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Manufacturing a Run: How Major League Baseball Can Use the Morals Clause to Clean Up Baseball, 48 J. Marshall L. Rev. 539 (2015)

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MANUFACTURING A RUN: HOW MAJOR LEAGUE BASEBALL CAN USE THE MORALS CLAUSE TO CLEAN UP BASEBALL¹

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1. “Manufacturing a run” is an idiom used to describe a baseball strategy for scoring runs without the use of extra base hits or power hitting. The strategy is often characterized as “small ball.” For further definition of “small ball” see *What Is Small Ball?*, SPORTING CHARTS.COM (Oct. 2, 2013), <http://www.sportingcharts.com/dictionary/mlb/small-ball.aspx> (defining and discussing the strategy of “small ball” throughout the history of baseball).

I. AN INTRODUCTION AND BRIEF HISTORY OF BASEBALL AND THE LAW OF MORALS CLAUSES

A. Introduction

On August 5, 2013, Major League Baseball (MLB) announced the suspension of thirteen players for the use of performance-enhancing drugs (PEDs), commonly referred to as steroids.² Of the players suspended, twelve³ accepted their unprecedented suspensions.⁴ However, the highlight of the list was the one player who refused to accept his suspension, Alex Rodriguez.⁵ Since his Major League debut on July 8, 2004,⁶ Rodriguez has hit 654 home runs,⁷ collected 1969 runs batted in,⁸ and holds a .299 career batting average.⁹ Despite lofty numbers, Rodriguez's involvement in the latest PED scandal¹⁰ left the New York Yankees seeking to

2. See Jayson Stark, *An Unforgettable Day in Baseball*, ESPN (Aug. 5, 2013), http://espn.go.com/mlb/story/_id/9540953/biogenesis-suspensions-clearly-make-truly-historic-day-baseball-history-mlb (announcing MLB's decision to suspend players connected to the Biogenesis clinic in southern Florida).

3. *Id.*

4. See *id.* (detailing the immense breadth and depth of MLB's investigation into the Biogenesis clinic as well as the fact that twelve players accepted suspensions for PEDs without failing a drug test).

5. See Julie K. Brown, *A-Rod, 12 Others Suspended in Biogenesis Scandal*, MIAMI HERALD (Aug. 8, 2013), <http://www.miamiherald.com/2013/08/06/3543980/a-rod-12-others-suspended-in-biogenesis.html> (stating Alex Rodriguez and 12 other players were suspended for connection to a Miami based doping clinic). Since Alex Rodriguez decided to appeal his suspension, he was allowed to return to the Yankees and play while the other twelve players were suspended for the remainder of the 2013 season. *Id.*

6. *Alex Rodriguez Statistics and History*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/r/rodrial01.shtml> (last visited Sept. 13, 2013) [hereinafter BASEBALL-REFERENCE].

7. *Id.* A "home run" is a hit in baseball that enables the batter to make a complete circuit of the bases and score a run. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 595 (11th ed. 2003).

8. BASEBALL-REFERENCE, *supra* note 6. A player's runs batted in (RBI) is the number of runners that have been able to score, including him/herself, as a result of the player's at bats. *Official Info*, MLB.COM (last visited Jan. 31, 2014), http://mlb.mlb.com/mlb/official_info/official_rules/official_scorer_10.jsp. The player does not get credit for an RBI if the runs during an at bat scored because of an error. *Id.*

9. BASEBALL-REFERENCE, *supra* note 6. A batting average is a ratio (as a rate per thousand) of base hits to official times at bat for a baseball player. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 7, at 104.

10. See Brown, *supra* note 5 (stating that "[t]he Miami native [Alex Rodriguez], once expected to become baseball's all-time home run king, will now forever be remembered as the central figure in one of the game's worst scandals"); see also Terri Thompson et al., *NY Yankees Unlikely to Get out of Alex Rodriguez's Contract Even if MLB Hands down Punishment for Latest Steroid Scandal*, NYDAILYNEWS.COM (Jan. 29, 2013), <http://www.nydailynews.com/sports/baseball/yankees/yanks-efforts-escape-alex-figure-void-article-1.1250815> (stating Alex Rodriguez admitted to using steroids in the past); A

void the remaining five years and \$114 million due on his contract.¹¹

Fortunately for the Yankees, recent changes to the MLB Collective Bargaining Agreement, Joint Drug Prevention and Treatment Program,¹² and players' attitudes toward drug use in baseball¹³ may soon allow a club to void a player contract by invoking the morals clause contained in every MLB contract.¹⁴ This Comment will explore the applicability of the morals clause to the PED scandals that have afflicted baseball in the twenty-first century¹⁵ and how it might be employed to clean up the sport. This Comment first discusses the development of the morals clause in sports and entertainment contracts. Then the Comment proposes a

Timeline in the Bonds/Balco Investigation, MERCURYNEWS.COM (Nov. 15, 2007), http://www.mercurynews.com/barrybonds/ci_7473863 (detailing the timeline of the BALCO steroid scandal in baseball that led to Congress investigating steroid use in Major League Baseball).

11. See Thompson, *supra* note 10 (implying that although the Yankees would like to void the contract, they would likely be unable to).

12. See Jerry Crasnick, *HGH and the New CBA*, ESPN (Nov. 11, 2011), http://espn.go.com/mlb/story/_id/7270181/hgh-baseball-new-cba (discussing the elements incorporated in MLB's new Collective Bargaining Agreement); see also COLLECTIVE BARGAINING AGREEMENT BETWEEN MAJOR LEAGUE BASEBALL AND THE MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION FOR 2012–2016 48–51, (Nov. 2011), available at http://mlb.mlb.com/pa/pdf/cba_english.pdf [hereinafter COLLECTIVE BARGAINING AGREEMENT] (detailing all the elements of the new Collective Bargaining Agreement, specifically the discipline procedures in Major League Baseball); MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM 7–9 (2015), available at <http://mlb.mlb.com/pa/pdf/jda.pdf> [hereinafter DRUG PREVENTION AND TREATMENT PROGRAM] (listing all the substances the MLB players are forbidden from taking or using); David Schoenfield, *Players Determined to Clean up Game*, ESPN (Mar. 28, 2014), http://espn.go.com/blog/sweetspot/post/_id/45401/players-determined-to-clean-up-game (describing the harsher penalties agreed to by the MLBPA and MLB).

13. See, e.g., Stephen Lorenzo & Christian Red, *Mike Trout Wants Players Caught Using Steroids and PEDs Thrown Out of Baseball for Life*, NY DAILY NEWS (Aug. 12, 2013), <http://www.nydailynews.com/sports/baseball/trout-calls-lifetime-ban-ped-cheats-article-1.1424725> (relaying the opinion of many current players that penalties for drug use should be increased). By way of example, Los Angeles Outfielder Mike Trout stated, "To me personally, I think you should be out of the game if you get caught," and Detroit Tigers Pitcher Max Scherzer opined, "the overwhelming theme among players is to have stiffer penalties." *Id.*

14. COLLECTIVE BARGAINING AGREEMENT, *supra* note 12, at 284. Paragraph 7(b)(1) contains the following morals clause in every Uniform Player's Contract:

The Club may terminate this contract upon written notice to The Player (but only after requesting and obtaining waivers of this contract from all other Major League Clubs) if The Player shall at any time: (1) fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship or to keep himself in first-class physical condition or to obey the Club's training rules[.]

Id.

15. MERCURYNEWS.COM, *supra* note 10.

revision to the morals clause in MLB players' contracts¹⁶ to effectively deal with the PED issue.

B. Baseball and the Law

Baseball has long been romanticized and looked to as "America's National pastime."¹⁷ The role of baseball in America's consciousness has inspired numerous major motion pictures¹⁸ and countless novels.¹⁹ Even the court system has acknowledged the important role baseball plays in American society.²⁰ Baseball carved out its own legal niche with its antitrust exception.²¹ In *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*,²² the Supreme Court announced that professional baseball did not fall under the Sherman Antitrust Act.²³ The Court reasoned that, although the playing of professional baseball required the clubs to travel across state lines for games, it does not qualify as interstate commerce because "personal effort, not related to production, is not a subject of commerce."²⁴

The antitrust exemption announced in *Federal Baseball*²⁵ remained in force and relatively unchallenged until Curt Flood sued Major League Baseball following his trade from St. Louis to Philadelphia in 1969.²⁶ In *Flood v. Kuhn*,²⁷ Flood tried to sue the

16. COLLECTIVE BARGAINING AGREEMENT, *supra* note 12, at 284.

17. See generally JULES TYGIEL, *BASEBALL AS HISTORY* (2000), available at <http://www.nytimes.com/books/first/t/tygiel-past.html> (describing the evolution and treatment of baseball as the national pastime during the mid-nineteenth century).

18. See, e.g., *Baseball America Ten Best Baseball Movies*, *BASEBALL-ALMANAC* (Oct. 3, 2013), <http://www.baseball-almanac.com/moviebat.shtml> (listing the top ten baseball movies made since 1989 including classics like *Bull Durham* and *Field of Dreams*).

19. See, e.g., Greg Zimmerman, *Top Six Baseball Novels*, *BOOK RIOT* (Oct. 3, 2013), <http://bookriot.com/2012/04/05/top-six-baseball-novels/> (providing one commentator's list of the six greatest baseball novels of all time while acknowledging the existence of countless others).

20. "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." *Flood v. Kuhn*, 407 U.S. 258, 266 (1972).

21. See *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922) (holding that the National League of Professional Baseball Clubs and the American League of Professional Baseball Clubs did not violate the Sherman Antitrust Act by attempting to prevent a third league from acquiring players for their teams).

22. 259 U.S. 200, 209 (1922).

23. *Id.* at 208.

24. *Id.* at 209.

25. *Id.*

26. See Kathleen L. Turland, Note, *Major League Baseball and Antitrust: Bottom of the Ninth, Bases Loaded, Two Outs, Full Count and Congress Takes a Swing*, 45 SYRACUSE L. REV. 1329, 1332-35 (1995) (discussing the history and development of the antitrust exemption in baseball and how Curt Flood and others challenged the exemption throughout history).

Commissioner of MLB and the Presidents of the American and National Leagues, claiming that the “reserve clause” in his contract²⁸ violated the Sherman Antitrust Act.²⁹ The Court disagreed and, while seriously questioning baseball’s exemption from antitrust lawsuits,³⁰ concluded that baseball’s antitrust exemption “is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court’s expanding concept of interstate commerce.”³¹

C. The History of Performance-Enhancing Drugs in Baseball

The use of PEDs in baseball stretches back to 1988 when Thomas Brosnell, a writer for the Washington Post, accused Oakland Athletics’ outfielder Jose Canseco of using PEDs to improve his on-field performance.³² In response to the growing accusations of baseball players using PEDs, Congress passed two acts between 1988 and 1990. The Anti-Drug Abuse Act of 1988³³ and the Anabolic Steroids Control Act³⁴ outlawed the use of PEDs for any purpose other than the treatment of a disease by a doctor.³⁵

Starting in the mid-1990s, MLB witnessed an unprecedented “power surge” as seventeen different players hit forty or more home runs during the 1996 season.³⁶ Then, in 1998, St. Louis

27. 407 U.S. 258, 259 (1972).

28. See Jennifer K. Ashcraft & Craig A. Depken, II, *The Introduction of the Reserve Clause in Major League Baseball: Evidence of its Impact on Select Player Salaries During the 1880s* 2–5 (Int’ Ass’n of Sports Economists, Working Paper No. 07-10, 2007), available at http://college.holycross.edu/RePEc/spe/AshcraftDepken_ReserveClause.pdf (defining and discussing the history of the reserve clause in MLB). The “reserve clause” was a clause in every MLB player’s contract that bound him to one team until the owner decided to grant him his unconditional release from his contract. *Id.* at 2.

29. *Flood*, 407 U.S. at 265.

30. *Cf. id.* at 283 (noting that between the Court’s decision in *Federal Baseball* and 1972, Congress had ample opportunity to pass remedial legislation to outlaw the reserve system but failed to act).

31. *Id.* at 282.

32. See Thomas Boswell, *Jose Canseco’s 40-40 Vision Starting to Come Into Focus*, L.A. TIMES (Aug. 19, 1988), http://articles.latimes.com/1988-08-19/sports/sp-501_1_jose-canseco (discussing Jose Canseco’s statistical achievements and accusing the slugger of using steroids during the season).

33. 21 U.S.C. § 841

34. Pub. L. 108-358 (1990).

35. See Eldon L. Ham, *The Immaculate Deception: How the Holy Grail of Protectionism led to the Great Steroid Era: Why Congress Should Revoke Baseball’s Antitrust Boondoggle*, 19 MARQ. SPORTS L. REV. 209, 221–24 (2008) (discussing the history of the “Steroid Era” in MLB and subsequent actions by Congress to end the steroid era).

36. *Compare 1996 Major League Baseball Batting Leaders*, BASEBALL-

power hitter Mark McGwire and Chicago Cubs outfielder Sammy Sosa raced each other to break Roger Maris' record of sixty-one home runs in a season.³⁷ Each player did break Maris' record by hitting seventy and sixty-six home runs, respectively.³⁸ Finally, in 2001, Barry Bonds broke Mark McGwire's new record by hitting seventy-one home runs.³⁹ The sudden increase in power numbers and suspicion that illegal substances were used by players eventually led to a 2007 congressional inquiry concerning the use of PEDs in baseball.⁴⁰

One of the principal sources to trigger the congressional investigation was Bay Area Laboratory Co-Operative (BALCO), founded by Victor Conte.⁴¹ BALCO was a sports nutrition company that was investigated in 2003 by federal and local law enforcement following an anonymous phone call to the United States Anti-Doping Agency.⁴² The investigation of BALCO, which unfolded between 2003 and 2007, connected many athletes, including some of MLB's biggest stars, to the laboratory.⁴³ At the same time that Victor Conte and BALCO were being investigated by the FBI for supplying PEDs to professional athletes, Congress was conducting their own investigation of PED use by MLB players.⁴⁴

The BALCO scandal and congressional investigation, led by Senator George J. Mitchell, resulted in the now famous "Mitchell Report."⁴⁵ The Mitchell Report laid out the illegality of PEDs, not just in baseball but also in the United States generally.⁴⁶ The Mitchell Report then addressed a central tenet of this Comment: PEDs call into question the integrity of the game of baseball.⁴⁷

REFERENCE.COM, <http://www.baseballreference.com/leagues/MLB/1996batting-leaders.shtml> (last visited Mar. 12, 2014) (listing the top ten players in all offensive categories, most notably Home Runs, where all players hit at least forty home runs), *with 1995 Major League Batting Leaders*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/leagues/MLB/1995batting-leaders.shtml> (last visited Mar. 12, 2014) (showing that only four of the top ten home run hitters eclipsed the forty home run plateau). This is not meant to imply that all or any of the players on this list used PEDs in their career.

37. Ham, *supra* note 35, at 223.

38. Greg Bishop, *After Drug Revelations, Redefining '98 Home Run Chase*, N.Y. TIMES, July 5, 2009, at SP2, available at <http://www.nytimes.com/2009/07/05/sports/baseball/05homers.html?+r=0>.

39. Ham, *supra* note 35, at 223.

40. *Id.* at 223–24.

41. *Id.* at 223.

42. MERCURYNEWS.COM, *supra* note 10.

43. *Id.*

44. Ham, *supra* note 35, at 223.

45. GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 1 (2007), available at <http://files.mlb.com/mitchrpt.pdf>.

46. *Id.* at 10. "That means it is illegal to use or possess steroids or steroid precursors without a valid physician's prescription." *Id.*

47. See *id.* at 11–12 (describing steroids as cheating and advancing the

Senator Mitchell reported that “[t]he alleged illegal use of anabolic steroids and other performance-enhancing substances by players in [MLB] ‘is a matter of integrity’ that calls for ‘an impartial, thorough review’ to confront this problem head on.”⁴⁸

After United States Federal Agents raided the BALCO labs in September of 2003,⁴⁹ MLB revamped its PED policy.⁵⁰ Now, MLB has in place its strictest policy to date with a complete list of banned substances⁵¹ and strict penalties for violating the Joint Drug Abuse Prevention and Treatment Program.⁵² The MLB Players Association and the Commissioner’s Office created the Joint Drug Abuse Prevention and Treatment Program for the express purpose of educating players about the risks of PEDs, deterring future PED use, and establishing a program for punishing PED use.⁵³

D. The Evolution of the Morals Clause in Talent Contracts

Morals clauses have been used in entertainment contracts since roughly 1921.⁵⁴ A morals clause can go by several different

premise that steroids are just as damaging to the game of baseball as gambling, which was expressly prohibited in the 1920s).

48. *Id.* at 11 (citing Press Release, Major League Baseball Office of the Commissioner, Statement of Commissioner Alan Selig (Mar. 30, 2006)). The view expressed by Commissioner Selig in his Press Release and then quoted by Senator Mitchell provides the perfect backdrop for the premise of this Comment. Prior to 2007, when Major League Baseball finally started suspending players for using PEDs, there was little to no consequence for violating the express ban on illegal substances. *Id.* As a result, the valued integrity of the game that has so long been viewed as “America’s Past Time” was in serious jeopardy. The Mitchell Report was the first step in attempting to restore integrity.

49. Ham, *supra* note 36, at 223.

50. *See, e.g., id.* at 224 (discussing the development of MLB’s steroid policy after the BALCO scandal); *see also* DRUG PREVENTION AND TREATMENT PROGRAM, *supra* note 12, at 24–25.

51. *See generally* Crasnick, *supra* note 12 (explaining the latest MLB PED policy and delineating substances that are banned by MLB); *see also* DRUG PREVENTION AND TREATMENT PROGRAM, *supra* note 12, at 3–4 (listing all banned substances that the MLB will test for).

52. DRUG PREVENTION AND TREATMENT PROGRAM, *supra* note 12, at 22–28; *compare* Barry M. Bloom, *Mandatory Steroid Testing to Begin*, MLB.COM (Nov. 13, 2003), http://mlb.mlb.com/content/printer_friendly/mlb/y2003/m11/d13/c603458.jsp (stating under the 2002 MLB Drug Prevention Program, a first time offender resulted only in treatment for the player instead of a suspension), *with* DRUG PREVENTION AND TREATMENT PROGRAM, *supra* note 12, at 22 (setting out the punishments for violating the new drug prevention program, including a 50-game suspension for first time offenders, 100-game suspension for second time offenders, and a permanent ban from baseball for third-time offenders).

53. DRUG PREVENTION AND TREATMENT PROGRAM, *supra* note 12, at 1.

54. *See* Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares*

names,⁵⁵ but all morals clauses accomplish essentially the same objective.⁵⁶

According to Fernando M. Pinguelo and Timothy D. Cedrone, the term “[m]orals clause,” as used in the entertainment industry, has come to reference any number of contractual terms that cite certain behavior of a contracting individual and serve as a basis for termination of the agreement.”⁵⁷ To provide an example with a little closer application to MLB, Brian Socolow characterizes a morals clause as a clause which “gives the athlete’s team, league or the company paying the athlete to endorse its products the right to terminate a contract or otherwise punish a player who engages in criminal or unseemly behavior.”⁵⁸

The morals clause came into widespread use in entertainment contracts around the 1920s following the scandals surrounding movie star Roscoe “Fatty” Arbuckle⁵⁹ and the Chicago White Sox in 1921.⁶⁰ First, in the summer in 1921, popular comedian and actor “Fatty” Arbuckle signed a three-year, \$3 million contract with Paramount Pictures.⁶¹ Later that same summer, Arbuckle was rumored to have sexually assaulted and killed a female guest

About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know, 19 SETON HALL J. SPORTS & ENT. L. 347, 353–57 (2009) (discussing the evolution of morals clauses in the twentieth century and how the use of the clause has changed over time).

55. See *id.* at 350–51 (acknowledging the need to adequately define exactly what a morals clause is and how it operates for the purposes of the article); Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 3 (2005) (listing some of the more common names for a “morals clause” in a corporate endorsement contract).

56. Auerbach, *supra* note 55, at 3.

57. Pinguelo & Cedrone, *supra* note 54, at 351; see also Auerbach, *supra* note 55, at 3 (stating, “Morals clauses . . . are provisions included in an endorsement contract granting the endorsee the right to cancel the agreement in the event the athlete does something to tarnish his or her image and, consequently, the image of the endorsee or its products.”).

58. Brian R. Socolow, *What Every Player Should Know about Morals Clauses*, 4 MOVES 186, 187–88 (2004), available at <http://www.loeb.com/files/Publication/0953bcf8-0747-44dc-ab71-70e670d6285d/Presentation/PublicationAttachment/70f8fe3f-a00e-4882-83da-0096ecbab624/Brian%20Socolow%2c%20Moves%20Magazine.pdf>.

59. See Pinguelo & Cedrone, *supra* note 54, at 354–55 (discussing the history of morals clauses and the role Fatty Arbuckle played in their development).

60. David Quentin Voigt, *The Chicago Black Sox and the Myth of Baseball’s Single Sin*, 62 J. OF THE ILL. ST. HIST. SOC’Y 293, 295–306 (1969) (discussing the scandal, trial, and fallout of the Chicago White Sox conspiring to throw the World Series in 1921). Most notable among these players was “Shoeless” Joe Jackson, who many believe would have easily been elected to the baseball Hall of Fame after his retirement. Rob Neyer, *Say It Ain’t So . . . for Joe and the Hall*, ESPN (Aug. 2, 2001), http://espn.go.com/classic/s/2001/0730/123_2950.html.

61. Noah B. Kressler, *Using the Morals Clause in Talen Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 236 (2005).

at his Labor Day party. This caused public opinion to quickly turn against Arbuckle and left Paramount Pictures wanting to cancel his contract.⁶² That same year, eight Chicago White Sox players were accused of conspiring with a ring of gamblers and taking payments to throw the World Series.⁶³ All eight players were acquitted by the court system, but Commissioner Kenisaw “Mountain” Landis decided to ban all eight men from the sport of baseball for the rest of their lives.⁶⁴ After these two scandals scarred the film and professional baseball scene, morals clauses started appearing in entertainment contracts. Once inserted, their use inevitably led to litigation over the clauses’ validity.⁶⁵

1. *In Entertainment Contracts*

Some of the first instances where the morals clauses in entertainment contracts were the subject of litigation were the “Hollywood Ten Trilogy” cases.⁶⁶ The first of these cases was *Loew’s, Inc. v. Cole*.⁶⁷ Lester Cole, a screenwriter for Metro-Goldwyn-Meyer studios, was terminated after he was found in contempt of Congress when he and nine fellow screenwriters challenged the authority of the House Committee on Un-American Activities to conduct an inquiry into whether they were members of the Communist Party.⁶⁸ After his citation, Cole’s contract was terminated under the morals clause provision because of alleged communist ties.⁶⁹ Cole sued his employer and the trial court found

62. *Id.*

63. Voigt, *supra* note 60.

64. *Id.* at 301.

65. See *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87 (9th Cir. 1957); *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844 (9th Cir. 1954); *Loew’s, Inc. v. Cole*, 185 F.2d 641 (9th Cir. 1950) (applying California law to uphold studios terminating employees using a morals clause in the “Hollywood Ten Trilogy” cases); see also *Revels v. Miss N.C. Pageant Org., Inc.*, 627 S.E.2d 280, 282 (Ct. App. N.C. 2006) (discussing the use of the morals clause against Miss North Carolina 2002); Pinguelo & Cedrone *supra* note 54, at 358 (citing and discussing examples of litigation over the validity of a morals clause in an entertainment contract).

66. See Porcher L. Taylor, III et al., *The Reverse-Morals Clause: The Unique Way to Save Talent’s Reputation and Money in a New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT L.J. 65, 75 (2010) (detailing the history and development of morals clauses in entertainment contracts). The “Hollywood Ten” refers to ten screenwriters who were called before the House Committee on Un-American Activities to testify about suspected membership in the Communist Party. See Pinguelo & Cedrone, *supra* note 50, at 358–62 (discussing the background and litigation of the “Hollywood Ten”).

67. *Loew’s Inc.*, 216 F.2d at 844.

68. *Id.* at 644–45.

69. *Id.* at 645. The clause in question read:

The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into

in Cole's favor.⁷⁰ However, on appeal, the Ninth Circuit reversed, holding that the trial court erred by presenting the issues of the case to the jury incorrectly because the issue presented was whether the accusations against Cole were true rather than whether or not the accusations against him provided the studio with grounds to terminate his contract.⁷¹

More recently, a morals clause in a talent contract was subject to litigation in *Revels v. Miss N.C. Pageant Org., Inc.*⁷² In 2002, Rebekah Revels entered into a contract with the Miss North Carolina Pageant Organization to enable her to compete in the pageant.⁷³ In the contract, Ms. Revels promised that she had not "[d]one any act or engaged in any activity which could be characterized as dishonest, immoral, immodest, indecent, or in bad taste."⁷⁴ A later provision provided, "if any of the representations proved false, the contract would be terminated and Revels would forfeit her rights as Miss North Carolina."⁷⁵ It was later discovered that Ms. Revels had sent a series of nude pictures to her ex-boyfriend, and she was forced to surrender her crown as Miss North Carolina.⁷⁶

2. In Sports Contracts

Shortly after morals clauses were introduced into entertainment contracts, the first version of a morals clause appeared in a baseball contract in 1922.⁷⁷ Morals clauses are included as important parts of professional athletes' contracts.⁷⁸

public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.

Id.

70. *Id.* at 646–47.

71. *Id.* at 662. The appellate court ruled that the trial court erred because it presented the case as one revolving around the truth of the accusations of Cole's membership in the Communist Party rather than whether his citation for contempt violated the provisions of his contract with MGM. *Id.* (remanding the cause so that the jury can properly be presented with the issues and evidence to determine if MGM had a right to fire Cole for breach of contract).

72. *Revels*, 627 S.E.2d at 282.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* The case was ultimately decided on the issue of whether or not Revels was compelled to arbitrate her claims and not on the morals clause issue, but the case is still helpful to illustrate examples of where a morals clause can come in to play. *Id.* at 284.

77. Taylor et al., *supra* note 66, at 75. The first version of a morals clause was a clause inserted into the contract of George Herman "Babe" Ruth. *Id.* at 75. The clause was used in order to try and curtail Ruth's infamous off field behavior, but was mostly ignored by both Ruth and the Yankees. *Id.* at 76.

78. See Pinguelo & Cedrone, *supra* note 50, at 356–57 (listing all the

The morals clause contained in a professional athlete's contract often provides for the termination of sponsorship deals, the suspension by the athlete's respective league, and the repayment of a player's past earnings to his team.⁷⁹ Some professional athletes and coaches who have triggered the morals clauses and have dealt with the consequences include Michael Vick,⁸⁰ Adam "Pacman" Jones,⁸¹ Rick Neuheisel,⁸² and Jason Giambi.⁸³

MLB,⁸⁴ the National Football League,⁸⁵ the National Hockey

professional sports leagues allowing morals clauses as of 2008). Every professional sports league's collective bargaining agreement authorizes the use of a morals clause in every player contract, though some players do not realize it is there. *Id.*; see also Socolow, *supra* note 58, at 186 (stating that most athlete contracts contain the morals clause, but few athletes actually look past the salary figure until after they are in trouble).

79. See Socolow, *supra* note 58, at 188 (listing the possible consequences of triggering an athlete's morals clause).

80. In 2007, Michael Vick, star quarterback for the Atlanta Falcons, was convicted of bankrolling a dogfighting ring and sentenced to twenty-three months in prison. *Vick Suspended Indefinitely by NFL*, ESPN (Aug. 24, 2007), <http://sports.espn.go.com/nfl/news/story?id=2990157>. Upon his conviction, Vick's endorsement deal with Nike was cancelled and he was sued by his team the Atlanta Falcons for \$20 million in bonuses. *Id.* Subsequently, Vick was made the backup quarterback for the Philadelphia Eagles. Kevin Patra, *Michael Vick: Nick Foles Should Be Eagles' Starting QB*, NFL.COM (Nov. 22, 2013), <http://www.nfl.com/news/story/0ap2000000285802/article/michael-vick-nick-foles-should-be-eagles-starting-qb>.

81. Adam "Pacman" Jones was suspended by the National Football League in 2007 for the entire season after being arrested five times and violating probation. Socolow, *supra* note 58, at 187. Jones now plays for the Cincinnati Bengals but continues to find himself in legal trouble. See *Adam "Pacman" Jones Pays \$130 Fine*, ESPN (Sept. 27, 2013), http://espn.go.com/nfl/story/_/id/9731267/adam-pacman-jones-cincinnati-bengals-pays-disorderly-conduct-fine (discussing Adam Jones's most recent issues and run-ins with the law).

82. Rick Neuheisel was fired from his position as the head coach at Washington University for gambling on college sports but was later hired as the head coach at UCLA. Socolow, *supra* note 58, at 187.

83. Socolow discusses Giambi as an example of a player who actually did pay attention to the language of his contract and negotiated an alteration that allowed him to remain on his team (at the time the New York Yankees). *Id.* Giambi negotiated to remove language permitting his termination in the event he was discovered to have used steroids, thus preventing the Yankees from voiding his contract after his testimony to a grand jury in the BALCO scandal was leaked. *Id.*

84. COLLECTIVE BARGAINING AGREEMENT, *supra* note 12, at 49. The morals clause for Major League Baseball states:

Players may be disciplined for just cause for conduct that is materially detrimental or materially prejudicial to the best interests of Baseball including, but not limited to, engaging in conduct in violation of federal, state or local law. The Commissioner and a Club shall not discipline a Player for the same act or conduct under this provision. In cases of this type, a Club may only discipline a Player, or take other adverse action against him, when the Commissioner defers the disciplinary decision to the Club.

Id.

85. NAT'L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT 204

League,⁸⁶ and the National Basketball Association⁸⁷ all include a morals clause in their collective bargaining agreements. Many of these clauses allow little to no negotiation to alter the language of the clause.⁸⁸ However, one forum where an athlete is able to negotiate over a “morals clause” is when it comes to endorsement contracts.⁸⁹

Armed with a background of baseball’s history, interaction with the law, and approach to drug prevention, this Comment next analyzes the law of morals contracts and its application to baseball, proposes drafting language for MLB, and finally predicts the effect of the morals clause in cleaning up baseball.

II. ANALYSIS

A. *What Are the Contents of a Morals Clause?*

The actual title of a morals clause can vary widely from contract to contract,⁹⁰ but all types of these clauses will have the same goal in mind: curtailing a celebrity’s behavior.⁹¹ While the clause is always meant to accomplish the same goal, the language itself will still almost certainly be unique to the individual contract.⁹² Take as examples the language from the three contracts involved in the “Hollywood Ten Trilogy” cases⁹³ and the clause from the contract of television and film actor Charlie Sheen.⁹⁴

(2011), available at <http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

86. NAT’L HOCKEY LEAGUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS’ ASS’N 124 (2013), available at http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf.

87. NAT’L BASKETBALL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT 47–51 (2011), available at http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/1999NBA_NBPA_CBA.pdf.

88. Pinguelo & Cedrone, *supra* note 54, at 364. *But see* Socolow, *supra* note 58, at 187 (discussing how Jason Giambi did manage to negotiate a change in the language of the clause).

89. Socolow, *supra* note 58, at 187. Since the focus of this Comment is how MLB can employ the morals clause in order to clean up the sport of baseball, there will be very limited discussion of athlete endorsement deals. However, endorsements are an area where most athletes run into trouble. *Id.*

90. Pinguelo & Cedrone, *supra* note 54, at 351.

91. *Id.* “Morals clause’ as used in the entertainment industry, has come to reference any number of contractual terms that cite certain behavior of the contracting individual and serve as a basis for termination of the agreement.” *Id.*

92. *Id.*

93. *Loew’s Inc.*, 216 F.2d at 645.

94. *See* Brooks Barnes, Bill Carter & Michael Cieply, *Sheen Is Surrounded by a Coterie of Enablers*, N.Y. TIMES, Mar. 7, 2011, at B1, available at http://www.nytimes.com/2011/03/07/business/media/07sheen.html?pagewanted=1&_

In February 2011, Warner Brothers cancelled the remaining four seasons of *Two and a Half Men*, in which Charlie Sheen had starred since 2003.⁹⁵ Sheen proceeded to go on a media blitz and sued Warner Brothers over his termination.⁹⁶ The threats by Charlie Sheen caused Warner Brothers to publish the contents of a specific clause in Sheen's contract that they pointed to as the morals clause.⁹⁷ The clause stated:

If Producer in its reasonable but good faith opinion believes Performer has committed an act which constitutes a felony offense involving moral turpitude under federal, state or local laws, or is indicted or convicted of any such offense, Producer shall have the right to delete the billing provided for in this Agreement from any broadcast or other uses which are thereafter made of the episode(s) in which Performer appears. In addition, to the extent such event interferes with Performer's ability to fully and completely render all material services required hereunder or Producer's ability to fully exploit the Series, Producer shall have the right to treat such act as a default under the applicable provisions hereof.⁹⁸

Beyond this section of the contract, Warner Brothers also pointed to two additional sections of the contract as a "morals clause" of sorts.⁹⁹ There is some debate about whether the clause

r=0&ref=charliesheen (providing the biographical information for Charlie Sheen and his acting career and his reckless lifestyle that has often gotten him in trouble). Charlie Sheen was one of the top-grossing film stars in the late 1980s and early 1990s until his lifestyle of partying and drug abuse nearly cost him his life. *Id.* Sheen's career was revived on television with his appearances on *Spin City* and his starring role in *Two and a Half Men*. *Id.*

95. See Bill Carter, *Sheen, Seeking More Than \$100 Million, Sues His TV Show's Creator and Warner Brothers*, N.Y. TIMES (Mar. 11, 2011), <http://query.nytimes.com/gst/fullpage.html?res=9F02E6DE1338F932A25750C0A9679D8B63&ref=charliesheen> (discussing how Charlie Sheen's lifestyle caused the cancellation of his role on *Two and a Half Men* and Sheen's subsequent media blitz); see also Eriq Gardner, *Charlie Sheen's Contract: Was There Actually a Morals Clause?*, THE HOLLYWOOD REP. (Mar. 8, 2011), <http://www.hollywoodreporter.com/thr-esq/charlie-sheens-contract-was-actually-165309> (describing the backdrop against which the language of Sheen's morals clause was called into question).

96. Gardner, *supra* note 95.

97. *Id.*

98. *Id.*

99. *Id.* The following are the two clauses Warner Brothers pointed to as morals clauses of sorts:

Producer is prevented from or hampered or interrupted or interfered with in preparing or producing the Series or any Program thereof or in utilizing Performer's services hereunder . . . by reason of any other cause or causes of any similar nature or beyond our control, or by reason of the death, illness, disfigurement, Default or Incapacity of a member of the continuing principal cast of the series . . .

Any publicity, paid advertisements, press notices and other information with respect to the...Series shall be under Producer's sole control (excluding [sic] normal, incidental, non-derogatory publicity relating solely to Performer's involvement with the . . . Series . . .). [sic]

reproduced above actually constitutes a morals clause,¹⁰⁰ but the language does seek to accomplish the general goal of morals clauses of attempting to curtail a celebrity's behavior.¹⁰¹

Each of the "Hollywood Ten Trilogy" cases, *Loew's, Inc. v. Cole*,¹⁰² *Twentieth Century-Fox Film Corp. v. Lardner*,¹⁰³ and *Scott v. RKO Radio Pictures, Inc.*, also involved morals clauses.¹⁰⁴ In *Loew's*, the language of the morals clause read:

The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.¹⁰⁵

This is quite similar to the language used in the clause litigated in *Twentieth Century-Fox Film Corp.*:

That the artist shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an offense involving moral turpitude under Federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency, morality or shall cause him to be held in public ridicule, scorn or contempt, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week's notice to the artist, terminate this contract and the employment thereby created.¹⁰⁶

The relevant language in *Scott* is equally similar:

At all times commencing on the date hereof and continuing throughout the production or distribution of the pictures, the producer will conduct himself with due regard to the public conventions and morals and will not do anything which will tend to

Therefore Performer shall not issue nor consent to, nor authorize any person or entity to release any such information without Producer's express prior written approval.

Id. (emphasis in original).

100. *Id.* THE HOLLYWOOD REPORTER asked the opinion of entertainment labor attorney Barry Peek on whether this clause constitutes a "morals clause." *Id.* Peek stated this was not a standard morals clause because it is very specific about the events that can lead to termination, whereas most morals clauses state that actors will conduct themselves in a way not to bring negative attention to a show. *Id.*

101. Pinguelo & Cedrone, *supra* note 54, at 351.

102. *Loew's Inc.*, 185 F.2d at 645.

103. *Twentieth Century-Fox Film Corp.*, 216 F.2d at 848.

104. *Scott*, 240 F.2d at 87-88.

105. *Loew's Inc.*, 185 F.2d at 645.

106. *Twentieth Century-Fox Film Corp.*, 216 F.2d at 848.

degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the corporation or the motion picture industry in general; and he will not willfully do any act which will not willfully his capacity fully to comply with this agreement, or which will injure him physically or mentally.¹⁰⁷

Comparing the language in all three of the “Hollywood Ten Trilogy” cases, it is clear that, although there are differences, the Ninth Circuit correctly viewed them as substantially the same and, thus, equally enforceable.¹⁰⁸ Review of the three morals clauses from the “Hollywood Ten” cases¹⁰⁹ demonstrates that Charlie Sheen’s morals clause likely would have been enforced if the case were litigated.¹¹⁰

The language of the morals clause that evolved through use in entertainment contracts has also worked its way into the contracts of MLB players.¹¹¹ The language dealing with the termination of a player on account of the player’s conduct first appears in the MLB Collective Bargaining Agreement.¹¹² The specific language in the Collective Bargaining Agreement allows for a player to be disciplined for “conduct materially prejudicial to the best interest of Baseball”¹¹³ This language is then further expounded upon in the player’s individual contract.¹¹⁴ The Uniform Player Contract states that a player may be terminated by his club if he: “fail[s], refuse[s] or neglect[s] to conform his personal conduct to the standards of good citizenship and good sportsmanship or to keep himself in first-class physical condition or to obey the Club’s training rules.”¹¹⁵

There are striking similarities between the language of the MLB morals clause and the language of the entertainment contracts already discussed.¹¹⁶ All of the examples of morals

107. *Scott*, 240 F.2d at 87–88.

108. “We are confident that the morals clause in Scott’s contract was no weaker from management’s position than Lardner’s.” *Id.* at 91.

109. Pinguelo & Cedrone, *supra* note 54, at 351.

110. The language of all three “Hollywood Ten” clauses forbids any action by the talent resulting in incapacity. *Scott*, 240 F.2d at 91; *Twentieth Century-Fox Film Corp.*, 216 F.2d at 848; *Loew’s Inc.*, 185 F.2d at 645. Similarly, Charlie Sheen’s contract with Warner Brothers includes a clause referencing the producer’s ability to cancel the contract if Sheen were incapacitated. Gardner, *supra* note 95.

111. Pinguelo & Cedrone, *supra* note 54, at 351.

112. COLLECTIVE BARGAINING AGREEMENT, *supra* note 12, at 49.

113. *Id.*

114. *E.g.*, COLLECTIVE BARGAINING AGREEMENT, *supra* note 12, at 3 (describing when the Club may terminate a contract); *see also* Socolow, *supra* note 58, at 187 (detailing how Jason Giambi negotiated a variation to his morals clause).

115. COLLECTIVE BARGAINING AGREEMENT, *supra* note 12, at 284.

116. *E.g.*, *Scott*, 240 F.2d at 91; *Twentieth Century-Fox Film Corp.*, 216 F.2d at 848 (noting specifically the language of conforming personal conduct to the standards of good citizenship).

clauses discussed previously make reference, in some fashion, to conforming behavior to “standards of good citizenship”¹¹⁷ and avoiding incapacitation.¹¹⁸

B. How Has the Morals Clause Been Deployed?

1. Endorsement Deals

The morals clause has most often been used to void endorsement deals with either an athlete or an entertainer.¹¹⁹ For example, in May of 2004, Mary Kate and Ashley Olsen were dropped from the popular “Got Milk?” campaign after the then-eighteen-year-old Mary Kate entered a clinic to receive treatment for an eating disorder.¹²⁰ Similarly, H&M decided to cancel its endorsement deal with super model Kate Moss after allegations of her cocaine use surfaced.¹²¹

The use of a morals clause to terminate endorsement deals extends beyond the entertainment industry and into the realm of athletic sponsorships.¹²² Some notable athletes have had their sponsorship deals cancelled because of their conduct. Lance Armstrong had his sponsorship deals terminated because of his PED use in competitive cycling that led him to seven Tour de France titles.¹²³ Professional golfer Tiger Woods sponsorships were terminated when the public discovered his multiple, concurrent affairs.¹²⁴ And National Football League quarterback Michael Vick

117. *Scott*, 240 F.2d at 91; *Twentieth Century-Fox Film Corp.*, 216 F.2d at 848; Socolow, *supra* note 58, at 187.

118. *Scott*, 240 F.2d at 91; *Twentieth Century-Fox Film Corp.*, 216 F.2d at 848; Socolow, *supra* note 58, at 187.

119. See Pinguelo & Cedrone, *supra* note 54, at 348–49 (listing some of the more popular instances of a morals clause being employed).

120. See Stephen M. Silverman, *Mary-Kate and Ashley Milk Ads Recalled*, PEOPLE (Jul. 7, 2004), <http://www.people.com/people/article/0,,661480,00.html> (discussing the circumstances around Mary Kate and Ashley Olsen’s ads being pulled).

121. See *Kate Moss: Sorry I Let People Down*, CNN (Sept. 22, 2005), <http://edition.cnn.com/2005/WORLD/europe/09/22/kate.moss/index.html> (detailing Kate Moss’s apology and H&M’s subsequent decision to cancel its endorsement deal with the model/actress). Kate Moss issued a public apology after allegations that she used cocaine. *Id.*

122. See Socolow, *supra* note 58, at 186 (discussing cases of athletes having their endorsement deals cancelled using a morals clause).

123. See Patrick Rishe, *Armstrong Will Lose \$150 Million in Future Earnings After Nike and Other Sponsors Dump Him*, FORBES (Oct. 8, 2012), <http://www.forbes.com/sites/prishe/2012/10/18/nike-proves-deadlier-than-cancer-as-armstrong-will-lose-150-million-in-future-earnings> (discussing the financial impact of Armstrong losing his sponsorships). Lance Armstrong recently admitted to using PEDs on his way to winning a record seven Tour de France Titles. *Id.*

124. See William Wei, *Tiger Woods Lost \$22 Million in Endorsements in 2010*, BUS. INSIDER (Jul. 21, 2010), <http://www.businessinsider.com/tiger->

lost sponsorship deals for his criminal involvement in dogfighting.¹²⁵

2. *Employment Contracts*

There have been only a few occasions where a morals clause has been used to terminate a contract for employment rather than for an endorsement deal.¹²⁶ One such example, besides those “Hollywood Ten Trilogy” cases,¹²⁷ is *Nader v. ABC Television, Inc.*¹²⁸ After ABC Television terminated Michael Nader for selling cocaine to an undercover police officer, Nader sued, alleging several claims of wrongful termination.¹²⁹ The district court granted ABC’s summary judgment and the Second Circuit affirmed the decision.¹³⁰

While it may be perceived that employers in the entertainment industry have wide discretion to terminate or discipline talent using the morals clause, this is no longer the case.¹³¹ There has been a seismic shift in the form and function of studio contracts since their introduction in the 1920s.¹³² Actors are no longer bound to comprehensive deals with their studios.¹³³ Rather, Hollywood attorneys regularly strike morals clauses from contracts.¹³⁴ That said, morals clauses are still very popular in most endorsement deals.¹³⁵

C. *What Conduct Can MLB Punish under a Morals Clause?*

This brings us to the question of what conduct MLB can punish using the morals clause in players’ contracts. In baseball, there has long been a sense of the need to protect the purity of the game.¹³⁶ One way to accomplish this is by punishing conduct

woods-lost-22-million-in-2010-endorsements-2010-7 (discussing the financial impact on Tiger Woods losing his sponsorships after his sex scandal broke).

125. Socolaw, *supra* note 58, at 187.

126. *E.g., Loew’s, Inc. v. Cole*, 185 F.2d at 657 (terminating the contract of the first “Hollywood Ten” screenwriters pursuant to the morals clause).

127. *Id.*

128. 150 F. App’x 54, 55 (2nd Cir. 2005).

129. *Id.*

130. *Id.* at 58.

131. See Merissa Marr, *When a Star Implodes—Studios Have Few Options When Celebrities Stumble; Return to Morals Clause?*, WALL ST. J. (Aug. 4, 2006), <http://online.wsj.com/article/SB115465052784926404.html> (discussing the change in use of the morals clause against talent).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. “Baseball is something more than a game to an American boy. It is his training field for lifework. Destroy his faith in its squareness and honesty, and

detrimental to the image of baseball.¹³⁷ The first commissioner to wield the power to discipline players for their conduct was Judge Kennesaw “Mountain” Landis, who in 1921 accepted the position of commissioner on the condition that he be allowed to clean up the game.¹³⁸

The first step in cleaning up conduct is to define a conduct violation.¹³⁹ There are two specific types of conduct that draw the attention of the commissioner in baseball: “on-field” conduct and “off-field” conduct.¹⁴⁰ Some of the most notable forms of punishable on-field conduct are fixing games and PED use.¹⁴¹ Throughout baseball’s history, this conduct has often been met with some of the most severe penalties from the commissioner’s office.¹⁴² For example, Landis banned the eight members of the Chicago White Sox for their connection to the fixing of games in the 1921 World Series.¹⁴³ Another infamous example of a player being punished for on-field conduct is Pete Rose.¹⁴⁴ Rose was banned for life from the game of baseball after he was accused of betting on baseball games while managing the Cincinnati Reds.¹⁴⁵ After the banishment for gambling, Rose was quoted as saying:

I picked the wrong vice. I should have picked alcohol. I should have picked drugs or I should have picked up beating up my wife or girlfriend because if you do those three, you get a second chance. They haven’t given too many gamblers a second chances in the world of baseball.¹⁴⁶

you have destroyed something more. You have planted suspicion of all things in his heart.” BASEBALL: A FILM BY KEN BURNS (PBS 1994).

137. See Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS OF SPORT 5, 12 (2013–2014) (discussing the development of concern for the “best interest of baseball” clause).

138. *Id.*

139. See Matthew A. Foote, *Three Strikes and You’re (Not Necessarily) Out: How Baseball’s Erratic Approach to Conduct Violations Is Not in the Best Interest of the Game*, 6 DEPAUL J. SPORTS L. CONTEMP. PROBS. 1, 3–4 (2009) (defining the different types of conduct violations allowing for discipline by Major League Baseball).

140. *Id.* at 3. On the field conduct is any violation that directly affects the outcome of games. *Id.* Off the field conduct is conduct that does not have a direct impact on the outcome of the game but is still potentially met with disciplinary action by the commissioner. *Id.* at 4.

141. *Id.*

142. *Id.*

143. Voigt, *supra* note 60. All eight of the implicated players were banned from baseball for life, including any potential hall of fame election. *Id.*

144. See *Text of Giamatti-Rose Agreement*, CHI. TRIB. (Aug. 25, 1989), http://articles.chicagotribune.com/1989-08-25/sports/8901070788_1_peter-edward-rose-special-counsel-major-league-baseball (providing the full text of the agreement between Pete Rose and Commissioner Giamatti banning Rose from baseball for life).

145. *Id.*

146. Brett Logiurato, *Pete Rose: I Would Have Been Better off “Beating My Wife” or Abusing Drugs*, SPORTS ILLUSTRATED (Aug. 12, 2013), <http://tracking>.

The reoccurrence of PED suspensions since the new drug policies went into effect provides an example of the third kind of on-field conduct violation established by the commissioner.¹⁴⁷

Off-field conduct is often less intrusive to the actual game but can still be viewed as detrimental to the image of the game.¹⁴⁸ One example of off-field conduct that could affect the game, and, therefore, require punishment is recreational drug use.¹⁴⁹ One of the most famous stories of recreational drug use in baseball is that of Pittsburgh Pirates pitcher Dock Ellis.¹⁵⁰ On June 12, 1970, Ellis threw a no-hitter against the San Diego Padres.¹⁵¹ While this would be a noteworthy accomplishment in its own right, Ellis's no-hitter has entered in to the realm of baseball lore because he admitted that he pitched that game while on the illegal hallucinogenic drug LSD.¹⁵²

The game of baseball is held in high regard and has pervaded all elements of American society.¹⁵³ The MLB has worked tirelessly to maintain the integrity and purity of the game under the belief that baseball should "be untainted and the league should punish severely any personnel that bring the pastime into disrepute."¹⁵⁴

The language and strength of the morals clause has developed and changed over time, but the goal of curtailing celebrities' behavior has always remained the same.¹⁵⁵ The mere existence of a morals clause in a contract, however, is not enough to make it enforceable. Rather, the judicial system must uphold an enforceable morals clause for it to effectuate its purpose. As described above, the judiciary has upheld the use of morals clauses in sports and entertainment contracts throughout the years.¹⁵⁶

si.com/2013/08/12/pete-rose-steroids-arod-alex-rodriguez-banned/.

147. Stark, *supra* note 2.

148. Foote, *supra* note 139, at 3.

149. *Id.*

150. See Patrick Hruby, *The Long, Strange Trip of Dock Ellis*, ESPN (Mar. 12, 2014), <http://sports.espn.go.com/espn/eticket/story?page=Dock-Ellis> (detailing the story of Dock Ellis's no-hitter against the San Diego Padres). It should be noted that Ellis was not punished by the league for his drug use during that game.

151. *Id.* A no-hitter is a game in which a pitcher does not allow any batters to reach base via a hit. *No-hitter*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/bullpen/no-hitter> (last visited Feb. 16, 2015). This does not count batters that reach base through an error or base on balls. *Id.*

152. Hruby, *supra* note 150.

153. BASEBALL-ALMANAC, *supra* note 19; BOOK RIOT, *supra* 20. Baseball has been the subject of numerous books and movies, but also has found its way into popular American music with songs such as "Mrs. Robinson" by Simon & Garfunkel. *Mrs. Robinson*, LYRICS.COM, <http://www.lyrics.com/mrs-robinson-lyrics-simon-garfunkel.html> (last visited Mar. 1, 2015). "Where have you gone, Joe DiMaggio? A nation turns its lonely eyes to you." *Id.*

154. Foote, *supra* note 139, at 4.

155. Pinguelo & Cedrone, *supra* note 54, at 357.

156. *E.g.*, *Loew's, Inc.*, 185 F.2d at 657 (deciding that the termination of

Given the precedent of enforcing morals clauses, now is time for MLB to start using the morals clause in its collective bargaining agreement and player contracts to clean up the game and rid it of PED users.¹⁵⁷ This Comment proposes doing so by going beyond the commissioner's power to empower the player's club.

III. PROPOSAL

As noted above, the collective bargaining agreement provides that the current morals clause be contained in every player contract. MLB clubs need to use a morals clause in a player's contract to void the contract if a player tests positive for PEDs during the term of the contract. The first part of this Proposal discusses why implementation of a morals clause would be more effective than MLB's previous attempts to curtail PED use. The second section of this Proposal addresses how to strengthen the force of the morals clause in player contracts by including language applying the clause more directly to steroid use. Finally, this Proposal will examine some of the problems that could be caused by voiding a player contract through the morals clause. Despite these problems, using a morals clause to clean up baseball would provide a stronger disincentive for PED use and would restore the purity of the game at a quicker rate than waiting for the commissioner's office to investigate and hand down suspensions.

A. *Why Should Baseball Re-Draft the Morals Clause?*

Previous attempts to curtail drug use in baseball have been conducted largely through the "best interest" clause in the MLB Constitution.¹⁵⁸ The best interest clause refers specifically to the power granted solely to the commissioner to punish conduct if said conduct tends to harm the game.¹⁵⁹ Attempts to enforce this clause have met with mixed results.¹⁶⁰ Under the strict language of the

Cole was valid because he violated the morals clause in his contract).

157. COLLECTIVE BARGAINING AGREEMENT, *supra* note 12, at 49; Pinguelo & Cedrone, *supra* note 54, at 350–51.

158. See MAJOR LEAGUE CONST. art. II, §§ 2, 3 (2008), available at <http://www.bizoffbaseball.com/docs/MLCconstitutionJune2005Update.pdf> (granting and defining the power of the commissioner of MLB to take action against conduct not in the best interest of baseball); PAUL C. WEILER ET AL., SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS 39–41 (2d ed. 1998) (discussing Baseball Commissioner Bowie Kuhn's suspension of Vida Blue, Willie Wilson, Jerry Martin, and Willie Aikens for the 1984 baseball season after the players were convicted for possession of illegal drugs as one of the first cases of MLB using the "best interest" clause to curtail drug use).

159. MAJOR LEAGUE CONST. art. II, §§ 2, 3 (2008).

160. WEILER ET AL., *supra* note 158, at 39. In the Wilson 1984 suspension case, the arbitrator accepted the commissioner's position "that player use of

best interest clause, it could be argued that the commissioner has the authority to ban players for using PEDs.¹⁶¹ However, both precedent and popular opinion would likely block any such use of the best interest clause.¹⁶² Howard Bryant explained that Commissioner Selig likely did not use the best interest power to ban Alex Rodriguez precisely because

[i]n the framework of collective bargaining, Selig's "best interest" power is largely a symbolic hammer. Under close scrutiny and an arbitration challenge by the players' association, it would likely dissolve like rosin in a pitcher's hand. Imposing the best interest clause could actually weaken Selig's mandate and undermine what has been an unprecedented level of momentum the sport has toward punishing performance-enhancing drug use.¹⁶³

drugs was a matter of legitimate concern regarding "the best interests of baseball." *Id.* at 41. In his decision, the arbitrator decreed:

Because baseball players are highly skilled, well compensated and constantly visible, they deserve and receive national attention. Neither the players nor the industry escapes the publicity. And drug involvement, because of its threat to athletes' playing abilities, because it is illegal and because of the related connotation of inroads by organized crime, constitutes a serious and immediate threat to the business that is promoted as our national pastime.

Id. However, while the arbitrator agreed with Commissioner Kuhn's position, he still reduced the penalty given to Wilson and the others from a full-year suspension to a one-month suspension. *Id.*

In 1992, Commissioner Fay Vincent sought a lifetime ban for pitcher Steve Howe after Howe was arrested for possession of cocaine in November of 1991. *Id.* at 42. In the Howe case, the arbitrator reviewed the expulsion using a "just cause" standard and subjected the commissioner's actions to "careful scrutiny." *Id.* at 43. Ultimately, the arbitrator threw out Commissioner Vincent's lifetime ban of Howe. *Id.* at 46.

161. MAJOR LEAGUE CONST. art. II, § 3 (2008):

In the case of conduct by Major League Clubs, owners, officers, employees or players that is deemed by the Commissioner not to be in the best interests of Baseball, punitive action by the Commissioner for each offense may include any one or more of the following:

(a) a reprimand; (b) deprivation of a Major League Club of representation in Major League Meetings; (c) suspension or removal of any owner, officer or employee of a Major League Club; (d) temporary or permanent ineligibility of a player; (e) a fine, not to exceed \$2,000,000 in the case of a Major League Club, not to exceed \$500,000 in the case of an owner, officer or employee, and in an amount consistent with the then-current Basic Agreement with the Major League Baseball Players Association, in the case of a player; (f) loss of the benefit of any or all of the Major League Rules, including but not limited to the denial or transfer of player selection rights provided by Major League Rules 4 and 5; and (g) such other actions as the Commissioner may deem appropriate.

Id.

162. See WEILER ET AL., *supra* note 160, at 40 (discussing the legal strength of Steve Howe's appeal of his lifetime ban from baseball in comparison to the other decisions by baseball to ban players like Willie Wilson).

163. Howard Bryant, *Bud Selig's Best Interests: Why Baseball Suspended*

The same challenge can also be applied to the strict language of the existing morals clause in player contracts.¹⁶⁴ One of the key differences between the use of the morals clause and the best interest clause is their respective invocation of punishment.¹⁶⁵ However, while a club invokes the morals clause and the commissioner invokes the best interest clause, both are subjected to the same standard of review in any grievance procedure. That means that if a player wishes to challenge a suspension, he must first discuss the issue with his club and then appeal to a Labor Relations Department before ultimately submitting the grievance to an arbitration panel.¹⁶⁶ Additionally, whether discipline is handed down by the club or the commissioner, the discipline will still be subject to the same grievance procedure.¹⁶⁷ Therefore, if MLB is going to use the morals clause to clean up baseball with the morals clause, there needs to be a change in the language and procedures in punishing PED users.

B. How Must the MLB Morals Clause Be Re-Drafted?

The first step in making a morals clause more effective is to expressly state in the language of the clause that PED use is grounds for a player's contract to be terminated. Section 7 of the MLB Uniform Player contract governs the termination of a player's contract with his club. The current language of the clause states as follows:

A-Rod under the Drug Policy, ESPN (Aug. 14, 2013), http://espn.go.com/mlb/story/_id/9568200/bud-selig-best-interests-alex-rodriguez-case (stating that although many in the commissioner's office wanted to ban Rodriguez for life under the "best interest clause," Commissioner Selig recognized that the decision would most likely have been overturned on appeal and his authority ruined).

164. COLLECTIVE BARGAINING AGREEMENT, *supra* note 12, at 284.

165. The "best interest" clause is a power that is invoked by the Commissioner rather than by the club. *Compare* COLLECTIVE BARGAINING AGREEMENT, *supra* note 12, at 284 (stating that "[t]he Club may terminate this contract upon written notice to the player . . .") (emphasis added), *with* MAJOR LEAGUE CONST. art. II, §§ 2, 3 (2008) (stating, "In the case of conduct by Major League Clubs, owners, officers, employees or players that is deemed by the Commissioner not to be in the best interests of Baseball, punitive action by the Commissioner for each offense may include any one or more of the following:") (emphasis added).

166. *See* COLLECTIVE BARGAINING AGREEMENT, *supra* note 12, at 48 (stating, "The Parties recognize that a Player may be subjected to disciplinary action for just cause by his Club, the Senior Vice President, Standards and On-Field Operations or the Commissioner.").

167. COLLECTIVE BARGAINING AGREEMENT, *supra* note 12, at 286. Paragraph 9(b) states, "All disputes between the Player and the Club which are covered by the Grievance Procedure as set forth in the Basic Agreement shall be resolved in accordance with such Grievance Procedure." *Id.*

The Club may terminate this contract upon written notice to the Player (but only after requesting and obtaining waivers of this contract from all other Major League Clubs) if the Player shall at any time: (1) fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship or to keep himself in first-class physical condition or to obey the Club's training rules.¹⁶⁸

This clause leaves open the question of whether or not PEDs fall under this morals clause. The clause should be re-written as follows:

7.(b) The Club may terminate this contract upon written notice to the Player (but only after requesting and obtaining waivers of this contract from all other Major League Clubs) if the Player shall at any time: (1) fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship or to keep himself in first-class physical condition or to obey the Club's training rules; or (2) fail, in the opinion of the Club's management, to exhibit sufficient skill or competitive ability to qualify or continue as a member of the Club's team; or (3) fail, refuse or neglect to render his services hereunder or in any other manner materially breach this contract;¹⁶⁹ *or fail, refuse or neglect to abide by Section 2 of Major League Baseball's Joint Drug Prevention and Treatment Program.*¹⁷⁰ *A list of all banned substances under the Joint Drug Prevention and Treatment Program is attached to this Contract as Schedule A.*

This re-draft of the clause will put all MLB players on notice that use of PEDs permits a club to terminate their contract.

The next step to making the clause capable of standing up to a grievance appeal is to remove PED-related grievances from appeals or to alter the language of the grievance procedure contained in the MLB Collective Bargaining Agreement. But this would need to be accomplished through negotiations between the MLB Players Association and MLB. The current standard grievance procedure already contains an exception whereby if a player is fined by the commissioner for on-field conduct, the conduct must be removed from the arbitration process.¹⁷¹ The language should be redrafted to include some form of exception for PED suspensions. The language in Paragraph 1(b) of Section A under Article XI of the collective bargaining agreement should be changed to read:

168. *Id.*

169. *Id.*

170. DRUG TREATMENT AND PREVENTION PROGRAM, *supra* note 12, at 11.

171. *See* COLLECTIVE BARGAINING AGREEMENT, *supra* note 12, at 44–45 (creating exceptions to the grievance procedures for “action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball” and a “dispute which involves the interpretation or application of, or compliance with the provisions of the first sentence of Paragraph 3(c) of the Uniform Player's Contract”).

“Grievance” shall not mean a complaint which involves action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball,¹⁷² *including but not limited to suspension or other punishment for the use of prohibited substances such as drugs of abuse, steroids, or any other performance enhancing substances.*

This change in language allows both the club and the commissioner to better enforce punishments and suspensions handed down in conjunction with PED. Furthermore, an arbitrator has already determined that it is in baseball’s best interest to curtail drug use in baseball.¹⁷³

C. *What Are the Potential Pitfalls in the Re-Draft of the Language?*

There are some potential issues with the proposed re-draft language. First and foremost, any redraft of the Uniform Player Contract or the collective bargaining agreement would be conditioned on MLB Players Association accepting the redrafts and including them in the contracts. While some players are likely to accept the redrafted language,¹⁷⁴ it will be an uphill battle to garner enough support from the MLB Players Association.

Second, allowing a team to void a player’s contract could upset the competitive balance among teams in MLB.¹⁷⁵ One example is the case of Alex Rodriguez and the New York Yankees. The New York Yankees organization publically announced it

172. *Id.* at 45.

173. WEILER ET AL., *supra* note 160, at 41. “And drug involvement, because of its threat to athletes’ playing abilities, because it is illegal and because of the related connotation of inroads by organized crime, constitutes a serious and immediate threat to the business that is promoted as our national pastime.” *Id.* The reasoning supports the use of commissioner authority in exercising power to curtail drug use, but in the Wilson case the suspension was reduced because the arbitrator felt some of the suspension was already served. *Id.*

174. See, e.g., Dan Connolly, *Nick Markakis Says PED Users Are ‘Stealing Money’ and Need Stiffer Punishments: Orioles Right Fielder Says He Would Be in Favor of a Lifetime Ban for First-time Offenders*, BALTIMORE SUN (Aug. 5, 2013), http://articles.baltimoresun.com/2013-08-05/sports/bal-orioles-nick-markakis-says-ped-users-need-stiffer-punishments-20130805_1_orioles-right-fielder-nick-markakis-biogenesis (discussing the position of Baltimore Orioles right fielder Nick Markakis on PED users that a first time user should be banned for life from baseball).

175. See Andrew Marchand, *Showalter: Yanks Benefit from Ban*, ESPN (Aug. 2, 2013), http://espn.go.com/new-york/mlb/story/_/id/9527967/buck-showalter-guarantees-new-york-yankees-sign-matt-wieters-alex-rodriguez-suspended-2014-season (discussing the view of Baltimore Orioles manager Buck Showalter that the New York Yankees would be benefitted by Alex Rodriguez being banned from baseball because it would free up salary money so they could sign big-ticket free agents).

wanted to reduce the team payroll to \$189 million in 2014.¹⁷⁶ Baltimore Orioles manager Buck Showalter was concerned that Alex Rodriguez's suspension (and the possibility that his contract was voided) would free up money for the Yankees to then turn around and offer a larger contract to impending free agents whom they otherwise might not pursue.¹⁷⁷

There are potential solutions to these pitfalls. The MLBPA's reluctance to accept any new language in the collective bargaining agreement or player contracts could be worn down over time if the image and popularity of baseball continues to suffer.¹⁷⁸ Additionally, competitive balance between clubs could be maintained by instituting a salary cap in baseball.¹⁷⁹ A salary cap would provide a spending limit to prevent larger market clubs from spending at-will to attract players to their clubs.

IV. CONCLUSION

The use of performance-enhancing drugs has been a plague on MLB since Jose Canseco, Mark McGwire, Sammy Sosa, and Rafael Palmeiro (to name a few) testified before Congress about steroid use in baseball. The issuance of the Mitchell Report and subsequent events cast nearly every player's reputation and accomplishments into doubt.¹⁸⁰ To restore the image of baseball and rid it of the stain of PEDs, clubs should include the revised morals clause proposed above in every player's contract. Such a provision would allow clubs to void any contract if a player tests positive for PEDs or is suspended by the League under the new drug policy. The redrafted morals clause thus will add teeth to any suspension for PED use by a player.

^{176.} *Id.*

^{177.} *Id.*

^{178.} See *Baseball*, GALLUP (Feb. 6, 2014), <http://www.gallup.com/poll/1696/baseball.aspx> (displaying the decline in baseball popularity among the major sports in the United States). The polls show that less than 50% of Americans identify themselves as baseball fans as of December 2012. *Id.* Also, as of December 2008, 30% more Americans said they prefer football to baseball. *Id.*

^{179.} This issue of a salary cap in baseball has long, hotly debated issue and will not be addressed further in this Comment. If you would like to read more about the history of the salary structure, including salary caps, arbitration, and free agency in more detail, please turn to Ed Edmonds, *A Most Interesting Part of Baseball's Monetary Structure—Salary Arbitration in its Thirty-Fifth Year*, 20 MARQ. SPORTS L. REV. 1 (2009) (discussing the history of salary arbitration in MLB and its effects on increasing salaries among MLB players).

^{180.} See Mitchell, *supra* note 45, at 138–234 (discussing findings based on the testimony of former and current players about drug use in baseball); see also Eddie Matz, *Innocence Lost*, ESPN (Aug. 10, 2013), http://espn.go.com/mlb/story/_id/9540048/baltimore-orioles-chris-davis-questioned-ped-use-successful-season-espn-magazine (discussing the suspicion of Baltimore Orioles' first baseman Chris Davis using steroids).