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LABOR RELATIONS AND THE FUTURE OF PROFESSIONAL BASEBALL

EDITORIAL FOREWORD

The Seton Hall University School of Law Journal of Sports & Entertainment Law is proud to publish the proceedings of the landmark conference Labor Relations and the Future of Professional Baseball, convened at the St. John's University School of Law on November 18, 2011. The Journal is a preeminent publication in the field of Sports Law and Denis Hughes, New York State AFL-CIO President, has acclaimed the Labor Law program at St. John's as "one of the finest in the country." The Seton Hall Journal of Sports & Entertainment Law's collaboration with the Center for Labor and Employment Law at St. John's is an innovative step forward in legal education, combining the great strengths of these two top-tier academic institutions.

Javier Diaz

Symposium Editor

Wolfgang Robinson

Editor-in-Chief

A MESSAGE FROM THE SYMPOSIUM CHAIRS

David L. Gregory & Joseph Gagliano***

> . . . There are the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season . . . and all the other happenings, habits, and superstitions about and around baseball that made it the "national pastime" or, depending upon the point of view, "the great American tragedy."
>
> Justice Harry Blackmun
> Flood v. Kuhn,
> 407 U.S. 258, 261-64 (1972)

> The game's beauty and drama make it difficult for some to see the players as employees. Indeed, baseball's owners insisted that the players were not employees within the meaning of the National Labor Relations Act . . . .
>
> William B. Gould IV
> BARGAINING WITH BASEBALL:
> LABOR RELATIONS IN AN AGE OF PROSPEROUS TURMOIL 9 (2011)

[It has been 165 years] . . . since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's Elysian Fields June 19, 1846, with Alexander Jay Cartwright as the instigator and the umpire. The teams were amateur, but the contest marked a significant date in baseball's beginnings. That early game led ultimately to the development of professional baseball and its tightly organized structure.

. . . On St. Patrick's Day in 1871, the National Association of Professional Baseball Players was founded and the professional league was born.

The ensuing colorful days are well known. . . . The formation of the National League in 1876; . . . the formation of the American Association and then of the Union Association in the 1880's; . . . interleague warfare with cut-rate admission prices and player raiding; the development of the reserve "clause"; the emergence in 1885 of the Brotherhood of Professional Ball Players, and in 1890 of the Players League; the appearance of the American League, or "junior circuit," in

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1901, rising from the minor Western Association; the first World Series in 1903, disruption in 1904, and the Series' resumption in 1905; the short-lived Federal League on the majors' scene during World War I years; the troublesome and discouraging episode of the 1919 Series; the home run ball; the shifting of franchises; the expansion of the leagues; the installation in 1965 of the major league draft of potential new players; and the formation of the Major League Baseball Players Association in 1966.

The game's nuances make any observation a multi-layered one. The ball and strike count on a particular batter may determine the kind of pitch that is delivered, and that, along with the comparative strength of hitter and pitcher, will have a great deal to do with where the players position themselves in the field.

We gather today as labor lawyers, sports lawyers, law students, law professors, sports reporters, sports agents, and as lovers of the game that the New York Times in 1971 dubbed "truly immortal." As Professor Gould reminds us, we gather in a time of turmoil. The challenges facing professional baseball today are many-fold and multi-faceted: the problem of hyper-specialization of players; the monumental expansion of the number of teams; the never-ending litany of increasingly complex statistics used to evaluate and "value" players, hitters, and pitchers; the continuing saga of illegal, performance-enhancing drugs; the effects of legalized and illegal sports gambling on the game; the staggering economics of new stadium construction; the expansion of the draft system on an international level; and the pressure to readjust revenue sharing among teams and players. These challenges serve as the backdrop as the Players' Association ("MLBPA") and the Leagues commence the process of negotiating a new collective bargaining agreement to govern our "national pastime."

These challenges come to a boil during a time of unprecedented prosperity. While many other forms of live, public entertainment and diversion suffer, professional baseball has become more and more profitable. Our country may be entrenched in recession; nevertheless, players earn millions and teams earn billions.

St. John's Law School does not and cannot come to discuss these challenges in a vacuum. Consonant with our mission, we are Catholic, Vincentian, Metropolitan, and Global. We are suffused with the charism of St. Vincent de Paul, and with

special focus on the plight of the poor and the oppressed. That charism is woven into all that we do as an academic institution. It is the flame that we hope to kindle in all our students as we send them out into a more and more challenging and complex world.

Neither the Labor Relations & Employment Law Society ("LRELS") nor the Entertainment, Arts & Sports Law Society ("EASL") are strangers to tackling issues of human rights, abuses, and societal power imbalances head-on. Last year, LRELS convened *The Theology of Work and the Dignity of Workers* Conference.[1] In 2010, EASL co-sponsored a symposium on the ethical and legal concerns of illegal music downloading: *Reaching Acc[h]ord – Resolving Disputes Over Music Downloading*.[2] For many years, our students have produced major papers on the subjects of today's conference, especially in our Advanced Labor Law, Sports and Entertainment Law, and directed research and advanced writing courses.

The students in EASL renewed everyone's interest in addressing the challenging myriad of labor, employment and social justice issues facing professional baseball when, during the Society's participation in a Mock MLB Salary Arbitration Competition, they were exposed to some of the practices of the Latin American draft process. That exposure became the spark that inspired this gathering. With the enthusiastic collaboration of the Center for Labor and Employment Law and the student leaders of LRELS and EASL (three of whom are on the Conference Plenary Panel), that spark was nurtured into today's conference.

We welcome our prestigious and dedicated alumni, Gene Orza and Jeff Fannell, who continue to answer alma mater's call to give generously of their time, talent, and mentoring and teaching resources. We are privileged to have esteemed members of the media, the sports agency communities, and the Major League and the Players Association with us today. Their voices will insure that vital constituents needed for our discussion to be meaningfully inclusive will be represented. We welcome our fellow academics from the NYU and the Seton Hall Law Schools, and from Manhattan College.

Above all, we are privileged to have Professor Gould lead us on our journey through this age of "prosperous turmoil."

1. 50 J. Cath. L. Stud. 1 (2011)
2. Unpublished.

Bill has been a wonderful and inspirational friend of St. John's. In 1968, Professor Gould launched his stellar teaching career; he taught at Detroit's Wayne State University, Dave Gregory was a senior at Sacred Heart High School, and the Detroit Tigers won the World Series for the first time since 1945. We did not put these pieces together until the summer of 1984; that summer, Gould was the international labor law star at Stanford and a distinguished featured speaker at an international labor conference at Oxford University; Gregory was an attendee, and an associate professor at St. John's. On January 31, 1992 at a labor conference at Stetson Law School, Gregory asked Gould what policies Labor Secretary Gould would pursue in the Hillary Clinton administration. Someone must have been listening. On April 24, 1996, NLRB Chairman Gould spoke to a standing room audience at St. John's. In January, 1997, Gregory chaired the Labor Law Section of the nation's law professors, and he refereed the charged debate between Chairman Gould and Professor Richard Epstein.

Bill has been a featured luncheon speaker for two major international conferences sponsored by St. John's and chaired by Gregory, at the University College Dublin July 22, 2000 and at Cambridge University this past July 20-22.

We welcome and we honor this great friend of St. John's, the world's leading academic authority on labor relations and professional sports. His book is a masterpiece, reflecting a lifetime of love of this wonderful game. But, more important, Bill is the consummate teacher because of his humanity, compassion, and concerns for the least amongst us. And, perhaps most of all, this deeply evocative book reflects the deep love of Bill's parents for their precocious ball-playing son, the love that he so manifestly passes on to his children and grandchildren. This book is a beautiful and compelling love story on many levels, a labor of love by this great public servant, brilliant teacher, preeminent scholar, the Honorable William B. Gould, IV.

Finally, we thank everyone for your attendance and active participation.

ST. JOHN'S UNIVERSITY SCHOOL OF LAW SYMPOSIUM

November 18, 2011

> The one constant through all the years . . . has been baseball. America has rolled by like an army of steamrollers. It's been erased like a blackboard, rebuilt, and erased again. But baseball has marked the time. This field, this game, is a part of our past. It reminds us of all that once was good, and it could be again. Ohhhhhhhh, people will come, Ray. People will most definitely come.
>
> FIELD OF DREAMS
> (Universal Pictures 1989)

DEAN MICHAEL SIMONS: Good morning everyone. My name is Mike Simons. I'm the Dean here at St. John's. It's my pleasure to welcome you to St. John's and to the Belson Moot Court Room. It's also my pleasure to welcome you on behalf of not just St. John's University but our Center for Labor and Employment Law, our Student Labor Relations and Employment Law Society, our Student Entertainment Arts and Sports Law Society, and all of our cosponsors, including the NYU Center for Labor and Employment Law.

This is an apt time for this conference on labor relations and the future of baseball. The NBA is in the middle of a shut down because of labor strife. The NFL had its own lockout over the summer. The NHL took years to recover from its lockout back in 2005. And yet baseball just is wrapping up its winter meetings in the midst of what has been more than 15 years of relative labor peace. This book, "Bargaining with Baseball," tells a story not only about the love of baseball but about how that labor peace came about.

This is also an apt place for this conference, this gathering of labor and employment law scholars. I can't say it's an apt place for a gathering of baseball lovers. Queens has not been the best place for baseball over the last couple of years, but St. John's has been a fantastic place for labor and employment law and entertainment and sports law.

What my colleague and friend, David Gregory, has built over his 28 years here, and in the last couple years with the Center for Labor and Employment Law, has turned St. John's into a leader in this area. We have a very active Student Labor Relations and Employment Law Society, a very active Student Entertainment Arts and Sports Law Society, and a

burgeoning Intellectual Property Department. And I'm proud to say starting next year a new program in International Sports Law, which will help make St. John's a leader in that field as well.

It's a pleasure for me to welcome you all here this morning. It's always a pleasure for me to be in the Belson Moot Court Room in the presence of our benefactor and my friend Jerry Belson. And I'm looking forward to an engaging day of interesting conversations about labor, sports, and baseball. Thank you and welcome everyone.

PROFESSOR DAVID GREGORY: Good morning. I'm David Gregory. I feel like a wedding planner. This is our third major conference in the calendar year. It's been the best year of my now close to 30 years at St. John's, from at least where I'm sitting. I thank all of you for being with us today.

I have the great privilege of introducing Bill Gould, but first the person who really has given us a great synergy internationally and is the labor and employment law equivalent of E.F. Hutton; when Sam Estricher speaks, people listen.

Two years ago Sam asked me if we would be willing to cosponsor some of our programs with NYU Law School (where he is the beloved Dean of the Global Labor and Employment Law academic community). Of course, I immediately said yes. I've worked with Sam since I came to New York in 1982 to begin teaching at St. John's. He was the chair of the City Bar's Labor and Employment Law Committee. I was a rookie and he quickly became my intellectual big brother in so many ways. This past July we took our program to Cambridge University; employment dispute resolution sparked a remarkable gathering. I've asked Sam to say a few words.

Sam is always thinking and seeing over the horizon, so I've asked him to come as our senior partner in labor and employment law to tell us a bit more about what he's up to and what he sees over the horizon. So, Sam, thank you so much.

PROFESSOR SAMUEL ESTRICHER: David gave me what seemed to be a larger remit that I think I should exercise. You are here to hear Bill Gould speak on baseball. I have a little bone to pick with the Dean because he said that Queens has not been a good place for baseball. Now, my wife and I have never lived in Queens, but my wife is a diehard, passionate fan of the Mets. Being a fan for the Mets is a little bit like being a national in one of these tiny little principalities that always get destroyed whenever the war comes. It's

terrible. I mean it's punishment, but it's also loyalty. That's a virtue that I'd like to further in myself, and she has a great deal of.

Queens has been loyal. Queens is the home to the greatest team in baseball. Is it great because it wins all these games? No, it's great because it's a fighter. It's like the old Brooklyn Dodgers, they're fighters. It's really easy when you buy all the high talent and you bring them to New York and you name a cookie bar after them. That's just the easy path. The hard path is to do it without money, to do it without a great stadium, to do it without being in a big market. That's the hard path and that's where your mettle gets strengthened and tested. So that's the bone I have with the Dean.

I have a bone to pick with David. I love David and my bone is not with David, it's really with God because God seems to have made me David's big—he said his intellectual—his big brother, his intellectual big brother. It would suffice for me had he made me his basketball playing big brother and he could have left the intellectualism for someone else. I mean it just goes so far, this intellectual growth, when it's not accompanied by other aspects of growth. Now, my wife would say the problems, Sam, are not just physical, but we leave that for another time.

I am here because I love the game of baseball. I have gotten to know Gene Orza over the years. He's a great figure in this sport and I'm glad he's now been liberated to do other things. I think that's very good. There are other people in the audience that I know very well, including my colleague on the Labor Center Board Eisner, Gene Eisner. I've known Gene Eisner for a very long time.

I've also known Bill Gould for a very long time. I told him just yesterday that I was at Cornell ILR. I think it was called Collingswood Reading Room, and we were allowed to smoke then. It's a great time to be alive. And, you know, you didn't have this access to Xerox machines or the print button, so we had to get these books. I remember reading William B. Gould IV, writing about race in the labor movement and writing really good stuff. One, I thought he must be unbelievably old and, two, he must be unbelievably rich because who has a roman four after his name?

[Laughter]

So I was very eager to meet him. We did meet in Phoenix. We were on an ABA program together, and I've been an ad-

mirer ever since.

The real reason I'm here is because of David. I'm not gilding the lily. David and I are both Irishmen so sometimes we have a tendency to do this. But David is, in my view, the model of what a law professor should be. Most law professors think it's a cushy job. They come into the building; they write two or three articles a year that nobody reads. They have no time for the students because they want to teach the students high theory, which nobody needs, which nobody understands even if they needed it. And the students are then left to drift for themselves in the marketplace.

This is a basic model of modern legal education, but that is not David. David cares about the field, writes in the field, and most importantly cares about the students. And I've seen this a number of years now. This is a truly remarkable person. He's having an impact on the field through his sponsoring and mentoring of all these young people who are going to be in the field. So it's really with a great deal of pride that I share this podium with David and all of you.

PROFESSOR GREGORY: Thank you Sam. I tell everybody at every chance I have that Sam's most enduring work is going to be his remarkable talk to the American Irish Historical Society some years ago on Michael Quill, on whom he wrote his master's thesis at Cornell. There was not a dry eye in the house. That's Sam's real legacy.

The paradigm example here in-house of someone who has a true vocation and who loves his work is Joe Gagliano, an adjunct professor who is working more than full time several times over. Joe sang "Which Side Are You On?" in St. Thomas More Church for Cardinal Edward Egan on March 19, when the Cardinal celebrated the closing Mass of our *Theology of Work and the Dignity of the Workers*' Conference. It is Joe who really put some of the pieces together for today's conference, and I'd like him to say a few words.

PROFESSOR JOSEPH GAGLIANO: Thank you very much, David. You might want to stand for this. [Singing the National Anthem] "Oh, say, can you see by the dawn's early light what so proudly we hailed at the twilight's last gleaming? Whose broad stripes and bright stars, through the perilous fight, o'er the ramparts we watched were so gallantly streaming? And the rocket's red glare, the bombs bursting in air, gave proof through the night that our flag was still there. Oh, say does that Star-Spangled Banner yet wave o'er the

land of the free and the home of the brave?'

Play ball! I mentioned to folks last night that my most proximate connection to baseball is that I actually did deal with baseball in Queens. I had the privilege of singing the National Anthem for the Mets for a number of years. Whenever they had nobody famous, they called me.

It was a wonderful, wonderful experience. That was the crux—that was really the full scope of my connection, other than being a fan, until I started teaching here at St. John's and had the blessing, truly, to work with the students in our Entertainment, Arts, and Sports Law Society as their faculty moderator. They've taught me a lot about baseball. And they're truly a wonderful group of students who are extremely dedicated. It is they who put in all the work. I just helped them along the way. That's all.

I never can actually fully sum up the amount of gratitude that I have for David. It is extremely an honor to be able to teach with David, since David was my professor. It's hard to imagine because at the age of 40, you know, he probably started teaching when he was nine. Right? And he is an amazing man to work with. He is a colleague that you can collaborate with on any and every level. He supports and he doesn't just come up with the ideas but then he expands them and works till the end of the day to make sure that every single detail is in place. It's always my pleasure. I thank you all for coming today and on behalf of the Entertainment Society I am happy that we can present this panel to you.

PROF. GREGORY: St. Augustine says that when you sing, you pray twice. We just prayed several times past twice.

Read this book. Ken Belson and I were talking last night at some length. The great books are really love stories. The great books teach us about the theological virtues of faith, hope, and charity, about the cardinal virtues of justice, prudence, temperance, and fortitude. Great books are about more than their subject matter in the immediate sense; they're about the things that really matter. As Gene Orza put it remarkably well when he was here in May, "Value most the things that you cannot see." This is a book that approaches that high standard.

We won't go near the final four questions—death, judgment, heaven, or hell—we'll save that for those above our pay grade. This book is a love story about Bill and his parents; it is deeply evocative. When Joe and I we were collaborating on

our statement opening this symposium you could hear the violins playing and the angels weeping tears of joy.

I have known Bill before he knew me. I followed his work as a junior academic, and there we were at Oxford University in the summer of 1984. Going back to the Martha and the Vandellas theme, you can't forget the Motor City. When I was a senior high school student in Detroit in 1968, the Detroit Tigers obliged me by winning their first World Series championship in 23 years, 1945 to 1968. Bill was a junior professor starting a brilliant career, kicking things off at Wayne State University in Detroit. We didn't know any of this until we met in the fall of '84.

Bill's been a tremendous friend of St. John's. He's been with us on several occasions. He's keynoted two major conferences for me, one at Dublin Law School in July of 2000, and most recently Cambridge University this past July. Can Bill Gould follow Bill Gould? This was the question. I'm thinking, "There is no way." At the Dublin conference he talked about his ancestor who swam out to a Union navy ship and then embargoed goods off the coast of Ireland during the Civil War. He kept a journal and ultimately published it. Bill read from that journal before it became a book; a remarkable story.

My wife Garris, who had been at both conferences, said at the July conference that Bill really did trump his original talk. Now the question is can Bill go three for three? For the law students in the audience, read the footnotes. Footnote one, news to me which I've never heard before, Bill has a forbearer on his mom's side who played for the Negro leagues. BARGAINING WITH BASEBALL is a remarkable book. It's a love story. And I'm delighted that Bill is with us. Without further ado, Bill Gould.

MR. WILLIAM GOULD: Thank you. Thank you very much, Dave, and thank you to Dean Michael Simons and also Professor Gagliano. How can we top that? What a wonderful rendition and how important it is to sing and to, as in his case, sing so well. And, Sam Estricher, it's great to see you here. Sam is someone I've known over the years. Dave Gregory and I also go back a number of years together.

I remember meeting Dave at Stanford Law School as well and then, as he indicated, in the 1990's to be invited by St. John's Law School to be here with Basil Patterson, one of your distinguished graduates, as well as Gene Orza. Most recently,

I was invited to this wonderful conference that Dave put together in Cambridge in the United Kingdom again demonstrates how Dave has done a fabulous job here at the St. John's Law School. And I am really humbled and honored to be part of your proceedings here.

What I want to talk to you about today is what I talked about in large part in the book, the way I've seen the game of baseball in particular. The context of sports generally evolved since 1946 through this year, 2011. The book talks about the earlier years, the first 70-plus years before, as I say in the preface, I came into the world of baseball. And I really began with the world of baseball that sweet summer of 1946 when a lot of things happened to me personally and to baseball generally that have had an important impact on me and baseball in the years that followed.

That summer, for whatever reason, when our fourth grade class let out a bunch of us went down to the ball field and our mothers packed our sandwiches every day and we played baseball all morning and all afternoon, all summer, every day, with no uniforms, with no equipment rather than a couple of bats and a couple of balls, one or two balls. The guy who had his own ball was the most powerful and popular guy around.

There were no uniforms and no umpires, so that the game was very much—as a Red Sox fan I always loved good hitting and the game was very much skewed towards hitting because no umpires, no call strikes. And it wasn't quite like it was for a period in the 1880's and 1890's when the hitter could call for the kind of pitch he wanted, but you waited for your pitch and only peer pressure forced you to swing at something that might be a little less suitable from your perspective.

We had gloves. We left our gloves, as the major leaguers did until the rules changed in 1953, on the field. The field, there were no uniform distances between the bases. The bases were where the grass was thin, where the grass was worn out, and no measurement. And the catcher, the catcher was the guy on your team who took the ball on one bounce. We had no equipment for the catcher. We loved it.

We played every day and we read about it and listened on the radio; not on television because only the rich people had television that year of 1946. And there was one guy down at the end of the block whose place I would be able to visit from time to time, when I saw a game or two on television that year. It wasn't until '47 when television became more popu-

lar. The wonderful biography of Willie Mays chronicles in detail the advent of television and how television changed the game.

But the radio, the radio created images in our minds about that season of 1946, about the great Ted Williams. And my father who, as Dave said, played such an important role in this and was not interested in baseball at all, but he indulged me and when he consoled me when Williams, as he rarely did, struck out when the bases were loaded to me and said to me, "It has happened to the Babe also." So he had been in that period and that made me—it didn't make me feel particularly great but it made me feel a little better.

1946 was the year that players, the great players were coming home from the war. And, as you know, FDR had decreed that baseball should continue during the war because of the war morale. So suddenly you had many players coming back. Greenberg had arrived in the fall of 1945 but Williams, DiMaggio, and Musial were all coming back in '46. I don't think we appreciated the full impact of this until the summer went on.

What we didn't realize that summer of 1946 was that not only were we learning about this game of baseball and being drawn to it and being excited about it and feeling passionate about it because of it's on the field dimensions, but then off the field dimensions were developing that very year which have had an impact on the way in which the game has gone in these 65 years subsequent to that sweet summer of 1946. One, Jackie Robinson, Branch Rickey signed Jackie Robinson in 1946 and Dodgers assigned him to the Montreal Royals and we would read about him as he came to New Jersey to play the Jersey City Giants and the Newark Bears.

Jackie has been written about extensively; what an extraordinary individual. He was the first—not as so many believed until recently the first black player in baseball. Baseball had a number of black players in the previous century, but the first black player—at least known black player—in the 20th Century. There were of course a number of teams that had players who—many of them from Latin America who were light skinned and not regarded as black. And teams talked about—Cincinnati, in getting one of its ace pitchers in the early 1920's, talked about whether his color was sufficient to be accepted in the major league.

There were a number of players who were—I always re-

member my father would smile when some of the players were referred to as Indians. Well, maybe some of them are Indians. But Robinson was the first acknowledged black player in the 20th century. It had an enormous impact, of course, on society, the world. *Brown v. Board of Education*[3] of 1954 followed President Truman's desegregation of the armed forces in the year after Robinson came in 1948.

Some of the things that I say in this book about baseball in the wake of Robinson remind me a little bit about the mirror image, I think, of our country in the wake of *Brown v. Board of Education*; indeed, looking back further, the passage of the great post-Civil War amendments which gave rise to the civil rights revolution ultimately in this country. And that is that the actual practice has fallen, in many instances, considerably short of the promises. Much has been—something has been done for the Negro league players who would have been there but for discrimination. As Dave so kindly mentioned last night and today, one of my forbearers played for the Philadelphia Stars in the Negro league prior to—and is still alive—prior to the war, and was a very important part of that scene.

But what came in the wake of Robinson were the elite black players. You know, I point out how the blacks out-hit whites in those years after Robinson, 290 to 260 some. Well, why was that? Because you had only the very top black players coming into the league. And then of course, as has been so well chronicled in years subsequent in the 70's, there has been a retreat in some respects, a decline in the number of black American players playing the game, a decline which is, I think, is attributable to a number of factors, some of which are not within organized baseball's direct control.

The recruitment of more players from the colleges in recent years and the skewing of college scholarships, which help the disproportionately poor, and disproportionately minority towards the big revenue sports like football and basketball and not baseball. And there have been years when the Stanford team, which I watch, has not had one black player on the field. And so one of the avenues for recruitment is responsible for this decline, and still the problem of front line level, emerging of top positions, still is one that is with us ever since Frank Robinson became the first black manager in 1975.

Still in this very year, 2011, with the managerial vacancies

3. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

occurring, we don't see one African American being considered for them even though DeMarlo Hale, who has survived the very hazardous occupation of being a third base coach in Fenway Park; ask Rene Lachemann and Wendell Kim and Dale Sveum himself, who is being hired this year, about him and about that position. And DeMarlo Hale, being a bench coach, not even on anybody's radar screen to be hired.

So we've come some distance but there is much distance to go in the wake of Robinson, who came on the scene that year in 1946. Then he came to the Dodgers the following spring and my—I came home from school and my father, who had no interest in baseball, we sat down at the dinner table and he said, "I hear Robinson knocked one in today." And I was absolutely stunned by that. I, you know, "Dad, you don't have any interest in baseball. You've never talked about baseball." We followed Robinson throughout that summer with keen interest, and eventually got to see him play in Ebbets Field. So that was one very important development that summer of '46 which has had an impact and which continues to be a matter of policy discussion today.

The second was something that happened just a couple of months before we took the field at the Station Field we called it, which was right near the New York Long Branch railroad train station. It's called the Station Field. The distances weren't all that grand, although I had some difficulty in reaching those fences most of the time. I talk about one instance in the preface where I was successful, kind of lucky better than lucky, I suppose, than anything else, where I hit one out there at the Station Field onto Third Avenue.

But while we were playing at the Station Field we didn't know about the Mexican league because the Mexican league had come along just a couple of months earlier. The Mexican league, the Pasquel brothers in Mexico, enticed many of the big stars. I didn't realize at that time how close Phil Rizzuto was. I got to meet Phil Rizzuto. Eric Schmertz had a 100th anniversary of Babe Ruth's birthday at Hofstra University in 1995. I got to meet Phil Rizzuto and I didn't realize at this time he was about to go. He was about to go down to Mexico.

There was both frustration with the salaries that were being paid major leaguers and a concern about their security and lack of pensions; no pensions, the big concern always of athletes who have a very abbreviated playing career. Vern Stephens, who became so important to my emotional fortunes

in those great pennant races of 1948 and '49 when he was with the St. Louis Browns, almost went. But many did go, guys like Fred Martin, Max Lanier of the St. Louis Cardinals, Lefty, Mickey Owen—-who I think Gene talked aboutFalse Gene Eisner talked about last night—-who dropped the third strike in the 1941 World Series and—

MR. GENE EISNER: That may be why he left.

MR. GOULD: Pardon?

MR. EISNER: That may be why he left. He may have left because of that '41 disaster.

MR. GOULD: And then finally Danny Gardella, who became the plaintiff in an antitrust litigation that followed.[4] Because what happened after that summer of 1946 was that the siren's song that the Pasquel brothers were playing turned out to be more ephemeral than real and the players wanted to come back. And baseball said, "No. You can't come back. You're going to be banned because of the fact that you left baseball. You were tied to us by the reserve clause and you were tied to us in some instances by contract. There was contract litigation about some of the players leaving in here, in the courts of New York, in New Jersey. And, well, you're not going to be able to come back."

Now, we played every summer at the Station Field '46, '47, '48, '49. '49 we suddenly began to hear of these names that we really didn't know very much about. These very names Lanier, Gardella, because now there was a case in the Southern District of New York called Gardella against the Commissioner, against baseball, suing baseball for a violation of the Sherman Antitrust Act because of this group boycott engaged in against the players who had gone to Mexico.

A big hurdle for Gardella and those players was the 1922 Supreme Court Ruling called *Federal Baseball*,[5] which had said—in which Justice Oliver Wendell Holmes had said that baseball is not a business within interstate commerce, within the meaning of commerce. And although Justice Alito has written an article recently[6] saying that Holmes must be un-

4. Gardella v. Chandler, 79 F. Supp. 260 (S.D.N.Y. 1948), *rev'd*, 172 F.2d 402 (2d Cir. 1949)

5. Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

6. Samuel A. Alito, Jr., *The Origin of the Baseball Antitrust Exemption:* Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 34 J. SUP. CT. HIST. 183, 186 (2009)

derstood, the Holmes opinion in *Federal Baseball* must be understood as illustrative of the era in which he lived, Holmes is generally regarded as been having, like many law professors and baseball players, a bad day. And the decision has been roundly condemned on the—as the years have gone on.

When the Gardella case, however, got to the Court of Appeals, the Court of Appeals for the Second Circuit issued a divided opinion—three different opinions.[7] Judge Hand voted with the majority to remand the case to the district court for trial in light of the changed economics of baseball which had emerged since 1922.[8]

In 1922 of course we had telegraph. Aside from the fact that the teams were crossing state lines, you had the games themselves, which Holmes said were purely a local fair, being communicated about across state lines for profit, for business. Now you had radio. Now the plot was thickening. You had radio. You had television. You had a much more lucrative and complicated situation. The case was remanded and baseball, thinking that there wasn't a chance that the handwriting was on the wall, settled with these players, notwithstanding the fact that Federal Baseball had not been reversed as a result of the Gardella litigation.

It settled with baseball, with Gardella. And so suddenly there we were on the Station Field in the summer '49 reading about these guys that we had never heard about, who were coming back. The Dodgers quickly, perhaps because of the experience that Gene had in 1941, quickly dealt Mickey Owen to the Chicago Cubs. But some of these players became prominent. Lanier still had some gas in the tank and some of the other players—Gardella, was always—I characterize him as light hitting although I'm very careful to note that he had hit a number of home runs prior to his departure.

And so we thought, as the result of those events in 1946 and what followed in 1949, that there were going to be big changes in baseball. Later we will see that others attempt to attack Federal Baseball, which has been partially now reversed—and perhaps we'll talk more about this at the lunch hour—by the Curt Flood Act of 1998[9] for major league labor management relations purposes. We thought that Federal

7. Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949)
8. *Id.* at 407-08.
9. The Curt Flood Act of 1998, 15 U.S.C. § 26b (2012).

Baseball itself might be under attack.

An individual named Mr. Toolson who played at Binghamton and who that, I'm sure probably with a good deal of justification, his career was being thwarted by the New York Yankees because of the reserve clause which relegated him to Binghamton and put him at the bottom of the Yankees' stockpiling of really good players. This is in the period of pure Yankee hegemony, a period in the 1950's when I began to lose some interest in baseball as a Boston Red Sox fan, and began to become very unhappy.

In the 1940's my father was concerned and even complained to our local parish priest in St. James Episcopal Church Father Anderson that, "Bill knows every average of every player, all 25 players in all clubs, in 16 clubs. This is not a well-balanced individual." But in the 1950's I began to turn to other things and became discouraged by the scene that was emerging in New York that Mr. Toolson was complaining about. And my father would say to me from time to time, "Bill, whatever became of baseball? Whatever happened to this game you were so deep, you felt so deeply about?" It was hard.

The commissioner talked about, you know, the need for competitive balance to make baseball flourish. In some respects I think he's done a good job with this, in some respects, not.

And so Toolson tried to attack *Federal Baseball*[10] and he was denied on the basis of what we lawyer's call stare decisis in a per curiam opinion by the Supreme Court. And ultimately Curt Flood as well,[11] once he was traded from the St. Louis Cardinals to the Philadelphia Phillies, a consignment at that time that from Mr. Flood's perspective, given the dominance of Cardinals and the subordinate nature of the second division run of the Phillies with the development, which was unattractive from his perspective. So we had the Mexican league that summer of 1946 which led to a reconsideration of and an argument about whether *Federal Baseball* in 1922 made good sense.

And then the other and most important development as well, that is the union; the union. Robert Murphy, a lawyer for the NLRB, got involved with some of the players who were

10. Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).
11. Flood v. Kuhn, 407 U.S. 258 (1972).

interested for many of the reasons which promoted the exodus to the Mexican league in a union. And they decided to try to organize the players in the Pittsburgh Pirates because Pittsburgh was a union city. The steel workers were very strong there and Murphy, I thought, and I guess some of the players thought that this was a good place to begin.

There was a pitcher that summer of 1946 called the Rip Sewell who threw a pitch—a blooper called the "Eephus pitch"—which sailed up into the air and was very difficult to time. Ted Williams in the 1946 All Star game, which was won by the American League twelve to nothing, unloaded twice in Fenway Park and Ted hit one off Sewell, what was regarded at that time a remarkable feat. The New York Daily News, which my parents prohibited me from reading but which I could see from time to time when I went to the local barbershop, had a great picture of the course of Sewell's pitch in the air, which Williams waited for and then lofted it into the right field seats where all, virtually all of Williams' many homers went.

But Sewell was against the union and he was a leader in the Pittsburgh Pirates when the Pirates turned their back on the union in a vote not to strike. The union was squashed in its tracks and the owners then jumped in. Recognizing discontent, the baseball writers were later to say that the doxology now is the appropriate way to look at baseball, thank the major league, from whom all blessings flow. They formed a pension committee which I suppose might have been looked upon as a violation of the Act at that time, but was not protested and they worked out a pension plan in that period.

No union came along until 1954 and no active union was to come along until Marvin Miller became the leader of the union chosen by the players in 1960's. A great book by Charles Koor,[12] on the development of the union and in which Koor interviewed not only Miller but many of parties. It was quite a feat for Miller to gain the confidence of many of the players who were saying at that time publicly that collective bargaining has no place in baseball; maybe we do need some representations but not collective bargaining. Miller formulates the first comprehensive collective bargaining agreement in baseball and negotiates a provision for grievance arbitration

12. CHARLES KORR, THE END OF BASEBALL AS WE KNEW IT: THE PLAYERS UNION 1960-81 (2005).

machinery, which is to become most important as this story plays itself out.

Meanwhile, as he is moving along, Flood, with union support, is pursuing his case, protesting his transfer. He loses his trade. He loses in the United States Supreme Court five to three. And the Supreme Court saying that, "Yeah, maybe if we were to look at this issue of whether baseball is an industry within the meaning of the interstate commerce clause then the interstate commerce provisions of the Sherman Antitrust Act, maybe we'd look at it differently, but stare decisis compels us to adhere to *Federal Baseball* because Congress has had the chance all this time to change it and it never has."[13]

Meanwhile, Miller and the union were negotiating a number of provisions in the collective bargaining agreement. One of them becomes the so called "ten and five rule" which allows a player to veto a trade, which we hear of quite frequently these days, when he has sufficient seniority.

Ron Santo, who recently died, was the first player to in effect get, through collective bargaining, what Flood could not get through the antitrust courts because of Federal Baseball. And in the wake of Flood comes the salary arbitration provision, something directly as a result of the representation made to the Supreme Court by the owners who said, "Your Honors, collective bargaining is the way to go here, not through the antitrust laws. We'll go back to the bargaining table with the players." And they get the salary arbitration system which comes into existence in 1973, but then in many ways the most important of the developments of all unfold.

A picture that you here in New York know something about, James "Catfish" Hunter is employed by the Oakland Athletics, part of these great dynasty athletic teams, very much like Whitey Ford. You know, if you couldn't get him in the first inning; he's weak in the first inning. If you couldn't get him in the first, it's awfully tough to get thereafter. Charlie Finley, who was owner of the A's, a rather irascible, difficult personality decides that he is not going to pay Hunter his insurance. "I'm not going to provide Hunter an insurance policy, which is in his agreement," but Finley discovers it's not to his tax advantage, in his view, to do so. And this matter is taken to arbitration, the grievance arbitration machinery.

13. Flood v. Kuhn, supra note 11.

Finley is found to have materially breached his contract.

Hunter becomes a free agent and negotiates offers from; he's the only kid on the block. He negotiates a great offer from the New York Yankees, but also with the Yankees gets a guaranteed contract. And this, in many ways, is more important, the more important part of the story, the guaranteed contract. If he becomes ill or he becomes unable to play or skills depreciate, that money has to be paid. And the guaranteed contract becomes, not because of the collective bargaining agreement or anything in it but the practice that emerges in the wake of Hunter, the rule and not the exception in individual contracts of employment because of very tough agents like some are lawyers, like some that we have here; Tom Reich from Pittsburgh who was a leader in negotiating these types of agreements.

And then in 1975 Andy Messersmith and Dave McNally challenged the owners' view that even when your contract expires as a player, play out your option year, you can't go elsewhere.[14] Why? Because you're ours. You're reserved to us because of the reserve clause. What about the Bill Gould who wanted to play baseball but now is 75-years-old and he's no good to anybody? No, it doesn't matter. He's ours for life, whether he's 75-years-old or 25-years-old. And so Peter Seitz, the arbitrator who ruled in the "Catfish" Hunter case 1975,[15] rules that when the players play out their option that their contract is at an end. And, if they do not negotiate another agreement, they are free to bargain with other teams.

Now, the owners didn't even want to open the camps the following year in 1976. Bowie Kuhn ordered them to open the camps. They were in a great period of uncertainty. They finally negotiated a collective bargaining agreement in the summer of 1976 which has, in basic broad parameters, really remained the situation that we deal with in basic broad terms to this very day.

You know, Finley's idea and the idea of a few aberrants was, "Hey, let them all become free. See how they can make out on their own." You know, like Br'er Rabbit. "I will save you. We can only allow people to become free after they have

14. The arbitration of that issue was later affirmed by the Eighth Circuit Court of Appeals. Kansas City Royals Baseball Corp. v. Major League Baseball Players Assoc., 532 F.2d 615 (8th Cir. 1976).

15. Professional Baseball Clubs, 66 Lab. Arb. Rep. (BNA) 101 (1975) (Seitz, Arb.).

six years of seniority. Limit the number of people who go on the market." Finley wanted them all to go there. Koor talks about this in his book.

And then this sets off what we think of as a kind of thirty-years-war between Major League Baseball and the union; strikes and lockouts every time the collective bargaining agreement expires. Every single occasion strikes and lockouts, and the basic theme is that the owners are trying to recapture some of what they lost in 1975. We come to 1994-1995, the mother of all strikes, where the NLRB intervened in unfair labor practice proceedings under a provision that had not been used very much in previous years. In the years before the Clinton board was there, goes into Federal District Court utilizing Section 10-J and petitions then Judge Sotomayor, now Justice, to grant a preliminary injunction against the owners for their changes, free agency and salary arbitration.[16] And the players returned to the field. The owners accept them. They negotiate, after a year and a half, a collective bargaining agreement in November 1996. And they have negotiated agreements ever since that period of time peaceably, without any dispute.

There are many reasons offered for this development in the wake of 1995, and I think maybe all of them have some persuasiveness. One is that they may have, after all of this warfare; which reminds us so much of what is going on today in football and basketball, particularly in basketball today; they can stare into the abyss and realize that a lot of people were becoming disaffected, were skeptical, cynical about the game, and that maybe there ought to be another way to resolve the differences. And apparently, for the fourth time in a row, they will do it again within the next day or so if reports are correct about what's going on right now in the collective bargaining process; 1996, 2002, 2006, and now 2011 in the most recent set of negotiations.

Prosperity—Baseball has revenues today almost sevenfold beyond what baseball had in 1995. The game has prospered and it has prospered for a number of reasons. Obviously the internet is one of them. I talked about how when I was a young student at the London School of Economics my father

16. Silverman v. Major League Baseball Player Relations Comm., 880 F. Supp. 246 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2d Cir. 1995) (applying § 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j)).

would send me the clippings in the mail because he knew that I would have a great sense of excitement that spring with the Red Sox breaking to the top of the pack for the first time in a long time; Johnny Pesky at the helm. Of course it was not to be. It was a very short lived experience. But he religiously sent me those standings and I would then rush to see what more I could find out from the International Herald Tribune, which was a day or so late. The British newspapers usually didn't have the stories.

Well, compare that with now. Six years ago, I was seeing what's going on with the Red Sox when I went down to a local sports bar in London. I can go downstairs to my computer at the school that I was teaching at and I can learn about what's going on. I can see simulated games; I can see games on the internet.

Globalization—of course generally, the ability to sell things, to go to Indonesia and Turkey and see people wearing Yankee hats, people who are wearing UCLA jerseys, who don't know anything about UCLA, but they bought these hats. And of course the television thatFalse.broader, more television in Japan in the 1980's of Major League Baseball. . .that we had here in the United States through cable. I was seeing while I would travel in Japan, see more in the 1980's; so, enormous changes in a number of areas.

Of course the focus of the Blue Ribbon Committee, which [MLB Commissioner Bud] Selig put together at the beginning of this century, was more competition. The New York Times said—and I'm going to quote the Times again just in a second. It was regarded as the paper of record, although not necessarily in the respect in which I'm going to quote it. But the Times said that, you know, this idea of a wild card is wrong.[17] It goes against the idea. Bud said, "Well, we're not like basketball, where only the bad teams are not part of the postseason. We're a sport with winners." Well, you know, I think there are a lot of things that they're doing wrong, which are against the idea of fair, competitive integrity, but there are lots of things obviously that are being done right, which affects fan interest. There's more money, more peace, more prosperity.

Competitive balance, you know, the idea was that if all

17. Editorial, *Virtual Baseball*, NEW YORK TIMES, Sept. 4, 1995, http://www.nytimes.com/1995/09/04/opinion/virtual-baseball.html

these free agents can go free, it will be like the 1950's when of course there was no free agency and there was no draft system. And the draft was put in, in part, to say. "All right. We're not going to let the Yankees have every Mickey Mantle that emerges on the same. We're going to let some of the other clubs have a chance." Competitive balance, as I point out in the book, is judged by a number of criteria; winning and losing percentages.

Teams that are over .600 and under .400, which presumably discourages interest, much better in baseball much better than other sports like football and basketball. Turnover percentage in the postseason, baseball is much better than the other sports. Only with regard to the number of years that a particular team, perhaps because of Kansas City and Pittsburgh has not been in the postseason is baseball lagging.

But here is the interesting thing that comes out through this data which is in this book. All of these developments were taking place long before the reforms were placed in the collective bargaining agreement which were designed to deal with the problem of unimpeded free agency and the Yankees getting everybody because in the agreements which followed the strike you get two particular provisions, the so-called luxury tax.[18] Baseball doesn't like to call it the luxury tax, competitive balance tax, which is really aimed almost exclusively at the Yankees. The Red Sox have been caught by it a couple of times. A couple of other teams have been caught by it. And you can say that the other teams are maybe discouraged or have a justification for not seeking free agents by virtue of this tax. Revenue sharing and the luxury tax are placed in the agreements but competitive balance, the competitive balance criteria that I'm discussing and that puts baseball in a favorable position vis-à-vis the other sports existed simultaneous with free agency. We've had a more competitively balanced game since the events that I described in 1974 and 1975.

Now, baseball is confronted with a lot of problems, some of which may be addressed in this coming collective bargaining agreement, some of which may not. Drugs—Professor Hank Greely at Stanford Law School has written an article[19] which I

18. *See generally Luxury tax (sports)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Luxury_tax_(sports) (last visited August 4, 2012)

19. Henry T. Greely, *Disabilities, Enhancements and the Meaning of Sports*, 15

discussed in the book in detail, talking about how difficult it is. This is the age of enhancements.

We can see this on the, I don't want to have my grandsons watch the baseball games, fortunately one of these ads has not come on when I've I have been there with them but I know they must see it. Viagra ads on the baseball games. This is the age of enhancement, isn't it, in many respects.

Greely has a long article discussing this in detail, but I think, in my view, the business of drugs in baseball has been a scourge. It has been a scourge and it has been something that baseball gradually, primarily through the pressure of people like Lance Williams of the San Francisco Chronicle who wrote about Barry Bonds in the "Game of Shadows"[20] and the congressional committees who wanted to preen and dance and show off in front of television, but nonetheless baseball began to move. You know, baseball had adopted a reform in early 2005 and Congress said, "Hey, you've got to move again." And [Major League Baseball Players Association Executive Director Donald] Fehr said, "Hey, don't we have to see what the results of our reform are?" No. So they negotiated other changes.

Now, Michael Schmidt of the New York Times[21]—who I sense is not baseball and the union's a great favorite—-maybe that's how he got dispatched to Iraq—-has written a lot of eloquent, very informative pieces, I think, on the problems that baseball still faces with the testing procedures which are in place. But of course the big 500 pound gorilla which is in the background is HGH. We'll see, when this agreement is announced. My sense is that you're not going to see very much in the area of HGH. You're not going to see much movement. You're not going to get much movement until somebody pushes baseball, as may ultimately be happening now in football, to move on them.

Now, on the area of drugs, I can't pass the subject without mentioning the fact that I have offended and angered a guy who I regarded as my friend over the years, Gene Orza, by something I have in this book about him which characterizes

Stan. L. & Pol'y Rev. 99 (2004).

20. MARK FAINARU-WADA & LANCE WILLIAMS, GAME OF SHADOWS: BARRY BONDS, BALCO, AND THE STEROIDS SCANDAL THAT ROCKED PROFESSIONAL SPORTS (2006).

21. Articles by Michael S. Schmidt, http://topics.nytimes.com/topics/reference/timestopics/people/s/michael_s_schmidt/index.html (scroll to the bottom of the page, type "baseball" in the search box).

a position he took, or I thought he took. And he has advised me that I'm wrong and I apologize to him for being wrong in a mischaracterization of his position.

Here I say my *mea culpa* about him and he said to me, in a very angry email, he sent me an email last August. I was in New Orleans at the time I looked at the computer. I felt that this was one of those things you get to the mail, you know, where someone is saying, "Let's indict the president. Let's. . .," you know. And then I was about to erase it and then I noticed, no, it's to me. It's me. It's from Gene Orza. And he was very angry with me and I apologize to Gene deeply for mischaracterizing his position.

Now, I sense—I apologized for this but I sense—but I wish I could, in writing this book—it's a long book—do this again. I quote from the New York Times about Gene Orza. It's an accurate quote. "Gene Orza, the union's number two, dealing with proposals about drug reforms, offered the lame comment the other day that steroids were no more than cigarettes. This is the same Mr. Orza," said the Times, "who said last year, when the first years' test results were announced, the problem was under control."[22] This was written in 2005.

Now, that's an accurate quote.

Mr. ORZA: That's not an accurate statement. . .

Mr. GOULD: I didn't have to write; I didn't have to put this quote in the book, and I clearly, well, Gene didn't say it, looking back on it, I didn't have to provide that quote to make my point. If somebody had provided a quote about me; and there have been a lot of quotes about me, I wouldn't have been upset about it. Gene didn't say he was upset about it but I'm sure, as his statement just indicates, he is upset about it. I didn't use good judgment including that quote.

Now, big issues in front of us; drugs. I think baseball is going to be, we'll see what happens. I don't know what will be in this provision. Either having minor league testing on HGH—and as you know one of the guys who's been on the league whose tested positive says, how much of this there is, "I don't know." We don't know. But the record with regard to steroids does not seem to be one that inspires a great deal of

22. Harvey Araton, *At Last, Selig Assumes a Position of Authority*, N.Y. TIMES, Jan. 14, 2005, http://www.nytimes.com/2005/01/14/sports/baseball/14araton.html; WILLIAM B. GOULD IV, BARGAINING WITH BASEBALL: LABOR RELATIONS IN AN AGE OF PROSPEROUS TURMOIL 220 (2011).

confidence.

Drafting—there will be probably changes in drafting. The major league owners are deeply upset and want to, amongst other things; there are many ideas that are out there about changes in the amateur draft system. One of them is to provide for a so-called slotting system where teams cannot exceed offers. As you may know, Joe Borchard, a particular offer that's set forth. As you may know, Joe Borchard, who played right field for Stanford, great power hitter at Stanford; as he told me when the White Sox came into Oakland, he said to me, "People don't realize how hard it is up here." They paid him five million dollars. They didn't get anything.

This is the difficulty where you can't make or at least it's difficult to make an estimate of a player. It's much more difficult to make an estimate of a player's worth in baseball than it is in football and basketball where the colleges—this is a subject unto itself—are a kind of a minor league, should they be paying their minor leaguers. And these guys are much more pro-ready than are baseball players. So there will be, I think, some changes in the draft, and it may be that some of them affect slotting.

Revenue sharing— it may be that revenue sharing in basketball, we'll talk more about basketball at lunch. But it may be that if basketball had some revenue sharing you wouldn't have the Sacramento's and Golden State's and Memphis' and New Orleans', the teams in economically perilous circumstances. Basketball has always been a weak sister economically because of the fact that some of the teams are in perilous economic circumstances. Revenue sharing provides money to teams like the Oakland A's who don't seem to be interested in getting anybody to come to their games and want to maybe use it—maybe this is what Finley was about at various times—use it as a vehicle, the lack of attendance, to be able to move elsewhere. You may have read about what I called them in the book the Oakland, San Francisco, San Jose fracas.

Globalization—will the draft affect globalization? Is the protocol in Japan, will this be a part of the collective bargaining process? Will it be? I talk in the book about what might have happened if Matsuzaka had said "I don't like the deal. I want more money. I don't want Seibu to get all this money. I want more money from the Red Sox." Could he have, as Mr. Irabu apparently was threatening to do, could he have taken

a different route?

The thing about Japan is that you have players who are the senior players, the guys whose careers could be in a period of decline, like Mr. Messersmith and Mr. McNally, who say, "You know, I don't care. Let me attack the system. I don't have much to lose." Those guys would be likely to be free agents under the protocol between Japan and the United States. So the only guys who are interested in attacking the posting system which exists between Japan and the United States are the up and comers who are looking to leverage their capabilities and to become people who can be transferred to the United States once their team gets money from the United States and once they, for a period of time, become available to the team that their Japanese team chooses.

Thus far, baseball has seen and has profited, in their view, from the academy system in Latin America which has been full of abuses. I think Sandy Olsen and others have looked at this and progress is being made to clean up some aspects of this, but what about Cuba. What about Cuba? Some of us, like myself, know that we're not going to live forever and the Castro brothers are not going to live forever either. And when the Castro brothers are gone there may be more of an exodus of very talented players from Cuba to the United States. What's baseball going to do? Is it going to try to institute and is it in the interest of the players to institute a draft system of some kind which begins to have applicability internationally?

Well, it's a great game, and it's a game that has undergone enormous change since that sweet summer of 1946. The game was great that summer of 1946 for not the least of which was that the Red Sox left the Yankees 17 games behind them as they marched on to the pennant, ultimately clinched in Cleveland when the champagne was getting warm and when Williams finally hit his inside the park home run to left field, which brought triumph over the Cleveland Indians one to nothing, with Tex Hughson besting Rand Embry. The game was great then. It's changed a lot. In many respects I try to outline most of those that—maybe too many of those—that have come to my attention over the years both on and off the field. It's still a great game. I love the game and I think I'll close on that note. Thank you.

PROF. GREGORY: Thank you, Bill. That was quite the tour de force. Another landmark book, the one I read in the summer of '84 at Oxford, anybody and everybody who's inter-

ested in anything international should read it, JAPAN'S RESHAPING OF AMERICAN LABOR LAW,[23] a remarkable book by who else, Bill Gould. We're going to take a break till ten after 11:00 and then we'll reconvene for a who's who plenary panel.

Just a couple of administrative notes, the proceeding through the close of plenary panel is being recorded. Thanks to the Seton Hall Law School, the proceedings are going to be published in their Journal of Entertainment and Sports Law. Why Seton Hall, you ask? Well, there are three schools that are really preeminent in the country in terms of sports, arts, and entertainment. Some say Tulane, some say Seton Hall, some say Marquette, and Cardozo may or may not be in that loop. We're getting our journal launched, but we're going to take a page from the playbook of Seton Hall, which I think the best of the specialty journals. So I thank Seton Hall for their collaboration and cooperation. Thanks to Seton Hall for helping us out.

I'm going to introduce two people. Each with a very distinctive role. The Provost of St. John's University, Dr. Julia Upton. This is her victory lap as the Provost. At the end of the year she will be promoted back to the faculty. And our Dean, as though he doesn't have enough to do, is the chair of the search committee to select a new Provost. I say pull a Dick Cheney and cut to the chase. And then Mike will have two impossible jobs.

Immediately following Dr. Upton's remarks Jack Newhouse will be the plenary panel moderator. Jack is an executive board member of the Labor Relations and Employment Law Society. Jack is an entrepreneurial fellow who makes good things happen. He is the person who got some of our first major speakers committed to the program. In fact, we did a trial run on September 16, 2010 with Julius Getman presenting his great book RESTORING THE POWER OF UNIONS.[24] And, without further ado, with Jack waiting in the wings, Dr. Upton. So thank you.

DR. JULIA UPTON: Thank you, David, and welcome everybody. In one of my former lives I was an elementary school teacher and in those days we were told to be particularly attentive for teachable moments, moments when something

23. WILLIAM B. GOULD IV, JAPAN'S RESHAPING OF AMERICAN LABOR LAW (1984)
24. JULIUS G. GETMAN, RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT (2010).

would happen and it was just the perfect opportunity to delve in and explain something to the children.

Well, if there are teachable moments then there are also learnable moments and historically there is probably no more learnable moment, or teachable moment, for the integration of sport and law than the last two weeks. So it is fortuitous that Dave and your wonderful co-chairs have arranged this conference. Foresight, insight, providence, whatever has brought us together.

I also think that there is no better opportunity or more time when a university is most itself than when it is exchanging ideas and people are learning from each other and sharing with each other their wisdom, their insight, and their ideas. And therefore I welcome you to this teachable moment and this moment when the university, our university is most what it is called to be.

Enjoy your time together. It's kind of incongruous that you would think of me in the middle of sport and law. I've often told people I never once even thought about law school. I might be one of the only people who didn't think about law school in my youth. But my sport was ballet, for sure, and maybe tennis lust from afar. I grew up in Forest Hills, which in that once upon a time was the tennis capital of the United States. So it's not exactly my major bailiwick, apart from couch coaching the basketball team, but congratulations to you and your work and enjoy your day. Thank you.

MR. JACK NEWHOUSE: Hello everyone. My name is Jack Newhouse. Due to the size of the panel, I think I'm going to stand over there. I hope you're all okay with that. I'm a 3L here at St. John's University School of Law and I really just want to thank Professor Gregory for putting together this event. I've had the great fortune of being his research assistant. And, you know, in baseball you have coaches, pitching coaches, batting coaches, and a coach's job is really to develop a player, to develop their skills. Anyone who's seen MONEYBALL[25] knows that, you know, there are five-tool players like Billy Beane out there but the mental aspect of the game, bringing them from point A to point B, is really important.

I think a coach is a big part of that and to me Professor Gregory, and not just to me, actually to really a whole group

25. (Columbia Pictures 2011).

of people at St. John's, and I believe I speak on their behalf, that Professor David Gregory has been our coach in bringing us along, and not just teaching us the labor and employment law but also teaching us the practical side of law and putting us in contact with people, many people that are on this panel today who have really given insight into and will hopefully today give more insight into what it's like to be in the field of labor law.

Before we get started, I really wanted to go around the panel and have everybody introduce themselves. We will start over here and will make our way down to Gene Eisner, and we'll go up to Tom Reich and end off with Gene Orza.

MR. PATRICK FLANNIGAN: My name is Patrick Flannigan. I teach here at the university. And, unlike the Provost, it should come as no surprise to you my sport is not ballet.

MR. NEWHOUSE: And also, actually, when you're introducing yourself please also state what your relationship is to labor law, baseball, or both.

MR. FLANNIGAN: Thanks. I teach moral theology here at the university and so one of the edgy points in labor is asking the question "What does the church have to do with it?"

MR. MATTHEW HOWES: All right. My name is Matt Howes and I'm proud to be representing the Entertainment, Arts, and Sports Law Society here at St. John's. I'm looking forward to joining the Labor Law Society soon. I would like to thank Professor Gagliano and Professor Gregory for giving me this opportunity today. Everybody should read Bill Gould's book, it's phenomenal. It appears, at first glance, to be a short book but, trust me when I tell you, it's very dense in the best possible way. I'm a baseball addict myself and as the junior member on this panel, I'm humbled and honored to be here with some of the most distinguished legal and baseball minds. And so let's talk some baseball.

MS. MELISSA SCHNEER: Hi everyone. I'm Melissa Schneer. I am the President of the St. John's Labor Relations and Employment Law Society. I also graduated from Penn State with a degree in labor studies and that would probably amount to most of my labor experience. I have worked very closely with Professor Gregory and echo a lot of Jack's statements about him being a coach, a mentor, and someone I very much look up to. And I echo Matt's statement about being very humbled to be sitting on this panel with such prominent figures.

In terms of baseball, I come from a family that lives and breathes by the Yankees—sorry, Mr. Gould—and a little bit the Pittsburgh Pirates as well, so a mix of both. I'm very happy to be here and thank you for having me.

MR. JEFF FANNELL: I am Jeff Fannell, a graduate of St. John's Law School. Labor lawyer by trade, I spent 10 years at the Major League Baseball Association, so that's my professional connection to baseball. I grew up loving baseball. I thought I was going to be able to play baseball but wasn't able to realize that part my dream. I am working in baseball. I left the Players Association a year ago today, started my own consulting practice, and I still work with baseball players and agents. And so I'm glad to be here as well.

I count myself fortunate to be on this panel, read the book by Professor Gould. In addition to the information that was contained in the book, I was just really captured by his passion for the game of baseball. Baseball is a wonderful game and I'm really truly fortunate and happy to be a part of it and be here today to talk about it.

MR. JOE FAHEY: My name is Joe Fahey. I'm a professor of Religious Studies at Manhattan College and I am also director of the new BA in labor studies at Manhattan College. So that tells you a little bit about where I stand. I'm also the chair of an international association called Catholic Scholars for Worker Justice that was founded primarily to stand for workers' rights in Catholic institutions, but since Catholic teaching on labor transcends the Catholic Church itself, we stand for rights of workers everywhere and we've stood with workers, marched with them, and argued for them before legislatures and other forums as well.

I'm very happy to be here. I don't think I belong here honestly, in one sense, but Bill Gould asked that I be on the panel, so I hope that I can contribute in some little way. Thank you.

MR. GENE EISNER: My name is Gene Eisner. I've been a union-side labor lawyer for the last 50 years. I have been a baseball fan since 1941 when Mickey Owens allowed the ball to go past, not that he dropped the ball. The reason that I said earlier that he dropped the ball was that I was listening to the radio back in those days. Anybody remember the word radio? There was no TV at the time so I couldn't see whether he dropped it or he allowed it to go past him. But the radio said, "And Mickey Owen drops the ball, and Tommy Henrich

runs to first base!" I said, "Oh my God. We're going to lose this game." I was a Dodger fan. And the Yankee fans were, you know, they were crazy and the Yankees eventually won the game and won the series. So we never forgave Mickey Owens.

But, in any event, what 'am I doing here today? What do I know about collective bargaining in baseball? I have been a baseball fan. I have been a union lawyer. What I learned about collective bargaining in baseball I learned from Gene Orza and Dan Silverman, playing poker with them, because that's what they would talk about all the time. And on occasion I went to a baseball game in Yankee Stadium with Gene Orza and Bill Gould. And that's all they talked about was baseball and who did what, reserve system, and free agency, and salary arbitration or whatever. So that's where I learned about this stuff. Otherwise, I have no experience. I have never practiced in the field, but I'm an experienced labor lawyer and I love baseball.

MR. TOM REICH: My name is Tom Reich. I have been involved in professional sports, representing players in baseball, hockey, and football for 41 years. And, like Bill Gould spoke so eloquently about, the year, the blessed summer of 1946, I was a very little boy and that was my introduction. My brother took me to Forbes Field in Pittsburgh for the first time and the next year my uncle got me an autographed ball by the Pirate team and I began an addiction that has lasted for a long, long number of decades.

I ended up in the business because as a young lawyer these players had no rights; no nothing, nada. The union, starting with the Marvin Miller era all the way through to the present, and the players in this sport who are so much more committed have done an extraordinary job in advancing the cause to where it is now because in the early days they had nothing. They were all Curt Flood, getting nowhere. But block by block, building by building, they took over the town and equaled, leveled, whatever you want to call it, the playing field.

I'm very happy to be here. Speaking of the poker issue, my law school career was much more dominated by the poker table than it was the classroom until I went to work for the chief judge of the federal court in western Pennsylvania where I got a sudden, hard, hard rusty nail delivery of reality in terms of what it means to be a lawyer and to be committed

to what this is all about. I envy all of you. I wish I had my law school career to start over again, but then again I was still a little boy. But you do get a chance to grow up, but always retain the little boyness that started with me in baseball in 1946 and will never end until I do. Thank you.

MR. ED RANDALL: Morning everybody. I'm Ed Randall, I'm the host of Ed Randall Talking Baseball for nine years on WFAN Sunday mornings at 9:00. It is a tremendous honor for me to be here today. I started out playing little league baseball in the Bronx; I am a son of the Bronx. I played in the University Heights Little League and they played me in right field that first year because it was against the rules to play in Sweden.

[Laughter]

And my career advanced quite significantly to the point of having a tryout with the Kansas City Royals somehow. I've been in the broadcast business for 37 years and I have spent a tremendous amount of time on sidewalks covering labor disagreements in the bad old days between management and labor. There were eight work stoppages within 22 years and I was in college for the first one in '72, but I've covered almost all of them since.

I can remember at about—I think Gene could probably give you the exact time because he is such a brilliant intellect –about 3:00 in the morning when Marvin Miller walked in to the old Durrell Hotel on Lexington Avenue in 1980 and said that the players and owners had come to an agreement on everything except free agency and that that would be left for the next year, 1981. I remember thinking at 3:00 in the morning, and I had just been hired by something called the Cable News Network. We had done a month of run-throughs and we went on the air July 1st, 1980. I remember thinking to myself, "Boy, this could come back and bite them in the butt in a year." And then there we were in 1981 for the 50 day strike that cut the heart out of the 1981 baseball season.

I just consider myself so incredibly lucky and blessed to be doing what I love, both on the air and off, to have developed relationships and friendships in the industry; friendships to my left and to my right here today. And it is a great honor for me to be amongst you today.

MR. GENE ORZA: My name is Gene Orza. I'm a 1973 graduate of the Law School. I would just like to take a moment of personal privilege to extend three thank yous. First,

I want to thank Gene Eisner for playing in that poker game. I just hope he doesn't advise the IRS that we don't declare the income that he regularly gives to Dan Silverman and me. Some of you know I was co-founder of the Labor & Employment Society a long time ago.

In baseball, I'm frequently asked questions like, "Did you ever think that the world baseball classic would be as successful as it was?" Or, "Did you ever think you would see the day when you see a player making ten million dollars a year?" Or, "Did you ever think that there would come a time when the revenue in the sport would exceed five billion dollars?" And almost invariably my answer to those questions was, "Yeah, I did. I had a vision that the World Baseball Classic would be as successful as it was. I have no doubt there will be a 30 million player someday. And sports revenue in the sport will be over ten billion dollars. I have no doubt about that." But I never foresaw the success of the society that really is a function of David Gregory's work, so I want to thank him for that.

When Collin Dorney and I got together over a cup of coffee on Schermerhorn Street and said, "You know, we should get some outside practitioners in to occasionally talk to the people who are interested in labor law," we never imagined things like the "Dignity of Work" colloquium that David put on or something like this. It really is something I just did not see coming and I know the extraordinary amount of work that has to go into something like this. So I really do want to thank you, David, sincerely.

I frankly hadn't planned on my third thank you, but I must thank Bill Gould for the public apology he just extended to me. I mean that quite sincerely. It was very courageous on his part, I think, and I'm very grateful for it. For those of you who are mystified by what Bill and I are talking about, in his book Bill ascribes to me, that's simply a position I did not espouse, but a position which if I did espouse would suggest that my law degree should be given back to St. John's because no lawyer would ever espouse the position that the book has suggested I hold, and that was the source of my upset. I didn't want people for the rest of history reading the book and saying, "Boy, that Orza guy, he is crazy if he thinks that state action applies to private drug testing." And that was the source of my upset, but I truly am grateful. Again, I used the word advisedly but it was a very courageous thing, I think, that Bill did, and I accept that apology and I'm very grateful

for it.

So I too join with some of the people in suggesting you read the book, just 'not page 220.

But, again, it is a pleasure to be here, it always is. It's good seeing so many of you again.

MR. KEN BELSON: My name is Ken Belson. My legal experience is limited to winning a $900 claim in small claims court. My dad did represent labor unions for quite a while and my grandfather was a labor leader, but I never made it to law school. But thank you, David and Michael, for having me here. Through a long 12 year detour to Japan where I started working as a journalist covering business, I made it back to the States in 2004. Through a series of jobs leading up to 2009 was offered a spot to write about the business of baseball and other sports for the sports section at the New York Times. That has included, most recently, some coverage on the NFL and the NBA lockouts and thankfully no stories about MLB lockouts. So I'm here to provide a non-legal outsider's experience.

MR. NEWHOUSE: Thank you. So for the next 45 minutes we are going to have a discussion at the panel where I present questions to specific people on the panel and everybody on the panel is then welcome to chime in afterwards. And after 45 minutes I want to give about 15 minutes for the people on the panel to ask each other questions, if they would like. And then after that we're going to through it out until about 1:10 for Q and A afterwards.

So there have been three collective bargaining negotiations so far this year in the major sports—the National Football League, the National Basketball Association, and Major League Baseball—and two lockouts, so far. December 11th, the collective bargaining agreement for Major League Baseball is up. And I wanted to address my first question to Gene Orza, which is, in what ways do you think the contentious nature of labor negotiations in baseball in the past has paved the way for labor peace today?

MR. ORZA: Well, I think it's the child of the contention that existed before. All collective bargaining negotiations are, in a sense, the descendants of prior negotiations. I say it somewhat facetiously but there is a kernel of truth in it, that in a sense the chief beneficiaries of 1994-95-96 strike are the owners because it freed them of the burden of thinking that the sport needed the salary cap to survive. Once they had

gotten past that hurdle and they realized there were ways they could work effectively with the union to develop the sport and make it grow, they were liberated from the captivity that the fight over a salary cap had placed them in.

It's a little bit like the irony, and the sport abounds in ironies, and it's probably the reason why so many great writers in literature choose baseball instead of other sports when they want to use a particular metaphor; Philip Roth or Norm Mailer or whoever it might be. The fight for free agency similarly liberated the clubs from a bargain they had made essentially with the devil. If I could just take a minute to explain what I mean by that.

There are today 30 clubs. The origins of the reserve clause go back to when there were eight. But assume for the moment that the 30 shortstops playing baseball today are the very best 30 shortstops you could find, and you employed the fifth best and he gets hurt or he retires or he's gone. By definition, the only shortstop you could have at your disposal is the 31st because the other 29 shortstops that are in his class are all taken already. What free agency did is it liberated the clubs from a situation of a stagnation in which they couldn't, through a judicious use of free agency, change their teams in ways better than the reserve clause allowed them. That's why you had much more continuity in championships and stellar performance prior to free agency then after it.

Well, it's a similar thing here. There's similar ironies taking place here, I think, that the clubs, knowing they can't get a salary cap and seeing the degrees to which the players would resist it, having gone through that kind of enormous struggle, have—then at the end of the process seeing that the sport can do very, very nicely in the absence of one, have in a sense freed themselves of the burdens that that position imposed upon them. So the peace you've seen over the last 17 years is the child. Without the 1994-1995 struggle, you would not have seen that peace, I think.

That analogy applies in a variety of different areas well beyond and much more importantly than baseball. Geopolitically it applies, but that is the short answer. I know I didn't give one and I apologize for that, given the size of the panel. The short answer is that the peace you see today is the child of the struggles you saw in 1994-95.

MR. NEWHOUSE: In St. John's, I took a negotiation course where we learned that one of the most important parts

of negotiation are the actual characters that are a part of the negotiation itself. And I wanted to pose a question to the panel, maybe we'll start with Mr. Eisner. How do the predispositions and the personalities of the parties here, how have they affected labor negotiations? Or how do personalities and predispositions affect labor negotiations in general?

MR. EISNER: I'm sorry? How does the personalities of who?

MR. NEWHOUSE: How do the predispositions and personalities of the parties involved, so in the case of Major League Baseball you had Don Fehr and now you have [MLBPA Executive Director] Michael Weiner negotiating with Bud Selig, [MLB Executive Vice President for Labor Relations & Human Resources] Rob Manfred. How do their personalities affect the collective bargaining process?

MR. EISNER: I think having read Bill's book carefully, he points out all the mistakes that some of the owners have made and played right into the players' hand, and I think that the owners were somewhat rigid and had a predisposition to certain positions, and I must say knowing the representatives on the players' side like Gene and Don Fehr and others who—well, their predisposition of course was to do everything they can to enable the players to maximize their benefits. Going to the board, and Gene having worked at the board, and he worked in Washington and acquired a great deal of experience, really cornered the employers who sort of in a kneejerk reaction took certain positions in bargaining which they really were ill-equipped to do. And I think that the predisposition on their part was in very, very, very bad judgment.

Let me just quote you from Judge Sotomayor's decision when she issued the 10-J injunction against the owners because it's very clearly to me. I pulled up the decision and, by the way, I was in the courtroom when that case was argued and I heard the decision read. She read it from bench, to show you how up on this stuff she was.

She says in her decision, "The owners argue that the right to bid competitively or collectively must be a permissive topic of bargaining because if it were a mandatory topic the owners will be forced to give up their statutory right to the bargain collectively. Courts, in addressing the antitrust law, have easily recognized, however, the essence of collective bargaining is the establishment and maintenance of reserve and free agency where the owners agree to bid competitively for some and

not others. The owners' argument has a superficial appeal in its attempt to hearken back to the unionizing cry of employees when they banded together to create this nation's labor laws. What the owners have missed here, and the MLB has not, is that statutory right to join collective bargaining units belong to employees, not to employers."[26] How could the employers have missed that?

Obviously Gene and his colleagues knew full well and they backed those guys into a corner. And she puts in italics, "*The NLRA gives only employees section 7 rights to bargain collectively through elective representatives, not employers.*"[27] That is so fundamental to anybody who has practiced labor law. I don't understand how those people—I don't know, Gene, how you got those guys to back into that position but it was really fundamentally dumb. Gene?

MR. ORZA: Well, if I understand your question, I'm not—again, I don't want to be the focal point. There's so many other talented people up here. Let me just briefly say, first of all, I don't think personalities matter hardly at all. I think if, as I've said, if Sid Vicious gave me a good proposal I'll take it. And if Mother Teresa gave me a salary cap I'd reject it. So, you know, I don't think that, I mean the content of a proposal rules the day. This thing about personalities plays well in the press and it has a certain kind of plausibility to it, but in the real world I don't think it matters at all.

As far as the aspect that Gene alluded to in the 1994 litigation, I never focused on that so much as the fundamental mistake the owners made in 1994 by taking the position they did was failure to appreciate the history of how they themselves had gotten there. To say that free agency and salary arbitration are permissive subjects of bargaining means that the 1972 lockout, the 1976 strike, the 1980 partial strike, the 1981 strike and the 1985 strike and the 1990 lockout because they were over free agency and salary arbitration all happened to be work stoppages over permissive subjects of bargaining. What a preposterous proposition the lawyers had to espouse before the Second Circuit.

The Second Circuit case; Judge Newman did the chair at the panel at the time. I mean it must be a devastating expe-

26. Silverman v. Major League Baseball Player Relations Comm., 880 F. Supp. 246, 256 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2d Cir. 1995).

27. *Id.*

rience. I've never experienced that and I hope none of you ever do, but the clubs' lawyer got up and before he said anything Judge Newman looked at him and said, "Why are you here?" Literally, that's exactly what he said to him. "Why are you here?" Now, that bench was composed of appointees of President Carter, President Reagan, and it was of liberal, conservative, Republicans, Democrats. And they just were flabbergasted that the clubs would do that.

So, again, you make a bargain with the devil in various ways and one of them is when you are sincerely convinced that the sport must have a salary cap or it will die; that kind of fervid adherence to a proposition without further inquiry into whether it's accurate or not can lead you astray sometimes.

As far as the original question goes, I don't think that personalities matter very much at all, at least in my experience. In a sense, players are very fortunate that personalities don't matter very much because if they did, the players wouldn't have gotten the benefits that they got while I represented them.

[Laughter]

MR. EISNER: Gene, the next round is on me, buddy.

MR. NEWHOUSE: Mr. Fannell?

MR. ORZA: That's great. By the way, that line, "Why are they here," there would be more than hundreds; it would certainly be in the thousands of people over the years in this business that you could apply that to. Absolutely.

MR. NEWHOUSE: Professor Fannell?

MR. FANNELL: I have had the opportunity to work with Gene and for Don Fehr, and I agree with Gene on one hand that personalities don't really factor in. More than that, I believe that if personalities become predominant you have a problem. But I do believe that the disposition—and I think you were talking about the disposition of the parties. I think that matters. One of the things that I admired about Gene and Don Fehr was that intellectually, and Gene will be the first one to tell you, at a high level. Isn't that right, Gene? Right?

Gene is one of the smartest guys I've ever met; Don, great lawyer. But one of the things that I think was important was they also had inside of them the willingness and the ability to fight, to bloody your nose. And I believe that's important when you're going to advocate on behalf of players or you're

going to advocate on behalf of anyone. So they had a willingness to strike a deal but they also had a willingness to bloody your nose. I believe there was a time when there was a predisposition on the other side to spoil for a fight. And so when we you combine those; I believe that's why you see that there were so many fights.

I believe what's going on now, however, is that there are some different people in place in Major League Baseball and there seems to be more of a willingness, Gene talked about it coming out of the strike of '94-'95, of understanding that you can get along, that you can bargain. And I believe now that maybe that psyche has changed a little bit, that's why we're seeing more labor peace. But, you know, whether the personalities matter or not, perhaps not, you know, one hundred percent; but I do believe that predisposition is important and I think that's part of what we're seeing now, that there is a different mentality being brought to the table.

MR. NEWHOUSE: Professor Fannell, what you just brought up was that there is an aspect of wanting to bloody the other side's nose. Is contention an inherent part of labor negotiations? Does it always have to be contentious? Does it always have to have—-obviously in Major League Baseball—-is Major League Baseball an exception to the rule? Or can labor negotiations really, you know, be peaceful in a way? I wanted to hand this question over to Mr. Belson.

MR. BELSON: Well, I'll let the experts who have been across the table answer the first part of the question. But Jack is partly alluding to the conversation we had this morning about some of the labor negotiations I covered in Japan as a business writer and one in particular that I remember involving ANA, the international carrier.

One major difference is that they have company unions, so the pilots struck from ANA, not all pilots. And in this case it was around spring. And for those of you who have been over in Japan you may know there's a golden week, a series of national holidays, about nine days. It is their biggest travel season. And the pilots were on strike for about 10 days and then a couple of days before golden week called off their strike temporarily so they wouldn't hurt the airline, and then went back to work after the holidays are over. I'm sorry. I mean went back on strike after the holidays were over.

And I think that goes to the deeper point of, you can have mutual respect, if you will, without trying to trash the com-

pany or trash your opponent; and as a consequence they quickly got a deal done after that. So there are other ways to handle it, not just bashing. Both of those cases, I mean certainly in that case very little of it was done through the media. It was almost unseemly for either pilots or the airline itself to be on television at night discussing it. So it's very different than the sports sphere where actual players are tweeting overnight and so forth.

Mr. ORZA: For those of you who are puzzled by the Japan union going on strike, coming off strike, and going back on, in Japan you can have intermittent strikes. Unlike in America, intermittent strikes, as those of you who study labor law know—in fact, last year the Japanese Players Association, in a dispute over a free agency provision and reserve system provision and then collective bargaining struck on weekends. They announced their intention simply to strike on Friday, Saturday, and Sunday, and work on Monday, Tuesday, Wednesday and Thursday; a benefit that, had unions in America had, it would contribute a substantially different shape than it appears to be in right now at least. Whether for the good or worse I'm not going to suggest, but the idea that you can strike only on weekends and continue to work on weekdays is a concept that is not foreign in Japan but is foreign here in America.

MR. EISNER: Jack, can I follow up and ask Gene a question about—

MR. NEWHOUSE: Certainly, certainly.

MR. EISNER: I was wondering about the issues that Bill raises in his book about the Japanese players and the whole question of the reserve clause and whether the antitrust laws continue to be applied against Japanese players; and the whole issue of stare decisis, which there's at least one justice of the Supreme Court, Mr. Thomas, who doesn't believe in stare decisis; and there are others who give lip service to stare decisis. And whether or not the whole issue is going to come before the court again if a Japanese player or players contest the whole reserve system, what we think the outcome might be.

MR. ORZA: Well, first of all, in Japan, players are reserved to their clubs for a period of nine years.

MR. EISNER: But if they come to the States? If they, you know—

MR. ORZA: They come to the States only under two cir-

cumstances. After that nine year period is over, they are free agents and Major League Baseball is free to sign them, as anybody else in the world is free to sign them. While they are under reserve in Japan, Major League Baseball, through the protocol to which Bill alluded, honors that reserve.

So no Japanese player under reserve can come to America other than through this posting process that Bill also alluded to in which an American team can express interest in a particular player who is under reserve. There's a commissioner to commissioner communication about that, forwarding that request. Then they contact the club. "Are you willing to undertake discussions with the Boston Red Sox," let's say in the case of Matsuzaka, "for the Boston Red Sox purchase of Daisuke." And if that club then says yes, then there's a period of time in which the Red Sox and Matsuzaka can try to work out a deal. So those players under reserve come through the application of this posting process.

I assume when you raised the antitrust question you're talking about the Japanese player who wants to come to America to play while under reserve, attacking under the antitrust laws, the failure or the combination of American clubs refusing to entertain offers from him for his services. The answer to that, I think, is quite apart from the legal analysis that would accompany whether or not the Major League Baseball's exemption from antitrust, limited-now exemption from antitrust laws, applies to that situation. It's a matter of time.

Okay, so the player files the suit and it takes five years to resolve and it goes to the Supreme Court or something like that. Now that 24-year-old player is 29 years old and he hasn't played baseball in Japan because Japan's not taking him back. So there are practical implications. Danny Gardella faced precisely this situation in the Gardella case.

It is difficult to ask a player, average career in Major League Baseball is five years and a hundred days. The median career is four years and change. The change fluctuates a little bit from year to year but you ask a person who's devoted most of his entire life-by the way, you don't get to be a Major League Baseball player by staying home and reading the poetry of Emily Dickinson and going to the opera and, you know, studying the piano. I tell people in the staff, Jeff knows this, in the history of civilization the greatest violinist has never been the greatest doctor. It just doesn't happen. There's not

enough time.

Well, you know, in a five year career asking to undertake litigation is extremely difficult. So, as a practical matter, Gene, I don't think that you'll see that antitrust case ever emerge because the time constraints on the Japanese player coupled with the cultural issue that attach when a Japanese player is asserting publicly he wants to leave his team, there are all kinds of cultural issues associated with that kind of a statement by him. It's one of those legal issues that will just be out there in the midst of time but I don't think you'll ever see it come to fruition as a legal issue.

MR. BELSON: I wanted to follow up just briefly with a passage from Professor Gould's book about players in the '40's having trouble getting recognized as labor. The general public generally viewed them as players and athletes who should be grateful for their jobs. I think that general sentiment still prevails in Japan too. And then there's a whole layer of corporate loyalty that is still probably prevalent in Japan that you see much, much less here in the States. So to find that Japanese player willing to do that would be very, very hard.

MR. NEWHOUSE: I wanted to ask Mr. Reich a question about your relationship to the union and to management to Major League Baseball because you represent individual players as opposed to the union, which is representing the collective in Major League Baseball, which is management side. Can you describe to us your relationship with the two sides? What's the fact and what are the myths of being a sports agent in your position?

MR. REICH: Well, it's delicate for sure. Let's talk about baseball and stay with baseball for now because there a huge difference in the collective bargaining history and in the qualitative aspects of the different unions in sports. The evolution of the rules where players had no rights and now they have a playing field that's permitted them to share in the largess and the gains that have been made by the sport itself, the battleground was, as has been described both in professor's book and in the comments by Gene and others, and the book speaks for itself about the evolution.

The point is you have to at all times be aware what the position of the negotiators are and whether it's wartime or peace time. There's a tremendous difference because during wartime there is all kinds of things going on. And the most important thing during wartime is the solidarity with players

and the union and the agents.

Now, does everybody practice that? No. During wartime, many of the agents were busting their tails for the cause and the majority of them were busy stealing players, which by the way is one of the most rapidly growing aspects of the whole industry, along with the salaries, et cetera. This is much better than bank robbery because they have no downside risk. There is no jail. There is no nothing.

But it is an obligation of a player representative to be doing the right thing with respect to the union's position because all of these rights flow from their successes. And, at the same time, your first obligation as a lawyer is to the player, which is often forgotten about, too. So the balancing between that and your obligations to the union have been and always will be an extremely delicate balance. But the priorities of them; without them being balanced properly, we wouldn't be sitting here talking about the evolution or the evolution that's spelled out in the book about all these rights that the players now enjoy because when I started in 1969 doing this and representing Doc Ellis, they barely had a right to be alive in terms of rights. They had none. They were not even permitted to be represented by counsel.

So the very first experience I had almost ended up in a fist-fight with a general manager because he agreed to have a meeting with me. I showed up for the meeting and he promptly suggested to me that he doesn't want to meet. Then coats were coming off and stuff like that, but wiser heads prevailed. But the point is that's the way it was. This is the way it is now and that's primarily because of the efforts of the baseball and union people going all the way back to the beginning of time. And some guys who were willing, as Jeff pointed out, to get their nose bloody or bloody somebody else's.

There is a reality to personalities, by the way, in this business, but in the context that Gene was talking about, as to labor issues and whether there is a labor deal, at the endgame. He's right. Along the way it's another story, you know, over a large body of time.

MR. ORZA: Free agency as a matter of right as opposed to, like, a violation that Bill alluded to in the Catfish Hunter case where a club violates a contract and you become free through material breach, free agency as a matter of right did not exist in the 1970's. The decision in Messersmith was in 1975 and the first negotiation to undertake free agency was

the 1980 negotiation because there was in effect at that time a collective bargaining agreement, or one had expired.

But the first real negotiation was towards the 1980 basic agreement and in that negotiation the clubs resisted any application of the free agency concept whatsoever. So Jim Bouton proposed that players be granted free agency at the age of 65 and the clubs rejected the proposal. And the clubs rejected the proposal on the ground that, if they put 65 as the age for free agency in the contract, before you know it then it will become 60 and then it will become 55 and eventually it will go down to, like, 30. And, you know, not passing over the fact that to go from 65 to 30 in five year increments you're talking about 75 years of contracts in which they'd all be dead, the people in the room. But that is a fact that Jim Bouton proposed that free agency be granted at the age of 65 and the clubs refused it on the grounds that it will be a slippery slope down which they would be forced to slide if they granted that provision.

MR. REICH: Especially for him.

MR. NEWHOUSE: Mr. Randall, one of the most controversial issues in baseball over the last decade has been steroids, performance enhancement drugs, use of amphetamines. And I wanted to ask your opinion on how the union and management; how would you characterize how the union and management handled the steroid issue?

MR. RANDALL: I don't think they did. I think, and I've said this on the air numerous times. I hate talking about this, by the way. It's not baseball. It's applicable to the game obviously, but I hate talking about it and it never seems to go away. I think that, as I've said on the air, we all share a sense of culpability about it, that era. Era—-not a year, not a season, an era. And I think that's most unfortunate. I think that we were all complicit: management, the union, the agents, me, everybody on the air—that we were watching something that was almost mystical.

Senator [Jim] Bunning talked about the fact that in his time of pitching, and he was a Hall Of Fame pitcher, players didn't get better at the age of 35. I don't know what statistical scientific evidence there is to support how—in anticipation of this, I have notes. I was looking something up. Your hat size is not supposed to grow. The size of your feet is not supposed to grow after you are a teenager or whatever. We saw this incredible growth of two to three times of sizes, two to

three times larger than they were and two or three sizes. At 38, your lifetime batting average of .290 is not supposed to grow to .370 and .362, and your lifetime slugging percentage of .556 and then you slug .863, and then you have two other seasons over .800 and one at .799.[28] These are stratospheric inexplicable increases in production.

And now we look back on this and we will continue to look back on this for an awful long period of time because it's going to rear its ugly head every January with the announcement of the Hall Of Famer's. [Jeff] Bagwell got 44% coming out of the box last year. The discussion continues every January. Well, what are we going to do? We have Manny Ramirez now, off, wherever he is. He has shamed himself out of the game. Has he absolutely positively eliminated himself from contention with regard to entry into the Baseball Hall Of Fame? And [Rafael] Palmeiro is mentioned in the same breath. What do we do about [Mark] McGwireMcGwire? What are we going to do about Alex [Rodriguez], who admitted that he used illegal substances? Is he in another place?

So, it's an awful lot of grey area but I go back to what [former MLB Commssioner] Fay Vincent said to me on the air, "We have no proof." And the things that McGwireMcGwire was using at the time were considered legal. It is just very distressing. But when you look at the numbers that obviously were skewed and without precedent, guys routinely going past 60 home runs—I can remember when [Graig] Nettles led the American League in home runs with 32. It's just been very distressing to talk about it and just a shameful period in the history of Major League Baseball.

I wish that it never happened but my goodness. . . I mean I've spent a lot of time in locker rooms and I go up to these little guys and tap them on the back and it was like I was hitting a brick wall or something. What caused that? And one of the other. . .and I've spent an awful lot of time on the show talking about this during this past year with the Bonds trial. I would have legal experts on, medical experts and such to address the issues because God knows I don't know the answers. I just—it's just a very depressing, very depressing time and depressing subject.

28. *Barry Bonds,* http://www.baseball-reference.com/players/b/bondsba01.shtml (last visited Aug. 4, 2012).

MR. ORZA: It's depressing in more ways than one. We're in a Catholic university and the Catholic Church probably has done more to foster the idea that people should stay focused on the ends and means analysis than perhaps any institution in the history of western civilization. The laudability of your end does not necessarily justify any means to achieve that end.

One of the great and depressing aspects of drug debate is how the sport—and I blame myself as much as anybody else—has been unable to educate sports writers and radio personalities and fans to the legal implications of what we're talking about here. When you establish a disciplinary regime that in effect allows the federal government of the United States to end-run the Fourth Amendment to the constitution, when you conduct random drug testing, an endeavor which at least currently the federal government cannot undertake by virtue of the Fourth Amendment-the Fourth Amendment says, as you all know, government cannot undertake unreasonable searches and seizures.[29]

I know Bill has a particular view of the *Dimeo* case in the Seventh Circuit.[30] I think that the role of the state in the idea of gambling and jockeys is entirely different than in baseball. But he will agree that currently at least there is no precedent for the proposition that the federal government could come in and conduct a random drug testing of baseball players; but an employer can, if it agrees with the union in collective bargaining to conduct private drug testing.

So now you are drug tested pursuant to a collectively bargained procedure, randomly. Your urine shows up and it shows that you have ingested cocaine, steroids, whatever it might be. And you are suspended for that pursuant to the disciplinary regime enacted by the parties to the collective bargaining agreement.

Now, had the government, before you were tested, gone before a magistrate seeking a warrant to urine test you or a blood test you, they need probable cause. They won't have any because you're just playing third base. But now you've been suspended. The government goes before a magistrate and says, "I just read that Newhouse got suspended for ster-

29. U.S. CONST. amend IV.

30. Dimeo v. Griffin, 924 F.2d 664 (7th Cir. 199), *reh'g granted*, 931 F.2d 1215 (7th Cir. 1991).

oid use. I have probable cause to believe he's using steroids." The government tries you. They convict you. The test is infallible. It's perfect. It's reliable, no one disputes it. You go to jail. You are now in jail on the basis entirely of evidence that the Constitution of the United States prescribed the government from getting on its own. Imagine that consequence.

So the issue about steroids has never been whether people are on steroids. It's about the means by which you detect its use and eradicate its use in the sport. For those of us who have suggested there might be ways of doing that, of eradicating its use from the sport just like cocaine use is virtually, was a big deal in 1979 and 1980 but through hard work by the parties cocaine use in sport is much lower in baseball than the general population for sure and hardly ever an issue in the sport. There have been only a handful of players who have had drug abuse issues over the course of the last ten years.

The issue has never been about whether steroids should be used or not. The issue is what means do we employ to eradicate it from the sport. And for some people who believe that the means shouldn't be a means which enables the government to put you in jail on the basis of evidence the United States Constitution says the government couldn't get on its own is not a healthy thing for our society to undertake. That's truly a slippery slope because we love baseball. We like the sport.

It has all this romance. I take a backseat to no one on the romantic notions of baseball. My mother and father were born in Italy. My grandmother couldn't read or write English or Italian but they lived to watch Yankee games. I went to every single night game the Yankees played in 1953-54. I was telling one of the students earlier this. I taught my grandmother how to add and subtract on the basis of the magic number. She never could divide. She never could divide or multiply. I never was able to teach her that. She could write her name but she could not add and subtract on the basis of the magic number formula for the Yankees. Every year in September we'd sit down and I'd go over how three from four meant one. So my familiar connections are with the sport, but I'm also a lawyer and I'm also in St. John's Law School and I'm also a person who defends not only baseball players but the Constitution of the United States. The constitution doesn't apply to random drug testing but it has principles and values that are tinged by random drug testing. And that's the

issue we have never been able to adequately explain.

I never give a speech where somebody doesn't raise the subject of drugs and say, "But, Gene, all I want is a level playing field." My suggestion is to that person—and I was unable during my tenure to get it across to enough people—is that that should never be all you want, simply a level playing field. You should want a level playing field in the context of your being an American citizen who has certain rights and privileges that the government and people under the aegis of the government should not be allowed to trample upon.

And random drug testing poses at least that question. Is it an appropriate means because of its implications? People can go to jail for a random drug test result that the government, on the basis of evidence, the government was barred by the Constitution from getting. And that's really what the issue of drug testing is about.

MR. EISNER: I'd like to comment on that because in my many years of collective bargaining we have unfortunately too many situations where a private employer can engage in conduct that would be impermissible by the federal or state or city, any public authority.

For example, I had a case many years ago where a couple of guys were accused of theft in the warehouse. And they had some private detectives come in and they called in some private guards who said they saw these two guys stealing the merchandise, and they confessed.

About a week later the Supreme Court of the United States came down with the decision that you have to give a Miranda warning before you could obtain a confession.[31] So I argued in the arbitration that these private guards did not give the Miranda warning. And the arbitrator said, "This is private employment. It has nothing to do with the government. I have testimony from the private guards that they didn't have to give them a Miranda warning." And unfortunately he upheld the discharge.

Now, I argued that we should apply the same standards in private employment that we do in the Supreme Court of the United States rules, but the arbitrators said, "I don't have to. This is private employment. We have our own rules." And, unfortunately, that happens over and over again in private employment. Not everything that happens in private em-

31. Miranda v. Arizona, 384 U.S. 436 (1966).

ployment is, we can say that if it happened in, obviously, if it happened with cops, police officers, yes, obtaining a confession without giving a Miranda warning would have been unlawful but not in private employment. And it happens too many times.

MR. FANNELL: I'd just like to add something to what Gene Orza said. First of all, Gene Orza is absolutely right. I believe it's unfortunate and it's unfair that when it comes to drug testing, this call for the level playing field, and when Gene says it's not just where you get but the means in which you get there, that is so important. And I believe it goes back to what Professor Gould mentioned in the book and someone on the panel mentioned earlier. When it comes to professional athletes, one of the things that seems to get lost is that professional athletes have rights. They are employees and they're part of a collective bargaining unit. They are employees. They have rights. They have rights as citizens in this country.

And, yet, when someone makes the comments that Gene makes I can hear it now, "Oh, there goes that union again. Just trying to get in the way and trying to block what needs to be done here. And that is to rid the sport of performance enhancing substances." No one's trying to do that, but it really is a question. How do we get there? And, if we get to the point where just getting there is more important than how we get there, then we have more problems than someone using steroid in sports. And I believe that's something that gets lost.

MR. FLANNIGAN: Gene, thank you for recalling our Judeo-Christian roots here at the university. And, as one who teaches in the field of theology, I want to just speak about that business that, Ed Randall, you spoke about that business about complicity. You know, my students are fascinated constantly with the fact about this business about the Catholic Church has this thing called a sacrament, confession, and that you go into this box, you divulge your sins and the priest absolves and you go on with your life, and go on in somewhat of a sense of renewed freedom. But then they are always confused because people still dislike them and people they hurt haven't forgiven them. And so we begin this whole discussion, God hates the sin but loves the sinner. But then we also get into the situation too that, you know, God may forgive you of your sin but you have to deal with the reality the rest of your

life of what you did.

Just thinking about your piece about complicity, I'm wondering, in light of your observations, how much the public, the fans are complicit in this reality of drug testing—not drug testing, drug abuse, shall we say. The reason I ask that question is because we have expectations. We have high expectations that the team that's playing before us is going to be better than the teams last year. And so these players that are out there now are going to be better than the ones in 1946 and they're going to break even better records than the past. So, would you include the fans in the complicity?

A subsequent question that I have with that is that it has to do with a sense of this business of passes. And it almost goes back to this business about personalities at a union negotiation table. How come some players get passes and other players do not get passes? In other words, why does someone who has a massive drug problem and comes out and speaks about it and gives his life now to a certain charity get a pass from the public? And someone who said it was just one or two incidents, isolated incidents perhaps, doesn't get a pass and is forced to resign from baseball? There's probably more questions than answers, but you guys are much more adept at sports than I am, obviously.

MR. RANDALL: Well, I just want to say this. Steve Howe had personal demons and was suspended seven times from baseball, and Yankee fans applauded him. So is there complicity? Absolutely. "Well, he may be dirty but now he's our guy and he's wearing our uniform. So I'm going to root for him." If he was still with the Dodgers, "Oh, I'm going to kill him." And I think basically that's what it comes down to. Is there complicity? Yes. But I have tremendous compassion for the father—not yourself. By the way, I spent a lot of time in those dark boxes you were talking about.

[Laughter]

And I'm not a father, the father trying to explain what was going on to his son who was rooting for McGwire or rooting for [Sammy] Sosa, as an example. Again, no proof, but how do you explained what it is that we were watching? I mean if what we are watching we can't truly believe, then it's wrestling. It's not baseball. And how does a father explain to his son the disparity based on seasons of performance and then all of a sudden there is something very different? Is there complicity? I believe so, but I think a larger issue here is per-

ceived, again because there is no proof, betrayal.

MR. ORZA: People like people for whatever reasons they like them. I mean, you know, some people are likeable, some people are not. One of the bad—I mean he won't be offended if I use his name, I know, because he's truly great guy and I'm going to say nice things about him. But one of the guys the press didn't like and as a result fans didn't like was Eddie Murray. Trust me, if you want to go to war, go with Eddie Murray; great human being. One of the greatest guys you'd ever want to meet. I know some baseball players the fans idolize I wouldn't play poker with them if they were free. They're just not likeable people. Some people are likeable and some people aren't. Even the liker, I know, brings to that some misjudgment sometimes.

So there's no accounting for tastes. You know, most people in the sport regard me as an ogre but I have five girls who will swear that I'm the most wonderful father you could possibly have. So, hey, you know, what can I tell you? Different strokes for different folks.

MR. RANDALL: And the players are held to a different standard. You go to the movies and watch the performances of rapacious human beings, in many cases, who exhibit horrific behavior, people that, as Gene said, we would never ever invite into our homes; but we take the players personally. Those are our guys and they're supposed to—there's a certain code of conduct here that they need to abide by. And we hope and pray that there will not be a violation of that code of conduct because there was an implicit contract between the fan and the player, and that expectation that he's going to play, he's going to play hard, and he's going to play clean.

MR. REICH: The point is there is a tremendous difference between this implied conduct and expectation. In the point that Gene was making and some of the other gentlemen that spoke about due process, what got trampled unbelievably, and I've represented a lot of guys in criminal proceedings. My brother and I, who were involved with, were charged with being involved with drugs. And there were a lot of guys who were in trouble, or who were listed in newspaper articles on lists that a certain writer that was mentioned by Professor Gould earlier who needs to be in Iraq.

It's a very good idea for him to stay there. He would call people. He would call guys that represented players. He would call people that worked for associations, private law-

yers who were representing players in cases who were charged by the authorities. And he told them that if they didn't cooperate—this is a writer—if they didn't cooperate, he was writing the piece anyway. And of course that didn't work out so well in that conversation, but he did it anyway; the list that was written that's supposed to be confidential when the association made the deal in the first place on a trial basis for testing. And then the evidence was snatched before it was supposed to be destroyed. This is where due process failed with respect to these demands that our players, our sport, they can't be doing this.

I am very anti-drug and I have a long established record in that regard and in confronting players of my own. I got tossed around a couple of rooms in my day because of that. But this failure of due process and this attitude about the entitlement or non-entitlement to it goes against everything that our whole system of justice stands for. Steroids, especially anabolic steroids, they do kill you prematurely. They stink and they did turn some people into freaks, but there's all kinds of drugs and levels that are things that people use all the time.

Cocaine was horrible back then in the day. I've been to places to tell people back then that there was a big addiction problem going on. This was many years ago, by the way, 30 years ago now. And cocaine created one of the biggest scandals in the history of sports in the very courtroom where I had worked 20 years before for the chief judge in Pittsburgh, Pennsylvania.

Please don't forget we love our game, these kinds of drugs have no business in our game but not at the expense of due process.

MR. ORZA: I know Bill has an observation and I just need, I might forget this though and I want to go back to what was said at the very, very beginning of the conference about a learnable moment. There may have been one in the way Father Fahey proposed the question. He alluded to what I think he'll agree is the Augustinian concept of, you know, hate the sin, love the sinner. Well, for those of you involved in labor law, I've adapted that proposition, that ancient proposition, slightly different. I recommend it to you in your collective bargaining roles if you're ever negotiating with anyone, which is that you can hate the proposition but you should love your proponent.

Don't confuse the proposition, don't equate propositions with proponents. Hate the proposition but love the proponent. Your adversary is entitled to your, for want of a better word, your love. What he's proposing may be completely distasteful to you and you can fight it as hard as you can; but love the proponent, hate the proposition.

MR. NEWHOUSE: One more comment on this. Mr. Gould?

MR. GOULD: Well, I've had a lot of time to talk but let me just make a couple of quick points. One is on this business of particular forgiveness or the loving the sinner, of course take the example of McGwire. Now, the problem with all of these situations it seems to me is this: The government in [the] BALCO [investigation],[32] they weren't prosecuting the players. They were trying to prosecute the guys who were feeding the players, which seems to me appropriate.

Now, we don't know anything in any of these calls—at least we, fans. I don't know what the commissioner knows and he doesn't make to the public a representation about what he knows. We don't know anything about what McGwire, or any number of other given guys, how they got this stuff. Where did it come from? What is being done to root it out? That seems to me to be; you know, everybody's talking about, I don't care about what McGwire says about whether it enhanced his performance or not. We can draw—we're grown people. We can draw our conclusions about what he did. But the notion, the idea that, so far as we're aware, the avenues of supply are not being pursued as the result of this situation. Now maybe they are, but no representation is made by anyone, so far as I can see, that they are.

The other point about it is this. There's a very delicate balance. The Fourth Amendment is all about balance. And what I've written about in this book is the question of whether Congress can legislate drug testing in baseball. Gene says, I think I read him saying, "No, they cannot because baseball is different than horseracing in Illinois or any number of instances where Congress has constitutionally legislated random drug testing because of some perceived evil that the public is concerned with which will flow from it." Now—

MR. ORZA: [Interposing] I don't want you to be giving me

32. United States v. Comprehensive Drug Testing, Inc. (CDT III), 621 F.3d 1162 (9th Cir. 2010) (en banc) (per curiam).

two apologies in the same day. I'll have a heart attack. I never said that the government couldn't legislate drug testing. I said it couldn't—

MR. GOULD: [Interposing] Well, you talked about what I said about *Dimeo*.

MR. ORZA: But no, that's—hold on a sec. I said the government couldn't conduct the drug testing. The United States government couldn't come in and simply conduct drug testing. There's a big—I think that if Congress were to pass legislation saying that henceforth all baseball players should be drug tested, there are legitimate Fourth Amendment questions involved in that. I agree with that entirely.

MR. GOULD: All right, okay. I rest my case.

MR. NEWHOUSE: Before we move on to the next part I wanted to pose a couple of questions to our students on the panel who are not a chairman of the NLRB or the former chief operating officer of the Major League Baseball Players Association and haven't worked in a law firm for more than internships and externships. And, as a student studying labor law, Melissa, I wanted to just get your impressions of the current collective bargaining agreement or the labor situation that's currently going on in baseball.

MS. SCHNEER: Well, it's tough for me to discuss the substance of the current bargaining agreement, but something that has definitely stood out to me about baseball and how it differs from traditional labor and employment law that I've learned in law school is just the way to characterize the players at the table. I have a hard time instantly wanting to call the owners "management" and have them sit on the management side and have the players "labor" and have them sit on the other side of the table. I know we've discussed numerous times how they're playing the game and in essence, they are working and they do have rights and I do believe that. But it seems that baseball, and this is perhaps probably based on the many years of turmoil. There isn't that traditional control that one side has over the other. In many ways, it seems that it's collaborative, but in other ways I almost feel that the players, from what I've read, have more power at the table than the owners do. And maybe the owners have relinquished some of that power for the purposes of labor peace, but that's definitely something that stood out to me as different than things that I've learned in law school.

And, more than that, I feel that in many ways there

should be almost a third seat to the table, and that should be the fans and the public. And these third parties such as, whether it's television stations or general fans or even the outside communities in some of these baseball stadiums. I instantly think of the Yankees and how their stadium is located in one of the poorest communities in New York. I almost think there was a statistic that it's in one of the more poor communities in the nation. And how does baseball give back to the community? Should that be something that is bargained for? Should the players have more, actually, should the players give back a little bit more personally to the community that they play for? And I think with free agency that's a bit difficult because their community that they play for can vary almost yearly at points.

But in some ways, it's just the fact there is this third party out there, that there are fans, and there's the community at large, and baseball, which continues to profit to a very large degree. You have ticket prices that are almost unaffordable for an everyday fan and you have television stations that are kind of ruling when and how and where these games are played. I think in the newest collective bargaining agreement, that's something that should be addressed. Whether it's finding a way to make ticket prices cheaper or finding a way to sort of consider that third party.

MR. ORZA: You started out real good, but then you wound up in hell.

[Laughter]

MS. SCHNEER: I knew you would say that.

MR. ORZA: Yeah. Baseball players as union members are different than typical union members because of their irreplaceability. See, when Ford goes on strike, the guy welding your car is his replacement. You don't know who it is. You don't know who welded your car. But when a player, when Yogi Berra is not catching and somebody else is, you can identify it. That's not Yogi Berra. That notion of irreplaceability actually is at the foundation of the court's decision on permanent replacements; that if in fact an employer could not permanently replace anybody, then unions would always win. But in baseball they are harder to replace because of their identity. Their identity is part of the product they represent. So that was a good point, but after that—we need another conference to go over all of the places you went that you shouldn't have.

[Laughter]

Imagine the following scenario. Let me try to put it in its simplest terms. If Barbara Streisand were to appear in Las Vegas and she would have a fight with a stage manager, she could walk out and go ply her entertainment talent in a nightclub in Reno, or in California, or in New York City. The reason why baseball players can't do that is all of the owners have gotten together and they have locked up the baseball playing industry. Imagine a world in which singers could only perform in venues owned by one human being, one entity, how that would affect what happens there. Now, you don't say, you know, "It cost me a $150 to see Billy Joel. I was sitting up in. . ." You don't say that.

Finally, the last point is, and this is a very important point from an economics standpoint and you must get this. Make this part of your, you know, your fiber, as Walt Whitman would say "the fiber of your being." Salaries have nothing to do with ticket prices. If they did, the Olympics would be free. Why do the ticket prices always go up? Why does a team cut its payroll and raise its ticket prices? That's because salaries—and any economist who has studied the industry will tell you salaries are a function of what the person setting the salary—I mean ticket prices are a function of what the person setting the ticket price believes will generate the most plausible revenue for his franchise or her franchise.

If I think I can sell 1,000 tickets at $5, and if I lower the price to $4 and I can sell 12,000, that's not good enough. I'm out $200; that's $4,800. If I can sell the same number of tickets at $5.50, I'll do it. Not because of my salaries, it's because of the law of supply and demand. I believe that I can sell tickets at $100. Ticket prices are what they are because that's what is perceived to be the market for those ticket prices, which maybe it shouldn't be that way in a perfect society. We should pay our nurses more than we pay the baseball players, I would agree with that but that's not the world we live in.

But the Mets' ticket prices and Yankees' ticket prices are not a function of their payrolls. If that were the case, when payrolls went down, you would expect ticket prices to go down. You know the NCAA tournament. Last year the NCAA tournament in basketball was $150 a ticket. I went to the NCAA's, it was $25. The first Home Run 'Derbies in baseball, people don't believe me when I tell this but Jeff will

attest to it, they were free. You didn't go, you didn't even pay a ticket to go to the Home Run Derby and players aren't paid for the Home Run Derby. Now tickets cost $300 to go see the crazy event. I would never pay $300 to go see a Home Run Derby, but that's what they believe they can do. If you saw the Home Run Derby, what did you notice?

MS. SCHNEER: Home runs.

MR. ORZA: The stadium was packed.

MS. SCHNEER: I mean I actually think that, I wasn't meaning to insinuate that I think the high salary should correspond to a lower ticket price. I do see a billion dollar industry where some of the most loyal fans aren't able to attend the games and I—

MR. ORZA: They've been priced out of the market.

MS. SCHNEER: Right, and I think that—

MR. ORZA: The market is supposed to generate seven billion dollars.

MS. SCHNEER: I would think it, or maybe it's not possible, but just for some sort of way to find a way, regardless of who is paid what, to make sure that those fans that are the most loyal—

MR. ORZA: This is more fun than everything you've heard so far. Some day you're going to be a very prominent lawyer and you're going to raise your price from $600 to $800. And do you know what you're going to do? You're going to price out of the market a lot of people for your services because they could afford $600 but they can't afford $800.

MS. SCHNEER: Oh, yeah, but baseball is America's game, you know.

MR. REICH: More teams are providing, in fairness to the sometimes rapacious mentality that goes with big money and, oh, yes, it's a problem all over our world. Teams are doing a better job now, in the era of higher and higher prices for qualitative seats, in creating opportunities for the public to get economic tickets. They're doing a better job at it.

MR. RANDALL: Connecting with their community.

MR. REICH: The other thing about players themselves in their communities and otherwise, in all these years that I've been a fan and I've been involved in whatever way. I used to get in for a buck when I went back in the '40's or whatever it was. The point is players do more for charity and more for communities today by far than they ever did before. Now, some of them, as Gene pointed out earlier, I wouldn't play

poker with either. But there are more guys that care and show it in a meaningful way. Is there a lot more room to do more? You bet ya, and your voice should never be quieted for speaking for all of those things for people who can't afford whatever it is; $150, $250 jerseys and this and that. Your voice should never be quiet.

MR. BELSON: I think partly, too, the reality of most income. Revenue side of teams is television now is a huge part of it.

MR. ORZA: Local television.

MR. BELSON: Local television rights, advertising.

MR. ORZA: It's the best correlation to ticket prices and salaries.

MR. BELSON: Yeah. Signage, corporate suites at a half a million dollars with a three year contract or a five year contract, that's where they're making the big money. And if you look at the Mets' stadium bonds, 650 million dollar bonds, it doesn't come from and it's not being off with the guy sitting in the $11 seat. They're paid off with suites and TV money.

MR. ORZA: In the first collusion case[33] the clubs' own economists testified that the only correlation between salaries and any source of revenue was local television revenue. That is that the Yankees' pay more than do other clubs is because of local television. That's the best correlation. I can't leave without—we're going to have to break but one statistic which Jeff heard me talk about at my farewell speech for the Players Association. Major League Baseball in 1969 commissioned a study of when the major leagues began. And they concluded, these historians, that it began in 1876. There were six professional major leagues since 1876, that's 135 years ago. In 135 years, there have been a grand total in 135 years of 17,180 or so, give or take 50, human beings who have played a day of Major League Baseball.

If you were to call up the AMA today and ask them how many surgeons are members—surgeons, not doctors—are members of the AMA, they would tell you that there are in fact today 170,000 licensed surgeons. There are ten times more surgeons today than individuals who have played a day of Major League Baseball in 135 years. Baseball players

33. In the Matter of the Arbitration Between Major League Baseball Players Ass'n and the Twenty-Six Major League Baseball Clubs, Grievance No. 86-2 (1986) (Roberts, Arb.).

have—and this literally was my farewell speech to the players. Never, ever, ever feel guilty about their salaries. They should never do that. They are one of the rarest breeds you've ever witnessed, 17,180, according to the Elias Stats Bureau, in 135 years. You do the arithmetic.

MR. NEWHOUSE: And before we go to Q and A I just wanted to ask Mr. Howes over here, who I've spoken to several times in my tenure here at St. John's, he's a big baseball fan. And I wanted to ask you, as a fan, what would you add and what would you subtract from the game of Major League Baseball?

MR. HOWES: Well, I'm glad to switch gears a little bit from economics, at least momentarily. There have been numerous changes in only my lifetime, and I think there should continue to be discussions among fans and friends and lawyers about discussions in the future of baseball. I had narrowed it down to a couple of recurring themes that I've encountered in heated discussions with my very opinionated Mets fan roommate.

So, first, we talk a lot about how, and I think Professor Gould would agree with this, that the All Star game shouldn't mean home field advantage in the World Series. I think that most people kind of think that's a little ridiculous. It should be an exhibition and I think that it was kind of a kneejerk reaction following the tie a few years ago and it just shouldn't be in place.

Secondly, I think the newly proposed wild card system that was actually proposed this past week where they're going to add two wild card teams, one in each league; I think that should be reexamined, personally. I think it cheapens the pennant race. It cheapens the regular season. And we wouldn't, if we had four wild card teams, we wouldn't have had the season that we had this year with four teams fighting for only two spots in the last day of the season, which, in my lifetime, it was the greatest day of baseball that I've ever seen.

And, finally, and probably the most difficult situation that a lot of fans advocate for is for a hard salary cap. I'm not here to do that. I think especially after—

[Laughter]

MS. SCHNEER: I was going to tell you not to do that.

MR. HOWES: Yeah, I'm treading very lightly here.

MR. GOULD?: Where do you live?

MR. HOWES: Especially after reading Professor Gould's book. Initially I think that parity in baseball is almost at an all-time high. If you look at just the last ten years, the number of teams that have been competitive, that have made playoffs, that have won the World Series is incredible. Professor Gould pointed out that the years 2000 and 2007 were the first years since the year 1900 where no teams had a higher winning percentage than .600 or a lower winning percentage than .400. So, across the league, it's pretty even, lately at least. And then—

MR. REICH: My Pirates had less than .400.

MR. HOWES: Sorry about that.

MR. REICH: So am I.

[Laughter]

MR. HOWES: I think personally, and you're going to have to take this with a grain of salt because I'm a Yankees fan; I think the current system is working and I'd actually like to open it up to Professor Gould because in his book he raises a few suggestions that people have made with regard to minimum payroll requirements, scaled inverse tax on low payroll teams, and attendance incentives in order to incentivize owners to reinvest what they get in revenue sharing process in their team rather than kind of just pocket it. And so I don't know if you had any. . .

MR. GOULD: Well, I don't want to take too much time, but I think that if I read the current collective bargaining correctly I think that there is a movement towards compelling or inducing the teams, you know, the laggers, to spend more money on payroll than they have previously. I mean there's a provision in the current collective bargaining agreement that gives the commissioner an authority to intervene. And only in one instance that I'm aware of have they taken a look at the club, the Marlins. The union and the commissioner looked at the Marlins. I think that there's a movement more towards that; I think that probably will be the big change in revenue sharing. You can call it a de facto minimum payroll if you want, but I think there is a movement in that direction. And it is abuse. I mean if the—we talked about the Pirates in this connection and the Marlins in the past. The Marlins have a ball park now, so I don't think the Marlins are going to be a problem in the future. Although the Pirates also have a great ball park and they are a problem.

MR. REICH: Well, they've had a great ball park but the

guy's still been putting the money in his pocket. However, it is going to be in this new agreement.

MR. ORZA: Going back to the very beginning where we talked about how all negotiations are the child of the negotiations that have gone before. If you look at and carry that principle out forward, it's a short road from the proposition. If you've agreed to a minimum, why wouldn't you agree to a maximum? So that's why you won't see the Players Association, and in the next basic agreement I can guarantee you won't to see an absolute minimum. Bill is quite right. There were provisions that required revenue sharing dollars to be spent on development. Again, as we were among the arguers in favor of the proposition, who's to say that taking revenue sharing dollars and hiring a better general manager or improving or spending the dollars to revamp your field to make it easier or harder for people to hit home runs are not things that will benefit your club?

So the acquisition of players is not the only component of a winning strategy. But there is an effort and there will be in the next collective bargaining agreement, I'm sure. Something more than simply that the club shall endeavor to do this, there are going to be ways of testing whether in fact they are. And so there is movement; Bill is quite right, in that direction; but you will never see a minimum.

The final point in that area that you should pay attention to going forward when or if you hear about a new deal is that the notion of taxes contemplates they will be paid. Okay? A competitive balance tax which no one pays is a salary cap because no one is paying above the threshold of the tax. So anytime you institute a tax system it must be set at a level such that people will pay the tax. And the big test of this next agreement is going to be, I think, will the taxes that are going to be imposed upon the drafted individuals operate as a cap because, if the tax threshold is simply a synonym for a cap, then the Players Association has some rough roads ahead of it.

When we negotiated the very first competitive balance tax that was something we insisted on, that this can't be a threshold that is so high that nobody will pay it because if no one's paying it we've agreed to a salary cap and we didn't go on strike for 238 days to get a salary cap.

MR. BELSON: Yes, it's worth remembering that Pittsburgh, Miami, and, sorry to bang on the same drum, don't

have their own individual regional sports networks. So, say what you will about their individual owners and their propensity to spend, but they have fewer resources in that regard. Unless the Penguins, Steelers—well, it's not the Steelers. Penguins and Pirates band together and maybe form an RSN they might have. . .

MR. ORZA: They've tried.

MR. BELSON: They did try? Okay.

MR. ORZA: They failed.

MR. BELSON: Failed? Anyhow.

MR. NEWHOUSE: Okay. So I think we'll open this up to the floor to ask the panel some questions.

FEMALE VOICE: Do you want me to do a mic or just shout it out?

MR. NEWHOUSE: We'll see how that works.

FEMALE VOICE: It's a two part question going back to the drug testing issue and the Fourth Amendment. They have been doing it for minor leagues, I'm curious as to whether anybody has been prosecuted or anything from that. And then, if Congress is hell-bent on trying to get Major League Baseball to do testing, if they granted immunity to everyone from prosecution, would that solve the issue?

MR. ORZA: Yes. My opposition to random drug testing would decrease substantially if it was accompanied by a promise that the government would give me which would say, and, by the way, the government is not just the federal government. It's those state and county and local prosecutors that might make a name for themselves prosecuting Marion Jones or Gene Orza, whoever it may be. Yes, if it were accompanied by a promise from governmental authorities that the evidence will be inadmissible in any proceeding, yeah, my opposition to random drug testing would dissipate.

FEMALE VOICE: Do they know that?

MR. ORZA: Does the government know that? You don't really think the government is going to be able to enact legislation which says we won't use evidence of a crime?

FEMALE VOICE: No, but the hearings and the Congress dragging everybody in. Is anyone throwing it back to them saying, if you do this, fine.

MR. ORZA: That's just not realistic. It's not going to happen.

FEMALE VOICE: And then regarding the ticket issue—if you have questions about ticketing, it pays for all of that.

MR. REICH: There is no way to go.

FEMALE VOICE: It's an important point to understand.— Did you donate tickets? Did you? But with the economy one of the biggest issues we have is even when you're donating tickets people have to get there, and the communities cannot afford the buses to bring them. There are a lot of other factors as well, so it's very tough for the clubs. They do try to do things to try and make them more affordable but it's not that simple because of other aspects.

FEMALE VOICE 2: A two part thank you, one part comment and a query. Mr. Randall, thank you very much on your conversation about complicity. Having been immersed in the most repulsive real estate climate for years, you speak it all because it was everybody's fault. And that environment in real estate as well as sports, everybody knew what was going on; you know, the managers, the lawyers, the brokers. I embrace your answer and your response. I'd like to hear the argument ended as well.

Mr. Orza, I also thank you for your refreshing reaction on the issue of personalities and dispositions. As a confident, competent, and not intimidated female attorney for 27 years, I'd add ego to that. I relish the opportunity to be one of the professionals at an intellectual level where they can remove their own personalities and dispositions from the interactions.

And last but not least, touching a little bit on the criminality issues that have been presented. In my ethics class this week we covered animal rights and of course Michael Vick, and raised some really important questions and thoughts because I am a constitutionalist and a firm believer of rehabilitation, second chances, and debt to society. But, you know, particularly in that scenario, which is far worse than drugs, you know, you have individuals who make mistakes, but these are individuals who are trained and groomed to be professionals and carry themselves as such. And when they engage in these illicit, you know, behaviors, of course animal abuse—could we possibly legislate, you know, more ethical examples?

You know, when you look at sports teams that put them back to work; as you said, the fans are complicit, we want to see them on the field. But, you know, could we possibly legislate for that and say, "No, this is wrong. You know, these are our role models." I just wonder how you'd respond to that.

MR. ORZA: Well, is it the legislation that provided a sen-

tence for the crime, the very essence of what you're taking about? You just want to increase the crime rate then, the crime penalty then, right? I mean you don't need additional, let's say, I don't know what the rule is but let's say that stealing hot dogs from a ballpark is a class E felony punishable by no more than one year in jail. You could legislatively make that, because you regard it as a particular heinous crime, a three year punishment. Michael Vick served whatever the punishment was that was imposed upon him by the judicial system. It may not have been enough for people. Their recourse is to get the punishment up legislatively, if that's the case.

But the whole question of role models implicated in that to—and if where you're going is that there should be special rules for employers of people that you think are role models, well, that's pretty selective. I mean in 1957, and you're too young to remember this but Bill will; in New York City Mickey Mantle, Hank Bauer, Billy Martin and Whitey Ford went to the Copacabana and one of them punched a waitress. And it was a huge, huge thing. Daily News, New York Post, even the New York Times covered it.[34] We covered it for about a week and a half in New York City. I idolized Mickey Mantle. I thought he was the greatest thing since sliced rye bread, but I didn't think because I idolized Mickey Mantle that therefore it was easier or more justifiable to punch a waitress. I didn't think that.

I think quite contrary to most people, I guess, who have talked on this subject and maybe most people in the room. Talking again about teachable and learnable moments, a child's disappointment in somebody is not so much to be feared as to be grasped. It's a learning opportunity. It's a teaching opportunity for his father or mother, that, you know, "Johnny, I know you love this guy, but here's what the issue is and here's why you shouldn't be doing this. And here's why you shouldn't put that much stock in these guys," et cetera, et cetera, et cetera. That's the better response, the more constructive response, than simply throw up your hands and say, "Oh, my Johnny loves Mickey Mantle. Now he's going to go out and punch waitresses." That's not the right way to ap-

34. *Yanks Play the Copa*, N.Y. TIMES, May 16, 1957 http://www.nytimes.com/packages/html/sports/year_in_sports/05.16.html (actually Bauer was accused of hitting another patron with whom the Yankees were fighting).

proach it. I think that these are opportunities. They're not things to be decried necessarily. When people misbehave and you are worried about children, I think the best thing you can do is seize that moment and teach that kid something by virtue of what he has just or she has just witnessed.

FEMALE VOICE 2: Actually, I think you misinterpreted the meaning because I fall on the same side. You know, a lawyer can lose his license. A doctor can lose his license. But these are the unfortunate issues in our democracy with our Constitution. We don't have the right; they served their sentences, okay. And we don't have the right to legislate personal ethics in all instances in business. And I do look at it as that moment, you know. And those would say it doesn't belong here. We don't have those structures and there are reasons for that. You can't deny them their freedom because of that. But thank you very much, I enjoyed your response and I love those teachable moments. They're great, yes.

MR. RAY BERNIE: My name is Ray Bernie, class of '83. I spent my life and career in public sector collective bargaining but my question transcends all of professional sports. I think it's accurate to say that public perception is, as Mr. Orza pointed out, a very small number of people who make a lot of money; baseball players, football players, basketball players, owners who make a lot of money. But we all see the stories of the injured football player who doesn't have any money to pay his bills, the boxer who doesn't have any money who's 35 years old. My question to all of you because you all represent different portions of that individual superstar, where does that responsibility fall, in your estimations, to make sure that the 20-year-old who gets a 30 million dollar contract isn't poor and has no medical coverage when they're 55-years-old? Is that still with the union? With the agent? With the management? And, if my perception is correct, is it that these things are not addressed or have they been addressed and it's just not the story we see in the newspapers?

MR. FANNELL: I guess I'll answer since no one else does.

MR. ORZA: I was going to say, "Jeff, help me out here, will you?"

MR. FANNELL: I think that when we hear the stories in the newspapers and we see these stories; I mean they really pull at our heartstrings, but I think one of the things you have to keep in mind is that that's not the rule. I believe that a lot of the players and a lot of the athletes are getting the

type of counsel you're talking about. Where does it come from? It'll come from the agents. I mean especially now, you see a lot of the larger agent groups that do a lot more than just negotiate the contracts. They provide a whole host of services from physical training, getting nutritionists, but also financial services as well. Those things are available, so agents are doing their job.

The union is also concerned about that and we have a lot of former players who will work with the union and try to make sure that we don't have those hard luck stories, but you're not going to be able to be 100% successful in that.

I think that when you see football players, for example, you know, one of the things when you look at their contracts, they're so called guaranteed contracts. Right? Which are only to the portion of that signing bonus that they received. Other than that, a football player can have a long-term contract and be cut and he's not really entitled to much after that. So I think that's part of what you see in football.

Boxing is a whole different animal. I think the underbelly of boxing is terrible. But I do believe that when you look at in the main, that athletes are getting more advice today than they have been, but it's not going to be able to be successful 100% of time.

MR. REICH: It's a lot, the problem is, the question is a very good one because there are stories that reach the press of guys that are broke, who have made millions and millions of dollars during their career invites this. The problem has varied over the years but now the money is so much greater and so is the number of people in the investment side, in any side. They are some of the smartest and the best people I know that are also some of the worst people that I have ever seen. So the horror stories will always continue.

There's a lot of corruption running around anywhere where there is a lot of money involved, and the problem has become significantly worse because the stakes are higher. There are a lot of the best money managers existing that are available to players or anybody of wealth if somebody cares enough to make the right recommendations, but most of all if the entertainers or athletes themselves are willing to listen and take the advice. Sometimes their own families rip them off.

MR. ORZA: There are plenty of entities that bear responsibility for the circumstance you described. Let's not leave out

the courts. Sometimes you don't understand or don't see the impact of what you're doing until later on. And the football situation, I think, is a good illustration of that, that we're seeing now in retired football players something that we had no reason to believe we would see 25, 30 years ago. And that points out the question of whether or not the Supreme Court's decision of the chemical workers[35] should be reversed, and that allowing a union to negotiate on a mandatory basis on behalf of retirees.

Now, I understand that's a small anecdotal basis upon which to hinge that but in certain endeavors you don't understand the dimensions of your problem until much later, after the person may have left the workforce. And yet that's a permissive subject of bargaining. We used to have this fight in baseball all the time where the older players would come and say, "We want eight million dollars." And I would tell them, "If I ask for eight million dollars for retirees, the first response to me would be, 'Okay. Now, I know that eight million dollars is not part of your proposal because I ain't talking to you about it. I don't have to under the chemical workers' decision. You're talking about retirees. They're no longer employees. You don't represent them for these purposes.'" And getting that point across was very, very difficult.

So the first thing is whether or not unions should be authorized to conduct negotiations on behalf of retirees, whether that question should be revisited. The second is whether the courts have let many, many institutions get away with the most liberal, I use the word advisedly, the most liberal interpretation of what an independent contractor is. I mean if you think cab drivers are independent contractors, I would like to know who made their air conditioner because I want to inhale it too.

When Elliot Spitzer was governor he undertook a study of how many dollars are lost by virtue, or not paid on behalf of people. Boxing—if you think boxers are independent contractors, they've gotten away with murder, the people who have asserted that. So it's very, very hard for boxers to organize because they're so-called independent contractors. We have agents who like to pretend, and Jeff will attest to this to, like to pretend they're independent contractors. And I always to

35. Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

them "And what other institution do you work for?" Because independent contractors theoretically work for, a guy will sign himself, will work with the Tom Reich agency. And I'll say, "Okay. Who besides Tom Reich do you work for?" "Well, I only work for Tom Reich." "Well, don't independent contractors, like my air conditioner guy, work at different places?" I mean, you know.

The law of independent contractor has to be revisited and that will have some impact here. But, that said, there's enough blame to go around, including at the Players Association level, formulating agreements which ensure people who have contributed to the game are taken care of into their later years.

MR. NEWHOUSE: I can hear people's stomachs grumbling, so we'll just have one more question in the back.

MR. ORZA: Oh, this is fun. Have some more. Why do we have to leave?

MALE VOICE 2: I'm a management side labor and employment law attorney. As a fan, I don't want to see drug use of any type of players. As a guy who, like Mr. Randall, spends— I'm interested to hear from the theologians on whether it's appropriate to punish the player who has used drugs because of socio-economic background, addiction, or should we punish them the same way as we punish a man who used drugs for economic reasons.

MR. FLANNIGAN: Joe? Go for it, Joe.

MR. FAHEY: Well, I'm a theologian but I'm a little bit out of my field on that one. You want to know if punishment for a player should be the same as the punishment for, let's say, a poor guy who uses drugs?

MALE VOICE 2: Well, a player is using drugs or recreational drugs or because of a disability, an addiction, because it's part of his socio-economic cultural image versus a player who doesn't have any of those disabilities or evidence, and decides he's going to consume drugs for economic or competitive advantage.

MR. FAHEY: I'm going to pass. I don't know enough about it.

MALE VOICE 2: The penalty—secondly, should the penalty for the utilization of the drug be the same?

MR. FAHEY: I don't know that.

MR. FLANNIGAN: I'm just trying to understand the question here.

MALE VOICE 2: Is it moral? You know, when I went to law school in first year of law school I studied criminal law. The first thing in criminal law that you study is "Why does a civilized society punish?" And I was taught three reasons: reform, rehabilitation, blah, blah, blah. I was taught that and, you know, in the —

MR. ORZA: You could have pulled a Rick Perry there and forgotten the third one. It would have been another teaching moment.

[Laughter]

MALE VOICE 2: So, you know, the issue for me is, is it moral to do so? Is it moral to differentiate or to look at factors, when the crime is drug use? What's the derivative reason for drug use? Should there be a moral differentiation?

MR. FLANNIGAN: Okay. It seems to me, as you read the newspaper reports, when you have people who are brought before the courts they speak about their harsh upbringing or the reality of their present economic situation, the judge might express some leniency towards that person but the person still has to serve some sort of sentence.

In terms of moral culpability there might be less moral—or there might be less culpability but still there is the same legal responsibility, if that makes sense.

MALE VOICE 2: I guess the question is, is it appropriate to punish someone more for economic greed than it is for disability or addiction, from a moral viewpoint?

MR. FLANNIGAN: Can I just say—can I do what I would do with my students? Do you have—can we hear your own thoughts on that?

MR. ORZA: Performance enhancement?

MALE VOICE 2: I'm an employment lawyer as well as a labor lawyer. You know, I represent management and the first thing that management always gets accused of is they're greedy, they're grabbing for money, they're trying to be unjust. And here management has effectively said we're not going to punish the player who's making that or using that same greedy motive any differently, right? As a player who might be using a drug because of a disability. And the law certainly differentiates between someone with a disability versus someone without a disability using drugs.

MR. ORZA: I'm just wondering if your premise is correct. Let's take, at least let's distinguish, first of all, between drugs of abuse and performance enhancing substances. When you

discipline a player for a drug abuse use, that penalty is reviewable under the just cause standards in the contract and arbitrators will bring exigent circumstances into that.

Let's take Steve Howe's case.[36] Steve Howe, rightly or wrongly, was diagnosed only after an arbitration by a panel of doctors ordered by an arbitrator to conduct the evaluation. We can speak more freely now about Steve because unfortunately he's passed away. I represented Steve Howe in the Steve Howe case and I had no qualms whatsoever about representing a guy who was suspended seven times. He was suffering from adult attention deficit disorder. I understand there are doctors who dispute the very existence of that condition, but the fact is that he was mitigated somewhat the way the arbitrator approached him.

So we do have ways of distinguishing between the individual who does something for economic reasons as opposed to some who might do them because of an addiction or something else. But there is very, very little evidence in the case of performance enhancing substances, and I put to the side the question of amphetamines. I can see amphetamines more as restorative than in fact performance enhancing. The United States military gives airline pilots in no fly zones amphetamines. They don't do it publicly but they do in fact. Put amphetamines to the side.

There's no known addictive capacity with respect to things like anabolic steroids, at least not enough to or no one in the scientific community is certain about that. So that's a little bit different because there is no person who uses steroids who is doing it because he's addicted to using them. He is typically using it because he wants to enhance his performance or restore a former level of performance.

But there is where an economic issue does come in because, and I think the moral distinction is based upon our very humanity. You have more sympathy for the following individual, I don't mean to draw a stereotype but these people exist. I've represented them.

The border between the United States and Mexico represents the greatest disparity in wealth in the world in terms of a single border with the exception of North and South Korea. Okay? In other words, people in the Sudan are poorer than

36. Major League Baseball Players Ass'n v. Commissioner of Major League Baseball (1992) (Nicolau, Arb.).

those in Mexico but Sudan's neighbors are all equally poor. The gap between Latin America and the United States is enormous.

Now, you have a player who lives with his common law wife and his mother, who is married the second time, her husband. He has a child. Those five people live together with another aunt and two children. Eight people in a one-room home in the Dominican Republic in San Pedro de Macoris. A scout comes to him and says, "You know, if you don't play Major League Baseball you're going to make $30 a month for the rest of your life."

Now, that guy is thinking, although he's not saying it out loud, now let me get this straight now. If I can get home run power, my children will live a longer life. They have better hospitals. My kids will grow maybe to become a doctor or a lawyer or a professor at St. John's Law School, as opposed to somebody. . . You know, the sheer poverty to which I am relegating my family versus the enormous economic reward, where do I sign up? Because I have an obligation to my family.

That's not to justify his using it. He's wrong. But the moral distinction between that guy and some other person in less exigent circumstances, I mean in different circumstances I should say, is part of our humanity. We make these judgments all the time. I feel sorrier for the guy who fell into that quagmire than I do for the guy who was a child of privilege and just did it because he thought he was going to make his right arm stronger than it otherwise would be to throw a baseball.

So I think a lot of, I'll leave it to the theologians, but I've read a lot of theology and you may have gathered as much. And I majored in Greek and I've read a lot of the great Greek philosophers. There is a level of culpability that is affected by the essence of our very humanity. We have a cognitive capability that allows us to empathize, allows us to sympathize. And to deny us, that is, to deny part of who we are. And so it's natural that all these dark black and white rules about this guy should be punished the same as this guy when they're in fact different human beings. I don't think many theologians would have the same problem you do or you allude to, I should say. I'm not saying you have that problem. They don't have that problem because I think they understand that. Part of theological analysis has always been the

humanity of which we are inspired.

MR. NEWHOUSE: And we can continue this discussion definitely during lunch. And I just want to turn the microphone over to Professor Gregory.

PROF. GREGORY: I agree with Gene. This is great fun. It's great fun to listen. And Bill Gould had the first word, the intermediate word; he will have the last word. He has very graciously agreed at some point during the lunch to open things up to continuing Q and A. So we're going to do that. And lunch will be downstairs as soon as folks meander down. It will be in the solarium right off the cafeteria.

I would leave, I suppose, two open questions. Should Penn State University unilaterally cancel its football season in the coming year? And extreme fighting, so called, has come to Madison Square Garden. Have any of the major sports leagues or unions or any combination thereof objected?

MR. ORZA: I'll take the first one. Somebody else can take the second one. I have a very strong view on the Penn State situation and it may not be a majority view but I'll share it with you anyway. I believe they should have cancelled the season but precisely so that when the students and the football players objected, saying, "But we're not responsible for any of this. Why are you punishing us?" It was a teachable moment for the university. They could have turned to those students and those football players and said, "It's only a football game. The reputation of this university is on the line. We have an obligation to do something dramatic here. We have an obligation to teach people we will not tolerate that. And the sacrifice that's being asked of you—so you don't play football game, big deal. It's only a game."

In the NCAA college athletics, getting across the notion that they are only playing a game is a very, very important message to be sending to our students and our athletes because we are spending so much capital of our intellectual and our moral capital in college athletics in a bad way that I think it was a great opportunity for Penn State to have anticipated the reaction, how negative it would have been, and turned that around on the students and the football players and said, "Yes, that's right, but it's only a football game. This is more important. We are about the business of fixing what's happened here to make sure it never happens again, and that's where we're devoting all of our energies." That would have been the smart thing, I think, to do.

MR. BELSON: Actually, I'd go one step further and make it a teachable moment for the donors who would probably make the same argument that they'd like to see their money being put to use on Saturday afternoons. And those donors effectively control the board of trustees.

MR. ORZA: That's how bad it is. I don't know if you watched the press conference were the vice chancellor of Penn State announced the termination of [head football coach Joe] Paterno and [university president Graham] Spanier. That was staffed by the networks with sports writers. It wasn't staffed from the national news desk. And the very first question, as Casey Stengel would say, "You can look it up." The very first question the vice chancellor of the university got was not "What are you doing about the victims," or "Who's investigating that?" It was "Who is going to coach the team on Saturday?"

I mean I understand why we can laugh now, but just think about that for a second. At the time, I almost broke my television. What jerk asked that question in a moment like this? But that's symptomatic of what he's talking about, that we could send lots of media from the sports department, not from the national news desk, and the first question would be, when it's been revealed that for nine of the ten victims were victims after the first victim. You know, it was not all on one day, that's over a long period of time. These children are getting, there are children, allegedly at least, getting raped and first question you're going to ask me about is not what evidence is being supplied to demonstrate that or to confirm that but who's going to coach the team—football team on Saturday. What have we come to? That was my first reaction. What is wrong with us? And I would have cancelled the season in a heartbeat.

MALE VOICE: There was not also the question about university president being dismissed.

MR. ORZA: Yes, but that didn't matter to them.

MALE VOICE: Yes.

MR. NEWHOUSE: Okay. And on that note I think—

MR. ORZA: He asked another question for somebody else. I don't know anything about extreme fighting. Right? You had an extreme fighting question?

PROF. GREGORY: Well, the extreme fighting question that's now in New York. Two years ago, some of my constitutional law students said that it would never happen. Well,

here we are. But maybe we can pursue it during lunch.