http://www.theatlantic.com/issues/84jun/8406brown.htm> (last visited Jan. 11, 2002). After the 1959 revolution, Castro banned professional baseball in Cuba and formed the Cuban amateur baseball system. See a synopsis of MILTON H. JAMAIL, FULL COUNT: INSIDE CUBAN BASEBALL (2000), at [http://www.siu.edu/~siupress/titles/s00\\_titles/jamail\\_full.htm](http://www.siu.edu/~siupress/titles/s00_titles/jamail_full.htm) (last visited Jan. 15, 2002). The professional baseball league in Japan is called The Professional Baseball Organization of Japan. See *The Professional Baseball Organization of Japan* at <http://www.inter.co.jp/Baseball/index.html> (last visited Jan. 11, 2002).

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United States, unless you happened to be a world-class sprinter, or a cross-country skier, and we still have one or two of those in the United States. I am a bad one. But now it is actually coming back to roost.

We have created this great new institution, the World Anti-Doping Agency, which was an effort by the United States Government and the International Olympic Committee and twenty-six or twenty-eight other nations in leadership roles to form an international body that would be able to provide a uniformity of purpose. A system where within the Olympic community, we would in fact be able to say that the Olympic Games were clean, that they were free from drugs.<sup>77</sup>

I think we have made tremendous progress in that direction. If you are an Olympic athlete today, you have no-notice testing. It is random, and in the Olympic community this is what the athletes want. If you talk to the athletes, overwhelmingly they will tell you: "We want such a system."<sup>78</sup> But they also want it to be fair, and respect their privacy.<sup>79</sup>

They want a level playing field, in part, because it is also a brave new world in that the level of abuse that we reached is unbelievable in some of these sports. Look at what happened in Sydney—with this new World Anti-Doping Agency and with a newfound commitment and the governments standing over the shoulder of the IOC, all of a sudden we went from catching maybe one or two athletes a game, to tens of athletes being thrown out in the run-up to the Games, entire teams removing themselves.<sup>80</sup>

And also, it has dawned on us that the rate of youth use of these substances, like steroids, has grown to a point now where if you are

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<sup>77</sup> See World Anti-Doping Agency, *supra* note 18.

<sup>78</sup> *Los Angeles States 2012 Case; City Uses Success of 1984 Games to Promote Latest Bid*, HOUSTON CHRON., Dec. 6, 2000 (quoting ex-drug czar Barry McCaffrey as saying, "What competitors want is an assurance that they don't have to use performance-enhancing drugs.").

<sup>79</sup> See *infra* note 88.

<sup>80</sup> See Mike Fish, *Drugs Get Spotlight at Sydney Olympics*, ATLANTA J. & CONSTITUTION, Sept. 26, 2000, at A1, available at 2000 WL 5477961 (reporting that "before the Games, 27 Chinese swimmers were cut from their team because of fears they would not pass drug tests in Sydney.").

concerned about your kids using cocaine, you ought to be equally concerned that they are using a steroid, because the fact is the rate of steroid use among young kids is on a par with cocaine use.<sup>81</sup>

And, by the way, here again—this is like a disclaimer day for me having left government, now I can speak freely—Title IX was one of the greatest things that we ever did for women’s sports, but it had the unintended consequence of making girls’ sports hyper-competitive like boys’.<sup>82</sup> I say “unintended.” Part of that is intended. It is a great thing that girls’ sports are competitive, the WNBA is great, but now if you look at our population of young girls, they want that scholarship just as bad as the young boys do.<sup>83</sup> They want to be able to say that they play for the Mystics just as bad as any young boy wants to be able to say they play for the Chicago Bulls. I didn’t use the Washington team purposely, even with Michael Jordan there.

MR. JURITH: Rob, you are in New York.

MR. HOUSMAN: I know. Well, but the Knicks, you know I’m a Knicks fan, are struggling a little bit there too.

But I think the thing is, we have reached the state where everybody woke up and said, “We’ve got a real big problem.” What we did was we ratcheted the system up, and I feel very confident in how far we’ve ratcheted the system up. But now, as we step back, we have some real challenges, and I think you are beginning to hear them.

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<sup>81</sup> See Gary Milhoses, *Steroid Survey Stirs Concern; Indicates Use By Kids of Both Sexes on Rise*, USA TODAY, Apr. 18, 2000, at 1C, available at 2000 WL 5775566 (detailing a report by the United States Department of Health and Human Services, which shows an increase in the use of anabolic steroids by both male and female high school students).

<sup>82</sup> See *Don’t Blame Title IX For Male Setbacks*, USA TODAY, Aug. 2, 2001, at A12, available at 2001 WL 5468204 (noting that women’s sports are undergoing an evolution because the increased opportunity has increased competitive achievement).

<sup>83</sup> Jacqueline L. Salmon, *Exploring New Fields; Other Sports Gain Popularity as Kids Discover Life Beyond Soccer*, WASH. POST, Aug. 15, 2001, at B01, available at 2001 WL 23186918 (noting that the increased funding for women’s collegiate sports, as a result of Title IX has made girls more aware of the financial benefits of using sports to get a scholarship).

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We have put in place a system, through the Dietary Supplements Act,<sup>84</sup> where a range of products are completely unregulated.<sup>85</sup> So when you go out and you think you are going to a health food store and that means it is healthy, au contraire, it is as likely as not. I would posit, that the food supplement that you are taking, if you are taking a performance-based one, something not intended to get you over a cold but something that is intended to bulk you up or make you more tough, there is a good likelihood that you are taking a banned substance within the international Olympic community world; and, more so, there is also a likelihood, a smaller one, that you are actually taking an illegal drug, because a bunch of these products contain steroids.<sup>86</sup> You do not know it, and traditionally the federal government has not done enough to police it, and it is completely illegal.<sup>87</sup> It is a fraud on the American public. But we think our foods and drugs are safe, so we go on about our merry way.

Well, that is great for you and me. All we do is expose ourselves to some risk. But if you happen to come from the NBA and you happen to be subject to a drug-testing regime, you can now find that the substance that is supposed to be pure, safe, and legal for you, at least in your mind, can put you in the hospital. And, as you were

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<sup>84</sup> The Dietary Supplement Health and Education Act of 1994, Pub. L. No. 103-417, 108 Stat. 4325 (codified as amended in scattered sections of 21 U.S.C.), available at <http://vm.cfsan.fda.gov/~dms/dietsupp.html> (last visited Jan. 11, 2002) [hereinafter The Dietary Supplement Act].

<sup>85</sup> Beatrice Trum Hunter, *Buyer Beware*, CONSUMERS RESEARCH MAGAZINE, Mar. 1, 2001, at 89, available at 2001 WL 14327037 (“A critical report from the General Accounting Office [GAO] says current federal laws and agencies’ efforts to monitor dietary supplements ‘do not effectively and consistently ensure that these products are safe.’”); Phil Wallace, *FDA Appears to Make Headway on Dietary Supplements Resources*, FOOD CHEMICAL NEWS, Mar. 26, 2001, available at 2001 WL 12772898 (discussing the FDA’s appeal for the additional funding that the FDA argues is necessary to effectively regulate dietary supplements).

<sup>86</sup> See *IOC Urged to Check Food Supplements For Doping*, XINHUA NEWS AGENCY, June 15, 2001, available at 2001 WL 2349496 (IOC is being urged to regulate use of nutritional supplements by athletes so that athletes do not mistakenly use nutritional supplements containing banned substances); *Stop That Pill!*, TIMES OF INDIA, Jan. 26, 2001, available at 2001 WL 10608287 (stating that a recent FDA report indicates that some dietary supplements contain steroids).

<sup>87</sup> See Cart, *supra* note 17.

saying, Ron, it can get you suspended. It can make you suffer in the eyes of your fans. It can really do a lot of damage to you.<sup>88</sup>

So the challenges we face are several-fold. One is we've got to evolve this system into something that the players are comfortable with. Particularly here in the United States, we have not done enough in terms of athlete education, and we have not done enough in terms of helping athletes deal with this changing reality; it is something that is being negotiated by a bunch of bureaucrats, myself in the past being one of them.

We also have not done enough with tackling the problem of young people using these substances, and it is not just because they think that the pros are doing it. There are a variety of other factors in place there. But we have not done enough with that.

The other thing we have not done enough with, I would suggest, and in the last Administration we were moving in this direction, and I have strong hope that this next Administration will carry it forward, is what you were saying, Adolpho—too many of these products are completely unregulated and entirely unsafe.

MR. JURITH: Maidie, as a leading sports arbitrator, how do we balance the integrity of the sporting event with the rights of the athletes?

MS. OLIVEAU: I think what everybody is talking about here, in terms of the brave new world, and new government regulations is consistent with the Court of Arbitration for Sport also being new. It has been in existence since 1983,<sup>89</sup> but as an accepted entity in the world of sports, it is only since the ruling of the Swiss Federal

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<sup>88</sup> See Roger Mills, *On The Rebound*, ST. PETERSBURG TIMES, Oct. 17, 1994, at 1C (quoting NBA player, Roy Tarpley, about the trauma of being banned from the league for violating the drug policy, "It was not easy to go through all the adversity and turmoil and embarrassment and humiliation and be able to suck it up and come back. I thought about killing myself. I thought my wife might leave. I thought about all the people I had let down.").

<sup>89</sup> On April 6, 1983, the IOC established the CAS to resolve sports-related disputes. McLaren, *supra* note 6, at 381; Nancy K. Raber, *Dispute Resolution In Olympic Sport: The Court of Arbitration For Sport*, 8 SETON HALL J. SPORT L. 75, 82-83 (1998); *see also*, <http://www.tas-cas.org/english/guide/fraguide.asp> (last visited Jan. 11, 2002).

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Tribunal in March 1993 that it has been formally acknowledged as a real arbitral tribunal.<sup>90</sup>

I think what we can do is balance the interests of management and the athletes, by having a body of jurisprudence, such as CAS has developed, where the rules are interpreted and the athletes have a manageable and somewhat less-expensive process to go through.<sup>91</sup>

The parties to collective bargaining agreements do not go to the Court of Arbitration for Sport, but pretty much everyone else does. Well, let me back up.

Every sport has an international federation that is at the highest level. For example, the United States Tennis Association<sup>92</sup> goes up one level to a federation called the International Tennis Federation.<sup>93</sup> The International Federations (IF) have rules applicable to their sports, including rules for drug use, as do the national governing bodies.<sup>94</sup> All of the federations in the Olympic Movement have adopted the Court of Arbitration for Sport and its process for resolution of their appeals, except for two federations, FIFA, which is the football federation, and the IAAF, the Track and Field Federation, for different reasons, mainly in my view political reasons, and perhaps Track and Field will soon adopt the Court of Arbitration for Sport as the court of final appeal.<sup>95</sup>

What that means is that the interpretation of the rules and how that interpretation is going to impact the athletes is now much more

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<sup>90</sup> CAS Book, *supra* note 25 at XXVI. The Swiss Federal Tribunal recognized in 1993 that CAS awards are final and enforceable. *Id.*

<sup>91</sup> See CAS Code, articles R 64.1 and R 65.2. The filing fee is 500 Swiss francs or approximately \$300 U.S. dollars. Raber, *supra* note 89.

<sup>92</sup> For more information about the United States Tennis Association, see <http://www.usta.com/aboutus/index.html> (last visited Jan. 11, 2002).

<sup>93</sup> For more information about the International Tennis Federation, see <http://www.itftennis.com/html/new/frameset.html> (last visited Jan. 11, 2002).

<sup>94</sup> See Raber, *supra* note 89, at 82 nn.54-61. All technical matters of a particular sport are under the International Federation's authority. The IF is made up of National Governing Bodies (NGB) from each country. An IF's responsibilities include: drug testing, imposing sanctions for rule violations and resolving disputes. *Id.*

<sup>95</sup> The International Amateur Athletic Federation (IAAF) and the Federation Internationale de Football Association (FIFA) choose to have their own adjudicative experts instead of CAS. McLaren, *supra* note 6, at 381.

consistent. The procedure does not have the conflict inherent in the past procedures.<sup>96</sup> When you have the governing body of a sport which also is the promoter of, let's say, the world championships in that sport regulating the athletes, appointing the arbitrators, conducting the hearings, and issuing the ultimate ruling which may involve a suspension or a sanction, there is a conflict. The federation may think: "My world championships are coming up next week and that is my star athlete that I have just advertised will appear. This has sold all my tickets and my TV, and I really do not want her not to be there, so I am going to suspend her sentence." That is an obvious conflict.<sup>97</sup> It also puts the governing body, the federation, in an uncomfortable position. So that kind of conflict is removed by CAS.

Also, the decisions of the Court of Arbitration for Sport are actually published, which means that the athletes understand the reasons for the ruling. The federations understand how to amend their rules and regulations, and everyone is much more able to improve the system and to address the issues.<sup>98</sup>

One of the things that is somewhat controversial right now is the issue of what is called strict liability in doping offenses.<sup>99</sup> The athletes when they have tested positive usually have a reason, they believe, for why they tested positive. Most of the governing bodies, are now saying: "It does not matter. You had the prohibited substance in your body. How it got there does not matter." It is deemed to have improved your performance, whether it did or not, since usually you do not get tested unless you won or placed very

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<sup>96</sup> There used to be an issue of conflict in the CAS as well when the IOC had direct authority over the procedures of the CAS. Now, most of the processes are run by the ICAS. Raber, *supra* note 89, at 89-90.

<sup>97</sup> CAS prevents the IF from acting as both the prosecutor and the judge on the same case. Raber, *supra* note 89, at 91. In addition to the lack of independence, there is a criticism about the lack of universal body of jurisprudence on the issue. McLaren, *supra* note 6, at 381, 384. "They [sport-specific arbitration panels] represent a failure to recognize the necessity for the arbitration panel to be independent, neutral, and impartial." *Id.* at 384.

<sup>98</sup> CAS Book, *supra* note 25, at XXIII. The CAS Book covers thirteen years of judicial practice.

<sup>99</sup> Doping is a strict liability offense, which means that intent is not required. See McLaren, *supra* note 6, at 396.

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highly in your event, so there is an irrebuttable presumption of an improved performance.<sup>100</sup>

I think the athletic community will start to understand that what we are talking about here is they cannot rely on their doctors. They cannot just take anything that they find in the health food store, but they have to learn about what they are ingesting and be responsible for themselves, which is a scary thing for these athletes, because they are not used to that, especially some of the ones in the either former Communist regimes or current Communist and more controlling regimes.

MR. JURITH: Thank you.

On that last point, I was not going to start there, but let's start there. The Controlled Substances Act clearly defines the illegal drugs: heroin, cocaine, marijuana, amphetamines.<sup>101</sup> The Controlled Substances Act also defines anabolic steroids.<sup>102</sup> But, as Rob Housman pointed out, the Dietary Supplements Act creates a whole range of substances that fall outside the Controlled Substances Act.<sup>103</sup> Now we have a situation where independent sports authorities are designating some of those non-controlled substances as banned under their testing regimes.<sup>104</sup>

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<sup>100</sup> For example, in *Raducan*, there was no need to find that a competitive advantage was achieved when there was a violation of the doping regulations. *See id.* at 396.

<sup>101</sup> The Controlled Substances Act, Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, *available at* <http://www.usdoj.gov/dea/agency/csa.htm> (last visited Jan. 11, 2002) [hereinafter The Controlled Substances Act].

<sup>102</sup> *Id.* at 1. The Controlled Substances Act "is a consolidation of numerous laws regulating the manufacture and distribution of narcotics, stimulants, depressants, hallucinogens, anabolic steroids, and chemicals used in the illicit production of controlled substances."

<sup>103</sup> *See* The Dietary Supplement Act, *supra* note 84; *cf.* The Controlled Substances Act, *supra* note 101.

<sup>104</sup> *See, e.g.,* C.W. Neivus, *Not Your Uncle's Protein Shakes*, S.F. CHRON., July 7, 2001, at F1, *available at* 2001 WL 3408342 (Andro is banned by the NFL, NCAA and IOC); *Andro Manufacturer Reaches Settlement with FTC*, SPORTSLINE WIRE REPORTS (Nov. 15, 1999) (Androstenedione is a dietary supplement, a non-controlled substance; private entities including the NFL, NCAA, and the men's and women's tennis tours have banned the use of androstenedione. This story details safety concerns and the fact that Mark McGwire used a supplement containing andro during his seventy-home-run season of 1998, but later discontinued use and urged others to do the same), *at* <http://cbs.sportsline.com/u/ce/multi>

And, to go to Maidie's point, are we giving the athletes adequate notice? Are we setting up a situation here where it is almost a "gotcha?" For example, when the over-the-counter "stuff" is found in the athlete's system after a chemical breakdown in the body, it may not be that obvious to the athlete that the "stuff" is banned.<sup>105</sup>

From the players' point of view, Ron, what is the players' standpoint in that regime? And then, Adolpho, how does management fit that into a collective bargaining situation?

MR. KLEMPNER: I think the most important aspect of the collective bargaining agreement of the drug policy has to do with this type of notice. You have to know what is going on. We just added steroids into our drug policy in 1998-99 as part of our collective bargaining agreement.<sup>106</sup> We then, later on, to get to the point of notice, had an issue as to whether we should add certain other substances that are not the core type of steroids that do not meet the standard that we have established. We were very concerned with whether or not the players had notice.

I do not think there is any way of getting around that. I think that there have to be absolutely clear indications in the agreements as to what it is that you are being tested for and what it is that can lead you to be disciplined. I do not see any way around that.

MR. JURITH: Adolpho?

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/0,1329,1597362\_13,00.html (last visited Feb. 6, 2002); see also Bodie Smith and Daily O'Collegian, *NCAA Still Battling Drug Use by Athletes*, U-WIRE OKLAHOMA STATE U., Dec. 20, 2001, available at 2001 WL 31590622 (Over-the-counter dietary supplements contain substances banned by the NCAA and use of such dietary supplements can result in a positive drug test and a one-year suspension under the NCAA's drug policy).

<sup>105</sup> See *supra* notes 50-51; see also *IOC Urged to Check Food Supplements For Doping*, XINHUA NEWS AGENCY, June 15, 2001, available at 2001 WL 2349496 (reporting that the IOC is being urged to regulate use of nutritional supplements by athletes so that athletes do not mistakenly use nutritional supplements containing banned substances).

<sup>106</sup> See *NBA Drug Policy*, *supra* note 23. The following substances are prohibited: amphetamine and its analogs, cocaine, LSD, opiates (heroin, codeine and morphine), PCP, marijuana, and steroids, available at <http://sports.findlaw.com/drugs/policy/basketball/index.html> (last visited Jan. 11, 2002).

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MR. BIRCH: I can tell you notice is certainly an important issue for us, but let me back up a little bit.

What happens with performance-enhancing substances? Let's say at first people were taking testosterone. When we figured out how to test for testosterone, people began to take a precursor to testosterone that when it gets into the body turns into testosterone. When we figure out what that is, people go to the next level down and they get whatever it is that turns into the precursor that turns into testosterone, and it goes on and on and on. You have androstenedione become a problem. We figure that out; next thing you know, androstenedione is in there because they have learned how to switch the markers a little bit and make a new substance that cannot be detected as quickly.<sup>107</sup>

So, while it is always important that we have notice, what we also strive for is to make sure that the players understand the big picture. The big picture is if you are taking things that are designed to enhance your performance, you are at risk, period. The cornerstone of our policy is the players are responsible for what goes into their bodies.<sup>108</sup> That is the end of all discussion.

In terms of notice, what we try to do is when new things come out, what we do is we will send alerts to put on the team boards. We send messages in their newsletters. We have a help line that they can call into at any time to ask questions about supplements. We talk to the trainers. We talk to the coaches.<sup>109</sup> We do everything in our power to let them know.

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<sup>107</sup> Athletes seeking to enhance performance might use masking agents or other stimulants that are similar to a banned substance to avoid detection. See *The Physician and Sportsmedicine: A New Banned Substance Makes Its Olympic Debut* (noting that Bromantan, a stimulant and masking agent that is similar to Mesocarb which is classified as a class A banned substance by IOC, was detected at the 1996 Summer Olympic Games), at <http://www.physsportsmed.com/issues/olympics/drug.htm> (last visited Jan. 11, 2002).

<sup>108</sup> See *No Comment: Janikowski Avoids Questions on 'Apparent Drug Overdose'*, CNN.COM (Oct. 11, 2001) (stating that the NFL has a strict substance abuse policy), at [http://sportsillustrated.cnn.com/football/news/2001/10/10/jankowski\\_ap/](http://sportsillustrated.cnn.com/football/news/2001/10/10/jankowski_ap/) (last visited Jan. 11, 2002).

<sup>109</sup> See, e.g., Mitchell, *supra* note 40 (quoting NBA Chicago Bulls Coach, Tim Floyd, "[General Manager] Jerry Krause spends a great deal of time with the players in the preseason talking about and reviewing banned substances.").

But the bottom line is we have in our policy a list of substances and at the bottom of it we have “and related substances.”<sup>110</sup> Any of these related substances can also be a cause of a violation.

And, frankly, I just do not think there is any other way to do it. You know, to suggest that there needs to be a more formal process of a year or two notice to make sure and have them sign off on different things, it just becomes unworkable.

MR. JURITH: Maidie and Rob, you both were at the Olympic Games in Sydney, Australia.<sup>111</sup> Looking forward to Salt Lake next February,<sup>112</sup> what do we need to do to make sure that those Games are drug-free and performance enhancer-free? Is USADA prepared to step into the breach and play that role? Is USADA prepared to step into the breach and to make sure that will happen?

MS. OLIVEAU: Well, I think both WADA and USADA and Sydney have really helped people to understand that the drug testing is going to catch them.

What, unfortunately, is happening, as Adolpho talked about, is the doctors and the players seem to stay one step ahead of the drug-testing program, so there is always going to be something new happening in the world of drug taking that we do not know about.<sup>113</sup>

But I think that the fight against doping is really taking hold. Everything that you read, everything that people say, especially the athletes, is in favor of very strict enforcement of the anti-doping process, so I would say that in Salt Lake we probably will have fewer positives because the coaches and the doctors are going to start to be a little bit less aggressive.

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<sup>110</sup> See NFL Steroid Policy, *supra* note 20; NFL Substances of Abuse Policy, *supra* note 30.

<sup>111</sup> For further information on the Summer 2000 Games in Sydney, see Sydney 2000 Day-By-Day Schedule, at <http://www.usatoday.com/olympics/sydney/schedule/day.htm> (last visited Jan. 11, 2002).

<sup>112</sup> See Salt Lake 2002 Official Website, at <http://www.sl2002.org> (last visited Jan. 11, 2002).

<sup>113</sup> See The Physician and Sportsmedicine, *supra* note 107.

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Amazingly, several countries had lots of positive drug test during and leading up to Sydney.<sup>114</sup> That is stupidity. That is going to stop, because people are now getting caught, and it is hurting them.

The Olympic teams, i.e. the national Olympic committees, are going to become a little bit more forceful about drugs.

MR. HOUSMAN: I think that is right. I think the U.S. Anti-Doping Agency is coming up to speed very quickly, and I think it is going to be very effective. I think the WADA is also beginning to show that it is very effective.

I think if there is a big bump in the road ahead, there are two of them.

Let me tell you a total nightmare situation for the United States, and I think this is where I get to sit here and say, "Here is the wish list," as opposed to when I was a government official saying, "thank you for your comment."

If there are two big speed bumps in the road as we look ahead, the first one is, and I will posit it to you as a nightmare scenario in hockey, on the eve of the Gold Medal Games, a player from another country, who happens to be a National Hockey League (NHL) player as well in the United States, is playing though not for the United States, playing for Czechoslovakia, whomever, Canada, whatever, comes into Salt Lake City, goes to the GNC,<sup>115</sup> and purchases an iron supplement, like C.J. Hunter,<sup>116</sup> buys it right in downtown Salt Lake City in the two weeks prior to the Games when they are training, starts taking it on the eve, and he is the scoring threat; and he blows

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<sup>114</sup> See *List of Drug Cases Linked to Sydney Games* (reporting on every positive test recorded before and during the Games that had some impact on who competed in Sydney), at <http://archive.sportserver.com/olympics/00sydney/front/story/0,4798,500264298-500409603-502497598-0-sportserver,00.html> (last visited Feb. 6, 2002).

<sup>115</sup> For more information, see General Nutrition Center, at <http://www.gnc.com> (last visited Jan. 11, 2002).

<sup>116</sup> See Christopher Smith, *As IOC Criticism of Supplements Builds, Pharmanex Sponsorship an Odd Pairing*, SALT LAKE TRIB., Feb. 26, 2001, at A1, available at 2001 WL 4630692. C.J. Hunter claimed that an iron dietary supplement may have been responsible for his four failed drug tests last summer. *Id.*

his drug test, ends up in the Court of Arbitration before twenty-four hours, and is suspended.

Now, my hypothetical here raises two things. First of all, who is going to actually pay for this? The athlete? The team? Certainly. But you know who is really going to pay for it? It is going to be the United States. We will be labeled in the international community once again "the drug haven of the world," because it will not be the athlete's fault that he takes this substance, because the substance is not going to be labeled. They are going to bring it in. They are going to show it. They are going to test it. They are going to show that this athlete had no way in the world of knowing what happened, but this poor athlete now is going to suffer. And so, it is going to be the United States and our credibility internationally that will suffer.

So the first thing I think we need to do is we need to clean our house for Salt Lake City. We need to deal with some of these real challenges, like dietary supplements. We only have a year, and it is very difficult to get regulation in place in under a year, by the way. In fact, given the strength of this industry and the amount of money it puts in the political campaigns,<sup>117</sup> one could argue it is virtually impossible. You have one in particular, who happens to be a Senator from Utah by the name of Hatch.<sup>118</sup> It is great to take the governmental shackles off.

The other part of that hypothetical is it shows the difficulty of merging two systems. What happens after that athlete is suspended?

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<sup>117</sup> See *Hatch Rejects Criticism of Dietary Supplements*, Dec. 20, 2000 (recognizing that Senator Hatch (R-UT) is among those politicians who receive campaign donations from makers of pharmaceutical drugs, health products and dietary supplements), at [http://www.canoe.ca/Slam001220/ama\\_hatch-ap.html](http://www.canoe.ca/Slam001220/ama_hatch-ap.html) (last visited Jan. 11, 2002).

<sup>118</sup> In 1994, Senator Orrin Hatch (R-UT) and Senator Tom Harkin (D-IA) introduced and passed the dietary supplement bill. Under the Hatch-Harkin bill, third-party literature that is truthful, non-misleading and does not promote a specific brand can be distributed to consumers. This served to minimize the regulatory regime imposed by the FDA. See, e.g., Ralph Moss, *Progress On Supplements 'Hatch-Harkin' Passes Senate, But Waxman Blocks It In House*, THE CANCER CHRONICLES (1994), available at <http://www.ralphmoss.com/Supplements.html> (last visited Jan. 11, 2002). Many criticized this Bill for fear that it would have the unintended consequences of disqualifying Olympic athletes who take common dietary supplements the way it did in the Sydney Summer Games. See *Hatch Rejects Criticism of Dietary Supplements*, (Dec. 20, 2000), at [http://www.canoe.ca/Slam001220/ama\\_hatch-ap.html](http://www.canoe.ca/Slam001220/ama_hatch-ap.html) (last visited Jan. 11, 2002).

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What does the NHL do with that suspension? The guy has been suspended for two years in the international world. Now, the press and a lot of these guys are my friends, they are going to call for his scalp in the NHL. They are going to want additional testing, but is that substance on the NHL list? I do not know. It is going to be a nightmare.

And then, they are going to have to deal with that after the fact, and then there is going to be this whole thing about the NHL being a drug-laden league, and the athletes being drugged up, and the reason why you now have 6'5" centers in the NHL is all because of steroids. It is going to be a nightmare.

I present to you that there is a twenty-five-to-fifty percent chance that something along those lines will occur in Salt Lake City, at least one. I hope I am wrong. I hope we head it off actually, but it is very real.

So the two speed bumps are: What is the U.S. Government going to do moving forward—are they going to keep the momentum and actually try to get this done? I know with Ed's leadership we will. And then, the other one is: How do the pro leagues and the international community merge their systems in ways that respect the collective bargaining agreements, respect the needs of the leagues, respect the needs of the athletes, and yet not make us seen as something other than a pariah internationally?

MR. JURITH: When we first started this discussion, I noted that in Ron's and Adolpho's presentations, we heard the distinction between the commonly accepted illicit drugs cocaine, heroin, and marijuana and the performance-enhancing drugs.<sup>119</sup> The illicit drugs, we seem to say, "Well, we acted in terms of the well-being of the players. What they did is behind closed doors and we need to try to attempt to rehabilitate." All legitimate objectives.

On the other hand, if you are caught with a performance-enhancing drug, we take you off the field. It would seem to me, from the public

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<sup>119</sup> See *supra* notes 29-40 and accompanying text.

policy point of view, about all types of doping in sports, there should not be a distinction in how we implement our policy.

MR. BIRCH: I can tell you, I was making my distinction based on things that were not violations of the law, in the sense that they were not, let's say, what a person would be arrested for as illegal substances. We treat those things totally differently. Our drug policy does allow for immediate suspension based on violations of the law involving drugs, or steroids.<sup>120</sup> So if a person is caught transporting some sort of steroid or something, we will treat those separate and apart, but also in conjunction with the main objectives of that policy.<sup>121</sup> So, in addition to getting everything else, the Commissioner will usually impose some sort of discipline separate and apart from what that policy says.<sup>122</sup>

But I do think, though, that there is a fundamental distinction, because one is a function of our sport and one is not. I think you have to be able to draw that dividing line because you have to understand that a lot of people, when someone tests positive for some substance, let's say marijuana, the public at large would tend to say, "Oh, you've got to fire him; this guy's got to go," but it does not work that way. It will not work like that in your job. It is not going to work like that in our job.

MR. JURITH: Ron, it depends upon the job you have.

MR. BIRCH: I agree, but with limited exceptions. What I would suggest is that all the leagues and particularly the NFL, I can certainly speak for us, do more in the way of punishment or

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<sup>120</sup> NFL Steroid Policy, *supra* note 20, at 5-6 ("Players or other persons within the NFL who are convicted of or admit to a violation of law . . . relating to use . . . of steroids, growth hormones, or related substances . . . are subject to discipline by the Commissioner, including suspension or, if appropriate, termination of the individual's affiliation with an NFL club."); NFL Substances of Abuse Policy, *supra* note 30, at 18 ("A player will normally be subject to discipline up to and including suspension without pay for four regular and/or post-season games for a first violation of the law related to substances of abuse other than alcohol and for six regular season and/or post-season games for a second violation of the law related to substances of abuse other than alcohol.")

<sup>121</sup> NFL Steroid Policy, *supra* note 20, at 1 ("Players use steroids for the purpose of becoming bigger, stronger, and faster than they otherwise would be. As a result, steroids and related substances threaten to distort the results of games and League standings.")

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deterrence for some violation of that type than do ninety percent of the regular corporations in America.<sup>123</sup>

So to me, I think the basis for a distinction is that one is that it has a direct bearing on the sport and our product.<sup>124</sup> Our product is football. That has a direct bearing on our product.<sup>125</sup> The other has an indirect bearing. The difference is apparent in how our policy came about.

On the steroid policy, the union came to us about that.<sup>126</sup> They wanted it. Everybody here has said that the players were in fact asking for such a policy because they were feeling under pressure to utilize those kind of things. That was a very big issue. They were hearing the reports of people injecting themselves and all kinds of things that were supposedly going on. The players felt that they were going to have undue pressure in order to keep their jobs to use these sorts of things.<sup>127</sup>

With drugs of abuse, it is just not like that. The players are not going to feel any pressure to go out and use cocaine because some other player does, so I think that allows us to balance the safety and the privacy of the players to some extent while also maintaining the integrity of our policy.<sup>128</sup>

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<sup>122</sup> *Id.*

<sup>123</sup> See Art Theil, *Seattle Seahawks Paying High Price for Spring's Foolishness*, SEATTLE POST-INTELLIGENCER, Dec. 7, 2001, at D1, available at 2001 WL 3572415 (reporting that of all North American sports organizations, the NFL has the most serious drug policy, including random drug testing and an extensive list of banned substances).

<sup>124</sup> See Pierson, *supra* note 32 (explaining that Paul Tagliabue claims that steroid abuse is the league's number-one drug problem because performance enhancers directly affect the integrity of the product by disturbing the competitive balance).

<sup>125</sup> *See id.*

<sup>126</sup> See Pierson, *supra* note 32. In March of 1986, the NFLPA proposed a drug program to the League. *See id.* (quoting Gene Upshaw, NFLPA executive director, "[The steroid policy] came from the players themselves. They wanted a level playing field.>").

<sup>127</sup> See Cart, *supra* note 17; NFL Steroid Policy, *supra* note 20, at 1 ("[P]layers who do not wish to use these substances may feel forced to do so in order to compete effectively with those who do. This is obviously unfair to those players and provides sufficient reason to prohibit their use.>").

<sup>128</sup> See Jeffrey H. Kahn, Book Review, *Leveling the Playing Field: How the Law Can Make Sports Better for Fans*, By Paul C. Weiler, 41 SANTA CLARA L. REV. 921, 927-28 (2001) (noting that Weiler argues that there is no competitive pressure to use recreational

MR. JURITH: Ron?

MR. KLEMPNER: You know, it has not been that much of an issue in the NBA, for whatever reason, one way or another. The drugs of abuse program came about in 1983 when *The Los Angeles Times* was reporting that between forty-five and seventy-five percent of the NBA players were using cocaine.<sup>129</sup> And certainly, from the business perspective, as I mentioned before, I think we all share the desire to maximize our revenues and to make sure that we do not give that perception of drug abuse. As Adolpho said, this indirect effect on the sport has always been something that we have wanted to legislate.

When it came to the steroids, it just has not been an issue in the NBA.<sup>130</sup> Basketball players, for whatever reason, maybe it is my rather simplistic view of things, but many players in the NBA will not benefit. I have not seen studies that will demonstrate conclusively one way or another that there are performance-enhancing effects in basketball from steroids. I just have not seen it, and certainly not with respect to most of the positions that players play on the basketball court.

I think that issue of whether something is performance-enhancing has to be judged on a sport-by-sport basis, and, for whatever reason, we have not seen it in basketball.

When we agreed to the policy in our collective bargaining negotiations in 1998 or 1999,<sup>131</sup> it was, in large part, for some of the points Adolpho was saying. Clearly, some of the players felt that if there is a perception out there, we want to go and nip it in the bud. And for those players who do believe that there might be a guy who

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drugs such as marijuana and cocaine).

<sup>129</sup> Mike Kahn, *For Athletes, Names Have Changed, But Drug Problems Remain* (July 20, 1998) (quoting David Stern, "In 1983, 70 percent of the NBA players used cocaine."), at <http://cbs.sportsline.com/u/page/covers/others/jul98/druglede72098.htm> (last visited Jan. 11, 2002).

<sup>130</sup> See Les Carpenter, *Springs' Steroid Suspension Rare: NFL Drug Policy Keeps Players Well-Informed*, SEATTLE TIMES, Nov. 30, 2001, at D1, available at 2001 WL 3528898 ("The NBA tests only once a year for both drugs and steroids, and suspensions for steroid use are very rare.").

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is using something, he wants to be on a competitive and a level playing field, so clearly there was that concern.

But there also was an overriding policy, and I hate to admit it, that it was not such a big deal to implement because the incremental invasion of the privacy rights was not going to be much, because people had already agreed to whatever drug-testing policy we have for the drugs of abuse, so if go and they test that same urine for illegal steroids, so be it.

MR. BIRCH: With all due respect, I would suggest that performance enhancers could have a place in any sport. I think to some extent the experience with the NBA might have something to do with the fact that they do not necessarily test for those type of things.

I will tell you that even among the football players we have a variety of reasons that are given in appeals as to why this particular player for the position that he plays would have no need or interest in taking a performance-enhancing substance. For example, the kicker says, "Well, why do I need to put on bulk? I'm a kicker," or, you have a defensive guy who says, "I need speed, I don't need this."

But the bottom line is that performance enhancers work in a variety of different ways, some of which are to speed recovery time,<sup>132</sup> or to aid endurance,<sup>133</sup> which can be useful in any sport. Some of them are very unique to individual sports, namely, things like beta blockers.<sup>134</sup> Beta blockers tend to make you stay calmer, stop nervous system activity somewhat. It is more of an issue in a sport like archery.<sup>135</sup> Some suggest that people on the golf tour are

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<sup>131</sup> See NBA Drug Policy, *supra* note 23.

<sup>132</sup> See *supra* note 50 (using a performance enhancer to help in knee rehabilitation).

<sup>133</sup> See Elsa Kircher Cole, *X. Sports Law: Applying A Legal Matrix To The World of Sports*, 99 MICH. L. REV. 1583 (2001) (recognizing that nutritional supplements and performance enhancers artificially enhance strength, endurance, and performance); see also *Drugs an Athletic Wrecking Ball*, U-WIRE OHIO U., Jan. 25, 2001, available at 2001 WL 7154770 (stating that performance-enhancing drugs are used to increase endurance).

<sup>134</sup> "Beta Blockers are drugs commonly used for treating heart disease and act to lower blood pressure and decrease heart rate." *Drugs and Sports—The Penalty Box: Others Drugs of Concern*, at <http://www.straightfacts.com/Sports/drugs.htm> (last visited Jan. 11, 2002).

<sup>135</sup> "In sports such as shooting, athletes have used beta blockers to steady the nerves and,

using it and that sort of thing.<sup>136</sup> But in a sport like biathlon, they never use it because they also have to do all the skiing and stuff.

So I agree with you that there cannot really be a universal sort of a list, because it would be too extensive to test everybody for essentially everything. But, at the same time, I would hesitate to let anybody leave with the thought that only football in particular would have some sort of issue with various types of performance-enhancing drugs.

MR. JURITH: Rob Housman?

MR. HOUSMAN: In terms of us, this is not going to be inhibiting. There is only one drug that they draw the line with, and that is marijuana. The reason why the distinction works, in a way, comes from what Adolpho was saying. In fact, I tend to agree. If you give me a sport, I can give you a drug. If I want to help you cheat, I can give you a drug.

You know, for a kicker, what is the biggest problem for a kicker in the final two minutes of the game? Nerves. I have never been out on the field in front of 100 million people on television with millions of dollars on the line and all I need to do is kick a little ball forty yards through an upright. Your nerves are firing away. So a beta blocker right there, all of a sudden you are very calm "I know I can; I am very calm."<sup>137</sup>

So that may be a wonderful list, and you can go to the list of what are banned substances in the Olympics. You say, "Well, why is it there?" Let's look at the street drugs versus performance enhancers.

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by slowing the heart rate, reduce pulse related vibrations in the arm." *Id.* Of the twenty-eight Olympic sports, only shooting and archery test for Beta-blockers regularly. *Grady: Drug Code Not Needed in Golf*, USA TODAY, Dec. 15, 2000, available at <http://www.usatoday.com/sports/golf/sgp/sgpfs14.htm> (last visited Jan. 11, 2002).

<sup>136</sup> In 2000, Wayne Grady, chairman of the Australasian PGA Tour, claimed that performance enhancing drugs would not help golfers, however, golf pro Craig Parry presented evidence to the contrary. Parry said that he knew of three players who won majors in the last ten years who have used beta-blockers. *See supra* note 135.

<sup>137</sup> *See id.* Similar to the way a golfer could use a beta-blocker to remain calm under pressure so could a kicker.

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Take cocaine. Cocaine is a stimulant.<sup>138</sup> If you are feeling a little down before the game, a quick little hit here, all of a sudden you are pretty up.<sup>139</sup> It also is a pain reliever, so let's say maybe your shoulder is a little sore; you take a little cocaine and you feel like a million bucks.<sup>140</sup>

So a lot of the drugs that you look at also need to go out. The street drugs have their origins in pharmaceuticals, and there is a purpose for them, and they become drugs of abuse.

About the only ones we find that you would not have are the hallucinogens because no one would want to be out on an NFL field, or if you are caught in the middle of the paint, with a bunch of big guys there, taking opium or LSD, I mean, I cannot imagine a worse trip, so most of those get crossed off because it is just ludicrous.

Marijuana is actually being debated as to whether or not it can help you if you use it the night before, but most of them are seen widely as being performance-enhancing in some way.

MR. JURITH: Maidie, how do we resolve this?

MS. OLIVEAU: In the Olympic Movement Anti-Doping Code Appendix A of "Prohibited Classes of Substances," A is stimulants, B is narcotics, C is anabolic agents, D is diuretics, E is peptide hormones, mimetics and analogues.<sup>141</sup> Heroin is prohibited under

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<sup>138</sup> Olympic Movement Anti-Doping Code, *infra* note 143 (listing cocaine as a stimulant).

<sup>139</sup> See *Basketball: Cocaine Use Worries NBA*, FACTS ON FILE WORLD NEWS DIGEST, Aug. 29, 1980 (stating that cocaine is a "mood elevator" that might be used to combat stress or fatigue before or during a game).

<sup>140</sup> See Bob Condor, *Marijuana's Therapeutic Value Impresses The Ill*, CHI. TRIB., Jan. 5, 1997, available at 1997 WL 3508105 (stating that unlike marijuana which cannot be prescribed by doctors for any purpose, cocaine is sometimes used as a pain reliever before surgery).

<sup>141</sup> Olympic Movement Anti-Doping Code, International Olympic Committee, Appendix A: Prohibited Classes of Substances And Prohibited Methods (1999), at 33-37, available at [http://www.olympic.org/ioc/e/org/medcom/medcom\\_antidopage\\_e.html](http://www.olympic.org/ioc/e/org/medcom/medcom_antidopage_e.html) (last visited Jan. 11, 2002).

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narcotics,<sup>142</sup> and cocaine is prohibited under stimulants.<sup>143</sup> This is the whole list. All of the athletes are treated the same.

Under Classes of Prohibited Substances in Certain Circumstances,<sup>144</sup> we have cannabinoids, which is marijuana, and it says: “Where the rules of a responsible authority,” which in the Olympic Movement includes the international federation, it could be the national governing body, it could be some other games authority, “so provide, tests will be conducted for cannabinoids (e.g., marijuana, hashish). At the Olympic Games, tests will be conducted for cannabinoids.”<sup>145</sup> And then, the rule specifies the levels that constitute doping.<sup>146</sup>

Cocaine is a local anesthetic. It says, “Injectable local anesthetics are permitted under the following conditions,” and then it lists the conditions,<sup>147</sup> but cocaine is not permitted.<sup>148</sup>

The Resolution is that it depends on the competition you are in. So if you are in a skiing competition where they do not prohibit marijuana, you are fine,<sup>149</sup> even if the athlete thinks that is

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<sup>142</sup> *Id.* at 33. “Prohibited substances in class (B) [Narcotics] include the following examples: buprenorphine, dextromoramide, diamorphine (heroin), methadone, morphine, pentazocine, pethidine, and related substances.”

<sup>143</sup> *Id.* “Prohibited substances in class (A) [Stimulants] include the following examples: amineptine, amiphenazole, amphetamines, bromantan, caffeine, carphedon, cocaine, ephedrine, fencamfamin, formoterol, mesocarb, pentetrazol, pipradrol, salbutamol, salmeterol, terbutaline, and related substances.”

<sup>144</sup> *Id.* at 4.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* “A concentration in urine of 11-nor-delta 9-tetrahydrocannabinol-9-carboxylic acid (carboxy-THC) greater than 15 nanograms per milliliter constitutes doping.”

<sup>147</sup> *Id.* at 39. “Injectable local anaesthetics are permitted under the following conditions: a. bupivacaine, lidocaine, mepivacaine, procaine, etc. can be used but not cocaine. Vasoconstrictor agents (e.g. adrenaline) may be used in conjunction with local anaesthetics; b. only local or intra-articular injections may be administered; c. only when medically justified, upon written notice prior to the particular competition to the Relevant Medical Authority, when applicable, or during the competition in matters of medical urgency.”

<sup>148</sup> *Id.* at 33 (listing cocaine as prohibited substance).

<sup>149</sup> See United States Ski Team (reporting that the International Ski Federation (FIS) will test for cannabinoids (marijuana, hashish) in camp and competition), at <http://www.usskiteam.com/general/dopinglist.bhtm> (last visited Jan. 11, 2002).

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performance-enhancing, but if you are in another sport where marijuana is prohibited, then you cannot do it.<sup>150</sup>

When you go to the Olympic Games, you have a higher standard than during your regular competitions, so it is really a question of education, when an athlete is competing at a different level.<sup>151</sup>

MR. BIRCH: I would also add that one thing that is different about some of the other policies, like particularly the Olympic Movement, is they do not focus on treatment. It is really more of a punitive/deterrent sort of thing. So for us, in particular, part of the reason that distinction is there is because of the vast treatment program that we put into place for the players who test positive for substances of abuse.

From a realistic standpoint, it does not really make much sense to have treatment and counseling for someone who took a beta-2 agonist or something that is more a performance enhancer. There are not too many studies about the addictive nature of some particular performance-enhancing things.<sup>152</sup> And frankly, if we get to that case and we find that there is some suggestion of addiction, then we can refer them to the other policy, and they can get treatment through that particular policy. So that is part of the distinction.

MS. OLIVEAU: I think there are different approaches. The Olympic Movement is going for integrity, whereas the professional sports are going for more than integrity.

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<sup>150</sup> In 1999, the IOC modified its International Olympic Committee Medical Code to include marijuana and hashish in Class III.B as a prohibited substance. See Weekly Report, Week 6, 8 February – 14 February 1999, at <http://www.olympic.org/ioc/e/news/highlights/hl%5F354%5Fe.html> (last visited Jan. 11, 2002).

<sup>151</sup> Cf. *infra* notes 161-62.

<sup>152</sup> Jeffrey Hedges, *The Anabolic Steroids Act: Bad Medicine for the Elderly*, 5 *ELDER L.J.* 293, 320 n.130 (1997) (explaining that the reason steroids are not included in the Controlled Substance Act is because Congress only intended to include those drugs which have a physiological effect or are psychologically addictive). *But see* Molly Hochkeppel, *Packed With Power*, *PATRIOT LEDGER*, Nov. 17, 1998, at 17 (quoting Eric Kupperstein, winner of the World Drug-Free Powerlifting competition as saying, “[s]teroids should be considered like cocaine or any other narcotic because they can be addictive and cause physical harm.”).

MR. BIRCH: Right. And so, I think when you add in things beyond the fairness and integrity of the competition, sometimes you probably need to make some alterations to that.

MS. OLIVEAU: Right. You make classifications based on what your objectives are.

MR. BIRCH: Absolutely.

MR. JURITH: I am going to ask one more question and then we will open it up to our guests for questions.

This is more of a generalized question, and it picks up on something that Ron said in his opening remarks about rights, obligations and notice. You know, we have the reputation around the world as being a very litigious society.<sup>153</sup> Meanwhile, we are setting up WADA and USADA and we have a whole bunch of these new rules and regulations that private bodies, if you will, are putting into place.

For example, we have the Amateur Sports Act,<sup>154</sup> which, as I understand it, requires that before any player is banned from a competition he has the right to notice and a hearing.<sup>155</sup> And, of course, that does not prevent anybody from going outside of the Federation structure to court to get an injunction. If the athlete says, 'I went to GNC. I bought this darn stuff off the shelf because I had a cold. They said it was natural, and now you are telling me that I

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<sup>153</sup> Douglas S. Eakeley, *Role of the Legal Services Corporation In Preserving Our National Commitment To Equal Access To Justice*, 1997 ANN. SURV. AM. L. 741 ("Perhaps more than any other industrialized nation, the United States is known for being litigious and lawyer-dominated.").

<sup>154</sup> See Ted Stevens Olympic and Amateur Sports Act, codified as amended at 36 U.S.C. § 220501 *et seq.* (1998).

<sup>155</sup> 36 U.S.C. § 220522(a)(13) ("An amateur sports organization is eligible . . . to continue to be recognized, as a national governing body only if it . . . provides procedures for the prompt and equitable resolution of grievances of its members."). 36 U.S.C. § 220503(8) assigns the following purpose to the USOC and therefore, by delegation, to the NGBs: "To provide swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports organizations, and protect the opportunity of any amateur athlete, coach, trainer, manager, administrator, or official to participate in amateur athletic competition."

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have now ingested 'Substance 13' on the list, and that was not on the list of ingredients. I do not care what your rules say.'

How do we address that issue, particularly when we are going to have international competition, not just the Olympics but other games in the future, here in the United States?

MR. BIRCH: We are protected through our collective bargaining agreement. Their involvement with the collective bargaining agreement and their participation as a person who is represented by that union is going to help us to ward off any efforts to go outside of the CBA. That has been tried in the past, but without too much success.<sup>156</sup>

I think outside of the labor law issues related to it, I think courts in general are just loathe to deal with issues that they do not normally deal with and that they are not really comfortable dealing with.

MR. JURITH: Well, Ron is going to have players who are going to want to be on the Dream Team.<sup>157</sup> The Olympic Movement is going to test for all the stuff, and it may be outside the scope of that collective bargaining agreement. How do we handle this collision?

MR. HOUSMAN: They do not go.

MS. OLIVEAU: Those NBA players when they are competing at the Olympic Games are not under the jurisdiction of the NBA. We as arbitrators, were we to have that case or the hockey case, we would not review the rules of the NBA. They are irrelevant. Those players at that point are under the jurisdiction of the USOC or, for example, the Czechoslovakian Olympic Committee.<sup>158</sup> They are brought there under a different set of rules.

The entry form that they sign for that competition, and perhaps another hypothetical competition, specifically states what the

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<sup>156</sup> See, e.g., *Holmes v. Nat'l Football League*, 939 F. Supp. 517 (N.D. Tex. 1996).

<sup>157</sup> See *supra* note 43.

<sup>158</sup> See Melissa R. Bitting, *Comment: Mandatory, Binding Arbitration For Olympic Athletes: Is The Process Better or Worse for "Job Security"?*, 25 FLA. ST. U. L. REV. 655, 658 (1998) (quoting the Olympic Charter as stating that any person or organization involved with the Olympic Movement "shall accept the supreme authority of the IOC and shall be bound by its Rules and submit to its jurisdiction.").

applicable rules are. It specifically references the Olympic Movement Anti-Doping Code.<sup>159</sup> It specifies the arbitration procedure which says it is a final arbitration.

Now, the Andreea Raducan case<sup>160</sup> could be somewhat equated to the fact scenario that Rob was positing. The ruling that we, myself and the two other arbitrators who heard that case, made was that her medal was properly revoked under the sanctioning power of the Anti-Doping Code.<sup>161</sup> The IOC could have imposed further sanctions: they could have suspended her and they could have taken away her other two Gold Medals, which she still had.<sup>162</sup> The IOC elected not to do that because there was discretion under the sanctioning provisions.<sup>163</sup> The Court of Arbitration for Sport concurred and dismissed her appeal, so that she still was missing one Gold Medal.<sup>164</sup>

She appealed the decision of the Court of Arbitration for Sport to the Swiss Supreme Court. The arbitration rules are developed by private bodies and, by contractual understanding, those private bodies have agreed to this process.<sup>165</sup> The agreement is that the

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<sup>159</sup> See Olympic Movement Anti-Doping Code 2000, available at [http://www.olympic.org/ioc/e/org/medcom/pdf/doping\\_code\\_e.pdf](http://www.olympic.org/ioc/e/org/medcom/pdf/doping_code_e.pdf) (last visited Jan. 11, 2002).

<sup>160</sup> *Andreea Raducan v. Comité International Olympique, Arrêt du TRIBUNAL FÉDÉRAL SUISSE*, 5P.427/2000, Ie COUR CIVILE, 4 décembre 2000; see also *Andreea Raducan v. IOC*, award of 28 Sept., 2000, reprinted in MATTHIEU REEB, *CAS AWARDS—SYDNEY 2000: THE DECISIONS DELIVERED BY THE AD HOC DIVISION OF THE CAS DURING THE 2000 GAMES IN SYDNEY 65* (2000), at 111 [hereinafter *Raducan*].

<sup>161</sup> Andreea Raducan, a Romanian gymnast, placed first in the Women's Individual All-Round Event. Following her win, she tested positive for the prohibited substance, pseudoephedrine. Relying on the strict liability rules with respect to a doping offense, the CAS found that a doping offense was committed, regardless of Raducan's lack of intent. The CAS did not accept her defense that she only took the pills because her team doctor gave them to her. See McLaren, *supra* note 6, at 396.

<sup>162</sup> Due to sympathy for Raducan's unfortunate predicament, which was highly publicized, the IOC only took away one of her medals. The IOC could have suspended her and/or taken away her other medals.

<sup>163</sup> The IOC has discretion in their sanctioning rules, while the CAS may not have discretion in finding a violation (due to the strict liability rules applicable to doping in the Olympics). See McLaren, *supra* note 6, at 396.

<sup>164</sup> See *Raducan*, *supra* note 160.

<sup>165</sup> McLaren, *supra* note 6, at 380-82 (explaining the private contractual nature of sports organizations).

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Court or Arbitration for Sport is the final arbiter, and if there is a breach of public policy, in international terms, “natural justice,” the athlete has the right to appeal to the Swiss Supreme Court. The Swiss Supreme Court upheld our decision.<sup>166</sup>

There was another decision in Australia before the Olympic Games, a decision of the Court of Arbitration for Sport on eligibility.<sup>167</sup> That decision was appealed to the New South Wales Court of Appeal, which also upheld the jurisdictional process of the Court of Arbitration for Sport.<sup>168</sup>

So I think that facing reality is the best avenue, rather than hoping that appealing to a U.S. court during the 2002 Winter Olympic Games in Salt Lake will result in a different (preferential) result because we are in the United States.

The rulings of the Court of Arbitration for Sport are thought-out. They reference the applicable rules, and the precedents established have developed into a body of law.<sup>169</sup> There have been decisions in favor of athletes on a regular basis when the International Federation rules or the testing process were flawed. The due process is absolutely a very important part of the procedure.

MR. HOUSMAN: If I can, having actually sat in on the arbitration, I could not concur more with that. There is no way in the world, given what I have seen, and assuming it carries over, that any U.S. court would not defer tremendously to the Court of Arbitration for Sport and how it ran its proceedings. I mean the deference would be truly substantial.<sup>170</sup>

I would draw a line of distinction with private contracts. They are going to be dictated by private contractual terms, but this is taken on

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<sup>166</sup> See *Raducan*, *supra* note 160.

<sup>167</sup> *Raguz v. Sullivan & ORS NSWCA 240* (2000); see also McLaren, *supra* note 6, at 392.

<sup>168</sup> *Id.*

<sup>169</sup> See CAS Book, *supra* note 25, at 106.

<sup>170</sup> See *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298, 303 (E.D. Ill. 1931) (“[An arbitrator’s decision] is binding unless it is unsupported by evidence or unless the decision is upon some basis without legal foundation or beyond legal recognition.”).

a whole new level.<sup>171</sup> I used to be an international lawyer. With the involvement of the governments in this, with these agreements being blessed by governments, now you are into the realm of soft law.<sup>172</sup> I mean, this is quasi-governmental. This is international body stuff; this is the stuff that you debate in international legal societies at great length, but this is soft law.<sup>173</sup>

I think what it comes back to now, though, is we are outside the realm of comfort for you guys, the pros, because you are no longer in a collective bargaining agreement where you know what you have signed up for. Your athletes are going to go and compete, because there is going to be a bunch of them who think it is good for their marketing.<sup>174</sup> And so now, you guys have to start playing a role in these discussions internationally as well, which is a whole new bailiwick.

MR. KLEMPNER: Right. And I think during the Games—and I do not disagree with anything that either of you said—absolutely, this is what they signed up for. This is what they bargained for, as Maidie said earlier.<sup>175</sup> We test people once they have won, and we kind of expect that our team is going to win again, anytime they go.

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<sup>171</sup> Labor Relations Div. of Const. Industries of Mass., Inc. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., Local No. 379, 29 F.3d 742 (1st Cir. 1994). A court may not substitute its interpretation of a collective bargaining agreement for the arbitrator's even if it finds the arbitrator's determination to be erroneous. The court's task is limited to deciding if the arbitrator's interpretation is in any way possible. *Id.* James A. R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT'L L. 489, 509 (recognizing that courts are beginning to recognize their role in helping to avoid disputes by promoting informal dispute resolution).

<sup>172</sup> For a discussion of soft law, see Joseph Gold, *Strengthening The Soft International Law of Exchange Arrangements*, 77 AM J. INT'L L. 443 (1983) (According to Professor Ignaz Seidl-Hohenveldern, a distinguished international lawyer, "the distinctive characteristic of soft law, at least in relation to economic matters, appears to be the intended vagueness of the obligations it imposes or the weakness of the commands.").

<sup>173</sup> *Id.* at 444. ("Much of soft law, therefore, is to be found in the law of universal international organizations, including the decisions of their organs, because the membership of these organizations is so diverse. The soft law of these organizations is the result not of failure of will or technical skill on their part, but of the deep divisions among members.").

<sup>174</sup> But see Charles B. Lipscomb & Peter Titlebaum, *Selecting A Sports Agent: The Inside For Athletes & Parents*: 3 VAND. J. ENT. L. & PRAC. 95, 101 n.57 (2001) (explaining that not all players are getting endorsements and the competition amongst top players for paid athletic endorsement deals has increased dramatically).

<sup>175</sup> Bitting, *supra* note 158 (quoting the Olympic Charter).

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The USOC decided to take away the treatment that the professional players, such as, basketball, hockey, and baseball players, have received over the last however many years, and force these governing bodies to submit a year in advance all those potential players who may possibly be playing, and then subject them to random testing at their homes by strangers, by the people who run the USOC.<sup>176</sup>

They have done this without any kind of a showing. It is not as if the basketball players or the hockey players or the baseball players have embarrassed anyone over the last ten years with their drug use. It is not as if they need to keep consistent treatment. You know, the professional players are treated differently with respect to amateurism rules. They live in separate parts of the Olympic Village. They do not live in the Olympic Village. They live in hotels.<sup>177</sup>

For the USOC to be presumptuous enough to go and say, 'Well, your drug policy that you negotiate in your \$2-billion-a-year business is not good enough for us, we need to go and impose these invasions upon your privacy without any showing in the last ten to twenty years that we actually need to do this,' is presumptuous as all hell and may result in the basketball players not going.<sup>178</sup> To the extent that the novelty has worn off with the Dream Teams going and beating the hell out of everybody in the Olympics, this may just push them over the edge.<sup>179</sup>

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<sup>176</sup> Selena Roberts, *In 2 Pro Leagues, USOC Drug Plan Draws Bafflement*, N.Y. TIMES, Feb. 28, 2001, at D1. The special treatment given to professional players in the past is finished. In the past professional athletes were only tested after being named to the Olympics. Now, the USOC wants to make them part of the twelve-month no-notice pool to which the other Olympic athletes are subject.

<sup>177</sup> Oliver Holt, *Winners Who End Up Olympic Losers*, THE TIMES OF LONDON, Sept. 18, 2000, available at 2000 WL 2923054 (reporting that most Olympic athletes stay at the Olympic village, but some professional athletes, such as the Dream Team in 1992, elect to stay in five-star hotels).

<sup>178</sup> See Roberts, *supra* note 176 (noting that the USOC may be acting presumptuously in their new drug testing rules for professional athletes especially since it was not discussed with the leagues before).

<sup>179</sup> George Vescey, *Olympics May Risk Losing Some Big-Time Professional Athletes*, N.Y. TIMES, Mar. 11, 2001 ("The very intention [of the USOC to implement year-round no notice testing on professional athletes] strikes me as virtually an invitation to professionals

MR. JURITH: Thank you. I think that was a great discussion on that point.

Why don't we open it up to any guests who want to ask questions. Yes, sir?

QUESTIONER: I was curious how the major leagues, the professional sporting leagues, have dealt with the inherent conflict of interest between regulating performance-enhancing drugs among their athletes and also putting a product on the field that is faster, bigger, and more aggressive. It seems to me, and I know this used to happen at the college level, and to a certain extent at the professional level, where it was kind of a "[wink, wink] drug tests are coming around in four weeks." My understanding is that is cleaned up.<sup>180</sup>

MR. BIRCH: I do not, frankly, see it as a conflict of interest. I think that it is incumbent upon the league to put the best product out there. It is not incumbent upon the league to put the biggest, strongest, or fastest product out there. So from my perspective in handling the policy, I do not view those as separate, or even conflictual.

I think that perception is perhaps a bit more media-driven than some others, because, from our standpoint, we are looking for excitement, and excitement comes as long as the playing field is level and as long as the players have an opportunity to perform. It comes, in particular, in our sport through immense team training, through the ability for these eleven players to be exactly on the same page, et cetera, et cetera.

So while we appreciate the big hit every now and again and the fast guy, I do not think anyone would suggest, at least to me, that we would appreciate it more if we knew the guy was using performance enhancers and could get just that extra tenth of a second off his forty,

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to duck the Winter Games in Turin, Italy, in 2006, and maybe even in Salt Lake City in 2002.").

<sup>180</sup> Golden, *supra* note 48 (stating that several NBA coaches and players had suggested, in 1985, that the league's policy may be ineffective in uncovering drug use considering that the death of Celtics star Reggie Lewis was partly caused by cocaine usage).

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or something along those lines. I guess I would just say I do not see it like that.

QUESTIONER: Putting aside performance-enhancing drugs, but focusing on recreational drugs or street drugs, why does the League insist on testing athletes for these types of drugs if, admittedly, the super-majority of most businesses cannot and do not do so?

Second of all, if we are talking about performance-enhancing drugs, then we are obviously talking about league and player image issues, as opposed to balancing the field. With respect to that, why does the league insist on fining and disciplining players automatically for drug issues, where you have convicted spouse abusers, you have murderers and other types of criminals in the league that do not get suspended at all?

MR. BIRCH: All right. Well, fortunately, in one of my other capacities I also deal with the League's personal conduct policy,<sup>181</sup> which is the policy that handles that, so maybe I can get to all of your questions.

First, I guess if I understood your question about street drugs, we are doing this, I think, from two perspectives. The first is that we do feel that we have an obligation, or at least the players have an obligation, that is slightly higher than the rest of society. In that sense, we think it is, from both an economic and a social perspective, important for us to try to do what we can do to show that street drug use and illicit drug use are not acceptable and they are things that need to be corrected.

I think that, while it is certainly partially image-driven, it is also driven by what I think is a genuine desire to try to prevent use by not only our players but by kids and people who obviously emulate our players and look at what they do more so than they would look at Joe who works in a factory or something along those lines. To that extent, I think that it is probably our obligation to track those as much as we track performance enhancers.

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<sup>181</sup> The NFL Personal Conduct Policy, from August 1997, is not available for public citation.

On the second point, I guess you were talking about what effect the performance enhancers may or may not have, and in that sense I do think it is critical to the fairness of the competition on the field that we monitor those and that we try to prevent them for not only the player who is using, but to stop other players who are using, like I talked about earlier.

Finally, if you want to compare some of the other things that are going on namely, player misconduct, if you think it is difficult for a corporation to penalize or take discipline against an employee for drug use,<sup>182</sup> you ought to try to take a look at what it is like to penalize or discipline an employee for off-the-job misconduct of any sort.<sup>183</sup> That is a very difficult issue.

And again, I will tell you we do more than ninety-five percent of the corporations out there when a player is involved in any kind of criminal activity. I mean, I could go on for days about what we have done to strengthen the conduct policy and what it entails, but suffice it to say that I would strongly suggest that a player who gets into some trouble in our league is probably worse off than a person who does similar conduct somewhere else.

MR. JURITH: Not to minimize the role of testing in private industry, at least probably the majority of the Fortune 500 companies in this nation test their employees, mostly in safety-sensitive positions.<sup>184</sup> Substance abuse on the job costs American business

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<sup>182</sup> See Comment, *Employer Liability for Domestic Violence In The Workplace: Are Employers Walking A Tightrope Without A Safety Net?*, 31 TEX. TECH L. REV. 139, 182 n.439 (2000) (noting that an employer can take disciplinary action or legally terminate an employee who engages in acts of violence either at the workplace or through the use of employer resources).

<sup>183</sup> *Id.* at 183 (recognizing the increased difficulty in disciplining an employee for conduct outside of the workplace. The ability of the employer to respond to employee conduct off-the-job will depend on federal and state law, the employee-batterer's civil rights, and the employer's duty to protect the safety of the workplace. If the employer could show a connection between the criminal conduct and the employee's job duties, it may be able to discipline or even terminate the employee).

<sup>184</sup> See Sharona Hoffman, *Preplacement Examinations and Job-Relatedness: How To Enhance Privacy and Diminish Discrimination in the Workplace*, 49 U. KAN. L. REV. 517, 542-46 (2001). Almost ninety percent of Fortune 500 companies require submission to a drug test. Drug tests in safety-sensitive jobs might be more widely administered than in other industries due to the reasonableness of the invasion. Federal law requires that

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billions of dollars a year, so it is an issue that is, not just in the sports field but overall, aggressively pursued by industry because it is in their financial interest to do so.<sup>185</sup>

QUESTIONER: Yes. My question is more, why is that? Why do you treat athletes differently? There is obviously this image thing that you are talking about, but I would think that it is unfair. An athlete is just an employee, just like everyone else is an employee. If a regular employee has some misconduct that has nothing to do with their job, and therefore they would normally not be penalized by their employer, but rather by the law under which everyone is equal, why do these leagues insist on treating athletes harder?

MR. BIRCH: Again, I think it goes to the recognition by all parties involved, including the players' associations, that the standard that the players are held to is higher than is afforded just a normal person in the population.<sup>186</sup> I think the article that you read that was written by Bob Lanier<sup>187</sup> is reflective of the fact that everybody understands that for the league to survive and prosper, they have got to take more aggressive measures than, say, an IBM that has a person who goes out and shoplifts and goes through a little legal process and that is sort of the end of it, because that person is not on *SportsCenter* five times a day repeatedly and brought up with dismissive comments about what he did or did not do.

MR. KLEMPNER: If I could just say one thing, and also coming to Adolpho's defense, we do have the champion again of the collective bargaining process, so to the extent that management will tend to overstep its bounds in either the drug area or the discipline

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operators of commercial motor vehicles and some mass transportation employees who conduct safety-sensitive duties must be subjected to preemployment testing for unlawful drug use. *Id.*

<sup>185</sup> Press Release, American Civil Liberties Union, New ACLU Report Debunks Workplace Urine Testing, Citing High Costs, Low Dividends, Junk Science (Sept. 1, 1999), available at <http://www.aclu.org/features/f090199a.html> (last visited Jan. 11, 2002).

<sup>186</sup> See James A. R. Nafziger, *Arbitration of Rights and Obligations in the International Sports Arena*, 35 VAL. U. L. REV. 357, 377 ("Although sports and athletes are special, their special status means a higher standard of conduct.").

<sup>187</sup> Lanier article, *supra* note 56.

player conduct area, we, thankfully, have arbitrators who will put things in place.

I cannot avoid passing up the mention, as we sit here at Fordham Law School, and since we sat and we saw the last panel, where everybody is a fan of whichever team, if we have any Knicks fans in the audience, you have to acknowledge whenever you have an opportunity to do so that the primary reason, if there is one person who you could pinpoint for the great success of the Knicks, that the Knicks have enjoyed the last two or three years, going to the finals, invigorating this City, that is the Dean of this Law School, Dean John Feerick.<sup>188</sup> Had he not found, properly so, that the Golden State Warriors had overstepped their boundaries in terminating Latrell Sprewell's contract, Latrell could have no way signed with New York as a free agent;<sup>189</sup> the only way he could have come here was by trade under our salary cap rules. Therefore, it is John Feerick who is responsible for Latrell Sprewell wearing a New York Knicks uniform. I could not pass up the opportunity to say that.

MR. BIRCH: And that is something to celebrate.

MR. JURITH: Sir?

QUESTIONER: Over the course of time, because sports is entertainment, the employee-employer relationship has been seen much differently. In the leagues, the league employees as we see them in the public or in the Olympic Movement, are actually the product, so that gives them a greater cause to look at them with more scrutiny. Is that the thought process that you folks use? I have heard that thrown around before and wanted to know what your thoughts were, treating them more as a product versus as an employee who, as you stated before, is not seen as much if he is in the back room programming a computer versus being on *SportsCenter* five times a day.

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<sup>188</sup> John D. Feerick is the Dean of Fordham University School of Law.

<sup>189</sup> See National Basketball Players Association on behalf of player Latrell Sprewell and Warriors Basketball Club and National Basketball Association, Mar. 4, 1998 (on file with Fordham Sports Law Forum).

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MR. BIRCH: I guess, from our perspective, I do not see the players as a product personally. I see the game as the product. We have very good people who know how to perform what we do, but in the sense of thinking of them as something that is sort of intangible and different, I do not see it like that.

What I do think, however, is that our League, in particular, to a great extent also the NBA, enjoys a relationship that at least understands that everybody is critical to the success of the League. So from that standpoint, I think they voluntarily take on a greater responsibility and a greater role and obligation than they might otherwise if they were just an employee that was sort of nameless.<sup>190</sup>

It is almost like if you have a big profit-sharing plan for your company, then when you get to that point your players or your employees are more invested in what goes on. They are willing to do things that they might not do had they no equity position. Our League is certainly structured like that, the NBA is certainly structured like that, and I think it does assist in helping us come to some sort of cooperative resolution on issues that are sometimes a little tricky.

MR. JURITH: Yes, sir?

QUESTIONER: I have a question for the two legal types on WADA and USADA, no offense to the others. But notwithstanding the “Butch Reynolds” clause that requires the athletes at the Olympic Games to take all disputes to the Court of Arbitration for Sport,<sup>191</sup> what is to prevent them, since you, Mr. Housman, had mentioned that these regulations have become quasi-governmental, what is to

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<sup>190</sup> Marrazzo, *supra* note 45, at 75 (stating that athletes have a strong influence on other people’s behavior).

<sup>191</sup> In 1992, Harry L. “Butch” Reynolds, won a lawsuit against the International Amateur Athletic Federation (IAAF), the international governing body for track and field for suspending Reynolds for using a banned substance. *See Reynolds v. Int’l Amateur Athletic Fed’n*, No. C-2-92-452 (S.D. Ohio, 1992) (awarding Reynolds \$6,839,002 in compensatory damages and \$20,517,006 in punitive damages); *see also Reynolds v. Int’l Amateur Athletic Fed’n*, 23 F.3d 1110 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 423 (1994) (holding that the district court does not have personal jurisdiction over the IAAF). The entry from requires athletes to submit disputes that arise during the Olympics to the CAS. *See Raber, supra* note 89, at 76-79.

prevent a Butch Reynolds from going to the Olympics, testing positive for a substance, claiming, again as Butch Reynolds did, that he did not take the substance, and claiming his rights were violated, and still taking it to a court; and having the court, even though you said they would defer to the Court of Arbitration for Sport, since it is a quasi-governmental relationship, what is to prevent that court, in the United States at least, from taking that case and taking it out of the jurisdiction of the Court of Arbitration for Sport?

MS. OLIVEAU: What is his argument when he goes to the court?

QUESTIONER: He would claim that again his rights were violated.

MS. OLIVEAU: What rights?

QUESTIONER: Due process. That is what Butch Reynolds claimed when he tested positive during out-of-competition testing, I believe in 1991 or '92, and that is what got the IOC to put in the "Butch Reynolds" clause.<sup>192</sup>

MS. OLIVEAU: That was different. That was the International Amateur Athletic Federation (IAAF). That was not the International Olympic Committee (IOC). It was a very different set of facts.<sup>193</sup>

QUESTIONER: So there is no legal impediment that they would I mean, other than them signing the application form that says they have to take all the matters to court?

MS. OLIVEAU: We cannot stop people from doing what they are going to do. If some individual athlete perceives that he has legal redress through another court system, he can go there.<sup>194</sup> Andreea Raducan appealed to the Swiss Supreme Court, and actually, rather than explaining only the legal issues that she was entitled to have explained under the applicable rules, the Swiss Supreme Court opened up the whole case and still ruled against her.<sup>195</sup>

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<sup>192</sup> See Raber, *supra* note 89, at 76-79.

<sup>193</sup> See *id.* (discussing Butch Reynolds case).

<sup>194</sup> *Id.*

<sup>195</sup> Raducan, *supra* note 160.

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I doubt that anyone in the Olympic Movement would seek an injunction preventing somebody from going to court. Just whoever the opposing party would be in that case would argue that there is an administrative procedure that would resolve the process: an arbitral procedure agreed upon by contract consistent with arbitration law.

QUESTIONER: Would that be more of a concern coming up for Salt Lake than it would be, say, if these games were held in, Toronto for the next one?

MS. OLIVEAU: Well, yes and no. The court has sat ad hoc divisions at three Olympics.<sup>196</sup> The first one was Atlanta.<sup>197</sup> So because the Summer Games are much larger, i.e. with more events, more athletes, more countries, a bigger U.S. delegation, I think that were it to come up, it would have come up in Atlanta. That is not to say it will not come up in Salt Lake, but I do not think it is a bigger concern.

MR. HOUSMAN: I absolutely agree with that analysis, although the only caveat I would have to it is—and, in some ways, this is the beauty of having served as one of the observers in Sydney and having seen the entire process—I think that any American lawyer that had tremendous resources could virtually guarantee that either in front of the Court of Arbitration for Sport or on appeal to a U.S. court after that, that there were flaws in the administration of the tests.

MS. OLIVEAU: The “O.J. argument.”

MR. HOUSMAN: Exactly. I am actually one of the only people who can say that I saw the entire Raducan case. I was there the day she was tested, I was in the room, not when she actually provided the sample, but in the room.

MR. JURITH: Thank you for that clarification, Rob.

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<sup>196</sup> The first ad hoc court was in the 1996 Summer Olympic Games in Atlanta. See McLaren, *supra* note 6. Subsequently, there were ad hoc courts in the 1998 Winter Olympic Games in Nagano and in the 2000 Summer Olympic Games in Sydney.

<sup>197</sup> McLaren, *supra* note 6, at 390 (stating that the “inaugural appearance of the Ad Hoc Division of the CAS coincided with the Centennial Olympic Games in Atlanta in 1996.”).

MR. HOUSMAN: I know, an important clarification.

But I actually witnessed the whole thing. I had been at the event. I saw how they had handled samples. I venture to say that that case could have been presented to you in a way that if there was some heartstring-pulling, that this poor little girl's doctor had given it, you might have had enough reasonable doubt.

MS. OLIVEAU: They tried the "poor little girl" argument.

MR. HOUSMAN: But they also did not present the full evidence, for example, that her sample was put in an unlocked refrigerator at one point.

MR. JURITH: We have time for one more question.

QUESTIONER: One of the things that was mentioned that I found really interesting was the concern that owners may use the drug policies as a way of getting out of bad contracts. I was wondering what other mechanisms are established to police that kind of bad-faith effort by owners? And also, how do you think the salary cap gives incentives for such conduct?

MR. BIRCH: For us, the first and primary protection, is that the owners have nothing to do with the policy. The Management Council runs the policy. The owners and the teams, frankly are, I would not say against, but they have a vested interest in their player not being suspended.<sup>198</sup> That is their biggest issue.

The only time it comes into play is when you have maybe like a signing bonus that has some language in it that requires forfeiture of part of that bonus if the person tests positive, or something along those lines.<sup>199</sup> But because the team cannot orchestrate any of that,

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<sup>198</sup> See *Am. League Baseball Club of N.Y. (Yankees) v. Johnson*, 179 N.Y.S. 498 (1919) (explaining that the league suspension of a player from a team may interfere with the club's reputation and their ability to compete).

<sup>199</sup> For example, a signing bonus recovery clause may state:

If Player fails Club's pre-season physical exam, or refuses to report to club, or fails to practice or play with club at any time for any reason including player's suspension for violating the NFL policies on anabolic steroids or drugs of abuse and alcohol, or leaves Club without its consent during the duration of above contract years, then, upon demand by Club, Player shall return to Club the total

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they do not know until after the fact, all they would be doing at that point is just recouping some of the money in accordance with the provisions, which are usually in there when a player has a history.

The other thing I think that is important is, unfortunately from my perspective, it is very difficult to keep a player out of the game who can play. So the incentives from a team to discard a player are pretty low if he can play.

MR. JURITH: Thank you.

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amount of the bonus having been received by Player, and Player shall have no right to receive any subsequent sums not yet received by Player.