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FORUM

PLAYING HARDBALL

By **Maurice M. Suh and Daniel L. Weiss**

The world of competitive sports stands at a crossroads in the wake of the Mitchell Report. Although all eyes are now focused on Major League Baseball, all sports are faced with the issue of the illegal use of performance-enhancing drugs. Enormous pressure is now focused on eliminating drug cheats, but it is crucial that this pressure does not create policies and procedures that we will all regret long after the latest news story is forgotten. Wrongly accusing an athlete or wrongly stripping an athlete of a title causes the same wrong as cheating — the wrong result occurs, and a career and reputation is destroyed. It is vital that the pressure to act does not blind us all to the necessary deliberation and thought in developing anti-doping policies. What has been lost among the scandals, admissions and denials of the last several weeks is the great opportunity that all sports have to craft a comprehensive system that achieves clean competition without sacrificing the rights of the athlete.

Clean sport is a goal that everyone can stand behind — the dilemma involves how to achieve it. Society is routinely faced with the question of what we are willing to sacrifice in order to obtain our goals. Indeed, in courtrooms across America, the criminal justice system routinely faces a similar question faced by sports today — how to investigate and enforce the laws vigorously and fairly, while protecting individual rights from bad evidence and false accusations. The people responsible for developing the anti-doping policies for this new

era in sport would be wise to consider the cornerstone principles of the American justice system, such as a presumption of innocence, procedural fairness and prosecutorial ethics. These concepts are part of American society and political culture — and athletics should not stand outside of them.

The phrase “presumed innocent until proven guilty” is not just a tag line for legal dramas such as “Law and Order” — it is a core principle of our legal and societal fabric. The practical effect of this principle is remarkable, but one that is largely lost in doping cases. Presuming that an athlete is guilty based on the test result alone assumes that the anti-doping tests are infallible. This is not true. As seen in recent months, ac-

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credited laboratories do conduct tests improperly. For instance, the two European World Anti-Doping Agency-accredited laboratories that tested American sprinter LaTasha Jenkins were found to have violated a clearly established testing standard. Anti-doping systems must take into account the fact that the laboratory results and methods are not always correct, and should place the onus, in each and every case, on the testing authority to establish not only that a valid test for performance-enhancing drugs was positive, but also that the test was performed in a scientifically reliable manner.

Further, a presumption of innocence is meaningless if the investigative and adjudicative process is not fair. To ensure fairness in the criminal justice system, we, as a people, are granted rights under our federal and state constitutions and laws. And, if our rights are violated, there are specific remedies we can seek. A comprehensive anti-doping system should be no different and does not now exist. The rights of the athletes should be clearly listed and a mechanism to enforce these rights should be developed.

Another method of ensuring that athletes’ rights are not intruded on in the quest for

clean sports is establishing prosecutorial ethics. The investigation and enforcement arms of any organization are extremely powerful. Accusation alone causes irreparable injury. Absolute power can corrupt even good-intentioned people. Therefore, our criminal justice system has measures to prevent a win-at-all-costs mentality. Prosecutors in the criminal justice system are held to a stiffer ethical standard than other lawyers. Critically, a prosecutor is required to turn over to the defendant all evidence, even evidence that benefits the defendant. Not only does this not currently exist in anti-doping efforts, but athletes often receive very little discovery at all, forcing a defense absent critical documents. Further, if sports are going to create investigative departments to supplement the analytical testing, the bounds and ethical responsibilities of these investigators should be clearly established. Without developing the ethical standards for investigators and enforcement personnel, there can be serious abuses of power that could tarnish the integrity of the system, and sport, itself.

An anti-doping system does not have to — and should not — operate contrary to these bedrock principles of American law. Both systems have a set of rules that people must live by. Both systems have people who are designated to enforce these rules. And both systems have a means by which to adjudicate violations of these rules. The difference is that anti-doping systems are in their infancy, whereas the criminal justice system has been balancing the investigation and enforcement of rules against individual rights for hundreds of years. Anti-doping systems should not turn a blind eye to the lessons learned over these years. We should not, and cannot, permit our desire for clean sports to frustrate the values that we as Americans hold as a fundamental principle — protection of individual rights.

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