

Penalties and Procedures

Increasingly complex off-the-field rules and processes for athletes mean more interaction between the worlds of sports and law



Marquette Law School's sports law program and its National Sports Law Institute were featured in the Fall 2011 issue of this magazine. Following up on that article and on the almost-daily headlines about problems with athletes' conduct, we asked five Marquette professors involved in sports law about their perspectives on trends in enforcement of rules, especially for off-the-field conduct. The five are Matthew Parlow, associate dean for academic affairs and associate professor of law; Matthew Mitten, professor of law and director of the National Sports Law Institute; Paul Anderson, adjunct professor of law and associate director of the National Sports Law Institute; Janine Kim, associate professor of law; and Martin Greenberg, adjunct professor of law and one of the leaders in the Law School's establishment of the National Sports Law Institute.

As with politicians and entertainers, athletes are sometimes being sanctioned today for things that were brushed under the rug or glossed over in earlier times. In what ways have lines been redrawn when it comes to conduct bringing some form of punishment?

PARLOW: I think athletes have always misbehaved off the court or field, but it is only in recent times—say, the last 15 years—where leagues have started to take a keener interest in punishing for behavior that, while unrelated to the athlete's performance for his team or during a game, is nevertheless problematic for the league. This newly focused attention is due, in part, to the incredible rise in advertising, sponsorship, and television and radio revenue for leagues and their teams. Fans love competitive sports, but fan support is also dependent on a league's image. The athletes that help compose the league—and their behavior both on and off the court or field—are critical for maintaining fan loyalty. Leagues have a vested financial interest to ensure that their players—while not necessarily looking like choirboys—are also not devaluing the league brand through inappropriate behavior outside of the game.

But a league's attention to athlete misbehavior off the court or field—and its

attendant punishment for it—are also due to the fact that not only has the press grown fond of reporting such transgressions, but there are also iReporters who need only pull out their cell phone and film (and upload onto YouTube) or Twitpic the image; the incident can go viral almost immediately.

KIM: I think there are at least two significant forces at work here. The first is one that was just mentioned: publicity. Athletes are celebrities, and their activities are much more exposed to public scrutiny and judgment. That makes it very hard for leagues and others simply to ignore misbehavior. The second is the phenomenon of evolving societal norms. Behavior that used to be considered acceptable or typical may no longer be considered that way. In the criminal law, for example, there have been major changes in the way we think about rape and domestic violence; we take these offenses a lot more seriously than we used to. It seems to me that private institutions, when establishing and enforcing codes of conduct, are not immune to this process of evolution. >>



Janine Kim

In what ways have the systems for determining those punishments changed?

PARLOW: With recreational and performance-enhancing drugs, leagues have obviously adopted stricter policies and protocols that impose harsher penalties for positive drug tests. This evolution has been occurring for decades, but especially in the last decade. In terms of punishing for misbehavior off the field or court, most league commissioners have invoked their “best interests” powers, whereby the commissioner may act in the best interests of the league, even if there are not prescribed protocols for such circumstances. This power can be limited by clauses or provisions in the league constitution, the collective bargaining agreement, or other league-governing documents. But since most leagues do not expressly curtail this power in the area of punishment for off-court/field misbehavior, league commissioners may invoke this authority when imposing such punishment. The NFL has adopted a personal conduct policy that more clearly lays out the expectations of all league personnel—including players—and details how they will be punished for transgressions that hurt the perception of the league.

GREENBERG: Focusing on colleges and on coaches, I have a lot of questions about what I see as a potentially bankrupted system, in a sense. Is the need to win so great

or the need to generate revenue so important that all ideals of amateurism and ethics are put aside? College athletics are big business. Coaches lead multimillion-dollar enterprises. Television and cable contracts, merchandising, naming rights, enhanced seating, and championship bowl games are as important in the college game as they are to its pro brethren. Sports-generated revenue has become even more important as a result of state budget cuts to higher education. Are university presidents giving ground to athletic directors and college coaches? Who actually is running the university today? Is the sports money machine actually winning out? Has big-time sports become an unchecked fiefdom where there is almost no end

to what will be undertaken to protect the brand, the image, the name, the heroes, the dollars, or anything that might interfere with the scoreboard? We probably need to take a better look at the amateur enterprise where transparency, oversight, academic priority, and public accountability need to be the bottom-line goals.

How much do the systems of sanctioning players, teams, or college programs resemble the kind of procedures you would find in a civil or criminal court case? Can you point to some of the similarities or differences between the theories for punishment that underlie our criminal justice system and those for sports leagues?

KIM: I’m not sure that there *is* a theory behind punishment by sports leagues. Philosophers and jurists have long struggled with theories of criminal punishment, asking questions about why and how much the state should punish individuals. Many people are familiar—even if only on an intuitive level—with notions of retribution, deterrence, and rehabilitation. The issue is by no means resolved, but it’s fair to say that the criminal justice system approaches it very self-consciously. But when it comes to private entities, like sports leagues, it’s hard to glean any particular theory behind their disciplinary actions, especially when they are authorized by a notion as undefined and unlimited as “best interests” of the game. That said, I don’t think it would be far-fetched to say that sports leagues are probably interested in achieving retribution, deterrence, and rehabilitation, even if they aren’t willing or able to pursue these purposes in a consistent and rigorous fashion.

PARLOW: Commissioners, in many instances, sit as judge, jury, and appellate court on their own decisions related to punishment meted out to wayward athletes. In this regard, a league commissioner has more power, authority, and control than any one actor would in a criminal or civil justice system.

What seem to be the most successful tools for keeping athletes in line? Fines? Suspensions? Escalating sanctions? Bad publicity?

ANDERSON: It depends on the level of athlete. High school athletes who break school, school district, or association rules are typically suspended or ruled ineligible, and this can work well. At the college level, violations can really affect a university (in that it may have to do such things as returning tournament revenues) more



Martin Greenberg

than the student-athletes themselves. Often, since the athletes who violate the rules are those who assume that they will be going pro in their sport, they could not care less about any penalties and are merely using college as a stepping stone to the professional ranks (even though their specific chances of professional success are so small). At the professional level, the main things that seem to dissuade players are fines coupled with suspensions. For players making millions of dollars, actually missing games can take a large chunk out of their paycheck—potentially several hundred thousands of dollars. The other side of this is that many players make so much money that this sort of punishment has no impact on them financially or otherwise.

PARLOW: I would say all of the above, save perhaps the bad publicity. Players hate losing money through fines (and suspensions, as they are unpaid suspensions almost all of the time), particularly because many of them have shorter careers and they need the money from their playing days to help sustain them later in life. Escalating sanctions have also seemed to work for some (Mark Cuban as owner of the Dallas Mavericks eventually got sick of paying six-figure fines, despite being a billionaire, and Adam “Pacman” Jones finally ran himself out of the National Football League because of escalating sanctions for a number of off-the-field transgressions). Bad publicity, on the other hand, is a mixed bag. Here’s why: Sometimes having a bad-boy image can be to the advantage of certain athletes, despite the league’s disliking it. It helps them sell jerseys; it gives them street-cred with kids who follow the sport. Allen Iverson comes to mind here.

The decision in Ryan Braun’s performance-enhancing-drugs case turned on a chain-of-custody issue involving the urine sample. That’s something you normally associate with courtrooms and not playing fields. As a lawyer, what do you think can be learned from how that case turned out? Did Braun get off on a “technicality,” as some say?

PARLOW: I think that the case is a good reminder to lawyers that procedure can be as important as the merits of your case.

ANDERSON: Chain of custody in a drug-testing appeal is not merely a technical rule; it is one of the most fundamental and basic parts of the policy itself. Especially in a situation where the system assumes the player’s guilt by imposing a strict-liability standard for what is in his body, virtually the only way to argue that a result should be set aside is to show that there was a problem with chain of custody. This is something done at all levels of drug testing. Other cases on the international sports level have made clear that in a system where an athlete is strictly liable for what is in his body, those implementing a drug-testing scheme should also be strictly liable, as it were, for making sure that the system is followed exactly.

Braun’s case received enormous attention. How do the procedures for cases involving banned substances allegedly used by a major league baseball player differ from such cases in other sports? In general, how effective are sports regulatory bodies in banning performance-enhancing drugs?

ANDERSON: Currently, Major League Baseball’s drug-testing program seems to be the most extensive system in professional team sports in the United States, in terms of both what it tests for and the seriousness of the penalties that can be imposed. Of course, baseball also has historically received the most criticism, and so this enhanced system seems to be a direct reaction to that.

If leagues truly have buy-in from the players to work together to create a strict liability system in regard to particular banned substances, the program can be very effective. There are several potential problems, though. First, the science of creating banned substances and methods continues to outpace the ability of regulators to create a comprehensive list of all the ways that a policy can be violated. Once a policy says that “these” are the methods a player cannot use or the substances a player cannot take, it runs the risk of someone’s developing an unforeseen method or substance that would not be covered but could also be just as performance-enhancing. Second, as the Braun situation illustrates, players need to



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— Matthew Mitten

expect confidentiality from the system, and so far, at least in baseball, this has not always occurred.

And, finally, the policies set up a system of responsibility for what one has in his or her body. They do not really test use or possession. Instead, the mere presence of a substance in one’s body is enough for him or her to be subject to liability. This mirrors the international system under the World Anti-Doping Agency (WADA) code. But it also adds to the perception of immediate guilt with virtually no way to show any valid reason why something appears or why a test result may be mistaken.

MITTEN: In contrast to Olympic, college, and high school drug-testing programs (which are unilaterally imposed by sports-governing bodies and educational institutions), major league professional sports’ drug-testing programs are a mandatory subject of collective bargaining, which generally requires the consent of the players’ union to be adopted. Similarly to those of the WADA code (which governs Olympic competition) and the NCAA’s approach, professional sports leagues’ drug-testing policies impose strict liability and establish sanctions (in particular, competition bans for a specified time) for violations.

But there are some key differences. The prescribed sanction for a first doping offense (e.g., use of anabolic steroids) is much shorter for NFL (4 games) and MLB players (50 games) than NCAA (one year) and Olympic athletes (two years). Although the length of the suspension of Olympic and NCAA athletes may be reduced based on one’s degree of fault for a doping offense, professional athletes generally are subject to a fixed suspension regardless of their

individual level of fault. In other words, both intentional and unintentional (or inadvertent) violations are punished the same.

To provide an effective deterrent, drug testing of athletes must be unannounced and occur out-of-competition as well as during competition, which is an important feature of Olympic, NCAA (except for Division III), and professional sports drug-testing programs. It is likely that more frequent and widespread drug testing (including the collection and analysis of blood as well as urine) combined with the use of non-analytical positive evidence (e.g., athlete admissions), which has been implemented for Olympic and some professional sports, has reduced the overall usage of banned performance-enhancing substances by athletes. But doping certainly has not been eradicated from sports at any level of competition.

The NCAA has an elaborate set of rules for athletic programs and athletes, yet it seems that instances of rule violations are increasingly common and increasingly serious. Is the system working? Any nutshell thoughts on what would make it more effective?

ANDERSON: The perception that rules violations by NCAA schools are becoming more common and serious is misleading. These problems have been happening for over 100 years. In fact, reform of college athletics to deal with perceived violations of the rules goes back perhaps to 1855, when Harvard agreed not to use graduates in athletic contests at the collegiate level. The difference now is the explosion of sports media, which brings any issue to the forefront, online or on television, immediately. The public is also very willing to throw out any notions of innocent-until-proven-guilty and assume



Paul Anderson

that any report of a violation of abuse in college athletics is true, before any real investigation occurs.

Although I am not convinced that the system needs a huge overhaul, the main problem is that the NCAA and athletic departments do not have the resources to be police forces. Their enforcement will be reactive and not preventative. And with the money coming to many (especially coaches at the highest levels), administrators will often sweep problems under the rug because they are willing to sacrifice the integrity of a program, and perhaps a university, hoping that that problems will go away or not be noticed. Until university presidents work consistently with other university leaders and athletic departments to treat athletics similarly to all other units in a university, reports of abuses will continue, no matter what rules are written.

MITTEN: The root of the problem is that the NCAA has a very detailed matrix of rules seeking to preserve the “amateur” nature of intercollegiate athletics in an increasingly commercialized environment, the latter being driven primarily by the American public’s passion for college football and men’s basketball. Although the NCAA and its member universities collectively generate billions of dollars and many coaches receive multimillion dollar contracts, the economic benefits that a student-athlete is permitted to receive are strictly limited to the value of an athletics scholarship, which does not equal the full cost of university attendance. If a student-athlete receives any “extra benefits” from institutional sources or representatives or preferential treatment from third parties (e.g., discounted tattoos), he or she violates the NCAA’s amateurism rules, which adversely affects the person’s intercollegiate athletics eligibility.

There is a strong, inherent incentive to violate the NCAA’s amateurism rules, with the attendant need (or so it may seem) to cover up any violations, because of the

substantial tangible and intangible rewards of fielding winning intercollegiate teams, as well as student-athletes’ economic needs and desires to receive a share of the revenues that their talents generate. Permitting universities to pay student-athletes a cash stipend to narrow the deficit between the value of an athletic scholarship and the full cost of attendance (which has been proposed and is currently being evaluated by the NCAA’s membership) should reduce amateurism-rules violations, but won’t completely eliminate them. Perhaps the most effective deterrent would be federal or state laws criminalizing the provision of economic benefits to student-athletes that causes the loss of their eligibility to participate in NCAA athletics, although this is not a measure that I advocate, for a variety of reasons.

What legal limits are there on the latitude sports teams, leagues, or regulators have to sanction athletes for things they do off the field and in their private lives?

MITTEN: Because the nature or scope of discipline imposed on professional athletes affects their working conditions, it is a mandatory subject of collective bargaining that must be agreed to by the players’ union in each league. As a *general* rule, team- or league-imposed discipline on professional athletes for off-field conduct is subject to review by an independent arbitrator based on a “just cause” standard of review. The arbitrator usually has authority to reduce the punishment if it is found to be unauthorized or disproportionate to the offense.

By contrast, Olympic, college, and high school sports-governing bodies, as well as educational institutions themselves, generally have the unilateral authority to establish reasonable codes of conduct regulating athletes’ off-field conduct (the opportunity to participate in athletics being typically viewed as a conditional privilege rather than a right). Public educational institutions—because they are “state actors” subject to the constraints of the federal constitution—must respect student-athletes’ federal constitutional rights by not prohibiting or disciplining protected private conduct (e.g., consensual sex among adults) and by providing due process before disciplining for off-field misconduct. Discipline imposed on Olympic sport athletes generally is subject to *de novo* review by an independent arbitrator; by contrast, discipline imposed on college or high school athletes is subject to very deferential, rational-basis review by a court (absent alleged violation of a constitutional right subject to heightened judicial scrutiny). ■



Matthew Mitten