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## ARTICLES

# THE COMMISSIONER GOES TOO FAR: THE BEST INTERESTS OF BASEBALL CLAUSE AND THE ASTROS' "HIGH TECH" SIGN-STEALING SCANDAL

WALTER T. CHAMPION\*

### INTRODUCTION

The Commissioner of Baseball, Rob Manfred, penalized the Houston Astros for sign-stealing in 2017, allegedly using “high tech” methods in opposition to the rules of Major League Baseball.<sup>1</sup> In a scathing nine-page report the Commissioner made sure to indicate that there was absolutely no evidence that Jim Crane, the Astros’ owner, was aware of any misconduct.<sup>2</sup> The Commissioner accused Astros employees in the video replay review room of using live game feed from the center field camera to attempt to decode and transmit opposing teams’ sign sequences. These employees would communicate the sign sequence information by text message which was received on the Apple watch of a staff member on the bench. The center field camera is primarily used for player development. After decoding the sign, a

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1. ROBERT D. MANFRED, JR., STATEMENT OF THE COMMISSIONER, IN *RE HOUSTON ASTROS DECISION* (Jan. 13, 2020), [https://img.mlbstatic.com/mlb-images/image/upl\\_oad/mlb/cglrhmlrwwbkacty2717.pdf](https://img.mlbstatic.com/mlb-images/image/upl_oad/mlb/cglrhmlrwwbkacty2717.pdf).

2. *Id.*

player would bang a nearby trash can with a bat to communicate the upcoming pitch type to the batter.<sup>3</sup>

The Commissioner held both General Manager Jeff Luhnow and Field Manager A.J. Hinch personally responsible for the conduct of the team. They were suspended from baseball for one year and subsequently fired by Astros owner Jim Crane. The Commissioner argued that the smart phone/trash can machinations raised questions about the game's integrity. The Commissioner forfeited the Astros' regular first and second round selections in the 2020 and 2021 Player Drafts. The Club will also pay \$5 million, "which is the highest allowable fine under the Major League Constitution."<sup>4</sup>

The Commissioner's power to discipline emanates from the so-called Best Interests of Baseball Clause.<sup>5</sup> Major League Baseball suffered through the Black Sox Scandal of 1919 when the Chicago White Sox allegedly "threw" the World Series.<sup>6</sup> Although the eight tainted ball players were acquitted of criminal charges, they were still suspended for life by the new, and first Commissioner of Baseball, Judge Kenesaw Mountain Landis, who asked for and received, unlimited power and lifetime tenure.<sup>7</sup> Of course, this mindset invariably leads to dictatorship. This created an inherent, dynamic tension between the Commissioner and the owners. The power to discipline under the Best Interests of Baseball Clause exceeds and is unconnected to the specifically enumerated discipline powers in the Standard Players Contract and the Collective Bargaining Agreement.<sup>8</sup>

Baseball is legally unique. It is the only entity that has an antitrust exemption, and for years luxuriated in the power of the reserve clause which "reserves" a player for life to one team.<sup>9</sup> Ultimately, the Collective Bargaining Agreement negated the reserve clause and forced the owners to allow free agency.<sup>10</sup> They fought it tooth and nail and countered with a collusion scheme that thwarted the signing of attractive free agents.<sup>11</sup> MLB was fined \$280 million by the recently deceased neutral arbitrator, George Nicolau.<sup>12</sup> Since

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3. *Id.*

4. *Id.* at 8.

5. See WALTER T. CHAMPION, *BASEBALL AND THE LAW: CASES AND COMMENTS* 173-233 (2016).

6. See *id.* at 173; see also *EIGHT MEN OUT* (Orion Pictures 1988); ELIOT ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (1963); *People v. Cicotte*, Indictment No. 21868 (Crim. Ct. of Cook Cty., Ill., Feb. term, 1921).

7. PETER A. CARFAGNA, *SPORTS AND THE LAW EXAMINING THE LEGAL EVOLUTION OF AMERICA'S THREE "MAJOR LEAGUES"* 1-2 (2009).

8. See generally Jason Pollack, *Take My Arbitrator, Please: Commissioner 'Best Interests' Disciplinary Authority in Professional Sports*, 67 *FORDHAM L. REV.* 1645 (1999).

9. See CHAMPION, *supra* note 5, at 83.

10. See *Kan. City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615 (8th Cir. 1976).

11. CHAMPION, *supra* note 5, at 315.

12. *Id.*; see Richard Sandomir, *George Nicolau, Arbitrator in Baseball Collusion Cases, Dies at 94*, *N.Y. TIMES* (Jan. 16, 2020), <https://www.nytimes.com/2020/01/16/sports/george-nicolau-dead.html>.

collusion was ineffective and costly, they tried the arbitrary contraction from thirty teams to twenty-eight, but that didn't work either.<sup>13</sup> It was yet another case of "Owners Acting Badly;" showcasing their messianic attempt to return to the halcyon days of "neo-slavery".<sup>14</sup>

However, the Commissioner's power is not unlimited. In *Atlanta National League Baseball Club, Inc. v. Kuhn*,<sup>15</sup> the court decided that MLB Commissioner Bowie Kuhn could suspend Ted Turner, the owner of the Atlanta Braves for one year for "tampering" with would-be free agent Gary Matthews, but the court did not allow the Commissioner to punish the Braves by forfeiting their first selection in the 1977 draft.<sup>16</sup> The Commissioner's decision to deprive plaintiffs of their first-round draft choice in the June 1977 amateur draft was held to be *ultra vires*, and therefore void.<sup>17</sup> It must be noted that Ted Turner was a "maverick owner", whereas Jim Crane is not.<sup>18</sup> Some might argue that the Astros punishment is comparable to the Commissioner's decision to penalize the St. Louis Cardinals for, ironically, hacking the Astros' computer system to obtain information on their scouting and draft plans.<sup>19</sup> Rob Manfred forced the Cardinals to pay \$2 million in damages to the Astros and surrender their two top remaining picks in the 2017 amateur draft (#46 & #75) to Houston.<sup>20</sup> The Cardinals did not dispute this punishment, but under *Atlanta National League Baseball Club*,<sup>21</sup> the deprivation of draft choices was a punitive sanction, and one not specifically enumerated in the Major League Agreement. The Commissioner's Best Interest of Baseball power cannot and must not be unlimited. In short, the Commissioner went too far in forcing the Astros to forfeit four top draft picks.<sup>22</sup>

### I. THE COMMISSIONER'S POWER, GENERALLY

Other than the Unmoved Mover herself, no one has more unchallenged power than the Commissioner of Baseball.<sup>23</sup> Baseball is legally different than

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13. CHAMPION, *supra* note 5, at 316.

14. *Id.*

15. 432 F. Supp. 1213, 1225 (N.D. Ga. 1977).

16. *Id.* at 1226.

17. *Id.*

18. *See id.*; *Cf.* MANFRED, *supra* note 1, at 1.

19. *See* United States v. Correa, No. 4:15-CR-00679 (S.D. Tex. Jan. 8, 2016).

20. *Id.*

21. *Atlanta Nat'l League Baseball Club*, 432 F. Supp. 1213.

22. *See generally Atlanta Nat'l League Baseball Club*, 432 F. Supp. 1213.

23. *See generally* Jeffrey Durney, *Fan or Foul? The Commissioner and Major League Baseball's Disciplinary Process*, 41 EMORY L. J. 581 (1992); Michael Willis, *Protecting the "Owners" of Baseball: A Governance Structure to Maintain the Integrity of the Game and Guard the Principal's Money Investment*, 88 NW. U. L. REV. 160 (1994); Jonathan Reinsdorf, *Powers of the Commissioners in Baseball*, 7 MARQ. SPORTS L. J. 211 (1996).

any other entity in the known Universe.<sup>24</sup> In the movie the *Field of Dreams*,<sup>25</sup> which fantasized the mythical return of Shoeless Joe Jackson who was banished from baseball as a result of the Black Sox scandal,<sup>26</sup> it was asserted that “the one constant through all the years, Ray, has been baseball. America has rolled by like an army of steamrollers; it’s been . . . rebuilt, and erased again. But baseball has marked the time.”<sup>27</sup>

Baseball evolved from a recreational past-time to a business in the 1870’s.<sup>28</sup> Owners pushed for reserve clauses and injunctions and such.<sup>29</sup> Before 1922, the Courts looked at Baseball in a relatively rational manner.<sup>30</sup> Some courts supported these onerous clauses, some courts did not.<sup>31</sup> In many ways Baseball was like any other emerging industry,<sup>32</sup> albeit one that was somewhere between a recreational pursuit and a job. But, in the early 1920s, it appeared to some reactionaries and America First fanatics, that the United States was falling apart and needed a loyalty test to prove our “Americanism.”<sup>33</sup> Baseball inexplicably jumped into that chasm. You’ve seen WWII movies, where they would question someone if they were a Nazi spy, by asking who won the World Series in 1938.<sup>34</sup> I’m afraid if that was the loyalty test today, most of us would be shot as enemy spies.

Shoeless Joe Jackson’s return “from the Heaven to Iowa (or was it vice versa?) to make up for his sins in the ‘Black Sox’ scandal of 1919, where Joe and seven of the White Sox allegedly threw the World Series,”<sup>35</sup> was similarly symbolic and poignant. But, the over-reaction to this scandal was the selection of “Judge Kenesaw Mountain Landis as Baseball’s Commissioner and the invention of the Best Interests of Baseball Clause.”<sup>36</sup>

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24. CHAMPION, *supra* note 5, at 1.

25. FIELD OF DREAMS (Gordon Company 1989).

26. CHAMPION, *supra* note 5, at 1.

27. FIELD OF DREAMS, *supra* note 25.

28. *Baseball – A Film by Ken Burns: Inning 1, Our Game* (PBS television broadcast Sept. 18, 1994).

29. *Id.*; See CHAMPION, *supra* note 5, at 27.

30. See *Baseball – A Film by Ken Burns: Inning 3, The Faith of 50 Million People* (PBS television broadcast Sept. 20, 1994); See, e.g., *Am. League Baseball Club of Chi. v. Chase*, 149 N.Y.S. 6 (N.Y. Sup. Ct. 1914). In *Chase*, the court refused to honor the preliminary injunction based on the lack of mutuality, the fact that the negative covenant was without consideration and that organized baseball was a monopoly. *Id.*

31. *Baseball – A Film by Ken Burns: Inning 3, The Faith of 50 Million People*, *supra* note 30; *contra Philadelphia Ball Club, Ltd. v. Lajoie*, 51 A. 973 (Pa. 1902).

32. *Baseball – A Film by Ken Burns: Inning 3, The Faith of 50 Million People*, *supra* note 30.

33. *Id.*; *Baseball – A Film by Ken Burns: Inning 4, A National Heirloom* (PBS television broadcast Sept. 21, 1994).

34. See *id.*; see *Baseball – A Film by Ken Burns: Inning 6, The National Pastime* (PBS television broadcast Sept. 25, 1994); see also KEN MOCHIZUKI, *BASEBALL SAVED US* (1993). In this book, the Japanese-American author was interned as a child in government internment camps in the desert, after he and his family were forcefully removed from their West Coast home. It must have been awful, but what “saved” him was the camp’s baseball teams. He was able to show how “American” he was by immersing himself in the most “American” of pursuits: Baseball. *Id.*

35. CHAMPION, *supra* note 5, at 1.

36. *Id.*

The Commissioner's power in professional baseball was inherent in the game itself almost from the beginning - it was not a peaceful existence; but, at least in early 1920 (let's say), there was a National Commission Chairman and Presidents of the American and National Leagues, who would administer justice including the power to discipline mostly recalcitrant ballplayers.<sup>37</sup>

Although the eight players were exonerated in *People v. Cicotte*,<sup>38</sup> the owners, especially Charles Comisky of the White Sox, wanted as the first commissioner of baseball, a man who would get 'tough,' [so they] . . . sought out federal Judge Kenesaw Mountain Landis, who demanded unlimited powers and a lifetime tenure. He then promptly suspended the eight players for life. . . ."<sup>39</sup>

The standard player's contract allows for discipline, to "be invoked to discourage a wide variety of activities, including gambling, criticizing umpires and referees, associating with undesirables, and failing to observe the rules of competition."<sup>40</sup> However, "[m]ost agreements recognize that the league commissioner has independent disciplinary authority."<sup>41</sup>

"Though the building blocks of professional sports are the athletic skills of the players, the mortar holding these blocks together is a nexus of contracts between the players, clubs and league."<sup>42</sup> League constitutions, by-laws, and collective bargaining agreements "state the scope of and the limitations on the authority of the commissioner, who is entrusted with overseeing the league."<sup>43</sup> In America's modern sports leagues, "Major League Baseball (MLB), the National Football League (NFL), and the National Basketball Association (NBA) each have a commissioner entrusted with protecting the 'best interests' of the game, though the contours of the position vary by league."<sup>44</sup> "The contract usually establishes that the commissioner has independent authority. The question is whether the athlete has consented to be bound by the particular disciplinary rules."<sup>45</sup>

The Commissioner's power is alive and well in the NBA as exemplified by Commissioner Silver dealing with the racist rantings of an owner:

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37. *Id.* at 173.

38. Indictment No. 21868 (Crim. Ct. of Cook Cty., Ill., Feb. term, 1921).

39. CHAMPION, *supra* note 5, at 174.

40. JOHN WEISTART & CYM LOWELL, *THE LAW OF SPORTS* 258-59 (1979) (footnotes omitted).

41. *Id.* (footnote omitted).

42. CARFAGNA, *supra* note 7, at 1.

43. *See id.*; *see also* Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L. J. 167 (1995).

44. CARFAGNA, *supra* note 7, at 1; *see also* Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L. J. 65 (1995).

45. WALTER T. CHAMPION, *SPORTS LAW CASES, DOCUMENTS, AND MATERIALS* 632 (2d ed. 2014).

Donald Sterling, the former owner of the Los Angeles Clippers, was recorded racist comments to his mistress. NBA Commissioner Adam Silver acted swiftly and correctly barred Sterling for life from the NBA and fining him \$2.5 million. A California state judge allowed Rachelle Sterling, Donald's estranged wife to make the sale on behalf of her husband, who was found to be incompetent by competent medical evidence. The team was sold for \$2 billion to Steve Ballmer, the former chief executive of Microsoft, in a forced sale.<sup>46</sup>

The commissioner's power is also used by the NFL to punish domestic abusers.<sup>47</sup> The Commissioner of the NFL can use three possible ways in implementing a domestic violence policy by using the collective bargaining agreement, the uniform player's contract, and the League Constitution and By-Laws.<sup>48</sup> Similarly, Baseball Commissioner Bud Selig proposed a multi-billion dollar deal to keep the troubled Los Angeles Dodgers' franchise afloat.<sup>49</sup> Baseball's Constitution allows the Commissioner to take control of a team that seeks Chapter 11 protection. The Dodgers were eventually sold for over \$2 billion dollars on April 13, 2012; the sale was approved by the bankruptcy court and on May 1, 2012, the sale was officially closed.<sup>50</sup>

## II. THE BEST INTERESTS OF BASEBALL CLAUSE

In *American League Baseball Club of New York v. Johnson*,<sup>51</sup> a 1919 New York case, the American League President, Ban Johnson, did not have the authority to compel the clubs to enforce the rules. However, in 1921, Judge Kenesaw Mountain Landis was selected as the first Commissioner with life tenure and unlimited powers.<sup>52</sup> In *Milwaukee American Association v. Bennett*,<sup>53</sup> the Commissioner's authority was held to encompass the disapproval of an option contract between ball club and player. The Commissioner was

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46. WALTER T. CHAMPION, SPORTS LAW IN A NUTSHELL 471 (5th ed. 2017); see also Billy Witz, *N.B.A. Signs Off on Ballmer's Purchase of the Clippers*, N.Y. TIMES (Aug. 13, 2014), <https://www.nytimes.com/2014/08/13/sports/basketball/sale-of-clippers-to-steve-ballmer-is-finalized.html>.

47. Anna Jefferson, *The NFL and Domestic Violence: The Commissioner's Power to Punish Domestic Abusers*, 7 SETON HALL J. SPORT L. 353 (1997).

48. *Id.* at 354–57.

49. CHAMPION, *supra* note 46, at 470.

50. See *id.*; see also Matthew Futterman, *TV Riches Fuel \$2 Billion Dodgers Deal*, WALL ST. J., March 28, 2012; Matthew Futterman, *Baseball's Dodger Deal Strikes Out, MLB Rejects Fox TV Pact Proceeds Were Needed for Payroll, McCourt's Divorce*, WALL ST. J., June 2, 2011.

51. *Am. League Baseball Club of N.Y. v. Johnson*, 179 N.Y.S. 498 (Sup. Ct. 1919).

52. CHAMPION, *supra* note 5, at 174.

53. *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1936).

“given jurisdiction to hear and determine finally any disputes between leagues and clubs or to . . . a player . . . in case of ‘conduct detrimental to baseball’” which included any conduct destructive to the baseball code.<sup>54</sup> The Best Interests of Baseball Clause “gave Landis the framework for unlimited powers. After his death in 1944, the owners sought to curtail that power somewhat but that did not last long.”<sup>55</sup>

The famous Supreme Court case of *Flood v. Kuhn*,<sup>56</sup> allows the reserve clause to continue on strict *stare decisis* grounds:<sup>57</sup> “To non-athletes it might appear that petitioner was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services.”<sup>58</sup> “Baseball is today big business that is packaged with beer, with broadcasting, and with other industries.”<sup>59</sup> Judge Cooper in denying Curt Flood’s preliminary injunction observed that:

Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young. Baseball’s status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody’s business.<sup>60</sup>

Commissioner Landis was given authority to take whatever steps that he “might deem necessary and proper in the interest and morale of the players and honor of the game.”<sup>61</sup> There was a clear intent “to endow the commissioner with all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial pater familias.”<sup>62</sup>

In *Atlanta National League Baseball Club, Inc. v. Kuhn*,<sup>63</sup> the Commissioner’s decision to suspend the chief executive of a baseball club, Ted Turner of the Atlanta Braves, was not an abuse of discretion and was within the Commissioner’s authority under contract. Turner was accused of violating the no-tampering rule and ignoring the Commissioner’s warning not to deal with

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54. *Id.* at 299.

55. CHAMPION, *supra* note 5 at 174.

56. *Flood v. Kuhn*, 407 U.S. 258 (1972).

57. *Id.* at 258.

58. *Id.* at 289 (Marshall, J., dissenting).

59. *Id.* at 287 (Douglas, J., dissenting).

60. *Flood v. Kuhn*, 309 F. Supp. 793, 797 (S.D.N.Y. 1970).

61. *Milwaukee Am. Ass’n v. Landis*, 49 F.2d 298, 299 (N.D. Ill. 1931).

62. *Id.*

63. 432 F. Supp. 1213 (N.D. Ga. 1977).

any free agents, such as Gary Matthews. However, the Commissioner's Order depriving the baseball club of its first-round draft choice in the 1977 amateur draft was *ultra vires* and void.<sup>64</sup> The Commissioner had ample authority to punish the team and owner for acts considered not in the best interests of baseball. The then imperial Commissioner Bowie Kuhn was determined by the Court to be within his authority as Commissioner and acting in the best interests of baseball when he suspended maverick owner Ted Turner. *Atlanta Baseball*<sup>65</sup> shows that although the authority is plenary in nature, his power may be limited by Baseball's Constitution and By-Laws; although the Commissioner could suspend Ted Turner as the Braves' owner, the Commissioner's power was insufficient to deprive Atlanta of its first-round draft pick.<sup>66</sup>

*Charles O. Finley & Co. v. Kuhn*<sup>67</sup> gives the Commissioner a great deal of flexibility as it regards the best interests of baseball. The question posed is whether the Commissioner of Baseball is contractually authorized to disapprove player assignments which he finds to be not in the best interests of baseball, where neither moral turpitude nor a violation of a Major League Rule is involved. Additionally, the Court asked whether a MLB provision waiving recourse to the courts is valid and enforceable.<sup>68</sup> Charles O. Finley, the maverick owner of the Oakland Athletics tried to sell his star players in a fire sale to avoid free agency: Commission Bowie Kuhn voided this sale underscoring his ability to disapprove player assignments that he deems to be not in the best interests of baseball.<sup>69</sup> Finley sold, just before the trading deadlines, Joe Rudi and Rollie Fingers to the Boston Red Sox for \$2 million, and Vida Blue to the New York Yankees for \$1.5 million.<sup>70</sup> "His motivation was that he would have lost these players to looming free agency, which in 1976 was a relatively new phenomenon."<sup>71</sup> The Seventh Circuit "goes back to 1921, and holds that Commissioner Bowie Kuhn, in 1978, has the authority to determine if any act, transaction, or practice is not within the best interests of baseball."<sup>72</sup> The Court decides "that Commissioner Bowie Kuhn acted in good faith, and essentially that is the end of their analysis since it is beyond the Court's jurisdiction to decide where he was right or wrong."<sup>73</sup>

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64. *Id.* (stating Ted Turner attended a cocktail party in New York City and was engaged in a conversation with Robert Lurie, co-owner of the San Francisco Giants, where he said "he would do anything" to sign free-agent Gary Matthews).

65. *Id.*; see CHAMPION, *supra* note 5, at 232.

66. *Atlanta Nat'l League Baseball Club*, 432 F. Supp. 1213.

67. 569 F.2d 527 (7th Cir. 1978).

68. *Id.*

69. *Id.*; see CHAMPION, *supra* note 5, at 232.

70. See CHAMPION, *supra* note 5, at 232.

71. *Id.*

72. *Id.*

73. *Id.*

“Gambling is the most serious possible infraction in baseball. Gambling has been a part of baseball since the beginning.”<sup>74</sup> After the fixed World Series of 1919, “[g]ambling has always been viewed as contrary to the goal of maintaining competitiveness and credibility in baseball.”<sup>75</sup> *Rose v. Giamatti*, concerns the jurisdiction of a court when a case is removed from state court based on a diversity of citizenship of the parties to the controversy.<sup>76</sup> Here, the Commissioner moves with great dispatch when he determines that Pete Rose, the all-time leader gambled as a manager. The Commissioner determined that those actions were not in “the best interests of baseball.”<sup>77</sup>

In 1992, the majority of National League teams voted for realignment. But, the Chicago Cubs prevented the realignment by using a veto provision within the National League Constitution.<sup>78</sup> Regardless, in *Chicago National League Ball Club, Inc. v. Vincent*,<sup>79</sup> Commissioner Fay Vincent ordered realignment using his best interests power.<sup>80</sup> The assumption is that the Commissioner has a special set of experiences within the culture of baseball and is the only person who can truly understand the nuances of governing baseball.<sup>81</sup> Accordingly, he has wide-latitude in interpreting the best interests clause.<sup>82</sup> However, *Vincent*<sup>83</sup> granted summary judgment against the Commissioner on the basis that his authority to investigate and punish does not encompass restructuring the league.<sup>84</sup> So, the Best Interests of Baseball does have limits.

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74. *Id.* at 509.

75. *Id.*

76. 721 F. Supp. 906 (S.D. Ohio 1989); see The Dowd Report, *Report to the Commissioner*, 68 MISS. L.J. 915 (Spr. 1999).

77. *Rose*, 721 F. Supp. at 918.

78. *Chicago Nat'l League Ball Club, Inc. v. Vincent*, No. 92 c4398 (N.D. Ill. 1992).

79. *Id.*

80. *Id.*

81. Reinsdorf, *supra* note 23, at 244.

82. *Id.*

83. *Chicago Nat'l League Ball Club, Inc. v. Vincent*, No. 92 c4398 (N.D. Ill. 1992).

84. See *id.*; see also Michael Willisch, *Protecting the "Owners" of Baseball: A Governance Structure to Maintain Integrity of the Game and Guard the Principals' Money Investment*, 88 NW. U.L. REV. 1619 (1993-1994); Jeffrey Durney, *Fair or Foul? The Commissioner's and Major League Baseball's Disciplinary Process*, 41 EMORY L.J. 581 (1992); Craig Arcolla, *Major League Baseball's Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring*, 97 COLUM. L. REV. 2420 (1997); Thomas Ostertag, *From Shoeless Joe to Charley Hustle: Major League Baseball's Continuing Crusade Against Sports Gambling*, 2 SETON HALL J. SPORTS L. 19 (1992); Matthew Pachman, *Limits on the Discretionary Powers of the Professional Sports Commissioners: A Historical and Legal Analysis of the Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1049 (1990); Livingston v. Shreveport-Texas League Baseball Corp., 128 F. Supp.191 (W.D. La. 1955) (discussing the arbitration clause for alleged breach of contract between baseball manager against ball club and concluding the President of National Association had jurisdiction to decide dispute after the President of League refused to act on it); Steinbrenner v. Esquire Reporting Co., 1991 WL 102540 (S.D.N.Y.) (analyzing maverick owner George Steinbrenner's attempt to circumvent then Commissioner Fay Vincent's investigation into Steinbrenner's activities with alleged gambler, Howard Spira. In *Steinbrenner v. Esquire Reporting*, George Steinbrenner harasses the stenographic company that conducted the Dowd Report interviews).

The Commissioner's powers are changing because of the impact of a true collective bargaining agreement. But, in 2015, the Commissioner's power is still "awesome." The MLB owners tried to fire commissioner Faye Vincent in 1992; he responded that Art. IX of the Major League Agreement prevented his termination. However, he resigned instead to "preserve" the "best interests of baseball."<sup>85</sup>

John Rocker was penalized for his verbal xenophobia on the basis that his off-season comments in December 1999 to a *Sports Illustrated* reporter violated the Best Interests of Baseball Clause.<sup>86</sup> Commissioner Bud Selig suspended Rocker with pay from both major and minor league spring training for 2000 and from the opening day of the season to May 1, 2000. He also was required to make a \$20,000 contribution to the NAACP.<sup>87</sup> In the Rocker arbitration decision, the commissioner's authority to discipline was based on the "just cause" provision in Baseball's Basic Agreement.<sup>88</sup> Rocker's uncensored assertions disparaged "kid[s] with purple hair, . . . some queer with AIDS, . . . foreigners," etc.<sup>89</sup> The arbitrator, Shyam Pas, found that Rocker was suspended without "just cause" and that his fine will be reduced from \$20,000 to \$500.<sup>90</sup> "Das found that the Commissioner had the authority to discipline Rocker, for his speech, but that the suspension was too severe and without 'just cause.'"<sup>91</sup> So, again it was found that the Best Interests of Baseball Clause had limits.

### III. BASEBALL'S HISTORY OF "GAMESMANSHIP"

Commissioner Manfred would have you believe that there are three preeminent scandals in baseball: the Black Sox scandal,<sup>92</sup> the steroids scandal,<sup>93</sup> and the Astros' sign-stealing scandal.<sup>94</sup> But, Black Sox and steroids are an entirely different scenario than sign-stealing. The Black Sox threw the World

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85. CHAMPION, *supra* note 5, at 233 (footnotes omitted).

86. CHAMPION, *supra* note 45, at 652; see Roger Abrams, *Off His Rocker: Sports Discipline and Labor Arbitration*, 11 MARQ. SPORTS L. REV. 67 (Spr. 2001); see also Lewis Kurlantzik, *John Rocker and Employee Discipline for Speech*, 11 MARQ. SPORTS L. REV. 185 (Spr. 2001); see also PATRICK THORNTON, LEGAL DECISIONS THAT SHAPED MODERN BASEBALL 126-39 (2012).

87. HOWARD L. GANZ ET AL., UNDERSTANDING BUSINESS AND LEGAL ASPECTS OF THE SPORTS INDUSTRY 765 (vol. 2 2001).

88. *Id.*

89. Jeff Pearlman, *At Full Blast*, SPORTS ILLUSTRATED 62, Dec. 27, 1999; See also THORNTON, *supra* note 86, at 127.

90. GANZ ET AL., *supra* note 87, at 796.

91. THORNTON, *supra* note 86, at 137.

92. See "People v. Cicotte. The Black Sox and Baseball's Most Famous Trial," in THORNTON, *supra* note 86, at 77-107.

93. See CHAMPION, *supra* note 5, at 530-43.

94. MANFRED, *supra* note 1.

Series,<sup>95</sup> whereas BALCO abused performance enhancing drugs.<sup>96</sup> The Astros sign-stealing is more aptly described as gamesmanship, as opposed to illegal acts.<sup>97</sup>

Not playing by the rules and hoping to avoid detection is considered cheating. Most everyone in sports would consider this to be ethically or morally wrong. Gamesmanship occupies a gray area between good sportsmanship and outright cheating. Gamesmanship utilizes legal tactics that are morally dubious and are designed to unsettle opponents. These tactics are not technically against the rules – At the professional level, with millions of dollars at stake, gamesmanship can sometimes take precedence over sportsmanship.<sup>98</sup>

It certainly can be argued that sign-stealing is gamesmanship. “Examples of gamesmanship can include trash talking, taking an inordinate amount of time between points in a tennis match, or calling an unnecessary time out to ‘freeze’ an opponent before a crucial foul shot in basketball.”<sup>99</sup> Sign-stealing is not criminal in nature, unlike gambling or drug abuse.

“Spying and gaining access to an opponent’s strategies is a long-standing issue in sports.”<sup>100</sup>

There is often a fine line between gamesmanship and sportsmanship, but gamesmanship is clearly present in sports, and always has been. The *American Heritage Dictionary* defines gamesmanship as ‘the method or art of winning a game or contest by means of unsportsmanlike behavior or other conduct that does not actually break the rules.’<sup>101</sup>

MLB player Miquel Tejada was involved in another “sign-stealing” scandal, although sign-stealing is usually acceptable in baseball, there is a line of

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95. THORNTON, *supra* note 86, at 77–107.

96. *See, e.g.*, *United States v. Bonds*, 924 F.2d 664 (7th Cir. 1991).

97. *See* George Vecsey, *When Gamesmanship Blurs to Cheating*, N.Y. TIMES (Sept. 23, 2006), <https://www.nytimes.com/2006/09/23/sports/football/when-gamesmanship-blurs-to-cheating.html>; *see also* Michael Bleach, *La Russa Denies Gamesmanship Charge*, CARDINALS.COM NEWS (June 30, 2010); *see also* STEPHEN POTTER, THE THEORY AND PRACTICE OF GAMESMANSHIP: OR THE ART OF WINNING GAMES WITHOUT ACTUALLY CHEATING (1998); *see also* John Paul Newport, *The Art of Gamesmanship*, WALL ST. J. (Jan. 11, 2009), <https://www.wsj.com/articles/SB123154192847669489>. These sources are cited in THORNTON ET AL., SPORTS ETHICS FOR SPORTS MANAGEMENT PROFESSIONALS 46 (2012).

98. *Id.* at 45; *see also* WALTER T. CHAMPION ET AL., SPORTS ETHICS FOR SPORTS MANAGEMENT PROFESSIONALS (2nd ed. 2020).

99. THORNTON ET AL., *supra* note 97, at 45–46.

100. CHAMPION, *supra* note 98, at 26.

101. THORNTON ET AL., *supra* note 97, at 47.

demarcation.<sup>102</sup> However, it is acceptable in baseball for one team to “try to spy on another’s team practice to gain valuable information for the next game.”<sup>103</sup> Tejada was accused of “tipping” pitches to friends on opposing teams and allowing balls hit by his fellow Dominicans to get past him at shortstop during games with lopsided scores.<sup>104</sup> There was no hard evidence presented against Tejada who denied the charges.<sup>105</sup> “Like other major league players, Tejada has a loyalty clause in his contract. Could the A’s terminate Tejada’s contract for his disloyalty based on his actions if it was proven that he was assisting opposing players.”<sup>106</sup>

In *Sports Ethics for Sports Management Professionals* – the following scenarios are offered as National Pastime Ethical Dilemmas –

1. In the 1980s, Chicago White Sox batters were allegedly looking to a flashing bulb on the scoreboard in Comiskey Park that would tell them what the next pitch was going to be from the opposing pitcher.
2. Major league player Sammy Sosa was ejected from a game against the Tampa Bay Devil Rays for using a corked bat.
3. In 1935, marketing genius Bill Veeck was at it again, this time handing promotional mirrors to fans in the stands who then took the opportunity to reflect sunlight in the opposing batter’s face.
4. In the 1980s, there were rumors the Minnesota Twins would turn the air conditioning units off and on to produce tailwinds for Minnesota batters when they came to the plate. Former Metrodome superintendent Dick Ericson confirmed the “vent manipulation” to the Minneapolis Star-Tribune in 2003.<sup>107</sup>

In May 2010, the Philadelphia Phillies were accused by the Colorado Rockies of using binoculars from the bullpen to steal signs; MLB issued a warning to the Phillies about their alleged sign stealing even though there is nothing in baseball’s rule book on sign stealing. In 2001, MLB Vice President Sandy Alderson reminded teams that “no club shall use electronic equipment to communicate to or with any on-field personnel.”<sup>108</sup>

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102. CHAMPION, *supra* note 98, at 26.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* (footnote omitted).

107. THORNTON ET AL., *supra* note 97, at 67 (footnotes omitted).

108. *Id.* at 69 (footnote omitted).

Hall of Fame baseball pitcher and patron saint Christy Mathewson wrote in 1912, “[a]ll is fair in love, war, and baseball except stealing signals dishonestly.”<sup>109</sup> Former major league pitcher, Bert Blyleven could be classified as an artist. He commented on sign stealing, “[s]tealing signs, or noticing when a pitcher is not cheating, that’s just baseball. You try to get an advantage over your opponent any way you can.”<sup>110</sup>

#### IV. THE BLACK SOX AND STEROIDS SCANDAL

The Chicago White Sox was the popular betting favorite in the 1919 World Series between the White Sox and the Cincinnati Reds. The White Sox was the most formidable team of its era with star pitcher Eddie Cicotte, future Hall of Famers catcher Ray Schalk and second baseman Eddie Collins, and arguably the best outfielder in baseball, “Shoeless” Joe Jackson.<sup>111</sup> The White Sox were famously underpaid by owner Charlie Comiskey. At that time there was a general acceptance of gambling, which created a fertile loam for gamblers to seek an advantage. First Baseman Chick Gandil approached gamblers and agreed to throw the World Series for \$80,000.<sup>112</sup> The money came from New York gambler Arnold Rothstein.<sup>113</sup> Gandil recruited Cicotte, Swede Risberg, Lefty Williams, Buck Weaver, Jackson, Fred McMullin, and Happy Felsch.<sup>114</sup>

The Cook County grand jury met on September 22, 1920, to investigate the allegations of the alleged conspiracy in the 1919 World Series.<sup>115</sup> The grand jury issued indictments in late September 1920 and publicized its reports on November 6, 1920.<sup>116</sup> Eddie Cicotte was the first to admit to wrongdoing,<sup>117</sup> and then Joe Jackson and Lefty Williams.<sup>118</sup> White Sox President Charles A. Comiskey immediately suspended the eight players.<sup>119</sup> These eight White Sox players were indicted by the Cook County grand jury on the charge of conspiracy to fix the 1919 World Series.<sup>120</sup> The jury found that the defendants were not guilty.<sup>121</sup> However, baseball’s new Commissioner, Kenesaw Mountain Landis, suspended the eight players for life on the basis that no one who throws

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109. *Id.* (footnote omitted).

110. *Id.* (footnote omitted).

111. See Michael Klein, *Rose is in Red, Black Sox are Blue: A Comparison of Rose v. Gramatti and the 1921 Black Sox Trial*, 13 HASTINGS COMM/ENT. L. J. 551 (Spr. 1991); see also THORNTON, *supra* note 86, at 77–108.

112. THORNTON, *supra* note 86, at 77–108.

113. *Id.*

114. *Id.*

115. *Id.* at 78.

116. *Id.* at 79.

117. THORNTON, *supra* note 86, at 79.

118. *Id.* at 80–84.

119. *Id.* at 84.

120. *Id.* at 85.

121. *Id.* at 104–05.

a ball game, no player that undertakes or promises to throw a ballgame, or sits in conference with crooked players, will never play baseball again.<sup>122</sup>

The conspiracy theory of steroid abuse in baseball is something like this: the sport suffered a grievous publicity setback when the 1994 strike eliminated the World Series, but regained its popularity with a home run derby fueled by steroids.<sup>123</sup> George W. Bush was the President of the Texas Rangers when steroid abuse first percolated through baseball.<sup>124</sup> Years later, President George W. Bush initiated the war on steroid use in his 2004 State of the Union Address: “To help children make right choices, they need good examples. Athletes play such an important role in our society, but, unfortunately, some in professional sports are not setting much of an example. The use of performance-enhancing drugs is dangerous . . . and it sends the wrong message.”<sup>125</sup>

Bay Area Laboratory Co-operative (BALCO) Labs was the focus of a federal Bay Area grand jury investigation that attempted to link more than 100 athletes, including Barry Bonds and other baseball players, to the use of a newly detectable “designer” performance-enhancing steroid known as “THG.”<sup>126</sup> As a result of the steroid abuse scandal and resultant home run bonanza, former Senator George Mitchell was made Chairman of a Special Commission (the Mitchell Report) established by Major League Baseball to examine the use of performance enhancing drugs in baseball.<sup>127</sup>

Scandals in baseball that tarnish the integrity of the game have been imbedded in the sport since the beginning; however, these morality plays have always involved criminal sanctions:

Cheating scandals in sports are nothing new. In the “Black Sox Scandal” of 1919, baseball fans learned that key players on the Chicago White Sox conspired with gamblers to throw the

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122. *Id.* at 106–07.

123. CHAMPION, *supra* note 45, at 701.

124. *See generally* Walter Champion & Danyahel Norris, *Obama vs. Bush on Steroids: Two Different Approaches to a Pseudo-Controversy—Or is it Really Worth a Note in the State of the Union Address*, 30 T. MARSHALL L. REV. 193 (2011).

125. President George W. Bush, *State of the Union Address*, WHITE HOUSE (Jan. 20, 2004), <http://www.whitehouse.gov/news/releases/2004/01/2004-t.html>.

126. CHAMPION, *supra* note 45, at 701; *see* James A.R. Nafziger, *Circumstantial Evidence of Doping: BALCO and Beyond*, 16 MARQ. SPORTS. L. REV. 45, 51 (2005); *U.S. v. Bonds*, 608 F.3d 495, 498 (9th Cir. 2010); *U.S. v. Bonds*, 784 F.3d 582 (9th Cir. 2015) (per curiam) (noting Barry Bonds’ conviction for obstruction of justice under 18 U.S.C. §1503 was reversed on the basis that a rambling non-responsive answer to a simple question is insufficient evidence to support a §1503 violation). Bonds’ response to “[d]id your trainer ever give you anything that required a syringe” digressed to . . .

That’s what keeps our friendship. You know, I am sorry, but that—you know, that—I was a celebrity child, not just in baseball by my own instincts. I became a celebrity child with a famous father. I just don’t get into other people’s business because of my father’s situation, you see.

*Bonds*, 784 F.3d at 583.

127. CHAMPION, *supra* note 48, at 480–81.

World Series to their opponents the Cincinnati Reds. In more recent times, baseball player Jose Canseco admitted that he used performance enhancing drugs throughout his career spanning the 1980-1990s (he claims many of his fellow baseball players did the same) and in 2003 umpires ejected player Sammy Sosa (no stranger to controversy himself) for using a “corked bat” in a 2003 baseball game. In the hyper-competitive world of professional sports, where hard-working athletes are heroes to children and adults alike, it is no secret that athletes will sometimes disappoint their fans by acting unethically to gain a perceived edge.<sup>128</sup>

Commissioner Manfred attempts to equate gamesmanship to cheating.

#### V. THE ASTROS' “HIGH-TECH” SIGN-STEALING SCANDAL

The allegedly “high-tech” aspect of the Astros’ sign-stealing was the tipping point that initiated the Commissioner’s harsh penalties.<sup>129</sup> Additionally, the Commissioner emphasized that sign-stealing violations would not be tolerated.<sup>130</sup> In *Atlanta National League Baseball Club*,<sup>131</sup> the court indicated that Commissioner Kuhn had previously warned the teams that any contact with potential free agents was strictly prohibited prior to the end of the season.<sup>132</sup> Manfred’s Statement of the Commissioner emphasized that “it is important to understand that the attempt to decode signs being used by an opposing catcher is not a violation of any Major League Baseball Rule or Regulation.”<sup>133</sup> The Commissioner had previously warned the Boston Red Sox in August 2017, that the continued use of smart watches to decode signs would not be tolerated.<sup>134</sup> However, the Commissioner indicated that the Major League Baseball Regulation prohibited the use of electronic equipment during games for the purpose of stealing signs or conveying information designed to give the team a competitive advantage.<sup>135</sup>

The Astros’ sign-stealing was described by the Commissioner as “[o]ne or more players watched the live feed of the center field camera on the monitor, and after decoding the sign, a player would bang a nearby trash can with a bat

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128. *Oliver v. Houston Astros, LLC*, No. 2:20-cv-00283, 2020 WL 1430382, at ¶2 (D. Nev. Mar. 23, 2020) (footnotes omitted).

129. See MANFRED, *supra* note 1, at 4.

130. *Id.* at 3–4.

131. *Atlanta Nat’l League Baseball Club*, 432 F. Supp. at 1223.

132. *Id.* at 1215–16.

133. MANFRED, *supra* note 1, at 2.

134. *Id.*

135. *Id.*

to communicate the upcoming pitch type to the batter.”<sup>136</sup> Since, only high-tech sign-stealing was prohibited, one wonders if trash can banging could ever be conceived as cutting edge. The clubs were put on notice as of September 15, 2017 “that any use of electronic equipment to steal signs would be dealt with more severely by my office.”<sup>137</sup> In the MLB memorandum of March 2018, the Commissioner’s Office restated that “[e]lectronic equipment, including game feeds in the Club replay room and/or video room, may never be used during a game for the purpose of stealing the opposing team’s signs.”<sup>138</sup> In a telling assertion, the Commissioner blamed Astros’ baseball operations for failing to establish a culture of strict adherence to the rules and stopping “bad behavior as soon as it occurred.”<sup>139</sup> Under the “doth protest too much, methinks”<sup>140</sup> analogy, there was immediate suspicion and speculation on the sincerity of the Commissioner’s punishment.<sup>141</sup> “At the heart of baseball’s sign stealing scandal, is the sport’s long struggle with technology and its inconsistent drawing of a line between gamesmanship and cheating.”<sup>142</sup> Jeré Longman of the New York Times accurately asserts that “[b]aseball’s mythos is immersed in cunning larceny and wily deceit.”<sup>143</sup> “Artful trickery makes baseball enduring, helps keep it relevant,”<sup>144</sup> and sign-signaling seems to be allowed to a point:

It is O.K. for base runners to steal a catcher’s signs, but not for anyone to use a television or computer to decipher the sequence of those finger-wagging signals. Then caginess is deemed an unfair advantage and, as we have seen in recent days, a fireable offense.<sup>145</sup>

This appears to be somewhat hypocritical since baseball executives with active MLB support are in the vanguard of the analytics movement in sports.<sup>146</sup>

Although not mentioned in the Commissioner’s Report, it was alleged *ex post facto* that the Astros’ also utilized an Excel-based algorithm that decoded

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136. *Id.*

137. *Id.* at 3.

138. *Id.*

139. MANFRED, *supra* note 1, at 4–5.

140. JOHN BARTLETT, A COLLECTION OF FAMILIAR QUOTATIONS 91 (Cambridge: Allen and Farnham, Stereotypers and Printers 1856).

141. Jeré Longman, *Technology Throws a Curveball to a Sport Built on Deceit*, N.Y. TIMES (Jan. 18, 2020), <https://www.nytimes.com/2020/01/18/sports/sign-stealing.html>.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

the opposing catcher's signs; the so-called "codebreaker" program.<sup>147</sup> However, in Manfred's letter eleven days before the Commissioner's statement, he confronted Jeff Luhnow that there was sufficient evidence that he should have known of the sign-stealing program, but MLB could not prove that Luhnow knew how codebreaker was used.<sup>148</sup> But again, there were no claims that Luhnow was duplicitous or aware of Codebreaker's existence in Manfred's detailed nine-page statement.<sup>149</sup>

## VI. THIRD-PARTY LAWSUITS AGAINST THE ASTROS

The Astros' sign-stealing scandal created a mini-feeding frenzy of third-party lawsuits.<sup>150</sup> This is a fairly typical reaction in professional sports where disgruntled fans sue for allegedly unsportsmanlike behavior such as bountygate,<sup>151</sup> spygate,<sup>152</sup> and lawsuits over bad officiating in a New Orleans playoff game.<sup>153</sup> These lawsuits are routinely dismissed on the grounds that the plaintiffs lack standing to sue or that there is no cause of action, and/or that the lawsuits are frivolous.<sup>154</sup>

The first legal response was season ticket holders suing as a class for diminished value based on the Astros' alleged fraud.<sup>155</sup> Other lawsuits that have

147. Ben Pickman & Matt Martell, *Report: Astros Front Office "Laid the Groundwork" for Sign Stealing*, SPORTS ILLUSTRATED (Feb. 7, 2020), <https://www.si.com/mlb/2020/02/08/astros-front-office-laid-groundwork-sign-stealing>.

148. Jared Diamond, *'Dark Arts' and 'Codebreaker': The Origins of the Houston Astros Cheating Scheme*, WALL ST. J. (Feb. 7, 2020), <https://www.wsj.com/articles/houston-astros-cheating-scheme-dark-arts-codebreaker-11581112994>.

149. MANFRED, *supra* note 1, at 6.

150. See David Bannon, *Do Any of the Astros Lawsuits Stand a Chance? A Lawyer Explains*, HOUS. CHRON. (Feb. 19, 2020), <https://www.houstonchronicle.com/texas-sports-nation/astros/article/Astros-lawsuits-face-complicated-path-toward-trial-15069061.php>.

151. See Judy Battista, *Saints Coach is Suspended for a Year over Bounties*, N.Y. TIMES (Mar. 21, 2012), <https://www.nytimes.com/2012/03/22/sports/football/nfl-delivers-harsh-punishment-to-saints-over-bounty-program.html>; see Tim Rohan, *N.F.L. Commissioner Reaffirms Bounty-Case Suspensions*, N.Y. TIMES (July 3, 2012), <https://www.nytimes.com/2012/07/04/sports/football/nfl-commissioner-reaffirms-saints-bounty-case-player-suspensions.html>.

152. See *Mayer v. Belichick*, 2009 WL 792088, at ¶ 1 (D. N.J. Mar. 23, 2009), *aff'd* 605 F.3d 223 (3d Cir. 2010) (discussing the Patriots stole signs; season ticket holders failed to allege breach of contract based on his contracting for a fair and honest game); see also *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 2015 WL 5148739 (S.D.N.Y. Sept. 3, 2015), *rev'd & rem'd* 820 F.3d 527 (2d Cir. 2016) (deflategate).

153. *Badeaux v. Goodell*, 358 F. Supp.3d 562 (E.D. La. Jan. 31, 2019) (stating season ticket holders were sued over "blown call" alleging negligence on the part of NFL Commissioner Roger Goodell and that he should either reschedule or reverse game's results; court held that mandamus relief is not available since it cannot be used to compel performance of contractual rights and obligations).

154. See, e.g., *Garza v. Nat'l Football League*, 2018 WL 2979568, at ¶¶ 1-2 (E.D. Cal. June 13, 2018); *Mayer v. Belichick* 2009 WL 792088, at ¶ 3 (D. N.J. Mar. 23, 2009), *aff'd* 605 F.3d 223 (3d Cir. 2010).

155. See *Consol. Amended Class Action Petition and Jury Demand* at 3, *Adam Wallach v. Houston Astros, LLC*, no. 2020-10637, *Roger Contreras*, no. 2020-11192, and *Kenneth Young*, no. 2020-11221 (Harris Cnty., Dist. Ct., 152d Jud. Dist., May 4, 2020).

been filed allege that the Astros' sign-stealing destroyed the career of a ball player<sup>156</sup> and that the cheating ruined the odds for legal gamblers.<sup>157</sup>

A recent third-party lawsuit against the National Football League by Raul Garza, a federal prisoner, alleges that the NFL team owners violated his constitutional rights when the owners allowed players "to commit acts of treason" by kneeling during the national anthem.<sup>158</sup> Raul Garza, also sued Cleveland Cavaliers basketball player LeBron James for committing treason, when he stated that "[n]ot one man runs this Country, and its sure in hell not him President Trump." According to Plaintiff, "this gives reason to believe that Lebron James is some leader for the NBA to support NFL acts of treason or is connected to an espionage to sabotage U.S. allegiance to citizens."<sup>159</sup> The court found that Garza's lawsuit failed to state a cognizable claim for relief.<sup>160</sup>

Anthony Oliver is another prisoner who sued the Houston Astros for losing a \$7,500 bet in Las Vegas in 2017 that the Los Angeles Dodgers would win the 2017 World Series.<sup>161</sup> Oliver also bet another \$6,000 through a sports betting app on the Dodgers to win the 2018 World Series.<sup>162</sup> "Plaintiff argues that he lost his bets both years because the Astros and Red Sox cheated, referring to the organizations' sign-stealing scandal."<sup>163</sup> Oliver alleges that the Astros and Red Sox violated RICO (Racketeer Influenced and Corrupt Organizations),<sup>164</sup> conspiracy to violate 18 U.S.C. §1962(c), (d), and unjust enrichment.<sup>165</sup>

The *Oliver* court discusses other unsuccessful third-party fan lawsuits,<sup>166</sup> for example, *Alessi v. Mayweather (In re Pacquiao-Mayweather Boxing Match Pay-Per-View Litigation)*<sup>167</sup> where it was held that Manny Pacquiao's non-disclosure of his shoulder injury prior to the match with Floyd Mayweather, Jr., did not constitute a legal injury to the fans since they got what they paid for, a full-length regulation fight between two boxing superstars.<sup>168</sup> *Mayer v. Belichick*<sup>169</sup> disallowed a season ticket-holder's lawsuit arising out of the New England Patriots' videotaping of opponent's signals. "Fans generally have no

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156. See Complaint for Damages & Demand for Jury Trial, ¶ 6, *Bolsinger v. Houston Astros, L.L.C.*, No. 20STCV05242 (Cal. Super. L.A. Cnty., Feb. 10, 2020).

157. See *Oliver v. Houston Astros, LLC*, No. 2:20-CV-00283, 2020 WL 1430382 (D. Nev. Mar. 23, 2020); *Olson v. Major League Baseball*, 447 F. Supp. 3d 159 (S.D.N.Y. Apr. 3, 2020).

158. *Garza v. National Football League*, 2018 WL 2979568, at ¶ 1 (E.D. Cal. June 13, 2018), *dismissed* 2019 WL 3226622, No. 19-15779 (9th Cir. 2019).

159. *Garza*, 2018 WL 2979568, at ¶ 2.

160. *Id.* at ¶ 3.

161. *Oliver v. Houston Astros, LLC*, No. 2:20-CV-00283, 2020 WL 1430382, at ¶ 1 (D. Nev. Mar. 23, 2020).

162. *Id.*

163. *Id.*

164. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964.

165. *Oliver*, 2020 WL 1430382, at ¶ 1.

166. *Id.* at ¶ 3.

167. *Alessi v. Mayweather*, 942 F.3d 1160 (9th Cir. 2019).

168. *Id.* at 1164; see *Oliver*, 2020 WL 1430382, at ¶ 3.

169. *Mayer v. Belichick*, 605 F.3d 223 (3d Cir. 2010).

'legally cognizable right, interest, or injury' to recover for violations of a professional sports league's 'own rules.'"<sup>170</sup> Similarly, *Bowers v. Fed'n Internationale De L'Automobile*,<sup>171</sup> disallowed fans' suits against car race organizers when competitors failed to appear on race day.<sup>172</sup> "The Courts have repeatedly refused to allow judges to become replay officials for disappointed fans. Oliver's claims here are even more remote because his bets directly benefited the sportsbooks, not the Astros or Red Sox."<sup>173</sup>

Oliver's theory appears to be that he would not have placed losing bets on the Dodgers if the dark secrets of the baseball trade, here the "signal stealing" scandals of 2017 and 2018, had been public knowledge prior to the 2017 World Series. Oliver's theory is that the Astros and Red Sox harmed him by defrauding the Dodgers through a pattern of stealing the Dodger's hand signals. Oliver cannot show that the Astro's and Red Sox's actions are the proximate cause of his harm because his actions (placing bets) are distinct from the alleged RICO violation (defrauding the Dodgers of their World Series titles). Oliver is not the direct victim here and there is no proximate causation.<sup>174</sup>

However, it is axiomatic that "[t]he Astros and Red Sox could have won the World Series for any number of reasons unconnected to the asserted pattern of fraud. The fact that a team may engage in the fraudulent use of technology to steal hand signals does not guarantee that the signal-stealing team will win."<sup>175</sup>

Former journeyman MLB pitcher, Mike Bolsinger, sued the Astros for ruining his career and forcing him out of baseball due to his shellacking allegedly as a result of sign-stealing.<sup>176</sup>

Plaintiff Bolsinger was a professional relief pitcher with the Toronto Blue Jays who was called into the game by his team on August 4, 2017 after the prior pitchers on his team gave up

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170. *Id.* at 237; *see Oliver*, 2020 WL 1430382 at ¶ 3.

171. *Bowers v. Fed'n Internationale de L'Automobile*, 489 F.3d 316 (7th Cir. 2007).

172. *Id.* at 319; *see Oliver*, 2020 WL 1430382 at ¶ 3.

173. *Oliver*, 2020 WL 1430382 at ¶ 3.

174. *Id.* at ¶ 4.

175. *Id.*

176. *See* Complaint for Damages & Demand for Jury Trial, ¶ 6, *Bolsinger v. Houston Astros, L.L.C.*, No. 20STCV05242 (Cal. Super. L.A. Cnty., Feb. 10, 2020); *see also* David Barron, *Former Pitcher's Lawsuit Rooted in Anger: Bolsinger Can't Get over Players' Attitude when Confronted About Sign Stealing*, HOUS. CHRON., Feb. 12, 2020, at C3; Jerome Soloman, *Commentary, Ex-Pitcher Files Suit over Club's Sign Stealing. In this Particular Case, Plaintiff Struggled Against more Hitters than Just Houston's*, HOUS. CHRON., Feb. 11, 2020, at C1; Chandler Rome and David Barron, *Ex-Pitcher Files Suit over Club's Sign-Stealing. Bolsinger Claims Cheating Scheme's Impact on Final Jays Outing Was Career "Death Knell"*, HOUS. CHRON., Feb. 11, 2020, at C1; *Crane, Vigoa Named in Bolsinger Lawsuit*, HOUS. CHRON., Feb. 21, 2020, at C3.

several runs. In .1 innings pitched, Plaintiff Bolsinger gave up 4 runs to the Defendant Astros and was immediately terminated and cut from the team never to return to Major League Baseball again.<sup>177</sup>

Bolsinger sued for unjust enrichment, restitution, unfair business practices (electronic sign stealing), fraudulent concealment, negligence, Intentional Interference with Contractual Relations, Intentional Interference with Prospective Economic Relations, and Negligent Interference with Prospective Economic Relations.<sup>178</sup> “Plaintiff [sought] restitution in the form of Defendant Astros returning the post-season bonuses earned from winning the 2017 World Series which . . . is approximately \$31 million.”<sup>179</sup> Bolsinger’s complaint was too speculative and fails to show the proximate cause between the loss of his career and the Astros alleged sign-stealing.<sup>180</sup>

In the consolidated class action lawsuit of Adam Wallach, Roger Contreras, and Kenneth Young, plaintiffs/Astros season ticket holders allege that the Astros’ sign stealing caused them monetary and equitable damages.<sup>181</sup> Plaintiffs assert claims in Fraud by Nondisclosure,<sup>182</sup> Violations of Texas Deceptive Trade Practices,<sup>183</sup> Money Had & Received,<sup>184</sup> and Unjust Enrichment/Assumpsit.<sup>185</sup> Plaintiffs claim “[t]he Astros won because they cheated. They not only stole signs to gain an unfair advantage in games, they pilfered the respect, dignity, and hard-earned money of their most devoted fans, who believed the Astros played by the rules and won because they earned it, not because they cheated.”<sup>186</sup> “These fans, including Plaintiffs, were cheated by the cheaters.”<sup>187</sup> The Astros’ correct answer is that plaintiffs/season ticket-holders do not have legal standing

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177. Complaint for Damages & Demand for Jury Trial, *supra* note 156, at 2.

178. *Id.* at 2, 6, 9–13.

179. *Id.* at 2.

180. See generally *id.*; see also *Astros Ask to Dismiss Suit from Ex-Player*, HOUS. CHRON., Apr. 1, 2020, at A9 (stating the Astros’ contend that the case is “utterly devoid of merit” and that California is not the proper venue); WALTER T. CHAMPION, FUNDAMENTALS OF SPORTS LAW 20 (2d ed. 2004) (footnote omitted) (“Proximate cause can be defined as that cause in which a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, without which the injury would not have occurred”).

181. Consol. Amended Class Action Petition and Jury Demand at 3, Adam Wallach v. Houston Astros, LLC, no. 2020-10637, Roger Contreras, no. 2020-11192, and Kenneth Young, no. 2020-11221 (Harris Cnty., Dist. Ct., 152d Jud. Dist., May 4, 2020) at 4; see unconsolidated causes: Wallach v. Houston Astros, LLC, Pet. No. 2020-10637 (Harris Cty. Dist. Ct., 152d Jud. Dist., Feb. 20, 2020); Contreras v. Houston Astros, LLC, Pet. No. 2020-11192 (Harris Cty. Dist. Ct., 127th Jud. Dist., Feb. 18, 2020); Young v. Houston Astros, LLC, Pet. No. 2020-11221 (Harris Cty. Dist. Ct., 165th Jud. Dist., Feb. 18, 2020).

182. Consol. Amended Class Action Petition and Jury Demand at 3, Adam Wallach v. Houston Astros, LLC, no. 2020-10637, Roger Contreras, no. 2020-11192, and Kenneth Young, no. 2020-11221 (Harris Cnty., Dist. Ct., 152d Jud. Dist., May 4, 2020) at 49.

183. *Id.* at 52.

184. *Id.* at 56.

185. *Id.* at 57.

186. *Id.* at 3.

187. *Id.*

to sue the Astros over their “disappointment” on how the Astros played the game.<sup>188</sup>

Similar to the Astros’ ticket holders’ lawsuits for alleged sign-stealing is *McCoy v. Major League Baseball*, which was a third-party suit for damages as a result of cancellation of parts of the 1994 and 1995 baseball seasons, including the 1994 World Series.<sup>189</sup> A group of businesses near baseball stadiums and fans sued the MLB based on the supposition that the owners’ failure to bargain in good faith was an unfair labor practice which resulted in game cancellations and resulting damages.<sup>190</sup> The court held that the businesses lacked standing to challenge baseball’s antitrust exemption.<sup>191</sup> “There is no evidence that the Owners intended to harm the fans. In addition, the injury suffered by the fans is not direct [and] . . . can be fairly characterized as an indirect ‘ripple effect.’”<sup>192</sup> Additionally, “the fans’ damages do not arise out of the allegedly illegal conduct that the antitrust laws are intended to remedy.”<sup>193</sup>

*Ajzenman v. Office of the Commissioner of Baseball*<sup>194</sup> is another ongoing lawsuit claiming damages incurred by season ticket holders resulting from the partial cancellation of the 2020 Major League Baseball season due to the COVID-19 pandemic. “More than \$1 billion in consumer capital is tied up in tickets to games that are stuck in limbo because of the pandemic . . . .”<sup>195</sup> Plaintiffs allege violations of California’s Unfair Competition Act, California’s Consumer Legal Remedies Act and Civil Conspiracy, and unjust enrichment.<sup>196</sup> Plaintiff asserts that “[t]he Commissioner and his office are tasked with carrying out discipline and decisions in the ‘best interest of the national game of Baseball.’”<sup>197</sup>

## VII. SIGN-STEALING AND GAMBLING MEET IN *OLSON V. MLB*

In *Olson v. Major League Baseball*,<sup>198</sup> plaintiffs contend that the Astros sign-stealing, and to a lesser extent the Boston Red Sox, constitutes fraud on legitimate Daily Fantasy Sports bettors.<sup>199</sup> “But did the initial efforts of those teams, and supposedly of Major League Baseball itself, to conceal those foul

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188. See David Barron, *Judges Asked to Dismiss Fan Suits. Ticket Holder Cases Lack “Legal Standing.” According to Team*, HOUS. CHRON., Mar. 26, 2020, at C.

189. *McCoy v. Major League Baseball*, 911 F. Supp. 454 (W.D. Wash. 1995).

190. *Id.* at 455–56.

191. *Id.* at 458.

192. *Id.* (footnote omitted).

193. *Id.* (footnote omitted).

194. Class Action Compl., *Ajzenman v. Off. of the Comm’r of Baseball*, 2020 WL 1929045 (C.D. Cal.) (Trial Pleading) (No. 2:20-cv-3643).

195. *Id.* at ¶ 2.

196. *Id.*

197. *Id.* at ¶ 14 (footnote omitted).

198. *Olson v. Major League Baseball*, 447 F. Supp. 3d 159 (S.D.N.Y. 2020).

199. *Id.* at 163.

deeds from the simple sports bettors who wagered on fantasy baseball create a cognizable legal claim? On the allegations here made, the answer is no.”<sup>200</sup>

During baseball games, pitchers and catchers use a series of “signs” to communicate the type of pitch being thrown, and the intended speed, movement, and location of the pitch. Keeping such signs secret from batters is critical to a pitcher’s success because knowledge of which pitch is coming improves the batter’s chances of hitting the ball. While, nevertheless, sign-stealing is not prohibited per se, at all times here relevant MLB’s rules and regulations prohibited using electronic devices to view or convey information about the opposing team’s signs.<sup>201</sup>

Plaintiff’s argument is that the Astros’ deception was intended to induce the bettors to play MLB DFS.<sup>202</sup> But, the Court dismissed Plaintiff’s claims on the basis that “purchasing MLB DFS entry fees – is simply too attenuated to support liability here.”<sup>203</sup>

To digress, “Daily Fantasy Sports (DFS) allows winning fantasy sports on a daily basis.”<sup>204</sup> “Sports betting has been reinvigorated by *Murphy v. NCAA*<sup>205</sup> where the Supreme Court held that the Professional and Amateur Sports Protection Act (PASPA)<sup>206</sup> was unconstitutional.”<sup>207</sup> *Murphy v. NCAA* cleared the way for states to legalize sports betting.<sup>208</sup> “[DFS] is another example of America’s contradictory approach to gambling.”<sup>209</sup> DFS “is ‘the act of building and competing with imaginary sports teams comprised of real-life athletes.’”<sup>210</sup> The teams consist of real-life athletes from real-life teams, but the only thing that is real is the athletes’ statistics that are combined by computers to determine the winners.<sup>211</sup> “The issue in determining the legality of a daily fantasy game [is] whether there are sufficient skill elements to keep it out of the realm of

200. *Id.*

201. *Id.* at 164 (footnote omitted).

202. *Id.*

203. *Id.* at 171.

204. Walter T. Champion, *Daily Fantasy Sports and the ‘Fuzzy Animal’ Debate in Texas*, 10 UNLV GAMING L.J. 41, 42 (2020).

205. *Murphy v. National Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018).

206. Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704.

207. *Murphy*, 138 S. Ct. at 1478, 1484–85.

208. *Id.* at 1484–85.

209. Walter T. Champion, *PASPA’s Got a Brand New Bag: President Trump’s States’ Rights Bias for Gambling Calls the Winning Hand*, 49 STETSON L. REV. 39, 59 (2019)(citing to WALTER T. CHAMPION AND I. NELSON ROSE, GAMING LAW IN A NUTSHELL 1-2 (1st ed. 2012)).

210. Champion, *supra* note 209, at 59 (footnote omitted).

211. *Id.* (footnote omitted).

sports betting.”<sup>212</sup> “DFS is a glorified sports book . . . .”<sup>213</sup> DFS is legal under federal law and is now legal in the majority of states, since it is “categorized as a game (just like season-long fantasy sports).”<sup>214</sup>

The Court in *Olson* held that plaintiffs did not state claims for fraud, negligent misrepresentation, consumer protection laws, and unjust enrichment.<sup>215</sup> The plot thickens, however, with the addition of a smoking gun in the guise of a sealed letter by the Commissioner that may (or may not) provide concrete evidence of sign-stealing by the Yankees (and Astros and Red Sox).<sup>216</sup> In *Olson*, plaintiffs claim that the Commissioner’s September 15, 2019 press release “falsely suggested that the investigation found that the Yankees had only engaged in a minor technical infraction, when they had in fact been engaged in a more serious sign-stealing scheme, as allegedly indicated in a separate letter written by Manfred.”<sup>217</sup> This letter from Manfred to the Yankees GM would generally have been routinely unsealed, however, defendant MLB and third-party New York Yankees<sup>218</sup> requested continued sealing of the letter, which *Olson* plaintiffs opposed. The *Olson* plaintiffs filed “the Yankees letter” which plaintiffs argued proved Manfred’s duplicity.<sup>219</sup> “The Yankees letter – which plaintiffs obtained from defendants during discovery—was filed under seal at the request of MLB and the third-party Yankees. In its memorandum order denying plaintiff’s motion for reconsideration, the Court found it necessary to refer to the Yankees letter.”<sup>220</sup> However, “[t]he Yankees letter is not only a judicial document, but one to which a very strong presumption of public access attaches.”<sup>221</sup>

The Yankees letter “was submitted to the Court in connection with a motion for reconsideration of the Court’s grant of a motion to dismiss, the Court’s final adjudication [of] the parties’ substantive legal rights.”<sup>222</sup> The Yankees, however, “nonetheless assert that only a low presumption of access applies because, they claim, the Reconsideration Order itself stated that the Yankees Letter was immaterial to the Court’s decision.”<sup>223</sup> The Court holds that the MLB and the Yankees “misapprehended the Court’s order.”<sup>224</sup>

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212. *Id.* at 60 (footnote omitted).

213. *Id.* (footnote omitted).

214. *Id.*

215. *Olson v. Major League Baseball*, 447 F. Supp. 3d 159, 173 (S.D.N.Y. 2020).

216. *Id.* at 173, 179.

217. *Id.* at 179.

218. *Olson v. Major League Baseball*, 466 F. Supp. 3d 450, 452 (S.D.N.Y. 2020).

219. *Id.* at 453.

220. *Id.*

221. *Id.* at 454.

222. *Id.*

223. *See id.*

224. *Id.*

In that order, the Court explained that “whether or not” Manfred’s statement in the 2017 Press “was a misrepresentation . . . [was] not material” to the success of plaintiffs’ fraud or negligent misrepresentation claims. The Court was plainly discussing the materiality of the Yankees Letter to the Court’s decision-making process. More importantly, the Court’s very discussion of both the 2017 Press Release and the Yankees Letter demonstrates that both letters were integral to the Court’s reasoning in this case.<sup>225</sup>

This, of course, “renders the Yankees Letter of significant value,”<sup>226</sup> which motivates the court to hold that the Yankees Letter should be unsealed.<sup>227</sup> In short, the rich get rich, and the poor lose draft picks.

#### VIII. THE COMMISSIONER WENT TOO FAR

It is clear from the strict reliance on the system set up by the Major League Agreement of 1921, and from the broad interpretation Commissioner Landis was allowed to give to the Agreement, that Major League Baseball intended for its Commissioner to have absolute power, and that question of scope and due process were apparently of little concern.<sup>228</sup>

However, the Commissioner’s power has limits, as shown in *Professional Sports, Ltd. v. Virginia Squires Basketball Club Limited Partnership*, where, like the Astros’ case, the Commissioner warned two basketball teams not to make any deal before the All-Star game.<sup>229</sup> In the American Basketball Association (ABA) by-laws, “Article IV, Section 5 requires that the member clubs accept the Commissioner’s decision as an arbitrator when a dispute arises concerning a player’s contract.”<sup>230</sup> But, “it would be unreasonable and unrealistic to believe that the club members ever intended to authorize him to settle disputes which he himself had initiated.”<sup>231</sup> Like in Baseball, “[t]he simple truth is that the member clubs have not given the Commissioner the power and authority he claims.”<sup>232</sup>

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225. *Id.* at 455 (citation omitted).

226. *Id.*

227. *Id.* at 456.

228. Pachman, *supra* note 84, at 32.

229. *Prof'l Sports, Ltd. v. Va. Squires Basketball Club Ltd. P'ship*, 373 F. Supp. 946, 948 (W.D. Tex. 1974).

230. *Id.* at 950.

231. *Id.*

232. *Id.* at 952 (arguing the Commissioner never had unlimited power under the best interests power); *see Reinsdorf, supra* note 23, at 226.

Article I, Section 3 of the 1977 Amendments to the Major League Agreement (MLA)<sup>233</sup> specifically responded to *Atlanta National League Baseball Club v. Kuhn*, which acknowledged that the Commissioner may not arbitrate self-created disputes.<sup>234</sup> In *Professional Sports*,<sup>235</sup> *Atlanta National League Baseball Club*,<sup>236</sup> and the Astros' sign-stealing scandal<sup>237</sup> the dispute was initiated by the Commissioner's memorandums. The forfeiture of the draft pick was *ultra vires* since it was not one of the MLA-enumerated powers available to the commissioner.<sup>238</sup> In both *Atlanta National League Baseball Club*<sup>239</sup> and Commissioner Manfred's Statement on the Astros sign-stealing,<sup>240</sup> "[t]he question which makes the case confusing and difficult . . . is to what extent the Major League Agreement applies here."<sup>241</sup>

*Atlanta National League Baseball Club, Inc. v. Kuhn*,<sup>242</sup> is controlling as precedent in determining the breadth and scope of the Best Interests of Baseball Clause.<sup>243</sup> *Atlanta National League Baseball Club* involves the Commissioner's power in relation to the actions of a team owner after being warned by the Commissioner to not do something; in this case, showing any interest in signing a free agent.<sup>244</sup> Of course, the preeminent goal of the Best Interests of Baseball Clause is to preserve the integrity and honor of baseball<sup>245</sup> and to prevent conduct detrimental to baseball.<sup>246</sup> In *Atlanta National League Baseball Club*, the Commissioner was encouraged by the Executive Committee and the Player Relations Committee "to issue warnings that tampering violations would not be tolerated, and to make every effort to deter such violations."<sup>247</sup> "The parties endowed the Commissioner with wide powers and discretion to hear controversies . . . and take such action as necessary to secure observance of the . . . promotion of the expressed ideals of . . . baseball."<sup>248</sup>

Since the Commissioner has the authority to sanction that conduct that he concludes is detrimental to baseball, he must also have the authority to issue advance notice as to what acts

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233. Reinsdorf, *supra* note 23, at 226.

234. *Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp.1213 (N.D. Ga. 1977).

235. *Prof'l Sports, Ltd.*, 373 F. Supp. at 948.

236. *Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1213.

237. MANFRED, *supra* note 1.

238. *See Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1223; *see also* Reinsdorf, *supra* note 23, at 226.

239. *See Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1213.

240. MANFRED, *supra* note 1.

241. *Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1220.

242. *Id.* at 1213.

243. *See generally id.*

244. *See id.* at 1215-16.

245. *See Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298, 301 (N.D. Ill. 1936).

246. *Id.*

247. *Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1215.

248. *Milwaukee Am. Ass'n*, 49 F.2d at 301.

will constitute forbidden conduct. Essentially the directives served to warn that conduct inconsistent with the directives would be considered not in the best interests of baseball and would be severely dealt with.<sup>249</sup>

The directives in both *Atlanta National League Baseball Club*<sup>250</sup> and the Manfred Statement,<sup>251</sup> notice the importance of warnings to legitimate the Commissioner's actions.

However, the warning in *Atlanta National League Baseball Club* did not insulate the Commissioner from a reassessment of the legality of forfeiting draft choices.<sup>252</sup> There are other preexisting limits to the Commissioner's powers, such as allowing modification to avoid infringing upon rights secured in the collective bargaining agreement.<sup>253</sup> Also, Commissioner Manfred was limited to fining the Astros \$5,000,000 "which is the highest allowable fine under the Major League Constitution."<sup>254</sup> The Commissioner's decision to punish cannot be based on bias or ill will,<sup>255</sup> it also cannot be arbitrary or wrong.<sup>256</sup> In *Atlanta National Baseball Club, Inc. v. Kuhn*, the court held that "[t]here is no evidence that the Commissioner's decision was the result of bias or ill will, although, during the same period one other tampering violation was dealt with less severely."<sup>257</sup> Manfred's Statement also indicated that the Boston Red Sox, like the Astros, were guilty of violating the Commissioner's warnings, but the Red Sox received a far less onerous punishment than the Astros.<sup>258</sup>

The Commissioner had the power to forfeit draft picks in 1931,<sup>259</sup> but not in 1977,<sup>260</sup> or 2020.<sup>261</sup> As was clearly stated in 1977, "[t]he denial of [a] draft choice . . . stands on a somewhat different legal footing."<sup>262</sup> The forfeiture of four draft choices,<sup>263</sup> which is the death knell of Houston's chances to ever repeat as World Champion, was unprecedented and not explicitly enumerated in the Major League Agreement,<sup>264</sup> "[d]enial of a draft choice is simply not among the penalties authorized for this offense."<sup>265</sup> The Commissioner will

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249. *Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1220–21.

250. *See id.* at 1215–16.

251. *See* MANFRED, *supra* note 1, at 3.

252. *See generally Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1220–21.

253. *Id.* at 1220.

254. MANFRED, *supra* note 1, at 8.

255. *Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1222.

256. *Id.*

257. *Id.*

258. MANFRED, *supra* note 1, at 2–3.

259. *See generally Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1936).

260. *Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1223.

261. *See* MANFRED, *supra* note 1, at 8.

262. *Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1223.

263. MANFRED, *supra* note 1, at 8.

264. *Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1223.

265. *Id.*

undoubtedly argue (unsuccessfully) that *Milwaukee American Association v. Landis*,<sup>266</sup> does not preclude the Commissioner from imposing other sanctions that he deems appropriate.<sup>267</sup> But, the Northern Georgia District Court in *Atlanta National League Baseball Club* “does not perceive Landis as going that far.”<sup>268</sup> In sum, “[o]ther provisions of the Major League Agreement and the Major League Rules support [the] position that the Commissioner is limited in his authority to take punitive measures.”<sup>269</sup>

## CONCLUSION

Baseball is legally unique with its anomalous antitrust exemption, the Best Interests of Baseball clause, the reserve clause, judicial notice of the dangers of foul balls, racism and a separate Negro League, the luxury tax, salary arbitration, unionism, idiosyncratic team owners, collusion, contraction, and baseball's global impact.<sup>270</sup> Baseball is culturally, socially, and philosophically different. Baseball is timeless: as Terrance Mann said in *Field of Dreams*, it “reminds us of all that once was good and could be again.”<sup>271</sup> However, the Best Interests of Baseball Clause is a double-edged sword. It was misused by Commissioner Bowie Kuhn in his attempt to thwart Justice Marshall's admonition in *Flood v. Kuhn* that “benefits to organized labor cannot be utilized as a cat's paw to pull employers' chestnuts out of the antitrust fires.”<sup>272</sup>

Justice Marshall's dissent in *Flood v. Kuhn* acknowledged the sea of change that happened in baseball after the Major League Players Association was formed in 1966.<sup>273</sup> The NLRB accepted jurisdiction in 1969 in a dispute concerning baseball umpires.<sup>274</sup> Commissioner Kuhn was determined to destroy the nascent free agency by any means.<sup>275</sup> However, it is an Unfair Labor Practice to not bargain in good faith.<sup>276</sup> MLB wanted to use the Best Interests Clause to sanctify their contraction scheme; they blinked when pushed with antitrust, labor, and contractual defenses.<sup>277</sup> In *Atlanta National League Baseball Club, Inc. v. Kuhn*, the Court specifically forbade Commissioner Bowie Kuhn from

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266. *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1936).

267. *Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1223.

268. *Id.* at 1224.

269. *Id.* at 1225.

270. CHAMPION, *supra* note 5, at 2.

271. *Id.* at 9–10 (quoting FIELD OF DREAMS (Gordon Company 1989)).

272. *Flood v. Kuhn*, 407 U.S. 258, 294 (1972) (Marshall, J., dissenting) (quoting U.S. v. Women's Sportswear Mfr.'s Assn., 336 U.S. 460, 464 (1949)).

273. *Flood*, 407 U.S. at 293–94.

274. *In re Am. League of Prof'l Baseball Clubs*, 180 N.L.R.B. 190 (1969).

275. *See Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977).

276. *See Silverman v. Major League Baseball Player Relations Comm., Inc. (Silverman II)*, 880 F. Supp. 246 (S.D.N.Y. 1995).

277. *See CHAMPION, supra* note 5, at 315; *see also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 1015 (2001).

expanding the Best Interests of Baseball Clause to include draft forfeitures.<sup>278</sup> Once specifically precluded from using draft forfeitures as an umbrella punishment under the Best Interests of Baseball in *Atlanta National League Baseball Club*,<sup>279</sup> Commissioner Rob Manfred in the Astros' sign-stealing scandal was similarly precluded from assessing the forfeiture of the Astros' "regular first and second round selections in the 2020 and 2021 First-Year Player Drafts."<sup>280</sup>

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278. *Atlanta Nat'l League Baseball Club*, 432 F. Supp. at 1223.

279. *Id.*

280. MANFRED, *supra* note 1, at 8.