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ARTICLES

WHERE TO DRAW THE LINE: THE ENDLESS SEARCH FOR A (LEGAL) COMPETITIVE EDGE

ANDREW BRANDT

I. CHEATING OR COMPETITIVE EDGE?

In 2015, NFL Network's Andrew Siciliano asked Pro Football Hall of Fame quarterback Joe Montana about rumors of cheating by the New England Patriots.¹ Having already admitted that his own Super Bowl-champion San Francisco 49ers had occasionally stretched the boundaries of the rulebook, Montana's response to Siciliano's query drew a fair bit of attention: "They always say, 'If you ain't cheating, you ain't trying.'"² One thing is certain: there has likely been cheating in sports as long as there have been sports. Nonetheless, the introduction of ever-more sophisticated scientific and technological developments to athletics has blurred the line between cheating and competitive edge.

The issue of cheating in professional athletics came to the fore again in early 2020, when the 2017 World Series-champion Houston Astros were revealed to have employed a complex system of cameras, algorithmic spreadsheets, and trash cans to steal signs from opposing teams.³ While the scheme was broadly condemned, some pointed out that sign stealing, without more, was common practice in professional baseball and had never been considered cheating.⁴ Therefore, the question became not whether or not the

1. See Ryan Wilson, *Joe Montana on Patriots: 'If you ain't cheating, you ain't trying'*, CBS SPORTS (Oct. 16, 2015), <https://www.cbssports.com/nfl/news/joe-montana-on-patriots-if-you-aint-cheating-you-aint-trying/> [<https://perma.cc/JKN6-5SXH>] (recounting interview between Joe Montana and Andrew Siciliano about allegations of cheating in professional football).

2. See *id.*

3. See Jason Diamond, *'Dark Arts' and 'Codebreaker': The Origins of the Houston Astros Cheating Scheme*, WALL STREET JOURNAL (Feb. 7, 2020), https://www.wsj.com/articles/houston-astros-cheating-scheme-dark-arts-codebreaker-11581112994?mod=article_inline [<https://perma.cc/JKN6-5SXH>] (recounting in detail logistics of Houston Astros' sign-stealing scheme).

4. See Jacob Bogage, *What is sign stealing? Making sense of Major League Baseball's latest scandal*, WASHINGTON POST (Feb. 14, 2020), <https://www.washingtonpost.com/sports/2020/01/14/what-is-sign-stealing-baseball/> [<https://perma.cc/84Y3-ADLT>] (noting that sign-stealing is "accepted tradition" and "as old as baseball itself"); Zach Helfand, *Is Stealing Signs in Baseball Really So Bad? Bobby Valentine Has*

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Astros had cheated (they had), but at precisely what point their conduct crossed the line; and further, whether that line had been drawn correctly in the first place.

This Comment attempts to identify a principled distinction between cheating and competitive advantage in an athletic landscape where scientific, technological, and biological developments continue to widen the boundaries of the gray area. Section II will trace the origins of two sports mantras- “competitive balance” and “integrity of the game”- and how they have been challenged to various degrees by instances of cheating. Section III will consider where the line should be drawn between cheating and competitive advantage given the realities of scientific and biological enhancements available to today’s athletes and personnel. Finally, Section IV of this Comment will offer suggested approaches that professional sports leagues might take to address the issue.

II. INTEGRITY OF THE GAME AND COMPETITIVE BALANCE

A. Role of the Commissioner

All major sports leagues in the United States today employ a Commissioner.⁵ Although Commissioners are involved in many of the day-to-day aspects of operating a professional athletic league, their primary authority rests in three areas: decision making, dispute resolution, and disciplinary power. In executing this authority, Commissioners are meant to act in the best interests of their respective *leagues*. However, with the continued skyrocketing of asset values of these franchises and the growing importance of business issues in major sports, the Commissioner position has become more and more aligned with the interests of *owners*, compared to players, in his or her day-to-day role.

Despite their ubiquity today, the first Commissioner in professional sports was not installed until 1920, when Judge Kenesaw

Some Thoughts, NEW YORKER (Feb. 13, 2020), <https://www.newyorker.com/sports/sporting-scene/is-stealing-signs-in-baseball-really-so-bad-bobby-valentine-has-some-thoughts> [<https://perma.cc/QVZ3-XA7Q>] (“Major League Baseball says that stealing signs is legal so long as it’s done the old-fashioned way, without telescopes, cameras, or other technology.”); *Everything you need to know about MLB’s sign-stealing scandal*, ESPN (Feb. 13, 2020), https://www.espn.com/mlb/story/_/id/28476282/everything-need-know-mlb-sign-stealing-scandal [<https://perma.cc/FR9A-8EGK>] (explaining that “[t]he old-fashioned way” of sign stealing does not break rules).

5. As of this writing, the commissioner of Major League Baseball is Rob Manfred, the commissioner of the National Football League is Roger Goodell, the commissioner of the National Basketball Association is Adam Silver, and the commissioner of the National Hockey League is Gary Bettman.

Mountain Landis was hired to restore the credibility of Major League Baseball following the infamous Black Sox Scandal. That episode saw a number of players from the Chicago White Sox, including Shoeless Joe Jackson, throw the World Series (intentionally lose it) in exchange for a portion of gambling winnings.⁶ In a line of case law originating with Commissioner Landis' appointment, two guiding principles emerged that have defined what is meant by the "best interests" that Commissioners are charged with protecting: integrity of the game and competitive balance.⁷ These principles have been the starting point in discussions surrounding various instances of cheating that have since been uncovered in all corners of professional sports.

B. NFL Highest-Profile Enforcement

The notorious "Deflategate" incident in the NFL was the rare modern cheating scandal that did not involve specialized technology or biological enhancement. Rather, the allegation at the center of the controversy was that the New England Patriots had underinflated their footballs below the league-mandated 12.5 pounds per square inch of air pressure during the AFC championship game against the Indianapolis Colts in 2015, giving Patriots' quarterback Tom Brady a competitive advantage.⁸ Following a series of findings by the NFL that supported a claim of foul play by the Patriots, coach Bill Belichick publicly defended his team, stating that there was not "any intent" to compromise "the integrity of the game."⁹

Nonetheless, the NFL's internal investigation did not put the matter to rest. Independent investigator Ted Wells released his own 243-page report on May 6, 2015, stating that it was "more likely

6. See Jason M. Pollack, *Take My Arbitrator, Please: Commissioner "Best Interests" Disciplinary Authority in Professional Sports*, 67 *FORDHAM L. REV.* 1645, 1645 (1999) ("In an episode popularly known today as the 'Black Sox scandal,' eight Chicago White Sox players fixed the outcome of the 1919 World Series, causing the White Sox to lose to the Cincinnati Reds, five games to three.").

7. See *Milwaukee American Ass'n v. Landis*, 49 F.2d 298, 299 (N.D. Ill. 1931) (upholding Commissioner Landis's refusal to approve trade between two baseball clubs on grounds that he allowed to take any steps "as he might deem necessary and proper in the interest and morale of the players and the honor of the game"); see also *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 539 (7th Cir. 1978) (upholding Commissioner Kuhn's rejection of three player trades on grounds that they would "seriously. . . unbalance the competitive balance of baseball").

8. See Erin Flynn and Beth Maiman, *A timeline of the Deflategate controversy*, *SPORTS ILLUSTRATED* (Jan. 15, 2016), <https://www.si.com/nfl/2016/01/15/new-england-patriots-tom-brady-deflategate-anniversary-timeline> [<https://perma.cc/KU58-T2LE>] (summarizing major events comprising Deflategate scandal).

9. See *id.* (quoting Belichick's press conference following NFL findings in regard to Deflategate).

than not that New England Patriots personnel participated in violations of the NFL Playing Rules and were involved in a deliberate attempt to circumvent those rules” and that “Tom Brady was at least generally aware of” the scheme.¹⁰ Days after the release of the Wells Report, NFL Commissioner Roger Goodell suspended Brady for four games, fined the Patriots \$1 million and took away their first- and fourth-round draft picks in 2016 and 2017, respectively.¹¹ Brady sued outside of league’s Collective Bargaining Agreement and won his case, represented by the NFL Players’ Association, at the District Court level, reversing his suspension. However, the NFL appealed (of course), and the United States Court of Appeals for the Second Circuit ultimately upheld his suspension.¹²

The principal takeaway from the Second Circuit’s opinion was its reaffirmation of the Commissioner’s broad power to exercise discretion as necessary in order to maintain the integrity of the game.¹³ Commissioner Roger Goodell had this to say about the considerations bearing on the Patriots’ and Brady’s punishments for the scheme: “[W]e will continue our efforts vigorously to protect the integrity of the game and promote fair play at all times.”¹⁴

C. Performance Enhancing Drugs: Crossing the Line

For many years, developments in performance-enhancing drugs (“PEDs”) have rendered them increasingly sophisticated, providing athletes with ever-growing competitive advantages while also being ever more difficult to detect. PEDs have been troublesome in professional athletics for years, forcing governing bodies into the

10. See Theodore Wells, INVESTIGATIVE REPORT CONCERNING FOOTBALLS USED DURING THE AFC CHAMPIONSHIP GAME ON JANUARY 18, 2015, 121-122 (2015).

11. See Flynn, *supra* note 8 (noting punishments rendered by NFL in response to Wells Report findings).

12. See Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n, 820 F.3d 527, 532 (2d Cir. 2016) (reversing lower court with instructions to reinstate Brady’s four-game suspension).

13. See *id.* (stating that commissioner’s authority “to impose discipline for, among other things, ‘conduct detrimental to the integrity of, or public confidence, in the game of professional football’” was “especially broad”); see also, e.g., Peter King and Andrew Brandt, *Two Views of the Brady Deflategate Ruling*, SPORTS ILLUSTRATED (Apr. 25, 2016), <https://www.si.com/nfl/2016/04/25/nfl-deflategate-tom-brady-suspension-reinstated-appeals-court-ruling> [<https://perma.cc/UL4H-XMYH>] (“The two judges, however, were clear in their ruling that Goodell has the power, via the [Collective Bargaining Agreement], to do what he wants in cases like this one.”).

14. *Wells report: Pats employees probably deflated balls, Tom Brady likely knew*, ESPN (May 6, 2015), https://www.espn.com/boston/nfl/story/_/id/12833542/wells-report-finds-new-england-patriots-probably-deflated-balls [<https://perma.cc/LZ3D-5RHA>].

difficult position of attempting to regulate a field while always one step behind it. While the competitive nature of professional athletics creates the incentive to use PEDs in every sport, their use has been especially notorious in baseball, cycling, and track and field.

In 2006, former Senate Majority Leader George Mitchell, at the direction of commissioner Bud Selig, released an investigative report summarizing his findings about the use of PEDs in Major League Baseball (“MLB”). The Mitchell Report expounded on the history of players’ use of PEDs and analyzed the effectiveness of the MLB’s Joint Drug Prevention and Treatment Program, offering recommendations for future prevention practices. The Report, despite having challenges of getting players to be forthright and informative, identified 89 MLB players alleged to have used PEDs, including Roger Clemens and Barry Bonds.¹⁵ Players named in the Mitchell Report generally were not punished, both in exchange for acceptance of a tougher drug-testing regimen by the MLB Players Association and also because many of the instances of PED use cited in the Report took place prior to 2004, when the league officially made it a punishable offense.¹⁶

Several years later, MLB players implicated in the Biogenesis Scandal did not have the same luck. News of the scheme broke in

15. See Rhiannon Walker, *Ten years ago, the Mitchell Report rocked Major League Baseball*, UNDEFEATED (Dec. 13, 2017), <https://theundefeated.com/features/ten-years-ago-the-mitchell-report-rocked-major-league-baseball/> [<https://perma.cc/5X2D-VYJN>] (noting that Clemens and Bonds were mentioned in Mitchell Report eighty-two and one hundred and three times, respectively).

16. See Michael S. Schmidt, *Players Named in the Mitchell Report Are Unlikely to Be Punished*, NEW YORK TIMES (Apr. 11, 2008), <https://www.nytimes.com/2008/04/11/sports/baseball/11mitchell.html> [<https://perma.cc/SE69-T3UQ>] (writing that “[t]he union’s position was that if it was going to accept Mitchell’s recommendations for a tougher drug-testing regimen, baseball should agree with his recommendation that no one be disciplined” and that “[f]ewer than a dozen players named in the report appeared to be in danger of being suspended because most of the violations cited came before 2004, when punitive testing for performance-enhancing drugs was instituted”). While players did not face punishment for merely being included in the Mitchell Report, it should be noted that Roger Clemens and Barry Bonds faced charges for perjury and obstruction of justice, respectively, after testifying in front of Congress that they had never taken PEDs. Ultimately, charges against both players were dropped. See Del Quentin Wiber and Ann E. Marimow, *Roger Clemens acquitted of all charges*, WASHINGTON POST (June 18, 2012), https://www.washingtonpost.com/local/crime/roger-clemens-trial-verdict-reached/2012/06/18/gJQAQxvzIV_story.html [<https://perma.cc/V97S-MRD8>] (noting that “Roger Clemens was acquitted Monday of all charges in his lengthy perjury trial”); *Department of Justice drops Barry Bonds prosecution*, ESPN (July 21, 2015), https://www.espn.com/mlb/story/_/id/13295151/barry-bonds-criminal-prosecution-formally-dropped-department-justice-conviction [<https://perma.cc/ACL5-EPNQ>] (providing that government would not appeal Ninth Circuit’s reversal of Bonds’ obstruction of justice charge).

2013, when several players were accused of obtaining PEDs from the now-defunct rejuvenation clinic in Miami named Biogenesis of America. A former clinic employee had revealed clinic records exposing its sale of PEDs to multiple professional baseball players. Thirteen of those players were punished with lengthy suspensions of fifty or more games, including Alex Rodriguez, who was suspended for a whopping 211 games.¹⁷

Similarly, allegations of doping followed professional cyclist Lance Armstrong as he amassed a record-breaking seven Tour de France titles between 1999-2005. Armstrong had consistently denied using PEDs, even as he was implicated by a steadily increasing number of former teammates coming forward with admissions of drug use.¹⁸ A two-year investigation by the U.S. Attorney's Office into the allegations culminated with federal prosecutors dropping charges against Armstrong for federal conspiracy, fraud, and racketeering.¹⁹ However, the United States Anti-Doping Agency (USADA), investigating Armstrong's use and distribution of PEDs directly, released its own report shortly thereafter, more than 1,000 pages of extensive evidence supporting the agency's conclusion "that the US Postal Service Pro Cycling Team ran the most sophisticated, professionalized and successful doping program that sport has ever seen."²⁰ USADA subsequently issued a report that caused

17. See David Lengel and Steve Busfield, *Alex Rodriguez and 12 other players suspended in Biogenesis PEDs scandal*, GUARDIAN (Aug. 5, 2013), <https://www.theguardian.com/sport/2013/aug/05/alex-rodriguez-suspended-mlb-peds-drugs> [<https://perma.cc/PL2M-WPUL>] (explaining that Alex Rodriguez was suspended 211 games, and twelve other players were suspended for fifty games, for "violations of MLB's joint drug prevention and treatment program and its basic agreement").

18. See generally Kelly Cohen, *Timeline of Lance Armstrong's career successes, doping allegations and final collapse*, ESPN (May 22, 2020), https://www.espn.com/olympics/cycling/story/_/id/29177227/line-lance-armstrong-career-successes-doping-allegations-final-collapse [<https://perma.cc/R6JQ-FEX9>] (providing timeline of Armstrong's career victories and subsequent investigations).

19. The basis for these criminal charges was the alleged use of government money to fund the cycling team's doping scheme, as they were sponsored at the time by the United States Postal Service. See Ian Austen, *Inquiry on Lance Armstrong Ends With No Charges*, NEW YORK TIMES (Feb. 3, 2012), <https://www.nytimes.com/2012/02/04/sports/cycling/federal-prosecutors-drop-lance-armstrong-investigation.html> [<https://perma.cc/7A2N-PEBQ>] (explaining that "the authorities were exploring whether money from the United States Postal Service, the primary team sponsor for the first four of Armstrong's Tour de France wins, was used to buy performance-enhancing drugs").

20. See Brent Schrottenboer, *USADA releases massive evidence vs. Lance Armstrong*, USA TODAY (Oct. 10, 2012), <https://www.usatoday.com/story/sports/cycling/2012/10/10/lance-armstrong-usada-reasoned-decision-teammates-doping/1624551/> [<https://perma.cc/2A64-444A>] (quoting USADA chief executive Travis Tygart's public statement regarding agency's investigative report).

Armstrong to be stripped of his seven Tour de France titles.²¹ Given his repeated denials of any wrongdoing, it was surprising when Armstrong failed to appeal USADA's decision, at least until a 2013 interview with Oprah Winfrey in which he admitted to doping during his Tour de France victories.²²

Allegations of doping, or using PEDs, have also been widespread in professional track and field for many years, both in the United States and abroad. Two particular instances, many years and many miles apart, illustrate the pervasiveness of the issue. In 1988, Jamaican-born Ben Johnson was competing for Canada's Olympic track and field team in Seoul, South Korea. Lined up next to greats Linford Christie, Calvin Smith, and his personal rival, Carl Lewis, Johnson shattered a world record by running 100 meters in only 9.79 seconds.²³ He only had about twenty-four hours to enjoy his gold medal, however, before a positive test for steroids led the International Olympic Committee ("IOC") to strip him of his victory.²⁴ Johnson was ultimately banished from the sport for good following another positive drug test in 1993.²⁵ Throughout his life, Johnson has maintained that he was no more culpable than his competitors. Both he and his longtime coach Charlie Francis, who passed away in 2010, were frequently candid and forthcoming about the fact that it was difficult, if not impossible, to compete at the highest level of track and field without the aid of PEDs.²⁶

21. A now-familiar refrain, USADA states on its website that it "continues to aspire to be a leader in the global anti-doping community in order to protect the rights of clean athletes and *the integrity of competition around the world.*" *Independence & History*, USADA (2021), <https://www.usada.org/independence-history/> [<https://perma.cc/NEQ6-AYTA>] (emphasis added); see also *Lance Armstrong stripped of Tour de France medals*, CBS News (Oct. 22, 2012), <https://www.cbsnews.com/news/lance-armstrong-stripped-of-tour-de-france-medals/> [<https://perma.cc/K6X4-ET7A>] (stating "American cyclist Lance Armstrong was stripped of his seven Tour de France titles and banned for life by cycling's governing body . . . following a report from the U.S. Anti-Doping Agency that accused him of leading a massive doping program on his teams.").

22. See Cohen, *supra* note 18 (quoting Armstrong as telling Winfrey, "'This story was so perfect for so long. It's this myth, this perfect story, and it wasn't true'").

23. See James Montague, *Hero or villain? Ben Johnson and the dirtiest race in history*, CNN (July 23, 2012), <https://www.cnn.com/2012/07/23/sport/olympics-2012-ben-johnson-seoul-1988-dirtiest-race/index.html> [<https://perma.cc/LVS2-R25N>] (describing 100-meter sprint at 1988 Seoul Olympics, alternately known as greatest and dirtiest race ever run).

24. See *id.* (quoting IOC official who was present as describing scene like "a 'wake'").

25. See *id.* ("A comeback was stillborn after he again failed a drug test in 1993 and was banned for life.").

26. See Steven Pye, *Ben Johnson, Carl Lewis and the drama of the Dirtiest Race in History*, GUARDIAN (Oct. 21, 2013), <https://www.theguardian.com/sport/that->

While Johnson's drug regimen was largely designed and executed by his personal trainer, another scandal nearly thirty years later centered around an extensive, government-sponsored doping program. In 2015, the World Anti-Doping Agency ("WADA") began investigating the Russian Olympic team, eventually uncovering evidence of a widespread scheme to provide Russian athletes with PEDs and disguise the efforts from sports governing bodies; the scheme had been in place during both the Olympic Games in London in 2012 and in Sochi in 2014.²⁷ Shortly after WADA's discovery of unreported failed drug tests and hundreds of destroyed samples, the head of the laboratory and a mastermind behind the scheme, Grigory Rodchenkov, escaped to the United States.²⁸ He admitted the full extent of the doping program to the New York Times in 2016, prompting another investigation into Russian state-sponsored doping.²⁹ The result was a partial four-year ban from competition. WADA recently instituted another four-year ban from all international athletic events against Russia in response to its failure to curb the concealment of athletes' drug use.³⁰

1980s-sports-blog/2013/oct/21/ben-johnson-carl-lewis-dirtiest-race-history [https://perma.cc/M2WL-MWNM] (describing pressure to take PEDs by citing mantra, "if you don't take it, you won't make it").

27. See Grigory Rodchenkov, *Russian doping whistleblower, still lives in fear*, NBC SPORTS (Aug. 10, 2020), <https://olympics.nbcsports.com/2020/08/10/grigory-rodchenkov-russia-doping-whistleblower/> [https://perma.cc/7EVX-ZVAZ] (describing "Duchess cocktail of anabolic steroids" provided to Russian athletes and recounting "Russian spies ensured the Duchess would not be detected in doping tests as FSB agents used a hole in the wall of the Sochi laboratory to swap out the dirty samples with clean urine at night").

28. See *The 'real' threat to Russia's former doping mastermind*, BBC (July 30, 2020), <https://www.bbc.com/news/stories-53596997> [https://perma.cc/YZ99-YZPV] (describing Rodchenkov as "the architect of Russian doping at London 2012 and at the winter games in Sochi two years later").

29. See *Timeline of the Russia doping case*, REUTERS (Dec. 7, 2019), <https://www.reuters.com/article/us-sport-doping-russia-factbox/timeline-of-the-russia-doping-case-idUSKBN1YB0BH> [https://perma.cc/5TQ4-DC38] (recounting series of events leading to discovery of Russian doping scheme).

30. See Grigory Rodchenkov, *supra* note 27 (noting that "[s]ome Russians were barred from competing at the 2016 Rio de Janeiro Summer Games and 2018 Pyeongchang Winter Games" following discovery of doping scheme). See also Patrick Reevell, *Russia banned from Olympics again over doping cover-up*, ABC NEWS (Dec. 9, 2019), <https://abcnews.go.com/ABCNews/russia-banned-olympics-doping-cover-up/story?id=67591877> [https://perma.cc/TQ8F-J3D4] ("As a result [of the ban], Russia will be officially absent at the Summer Olympics in Tokyo next year and at the soccer World Cup when it is held in Qatar in 2022, as well as potentially a host of other top events."). WADA has instituted a rule that Russian athletes able to affirmatively prove that they have not used PEDs will be allowed to compete internationally as "neutrals." See *id.* (likening rule to "decision. . . during the most recent Winter Olympics in South Korea last year, where Russian teams took part wearing a special 'neutral' uniform and the Russian flag and anthem were banned from medal ceremonies").

III. HOUSTON, WE HAVE A PROBLEM

In 2019, former Houston Astro Mike Fiers gave an interview to *The Athletic* in which he revealed an elaborate sign-stealing scheme that the Astros had used in 2017, the year they beat the Los Angeles Dodgers to become World Series champions.³¹ The MLB's subsequent investigation corroborated Fiers' account, revealing a multi-layered plot to observe opposing teams' signals and convey them to batters in real time. At the time, it was understood that Astros bench coach Alex Cora had arranged for a camera to be installed in center field and that a video monitor had been installed just outside of the Astros' dugout. Members of the Astros' team would decipher opposing teams' signals using the live video feed and then bang on a trash can a specified number of times to communicate to batters which pitch they should expect.

In its findings, the MLB described the scheme as primarily, but not exclusively, "player-driven."³² Despite the league's determination that top-level personnel within the Astros organization lacked actual knowledge of the scheme, the MLB nonetheless levied punishments against two of the team's executives. Further, MLB required the Astros to forfeit 2020 and 2021 draft picks and levied a \$5 million fine. MLB suspended General Manager Jeff Luhnow and manager A.J. Hinch without pay until the end of the 2020 World Series, and both were subsequently dismissed by the Houston Astros organization.³³

Notably, MLB commissioner Robert Manfred justified his punishment of Luhnow and Hinch in part for a failure "to establish a

31. See Jeff Passan, *Ex-Astros pitcher Mike Fiers: Team stole signs with camera*, ESPN (Nov. 12, 2019), https://www.espn.com/mlb/story/_/id/28066522/ex-astros-pitcher-mike-fiers-team-stole-signs-camera [https://perma.cc/TD2R-CHPD] (reporting Mike Fiers told publication *The Athletic* that "[t]he Houston Astros used a center-field camera to help steal signs during their 2017 championship season").

32. See Robert D. Manfred, Jr., *Statement of the Commissioner in re Houston Astros Decision* at 24 (Jan. 13, 2020), <https://img.mlbstatic.com/mlb-images/image/upload/mlb/cglrhmlrwwbkacty2717.pdf> [https://perma.cc/8GBG-EPCH] ("The Astros' methods in 2017 and 2018 to decode and communicate to the batter an opposing Club's signs were not an initiative that was planned or directed by the Club's top baseball operations officials. Rather, the 2017 scheme in which players banged on a trash can was, with the exception of Cora, player-driven and player-executed.").

33. See *id.* at 8-9 (announcing suspensions without pay for both Jeff Luhnow and A.J. Hinch); see also Jeff Passan, *Astros' Jeff Luhnow, AJ Hinch fired for sign stealing*, ESPN (Jan. 13, 2020), https://www.espn.com/mlb/story/_/id/28476780/astros-jeff-luhnow-aj-hinch-fired-sign-stealing [https://perma.cc/XUA8-WBF4] ("Houston Astros general manager Jeff Luhnow and manager AJ Hinch were fired by owner Jim Crane on Monday after Major League Baseball's announcement of discipline following the sign-stealing scandal.").

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culture in which adherence to the rules is ingrained in the fabric of the organization,” stating that the sign-stealing scheme had led many to “raise questions about the integrity of games in which the Astros participated.”³⁴ The Wall Street Journal later revealed evidence tending to suggest that team officials may have had more actual knowledge of the plot than originally known, including the existence of a Microsoft Excel-based algorithmic program designed by an intern that efficiently matched pitches to their corresponding signals.³⁵ The program was referred to within the Astros organization as “Codebreaker.”

IV. ANALYSIS

A. Where To Draw the Line?

Public outrage at the Astros and, in some instances, at the perceived levity of their punishment indicated fans’ general intolerance to cheating. It was not always clear from these criticisms, however, at what point the club’s conduct crossed the line from merely unfair to egregious cheating. Sign stealing with the naked eye, after all, has always been widely accepted as a part of the game. In this case, however, the Astros augmented this common practice on multiple levels. Did they tiptoe over the line when they installed a camera in center field? Did they take one more step over the line by installing a video monitor directly outside the dugout? Did they jog a few more steps by enlisting the help of an algorithmic computer program, and then sprint past the line by communicating the sum of this information in real time?

Upon close inspection, the line between what is considered cheating and what is permissible seems, at times, arbitrary. It is uncontroverted that using steroids to enhance one’s performance in athletic competition is against the rules. Their very designation as “*performance-enhancing*” drugs points to the underlying justification: they provide an unfair advantage to their users at the expense of competitors. However, this justification alone does not explain the

34. See Manfred, *supra* note 32 at 4-5, 8 (discussing culpability of officials within Astros organization and noting scheme’s negative impact on perceived integrity of games).

35. See Jared Diamond, ‘Dark Arts’ and ‘Codebreaker’: The Origins of the Houston Astros Cheating Scheme, WALL STREET JOURNAL (Feb. 7, 2020), <https://www.wsj.com/articles/houston-astros-cheating-scheme-dark-arts-codebreaker-11581112994> [https://perma.cc/7A63-EJ5Z] (stating that “[t]he existence of Codebreaker shows that it was the Astros front office that laid the groundwork for the team’s electronic sign-stealing schemes”).

prohibition against PEDs.³⁶ Athletes may use other substances, such as caffeine or certain protein supplements, without consequence. Similarly, non-substance training methods or tools can also provide a competitive advantage to athletes. For instance, the use of sensory deprivation tanks has become commonplace for athletes seeking faster recovery time, and many athletes travel to higher-altitude locations in order to optimize training. WADA has listed three criteria which must be met in order for a substance to be added to its Prohibited List: “a) it poses a health risk to athletes[,] b) it has the potential to enhance the performance[,] and c) it violates the spirit of sport.”³⁷ Practical experience suggests that these criteria undergird other institutions’ banned substance policies, as well, even if only subconsciously. Given the volume of performance-enhancing methods nonetheless available to athletes and the difficulty of defining with any clarity when the spirit of sport is violated, it may be that harm to the athletes themselves is the primary determinative factor bearing on which substances are allowed and which are prohibited.

The use of technological, rather than biological, aids to enhance performance presents a different, albeit related, issue. Cameras, TV monitors, and the like do not pose a health risk to players; therefore, the justification for their prohibition must lay on different grounds. In discerning what that justification might be, it is informative to consider other, non-technological conduct that is also considered cheating. Examples include “doctoring” a baseball by surreptitiously applying a foreign substance to it in order to affect its speed or spin or, as discussed above, secretly removing air from footballs to make them easier to grasp. The link between so-called “doctoring” a baseball or deflating a football, on the one hand, and using cameras to steal signs from an opposing team, on the other, is the hidden nature of the behavior.

For all the popular talk about unfair advantages, it would appear that they actually infrequently provide the basis for designating conduct as cheating. After all, if athletes or teams were suddenly able to freely engage in conduct currently prohibited by

36. Given the extensive regulations enacted by various sports leagues and governing bodies, both within the United States and globally, a full discussion of these entities’ PED regimes is beyond the scope of this Comment. Rather, this piece aims to address the underlying justification for PED prohibitions and cheating frameworks from a perspective applicable to professional athletics in general.

37. See *Answers to Common Questions Regarding Marijuana and Cannabinoids*, USADA (2021), <https://www.usada.org/athletes/substances/marijuana-faq/> [<https://perma.cc/7XTP-XDYJ>] (explaining why marijuana and cannabinoids are on WADA Prohibited List).

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their sport, then such conduct would cease to provide a competitive advantage; it would simply become another part of the game. It is more likely that other factors, such as harm to athletes or distaste for sneaky behavior, are the true signifiers of substances or conduct that crosses the line. Prohibition of those behaviors thus disincentivizes teams and athletes from sacrificing their integrity in order to create a competitive imbalance.

B. Continuing Challenge: How to Regulate?

Science continues to race ahead, introducing biological and technological tools of increasing sophistication that are capable of giving athletes a competitive edge. These tools exist on a spectrum; in between the clearly permissible and clearly prohibited, there is a large gray area that remains open to debate. Some have offered suggestions as to how athletic governing bodies might begin to draw a principled line between cheating and mere competitive advantage, rather than relying on piecemeal rules enacted retroactively.

At least one expert has noted the expectation of privacy doctrine that developed in the field of criminal procedure, suggesting that it logically parallels the issues presented by cheating in sports.³⁸ The expectation of privacy doctrine addresses whether information is protected by the Fourth Amendment. It provides that, where (1) a person exhibits a subjective expectation of privacy and (2) society would find that expectation of privacy objectively reasonable, the information at issue is entitled to Fourth Amendment protection.³⁹ Although cheating in sports does not implicate the Fourth Amendment, it does beg consideration of the distinction between hidden and public behavior. The expectation of privacy framework could be adopted in this setting, not in order to determine which information or behaviors are constitutionally protected, but to determine what conduct should be prohibited. For instance, individuals sneaking footballs into a bathroom in order to deflate them, watching a hidden television monitor in order to anticipate which pitch is

38. See Shawn E. Klein, *Sign-Stealing and Stupid Rules*, SPORTS ETHICIST (Jan. 14, 2020), <https://sportsethicist.com/2020/01/14/sign-stealing-and-stupid-rules/> [<https://perma.cc/RBP3-S964>] (positing that “we can draw a principled line between surveilling those things that are out in the open (like pitch signs) and things that are not (like a dugout conversation)”).

39. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (explaining “[t]hus a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the ‘plain view’ of outsiders are not ‘protected’”).

coming, or switching tainted urine samples for clean ones through a hole in the wall in order to thwart a drug test all expect that their conduct will remain secret. That expectation is likely reasonable, given the level of surveillance athletes typically receive.⁴⁰ Therefore, such behaviors would remain prohibited under this framework. This indicates that the expectation of privacy framework could provide a principled justification for drawing the line between cheating and competitive advantage without unduly disrupting the status quo.

Still others have suggested that sports leagues and governing bodies could simply stay ahead of cheating, at least where technological enhancements are concerned, by introducing counteractive technology. For instance, one writer has proposed providing catchers with a “credit-card size [electronic] console” that could trigger lights on the back of a pitcher’s glove, indicating which pitch the catcher wants thrown.⁴¹ Such technology, the writer argues, would negate the need to determine whether the thwarted conduct is cheating at all. While this suggestion may have utility in certain, narrow contexts, its limits likely preclude it from wide applicability to the cheating landscape. For one thing, it is inherently limited to counteracting the use of technology; it is difficult to imagine how technology could be harnessed to prevent, for example, the use of PEDs. However, it is also probable that athletes and teams would attempt to contravene the use of any such technology in an effort to gain an edge over their competitors. This problem would parallel the one already seen in the world of PEDs, where scientists struggle to devise drug tests and policies that can stay ahead of the substances they are meant to prevent. Given the emphasis on integrity

40. See, e.g., *Deflategate timeline: After 544 days, Tom Brady gives in*, ESPN (Sept. 3, 2015), https://www.espn.com/blog/new-england-patriots/post/_/id/4782561/timeline-of-events-for-deflategate-tom-brady [<https://perma.cc/7QNP-XD7W>] (noting that “an attendant was captured on video carrying two bags of balls into the bathroom [on the day of the alleged scheme] and exiting the bathroom 90 seconds later”); Manfred, *supra* note 32 at 2 (stating that “[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 to communicate the upcoming pitch type to the batter”); *Grigory Rodchenkov*, *supra* note 27 (describing how “Russian spies ensured the Duchess would not be detected in doping tests as FSB agents used a hole in the wall of the Sochi laboratory to swap out the dirty samples with clean urine at night”).

41. See Matt Vautour, *Alex Cora sign stealing: If Major League Baseball has technology to solve this and hasn't, why should we be outraged?*, MASS LIVE (Jan. 10, 2020), <https://www.masslive.com/patriots/2020/01/alex-cora-sign-stealing-if-major-league-baseball-has-technology-to-solve-this-and-hasnt-why-should-we-be-outraged-matt-vautour.html> [<https://perma.cc/7X5L-WU2A>] (opining “[i]t wouldn’t be hard for Major League Baseball to get rid of sign-stealing all together” if it wished).

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in professional athletics, it would be unfortunate for the game of besting an opponent's technology to take precedence over the game itself.

C. My Perspective

I have been fortunate to have had a front-seat view of sports from all angles in my thirty-year career. I have been a (highly unsuccessful) athlete; an agent to NFL, NBA, and Major League Baseball players; Vice President of the Green Bay Packers; an analyst for ESPN and Sports Illustrated; a podcast host; a speaker and lecturer on the business of sports; and a professor with the prominent Moorad Sports Law Center at Villanova University. With every one of these positions and perspectives, there has been one constant: athletes and teams are all looking for a competitive edge.

It is human nature and in the DNA of many, especially those who are athletes. We want to outperform our competition, whether as students, as professionals, or, as per this Comment, as athletes. This desire to "be better" is a common trait of elite athletes; I have seen it firsthand for decades. The overriding question is this: where to draw the line as to what is "legal" for a competitive edge.

When I was trying to compete as a professional tennis player, I remember playing during the dawn of new racket composition. Rackets were just starting to be made with substances other than wood: steel, aluminum, carbon fiber, etc. I remember thinking, "That seems like it is giving those players an edge; I should do that as well." Even now, as a current age group triathlete, I go to races and see \$20,000 bikes; new and improved hydration and endurance formulas and powders; and more lightweight and aerodynamic gear. I still think the same thing, and I wonder, "Am I losing out, by not having those things?" Even as a weekend warrior in my fifties, there appears to be competitive edge that I am missing. My athletic career is certainly not one that will matter to anyone besides me, but I still shake my head at athletes, even at my level, who draw the line or cross it further away from where I have drawn it.

On a macro-level, we see elite athletes and professional teams looking for that edge every day. Many approach or even "cross" that line. In my opinion, I do not think that most, if any, of these athletes and teams have thought that what they were doing was "cheating" or "illegal." Rather, they probably thought only that they were searching for that competitive edge that everyone else is searching for. It is only when they have been caught that the issue of line crossing is raised.

When I was an agent, I represented players that were using some sort of performance-enhancing substances (I do not even know what type). Sometimes they would tell me, and sometimes I would find out in other ways. I remember once when a player's wife called me in the middle of the night, terrified because her husband was in a "roid rage". I felt that my job was to outline the risks: the risk of discipline by the leagues if they were caught and the long-term health risks. Once I had done that, it was their choice, their livelihood, their body, their brain. Often, their response to my advice not to take performance enhancing drugs was: "*But everyone else is doing it!*" The fear of getting left behind, the fear of not getting a competitive edge was real and powerful.

When superstar professional athletes such as Barry Bonds and Alex Rodriguez were caught using PEDs obtained by local clinics with questionable credibility, many wonder, "*Why would the best athletes in the world get their steroids there?*" My answer is simple: "*Well, they are not giving these things out at the Mayo Clinic!*" What happens with athletes, at all levels, is that someone hears about something that is working as a competitive edge. And, like clockwork, others will flock. Whether it was the BALCO clinic in Northern California (Bonds) or the Biogenesis clinic in Miami (Rodriguez), players flocked to these places because the stuff there was giving players an edge in their training, their performance, and their recovery.

Now, looking at the Astros situation with my perspective of having managed a team (the Green Bay Packers) for ten years, I certainly understand what the Astros were doing, even if I do not endorse it. Since the advent of analytics in Major League Baseball, first started by the Oakland A's and general manager Billy Beane two decades ago- documented in the book and movie *Moneyball*- every team in sports has been trying to get that edge. Indeed, when I have talked to sports executives about that movie, the comment is always the same: "*Why would he (Billy Beane) expose that?*" In other words, Beane had a competitive edge, yet he lost it by sharing it with the world. The Astros, notorious for their comprehensive use of advanced analytics, took what the A's did and went further, becoming more brazen in looking for that edge and boldly crossing that line with their schemes.

Now, we enter a new era in competitive sports: the burgeoning use of biometric performance data. We are still at a nascent stage, but the key questions remain: what is a "legal" competitive edge, and where is the line to be drawn? These questions, in my opinion, will only become more frequent, more detailed, and more scruti-

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nized in the future. The regulators –sports leagues and governing bodies – simply cannot keep up with the chemists, the coaches, the trainers, and the athletes.

V. CONCLUSION

Advances in biology and technology provide today's athletes and teams with more ways than ever to pursue a competitive advantage and improve their performances on the field, court, or track. However, these developments have also made it more difficult to draw a principled line between permissible and prohibited conduct. Sports leagues and governing bodies are often in the difficult position of regulating or punishing forms of conduct retroactively, after they have already been introduced into a sport. Given the expanding gray area between cheating and gaining a competitive edge, it is critical for the world of sports to devise a cohesive principle that can be applied proactively to determine the permissibility of new substances, technology, and behaviors.

What is the answer? Time will tell. But my hope is that when rules and regulations are developed by leagues and governing bodies, they are formulated by those with experience, insight and perspectives that are differentiated and unique to this space. Specifically, there should be lawyers involved, as well as chemists, trainers, team executives, coaches, and players.

The goal of every sports venture is to create trust: to have integrity of the game and competitive balance. That goal is being challenged more every day by those looking for an edge. Once leagues and governing bodies accept that they can do something about it; using the best and brightest minds to regulate openly and honestly is a first step.