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A NEEDED CHANGE IN THE RULES OF BASEBALL

*Lewis Kurlantzick**

I. INTRODUCTION

Ideal accounts of modern sport paradigmatically portray it as activity involving the quest for the highest level of performance.¹ If the exercise and development of physical skills and the achievement of mastery over one's body are among the intrinsic pleasures connected with sports, the challenge of a contest enhances these skills and heightens this sense of mastery. The athletic interaction of a competitive contest appears to mobilize energies beyond what is possible in noncompetitive situations. If we hope to achieve what the philosopher Paul Weiss refers to as "the excellence of the body,"² we need others as opponents. One implication of this paradigm is that if the fastest runners or swimmers are barred from competition for some irrelevant reason, the victory or record achieved is devalued.³ No genuine sports fan nor any athletic participant in a championship contest, who values his own performance and the process for determining a victor, looks with favor on the needless disqualification of a critical member of the opposing team in an important game. Accordingly, a particular sport's rule structure should be framed to minimize such disqualifications.

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1. See, e.g., Simon, *Good Competition and Drug-Enhanced Performance*, 11 J. PHIL. SPORT 6, 10-11 (1985).

2. PAUL WEISS, *SPORT: A PHILOSOPHIC INQUIRY* (1979).

3. For these reasons, to many people, the gold medals won at the boycotted 1980 and 1984 Olympic Games were tarnished by the absence of some of the strongest challengers. Easy victory has little value. ALLEN GUTTMANN, *A WHOLE NEW BALL GAME: AN INTERPRETATION OF AMERICAN SPORTS* 1-7 (1988).

In the rational ordering of any activity, its substantive and constitutive arrangements (including the fundamental definitions of the roles of participants and officials) are tied to the purpose of the enterprise.⁴ Moreover, those charged with the creation and application of rules are cognizant of the inevitable interaction between liability and remedy. If remedial consequences of a rule violation are severe, the requisite triggering behavioral infraction will be correspondingly serious and the process for invoking the sanction will demand relatively higher standards of certainty and clarity in administration. In our criminal law system, capital punishment is constitutionally reserved for the gravest offenses and the maximum "due process of law" must be afforded before a person is put to death. Similarly, in the labor-employment context, the standard expectation in the world of work is that an employee will keep his job unless he does something wrong. The employee also expects to be discharged, pursuant to established fair procedures, only if a bad act is part of a broader pattern of unsuitable behavior which has not been corrected with less severe disciplinary measures.⁵

The conjunction of these seemingly disparate thoughts about the nature of sport and about the legal process was stimulated by an explosive, controversial incident in Major League Baseball: the ejection of Boston Red Sox premier pitcher Roger Clemens by home plate umpire, Terry Cooney, in game four of the 1990 American League Championship Series. While there is disagreement over exactly what happened⁶ and considerable difference of opinion over whether the umpire's actions were justified,⁷ the broad outlines of the event are clear. After walking a batter in the second inning, Clemens shook his head, and some hostile verbal exchange between him and Cooney followed. This outburst featured a number of obscenities spoken by the player, which resulted in Clemens being given the thumb.⁸

4. See generally G.M. KELLY, *SPORT AND THE LAW: AN AUSTRALIAN PERSPECTIVE* 18-21 (1987) for a discussion of the different kinds of rules, objectives, sanctions, and their interlocking systemic relationships in the internal "legal" apparatus of organized sport.

5. See PAUL WEILER, *GOVERNING THE WORKPLACE* ch. 2 (1990).

6. Compare *Scorecard: Control Problems*, *SPORTS ILLUSTRATED*, Oct. 22, 1990, at 17 with Nick Cafardo, *Clemens Gets 5-Game Ban, \$10,000 Fine*, *BOSTON GLOBE*, Nov. 21, 1990, at 1 (account of Red Sox catcher Tony Pena) and Peter Gammons, *The Right Call Needed Now*, *BOSTON GLOBE*, Feb. 1, 1991, at 49.

7. Compare Ira Berkow, *Cooney Showed Courage*, *N.Y. TIMES*, Oct. 13, 1990, at 45 with Michael Madden, *Umpire ignited explosion*, *BOSTON GLOBE*, Oct. 11, 1990, at 41.

8. After reviewing the incident, American League president Bobby Brown imposed a \$10,000 fine and a five-game suspension, beginning with the start of the 1991 season, against Clemens. Claire Smith, *Penalties Are Upheld by Vincent, and Clemens Starts to Sit*, *N.Y.*

I was troubled by the incident but initially unsure of why I was so bothered. (I know it was not simply because I was rooting for the Red Sox!)* Instinctively I thought, "can you imagine a veteran National Basketball Association referee ejecting a Magic Johnson, Michael Jordan, Larry Bird, or Patrick Ewing from a conference final playoff game?" Upon reflection, I concluded that what was worrisome was not the handling of this particular case by the umpire, though he may, in fact, have performed ineptly.¹⁰ Rather what was, and is,

TIMES, April 27, 1991, at 31. Clemens appealed. A hearing was held before Brown and briefs were filed. Fay Vincent, Decision In the Matter of Disciplinary Action Involving Roger Clemens (April 26, 1991) (unpublished decision on file with the Seton Hall Journal of Sport Law). Brown reaffirmed his ruling on April 2, 1991. *Id.* Clemens then appealed to Commissioner Fay Vincent. *Id.* On April 26, 1991, Commissioner Vincent issued a decision holding that there was just cause for Dr. Brown's sanctions. *Id.* at 4. Based on videotapes and other evidence, which included expert testimony from a lip-reader (this testimony was not previously available), the Commissioner believed Clemens' version of the verbal exchange, with umpire Terry Cooney. *Id.* at 5. Despite this fact, the Commissioner found that Clemens physical contact with another umpire (Jim Evans) and his threats to Cooney after being ejected were just cause for the imposition of the penalties. *Id.* at 4.

Not surprisingly, the players' union counsel was critical of the Commissioner's decision to sustain the original penalty and accused Vincent of intellectual dishonesty. Claire Smith, at 31. Specifically, the union counsel claimed that Vincent's decision was based only on what occurred after Clemens was ejected. *Id.* However, part of Clemens' discipline was in fact, related to Cooney's account of the pitcher's pre-ejection conduct and to the belief that the conduct justified his ejection. *Id.*

9. There is little doubt that the Red Sox, who were down three games to none to the Oakland Athletics at the time, would have gone on to lose the playoff series to their opponent, a better team, even if Clemens had remained in game four and managed to win it.

As baseball connoisseurs know, the Red Sox fared much better in an earlier ejection incident involving a famed hurler. On June 23, 1917, Babe Ruth was the starting pitcher for the Red Sox in the first game of a doubleheader against the Washington Senators. MARSHALL SMELSER, *THE LIFE THAT RUTH BUILT* 90 (1975). Ruth walked the first batter on four pitches, three of which he thought were strikes. *Id.* Ruth advised the umpire, "Brick" Owen, that he should "sleep more at night in order to be awake during the game." *Id.* Owen warned Ruth to keep quiet or he would throw him out of the game. *Id.* Ruth replied that if Owen ejected him, he would slug Owen. *Id.* Ruth was then ejected, and on his way off the field he took a swing at Owen that barely missed the umpire. *Id.* Ernie Shore then entered the game to replace the Babe; after the runner on first was thrown out trying to steal second base, Shore proceeded to pitch a perfect game! *Id.*

10. A team's prime pitcher in a desperate game is entitled to some leeway when riled by an umpire's decisions. See Vincent, *supra* note 8 at 2, n.3 (stating that "the language of a competitive game is different from the language of civil discourse" because stress and competition produce an effect on language). The umpire, on the other hand, though prepared for considerable verbal abuse as part of his job description, is entitled to be free of incessant verbal harassment (and the threat of physical assault) so that he can maintain his authority and concentrate on his task of facilitating the contest. To determine whether Clemens' reasonable expectations were violated and therefore he was treated unfairly that day, I would need to know much that I did not and do not know: for example, exactly what was said by Clemens and Cooney and in what order, the code of behavior governing player-umpire interactions and how

troubling is the fact that there is no limited formal sanction available in baseball; in this legal system, the umpire's arsenal of responses is severely restricted. His only choice — frequently difficult and uncomfortable — is between eviction and no formal response at all.

II. THE PROPOSAL - ITS PURPOSES AND ADVANTAGES

Baseball's structure, since it stands in sharp and defective contrast to that of other sports, such as basketball, soccer and tennis,¹¹ should be changed. Baseball should introduce a more discriminating, progressive disciplinary approach. Introduction of the equivalent of basketball's technical foul¹² (the "T"), or soccer's yellow card,¹³ would be beneficial to all of baseball's constituencies. Players would be given more precise notice, at the time of the inappropriate conduct, of the line between permissible and impermissible behavior. These players can alter their actions to avoid ejection and preserve the opportunity to excel individually and as team members in the contest.¹⁴ Additionally, team members, coaches and managers, given that same notice, can influence the cited offender. This influence would look to prevent the player's ejection with consequent benefits to both the player and his team. If the cited player, given the chance, corrects his behavior and avoids an ejection which otherwise would have occurred,¹⁵ fans will receive the dramatic excitement and aes-

it had been communicated to players and umpires, and prior umpireal practice, including prior ejection practice of this umpire. My purpose here, though, is not to pass judgment on Cooney (or Clemens). Rather, it is to identify a structural flaw in baseball's framework and to argue that this deficiency can and should be corrected.

11. See NATIONAL BASKETBALL ASSOCIATION (NBA) OPERATIONS DEPARTMENT, OFFICIAL RULES OF THE NBA—1990-1991, RULE No. 12, § VI, at 25-26 (1990) [hereinafter RULES OF THE NBA]; FEDERACION INTERNACIONALE DE FOOTBALL ASS'N [hereinafter FIFA], LAWS OF THE GAMES-GUIDE FOR REFEREES UNITED STATES SOCCER FEDERATION, LAW V(B), LAW XII, at 15, 23 (1990); ATP, TOUR RULES, § V(S) for the relevant structure of these sports.

12. In basketball, the technical foul serves both to warn and to penalize. RULES OF THE NBA -1990-1991, *supra* note 11, RULE No. 12 § VI at 25-26.

13. The yellow card serves to warn the offender, but does not involve an immediate penalty. FIFA, *supra* note 11, LAW XII, at 23.

14. In reality, of course, professional athletes are involved in the sport for prestige and economic advantage. I do not know whether players in Major League Baseball still experience satisfactions intrinsic to the game or whether they are motivated entirely by the pursuit of the external rewards of fame and fortune. I suspect, however, that the intrinsic pleasures of the physical contest still operate at the highest professional level. Even if players focused only on take-home pay, this proposal would be welcomed because continued participation of a (valuable) player in a game offers the prospect of economic benefit to him and his teammates.

15. Whether the fan romantically seeks the magic of heroic feats or simply the exhibition of craftsman-like artistry, the fan will prefer the avoidance of ejection. Compare Donald Kagan, *George Will's Baseball-A Conservative Critique*, 101 PUB. INTEREST 3 (1990) with George Will,

thetic enjoyment they hoped for from a contest which is played by the expected contestants. If an ejection does take place, fans can have confidence in the process and know that the punishment fits the crime. Moreover, opposing teams will not have their performance devalued. In addition, umpires, given more flexibility in the responses available to them, will be faced less often with the need to invoke the ultimate penalty of ejection; and the costs of erroneous impositions of discipline will be reduced. As a result, umpires may face less abuse and their authority and (self-)image may be strengthened. Finally, owners, broadcasters and sponsors will obtain the product, with its commercial appeal, that they dealt for.

A baseball "T"¹⁶ should be designed to serve one or both of the following purposes: warning and sanction. As a warning, a "T" provides notice to the cited player (and to all others on hand) that his conduct has violated the rules and that further similar behavior will result in ejection. The "T"'s implementation could give the player an opportunity to regain his composure,¹⁷ and the stop in the action would also provide the manager, coaches and teammates a chance to talk to the player.¹⁸ The hoped-for result is the continued participation in the game by the upset player.¹⁹ As a sanction, the "T" offi-

The Romantic Fallacy in Baseball-A Reply, 101 PUB. INTEREST 21 (1990) and Jacob Weisberg, *Washington Diarist: No-run Homer*, NEW REPUBLIC, Nov. 26, 1990, at 47.

16. I will henceforth use the term "T" as shorthand for a generic intermediate formal umpireal tool short of ejection. It symbolizes a baseball equivalent of the basketball technical foul or the soccer yellow card, and it deliberately omits any detailed rendering of what this equivalent would entail. See *infra* note 44 and accompanying text for an examination of the difficulties of fleshing out these details and the implications of these difficulties for a conclusion about the desirability of the proposed change.

17. The brief "cooling-off period" might also help the umpire to regain his composure, if necessary.

18. When a player is whistled for a technical foul in a basketball game, his coach will frequently remove him from the game and sit him on the bench for a few minutes to calm him down. This option is not available to the baseball manager because once a player leaves a game he can not be reinserted. But this limitation applies in soccer and tennis as well. In tennis the cited player must continue; there is no player substitution. Women's International Professional Tennis Council, Rules and Regulations, Kraft General Foods World Tour, § IV, 4.3.4 (1990) (on file with the Seton Hall Journal of Sport Law). In soccer, however, limited substitution is possible but once a player is removed from a game, he can not return. FIFA, *supra* note 11, at 11, Law III(4)(d).

19. The opportunity for continued participation exists whether or not the resort to the "T" is mistaken. Under the existing system, an erroneous invocation of discipline by the umpire results in ejection. This reduction in the costs of error is an attraction of the proposed change. The Clemens case itself underlines this cost-minimization element. See *infra* notes 26-28 and 66 and accompanying text.

cially condemns and penalizes the offending behavior, hopefully with some deterrent and retributive effects.

The core of this proposal parallels a fundamental set of ideas about discipline which is well-established in employment relations law: the precepts of progressive or corrective discipline. While this particular form of job protection is primarily associated with unionized and civil service employments,²⁰ the underlying premise of job security pervades nonunion employment as well.²¹ Under the mores of the workplace, employers have the right to expect certain standards of conduct from employees and employees know that discipline will be imposed for failure to adhere to these standards. However, "cause" must exist for the imposition of discipline. In the union setting, an arbitrator may measure the propriety of discipline and the penalty against the yardstick of "just cause." In carrying out their responsibility of determining whether the grounds for discipline and/or the particular punishment are warranted, arbitrators assume that the parties are committed to utilizing discipline progressively, as a tool to effect change in employees' behavior. Arbitrators agree that termination is to be reserved for those who have run the gamut of progressive discipline and have shown themselves to be incorrigible.²²

20. One of the prime motivations for unionization is usually protection from arbitrary disciplinary actions by the employer. Virtually every negotiated collective bargaining agreement contains grievance procedures culminating in arbitration.

In the public sector, employees may challenge supervisory actions through civil service channels. *See, e.g.*, 5 U.S.C. §§ 7511-13, 7701 (1988) (discussing the Merit Systems Protection Board's powers to hear cases); CONN. GEN. STAT. § 5-202 (1991).

21. *See* WEILER, *supra* note 5, at ch. 2.

22. ARNOLD ZACK, *Just Cause and Progressive Discipline*, in 1 LABOR AND EMPLOYMENT ARBITRATION § 19.03[3] (T. Bornstein & A. Gosline eds., 1990). In the typical arrangement, the arbitrator is empowered to review whether the employee behavior warranted any discipline and, if so, whether the particular penalty chosen was appropriate. Thus, he assesses both the existence of reasonable cause for the imposition of discipline and whether the quantum of discipline imposed was fair. *See id.* at § 19; ARNOLD ZACK, GRIEVANCE ARBITRATION: ISSUES ON THE MERITS IN DISCIPLINE, DISCHARGE, AND CONTRACT INTERPRETATION 61-63, 119-123 (1989) [hereinafter GRIEVANCE ARBITRATION] for a description of the operation of the requirement that discipline be for "just cause" and its enforcement through a grievance arbitration system.

Collective bargaining agreements in professional sports contain "just cause" and grievance arbitration provisions. Hence, discipline imposed by the commissioner of baseball may be challenged. *See, e.g.*, Raymond Goetz, In the matter of the Arbitration between Major League Baseball Players Association (Ferguson Jenkins) and Major League Baseball Player Relations Committee, Inc. (Commissioner Bowie K. Kuhn), Gr. No. 80-25 (Sept. 22, 1980) (unpublished decision, on file with the Seton Hall Journal of Sport Law) (holding that neither arrest on drug possession charges nor refusal to answer Commissioner's questions constitutes "just cause" and therefore suspension of player is to be revoked).

Admittedly, the origins and application of the progressive discipline precept lie in a concern for the protection of job security against arbitrary employer action in situations of suspension or discharge from employment, situations where a person's livelihood is at stake. However, the underlying purposes in the employment and sports contexts are similar, and as the Clemens situation demonstrates, ejection of a player can have serious effects on all of baseball's constituencies. The intent of a progressive disciplinary program is to correct behavior at the lowest levels of the graduated process before the heavier penalties are reached. This arrangement affords the employee the opportunity to rehabilitate himself and to restore his standing, while at the same time it gives the employer the chance to retain a reformed employee in whom it has an investment. This proposal serves the same progressive function by making the player (and others) aware that if the behavior is not corrected, he runs the risk of receiving an escalated penalty.²³ The "T" system, with its notice function, intentionally provides the player with the opportunity to "correct" (i.e. not repeat) his wrongdoing and avoid disruptive ejection if he does so.²⁴ Moreover, baseball has seen fit to utilize a progressive system in other contexts.²⁵

Introduction of a "T" is particularly sensible in circumstances — and these are frequently the case in baseball — where the line marking the boundary between permissible and impermissible behavior is not clear.²⁶ In these instances, a player (or umpire)²⁷ in a heated mo-

23. Of course, the levels of discipline are known in advance so that participants are cognizant of the risks of involvement in any rule violations. This knowledge is necessary for escalated penalties to have a deterrent effect.

24. Roger Clemens himself later asserted that, with respect to the playoff incident, if warned, he would not have repeated the verbal behavior. Leigh Montville, *A Moment of Madness*, *SPORTS ILLUSTRATED*, Nov. 26, 1990, at 112, 120.

25. Formal warnings and progressive reaction to offensive behavior are not alien to baseball's operational scheme. There are a number of situations where the rules direct the umpire to warn a player or manager who commits an infraction. Thus, the umpire is to warn a pitcher who intentionally delays the game, doctors the baseball or throws intentionally at a batter. *THE SPORTING NEWS, OFFICIAL BASEBALL RULES* § 8.02(a)-(d) (1990) [hereinafter *OFFICIAL BASEBALL RULES*]. If the player later repeats the infraction, he is to be ejected.

In fact, early in the history of baseball, a progressive disciplinary system was in place for the use of vulgar language by players. See GLENN WAGGONER ET AL., *BASEBALL BY THE RULES* 219 (1987).

26. There are few express instructions to players about on-field behavior. The rules provide that no player shall

(1) Incite, or try to incite, by word or sign a demonstration by spectators;

(2) Use language which will in any manner refer to or reflect upon opposing players, an umpire, or any spectator;

ment may well misjudge precisely where this line is,²⁸ and serious consequences will follow from crossing it. Availability of an intermediate step is especially apt here where different umpires may have different thresholds in interpreting the rules proscribing misbehavior.²⁹ This situation of imprecise notice to potential offenders recalls that of our criminal law system and its commitment to a policy of clear statement.³⁰ According to the traditional jurisprudence of rules, certainty, of course, is valued for its effect on the participants in the collective enterprise — here, the players in the sport. If the players can know in advance the incidence of official intervention, they will act accordingly. From the perspective of the venture's purposes and those who administer its substantive arrangements, this increases the likelihood that behavior will follow a desired pattern. From the perspective of the participants, it removes the inhibiting effect on action that occurs when one's gains are subject to sporadic, severe official interruption.³¹

(3) Call 'Time'. . . for the obvious purpose of trying to make the pitcher commit a balk;

(4) Make intentional contact with the umpire in any manner.

OFFICIAL BASEBALL RULES, *supra* note 25, § 4.06(a). Aside from these general directives, the rules lack any detailed articulation of what constitutes impermissible behavior. This scheme stands in contrast to that found in basketball, soccer and tennis. For example, the rules in basketball often state more precisely and in more detail the bounds of permissible conduct. *See, e.g.,* RULES OF THE NBA, *supra* note 11, Rule No. 12. In intercollegiate tennis, which has a well-functioning progressive system, the referee reviews the rules, including what will be treated as impermissible verbal and physical behavior, with the players prior to each match. Baseball players' knowledge of the behavioral boundaries is largely a product of experience. Within this "customary" or "common law" system, veteran players educate younger players about limits. The accepted unofficial wisdom on profanity to umps appears to be that you can swear, but do not let it be personal. Even here, though, individual umpires have somewhat different approaches to discipline.

27. Commissioner Vincent found that some of the offensive statements that umpire Cooney asserted he heard Clemens make prior to the ejection, were not uttered at that time. VINCENT, *supra* note 8, at 2-3, 5. It may be that in that particular heated moment, statements were misheard from a distance of over sixty feet in a full stadium. *Id.* at 5.

28. This chance of error ("factual" and/or "legal") has important implications for the design of the system. *See supra* note 19, *infra* note 66 and accompanying text.

29. *See, e.g.,* MIKE BRYAN, BASEBALL LIVES 264-74 (1989); Michael Sokolove, *Calling The Game: The Life And Times Of An Umpire*, SPORTS ILLUSTRATED, Sept. 18, 1989, at 6.

30. *See generally* 2 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 26-32 (1978); HENRY M. HART, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1229-39 (1958).

31. *See, e.g.,* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89(8) HARV. L. REV. 1685, 1687-89 (1976). *But see generally id.* at 1695-96 (desirability of chilling borderline obnoxious behavior).

Use of the "T," a formal intermediate step, also explicitly draws a temporal line. It not only defines offensive behavior, but it also signals the end of the first level of the episode, marking off the past from the future.³² In addition, an explicit announcement, though more costly administratively, avoids the possible confusion inherent in an informal oral warning. More precisely, a system without oral warnings is likely to poorly serve the notice function, while a system with oral warnings is open to confusion about whether an oral warning was, in fact, given.³³

The other purpose a "T" system may be designed to serve is to punish an offender. While basketball's technical foul both warns and sanctions, these two purposes are not always commingled. One purpose may be satisfied while the other is not. Thus, in soccer when a yellow card is issued to an offending player, he and his team suffer no other penalty at that time.³⁴ Baseball could similarly confine its intermediate response.³⁵ One reason for doing so would be the difficulty of fashioning a suitable detailed set of sanctions. However, such a limitation in baseball would be problematic. The resultant appear-

32. It is as if in the typical grievance arbitration case several possible disciplinary incidents over time were telescoped.

33. For this reason, many employers have an oral warning noted in writing, perhaps even initialed by the employee, to avoid disputes over whether the warning was issued. GRIEVANCE ARBITRATION, *supra* note 22, at 119.

The use of a formal bright-line mechanism may also remove some of the "personal" element from the umpire-player confrontation and consequently, the ultimate result (*e.g.* if the player is later ejected) and the process may command more respect. *See generally* LON FULLER, THE PROBLEMS OF JURISPRUDENCE 705-08 (temp. ed., 1949).

34. In fact, the other team is awarded an indirect kick. As previously noted, if the player receives a second yellow card, he is removed and his team can not replace him with a substitute. *See supra* notes 13 and 18 and accompanying text. Accompaniment of ejection with non-replacement virtually necessitates an intermediate warning step in a disciplinary scheme.

35. An analogy might be made to the tort doctrine applicable to domestic animals where an owner is not liable for damage unless and until he is aware of the animal's dangerous propensity. *See, e.g.*, 3 RESTATEMENT (SECOND) OF TORTS §§ 509, 518 (1977). Even if this analogy does not support "one free bite" in baseball, it does suggest that, using tort terminology, the offensive behavior of a baseball player upset at what he perceives to be an erroneous decision sounds more in "negligence" than in "intent." In light of this lesser culpability, the player should not be immediately visited with the severe penalty of ejection. A second offense, after warning, is more culpable because of the presumed intention. *See also* GEORGE F. WILL, MEN AT WORK: THE CRAFT OF BASEBALL 100 (1990) (discussing Bart Giammati's moral distinction between disciplinary cases involving impulsive violence springing from zealous physical competition and those involving deliberate cheating).

Of course, we might adopt a very different attitude, one which highlights the value in controlling oneself in a stressful situation and which views self-discipline as part of the ideal of sportsmanlike behavior. However, the traditional place of argument in baseball makes reference to this ideal here appear inapt.

ance of "one free bite"³⁶ may constitute an inadequate disapproval and deterrent of objectionable behavior³⁷ and may weaken umpireal authority.³⁸

However, introduction of the "T" need not entail elimination of the umpire's power to eject a player in extraordinary cases without first resorting to the intermediate response.³⁹ In basketball,⁴⁰ tennis⁴¹ and soccer,⁴² though the common disciplinary practice is progressive, referees do retain the prerogative to expel immediately extreme offenders. Similarly, in the labor relations context, arbitrators have recognized that for certain forms of egregious misconduct, an employer is entitled to fire for the first infraction.⁴³

36. The bite is not, in fact, "free" for the malefactor even in a soccer-like system as the cited malefactor has formally moved one step closer to ejection.

37. Assuming some sanction is utilized, even though a player could be said to choose to offend and incur the consequences, baseball cannot be said to be, or to have been historically, indifferent to the offensive behavior. See generally KENT GREENWALT, *CONFLICTS OF LAW AND MORALITY* 10-11, 15-18 (1987).

38. As a practical political matter the apparent condonation of contemptuous conduct implicit in a limited scheme might well bar umpire support for the proposal. A warning may appear a particularly lame response in baseball where the imbroglio is likely to be highly focused; everyone is looking at the player(s) and the umpire. The virtue of a penalty is that it goes beyond the umpire simply saying, "Naughty, naughty!" The dilemma is figuring out an appropriate penalty. On the other hand, soccer's system is content with a yellow card warning in the case of a dangerous play, a situation involving player safety and therefore, arguably, a more compelling occasion for penalization.

39. The Clemens episode itself might have appeared to be such a case to the umpire. In his defense, Cooney observed that the escalation occurred so quickly and the verbal attack was so foul that he had to react immediately in the way he did. Cafardo, *supra* note 6, at 63. But see Gammons, *supra* note 6, at 49.

40. See RULES OF THE NBA, *supra* note 11, § VI(b) at 25. Recently the NBA Board of Governors adopted a recommendation by the league's competition committee to impose stronger penalties against players who commit overly aggressive fouls. The new rule calls for the ejection of a player if a referee decides the player has committed a "potentially injurious" violation. N.Y. TIMES, Oct. 26, 1990, at A31. As noted elsewhere, see *supra* notes 12, 13 and 18 and accompanying text, baseball's lack of an intermediate response and its recourse to ejection for verbal abuse seems out of place in that the offense does not involve behavior which is injurious to a competitor or which secures an advantage against the other team. Indeed, and perhaps ironically, in the beanball situation, which does involve safety, baseball does utilize a formal warning system. See *supra* note 25.

41. See, e.g., Women's International Professional Tennis Council, *supra* note 18, § IV, 4.3.4.

42. See FIFA, *supra* note 11, Law XII (n)-(p), at 24.

43. GRIEVANCE ARBITRATION, *supra* note 22, at 61-62. In any case, though, an arbitrator will consider the reasonableness of a physical and/or verbal response by an insubordinate employee who is stimulated to attack by provocative language or action. *Id.* at 85.

III. THE PROBLEM OF DETAIL

More troublesome than the concept of the baseball "T" is the design of its details. Working out a scheme of incremental sanctions is a perplexing task. Of course, if the task turns out to be intractable, if we prove unable to work out the particulars of an acceptable operational scheme for the concept — if, for example, all imaginable penalties are intolerably clumsy or perverse — we will need to reshape or abandon it.

If the "T" system is to be used to penalize a player, the first question to be asked is what type of penalty is appropriate. Unlike our civil legal system where the preferred remedy is monetary, no easily divisible instrument is available here.⁴⁴ An adjustment is required that does not dramatically tip the scales of justice or cause aesthetic harm to the contest. Is there a moderate sanction which is neither too much nor too little, one which has some impact but does not conspicuously alter the shape of the game? In basketball, the opposing team shoots a free foul shot. In operation that translates into a high probability of a point for the opponent.⁴⁵ In tennis, a point penalty is assessed. However, in baseball the award of a run to the opposing team would be excessive. Runs are much rarer in baseball than points in basketball or tennis. Accordingly, the effect on the game's outcome of a penalty in the form of a run would be unduly marked. Similarly, the use of an out as a sanction, (for example, reducing the number of outs of the offending player's team or increasing the number of outs of the opponent), seems unsuitable since each team is allotted only twenty-seven of these precious commodities in a game and this allotment has major impact on strategic decisions.⁴⁶

44. However, the recent appearance and work of "sabrmetricians," the new baseball statisticians who have calculated mathematically the run-value to a team of different game events, makes this problem more manageable and suggests that there is more instrumental flexibility than is initially apparent. See *infra* notes 48, and 52-53 and accompanying text.

45. The probability is high because the opposing coach can choose the player on his team, who is on the floor, to shoot the technical foul shot. Professional basketball players in the NBA make a high percentage of their foul shots, and the best of them shoot over 90% from the foul line. Basketball players, though, shoot foul shots all the time in the course of a game. Penalties in baseball are more intrusive.

46. See generally DANIEL OKRENT, *NINE INNINGS* 169-71 (1985). Presently, there are situations where an out is used as a remedy. For example, a runner is out when he interferes with a fielder attempting to field a batted ball or when he runs outside a baseline in order to avoid a tag. OFFICIAL BASEBALL RULES, *supra* note 25, § 7.09, at 61-63. In these situations, however, the remedial response anticipates the outcome which would have occurred had the player acted properly. It is important to distinguish deterrence-oriented remedies from outcome-reconstruc-

Some more modest, attractive remedies suggest themselves. One would be to use the model of the balk.⁴⁷ If the offending player is on defense, the runners on the offensive team would advance one base. In addition, the batter could be awarded first base.⁴⁸ Assuming this remedy is acceptable, what would be the corresponding penalty when the offense is committed by a member of the team at bat? One option would be to levy an out against his team.⁴⁹ But intuitively that appears not to be the equivalent.⁵⁰ Statistically, an out appears, at least initially, to be worth more than the advance of one base in the successful production of runs. For example, a sacrifice bunt, in which an out is traded for the one-base advance of a baserunner, is rarely a wise move in terms of its contribution to the generation of runs (and

tive ones. This distinction may be analogous to that between the compensatory and punitive character of damages.

47. The balk penalty does have an outcome-reconstructive element because the pitcher has sought an unfair advantage. The purpose of the balk rule is to prevent the pitcher from deliberately deceiving the baserunner. The rule details certain procedures that the pitcher must follow when there are runners on base. OFFICIAL BASEBALL RULES, *supra* note 25, § 8.05 at 69-71. A pitcher who deviates from these prescribed procedures is called for a balk, and each baserunner advances to the next base. *Id.*

The balk rule has been the subject of much controversy in both leagues in recent years largely because the difference between a legal delivery to the plate and a balk is quite subtle. Accordingly, discretion plays a large role in the umpire's decision whether or not to make the call. The instruction to umpires under the rule states that if there is doubt, the "intent" of the pitcher should govern. *Id.* at 71. No guidance is given as to how this intent is to be determined by the umpire.

48. One can imagine situations where a defensive team would prefer to have a slugger from the other team placed on first base rather than given the opportunity to hit and therefore they would not regard the sanction in such a situation as a "penalty." Of course, if the manager truly preferred that alternative, he would himself order an intentional walk. In fact, the intentional base on balls is rarely a good strategic move in terms of its impact on run generation by the opposition; and therefore, the award of a base is a meaningful sanction. JOHN THORN ET AL., *THE HIDDEN GAME OF BASEBALL: A REVOLUTIONARY APPROACH TO BASEBALL AND ITS STATISTICS* 159-60 (1984).

One response to the possibility that a sanction will not operate punitively in fact in a particular situation is to give a team a choice of whether to have the sanction imposed or not. For example, the non-offending team could choose whether to have their slugger hit or walk to first base.

49. If the offending player were the batter, he could be ruled out. But that need not be the design. Thus, if the offending player were the batter or if he were not, we need not deprive him or a teammate of the opportunity to hit; we could simply declare an out against his team.

50. The impact of the sanction in a particular case is, of course, dependent on the situation: the inning, runners, score, etc. So, in a sense, we are comparing a range of responses. For example, an advance of a runner from first base to second is not equivalent, in terms of its probable contribution to runs, to an advance from second to third. The same is true with respect to comparisons between the impact of the first and second and third outs in an inning. We also do not know who the particular runner or batter will be when a sanction is invoked.

hence victory).⁵¹ However, a recent mathematical study, which statistically assigns run-production values to each offensive event, indicates that the values of an out and a one-base advance are not significantly out of line.⁵² Hence, employing them as a pair of sanctions would not be inappropriate.⁵³

Another possible, and less severe, approach would be to manipulate balls and strikes. In the case of an offense by a defensive player, we could award the current (or next) batter a walk with only three balls or permit him four strikes.⁵⁴ Similarly, if the cited player is on offense, we could allow the player at bat only two strikes or permit the pitcher five balls before a walk occurs.⁵⁵

51. See THORN, *supra* note 48, at 156-58.

52. *Id.* at 63 (the linear weights system). For example, the run value of a walk or a hit batsman was .33 during the 1961-1977 period while that of an out was -.25. A stolen base was worth .19 and a failed attempt -.32. *Id.* at 65. These calculations indicate that a balk versus an out is a fair exchange. A balk is worth about $\frac{1}{4}$ of a run while an out is worth about minus $\frac{1}{4}$. Letter from Pete Palmer to Lewis Kurlantzick (August 18, 1991) (on file with the Seton Hall Journal of Sport Law). Of course, a balk requires runners on base. The award of first base in response to an offense would be worth about $\frac{1}{3}$ of a run. *Id.*

53. Comparison with sanctions in other sports is instructive. According to Thorn and Palmer's statistical analysis, $\frac{1}{4}$ of a run is the equivalent of a fortieth of a win, as ten runs are needed on the average to produce a win over the course of a season. See THORN, *supra* note 48. In football, by comparison, a win requires approximately thirty six points. Since each twelve yards is worth approximately a point, a fifteen yard penalty is worth about one-thirtieth of a win. In hockey, a two minute penalty results in a goal about twenty five percent of the time; thus, it is worth about one quarter of a goal. Since it takes about seven goals to produce a win, the penalty is again equivalent to about one-thirtieth of a win. If we assume that a thirtieth of a win is a fair amount to penalize a player for an offense, then we can equate that to approximately a third of a run, which fits well with the balk/out model. Letter from Pete Palmer to Lewis Kurlantzick.

54. My own aesthetic reaction is that three balls to a walk is preferable to four strikes to an out. In a sport where individual performance is highly valued and carefully measured, the presence of the "undeserved" or "three-ball" walk and the "four-strike" hit may mess up the statistics. In addition, a substantial factor in the hold of professional baseball on public interest lies in its detailed statistical records. More generally, the unique importance of statistics in baseball's gestalt may suggest caution in the introduction of sanctions which affect the chances of success of a player other than the offender.

On the other hand, the "T" is not likely to occur with such frequency as to have any significant statistical impact; and historically other rule changes have, in fact, had distinct impact on player statistics and consequently have affected the fans' ability to compare player performance over time. *E.g.*, G.W. SCULLY, *THE BUSINESS OF MAJOR LEAGUE BASEBALL* 51-69 (1989). See also THORN, *supra* note 48, at ch. 2.

55. Unlike the use of the balk rule by analogy, the manipulation of balls and strikes offers an attractive symmetry of sanction among offensive and defensive teams. The count model is also reasonable in that Thorn and Palmer's statistical analysis demonstrates that a batter with one strike is about one-thirtieth of a run below average while with one ball there is a positive value of one-thirtieth of a run. See THORN, *supra* note 48. This approach has an advantage over the balk model because no baserunners are needed, and it permits the penalized team to over-

Baseball, however, has no tradition of such manipulations.⁵⁶ If this approach appears inapt because of lack of precedent or because of disproportionality to the offense or because, unlike the balk, the offense does not involve the playing of the game and therefore the sanction should similarly not influence the outcome (or its statistical rendering), we might resort instead to the automatic imposition of a fine on the offender.⁵⁷

IV. POSSIBLE DEMERITS

One plausible concern about the proposal is that it might make matters worse (i.e., it would encourage more offending behavior).⁵⁸ Specifically, the provision of "one free bite" may serve as an inadequate deterrent. However, some penalty is involved. Moreover, as a general matter, in a situation where only a severe sanction is available, uncertainty about whether the sanction will be utilized can lead to a lower level of actual social control than would occur if there were a well defined area within which there was a high probability of even a mild punishment. Capital punishment, we know, is unlikely to be an effective penalty for theft.⁵⁹ In addition, the "T" provides umpires with more flexibility in handling disputes. To the extent that umpires presently feel constrained by the all-or-nothing remedy to await ex-

come its disadvantage with extra effort. It also could be increased for more serious offenses. Letter from Pete Palmer to Lewis Kurlantzick.

Another vehicle which offers the possibility of a graduated response is the designated hitter rule. Thus, we could limit its use by the team of a cited player.

56. Basketball employs a scoring system that can be adjusted via technical fouls in moderate ways. In addition, we can gauge the impact of the penalty with some confidence. That is, we know the usual point spread and how the award of a technical foul shot statistically alters it. In baseball, it is more difficult to figure the impact of similar sanctions, such as the award of an additional strike or the advance of a base. As a result, the use of this kind of penalty may be more problematic. Of course, the same may be said of the balk rule. In that case, however, the offense goes to behavior which seeks an unfair competitive advantage in the playing of the game; and therefore, we are more impelled to impose a sanction which influences the outcome, even if we are not all that sure of the precise influence.

57. The fine could be a flat fee or a percentage of the player's annual salary. A fine could stand alone, but, of course, it also could be used in conjunction with another sanction. In the NBA, a player who is whistled for a technical foul for unsportsmanlike conduct automatically is fined \$100 for the first offense and an additional \$150 for the second offense in any one given game. RULES OF THE NBA, *supra* note 11, § VIII at 26-27. If a player is ejected on the first technical foul for unsportsmanlike conduct, or on a punching, fighting, elbow, flagrant, or breakaway foul, he is fined a minimum of \$250. *Id.* In addition, whether or not he is ejected, a fine not exceeding \$20,000 and/or a suspension may be imposed by the Commissioner. *Id.*

58. The limited sanctions for fouling encourage some fouls in basketball games.

59. Douglas Hay, *Property, Authority and Criminal Law*, in ALBION'S FATAL TREE 17-26 (1975).

treme abuse before ejecting a player, this more limited tool permits them to respond to a situation before an argument gets out of control. Thus, it is possible that over the long run, the "T" system will produce the same level or possibly even less (rather than more) offensive behavior.⁶⁰

The acceptance of the proposal may also depend on one's view of the clarity of the line that divides permissible and impermissible verbal behavior. If one believes that this line is clear, well known to players and evenly administered by all umpires, the attraction of the proposal is lessened.⁶¹ (Of course, one might still claim that ejection is too severe a remedy for the offense).⁶² On the other hand, if one believes — as I do — that that line is not at all precise⁶³ and that different umpires, for example, apply different thresholds,⁶⁴ the case for provision of clearer notice, before ejection, is strengthened. The acceptance, historically, of umpire-baiting as part of the game's "mystique" offers some support for the latter view.⁶⁵ Further, the lack of a clear line along with the presence of different thresholds

60. The proposal, accordingly, should not be seen as a limitation on umpires' power, but rather as providing them an additional tool to be well used.

61. Dr. Bobby Brown, the president of the American League, for example, states that "[e]very player understands explicitly what can bring about a prompt ejection from the game." Letter from Dr. Robert W. Brown to Lewis Kurlantzick (December 12, 1990) (on file with the Seton Hall Journal of Sport Law).

62. One might be influenced by the fact that a player is likely to be heated at the time; and therefore, may be less blameworthy than one who is in complete control of his faculties. See *supra* notes 10 and 35 and accompanying text.

Of course, it may be that the justifiability of player anger will vary. For example, players, perhaps, should show more tolerance for ball v. strike "mistakes" in light of the difficulty and number of these calls in the course of a game, as against an umpireal error on a safe v. out call. This thought may, in part, underlie the present prohibition against arguing about the call of pitches.

63. See *supra* note 26 and accompanying text.

64. See BRYAN, *supra* note 29, at 264-74 (discussing National League umpire Bruce Froemming's threshold).

65. It is not as if any argument with the authority figure constitutes "contempt of court." Argument — "jawing with the ump" — is part of the game in baseball. Innumerable players and managers have made a livelihood of "bitching". See, e.g., WILL, *supra* note 35, at 305-06 stating that John McGraw, the New York Giants' manager, was a cauldron of hectoring fury, who believed that his relentless bullying of umpires produced significant advantages for his team. Earl Weaver, the former Baltimore Orioles' skipper regarded by many as the preeminent manager of his era, deems "baiting" umpires "a great tradition of the game." David A. Kaplan, *What's Killing The Umps?*, N.Y. TIMES MAGAZINE, Mar. 20, 1988, at 42, 52 (stating that Weaver had been ejected from ninety-eight games).

Of course, another possible response to the problem of clarity of notice would be to reexamine the premise that umpire-baiting is permissible.

reinforce the desirability of an arrangement which reduces the consequences of erroneous invocations of discipline.⁶⁶

A different sort of objection is that these situations, in their variety, are better left to informal handling by an umpire (optimally by one not too hasty or oversensitive in his response and willing and able to first supply an oral warning). There is much to be said for well-functioning informality;⁶⁷ a good umpire (or referee) is attentive to subtle matters of degree and context that do not lend themselves to succinct verbalization (or prepackaged prescriptions).⁶⁸ Additionally, informality avoids the administrative costs of a formal system.⁶⁹ But the drawing of a bright line still has its merits.⁷⁰ Moreover, the proposal does not significantly limit the leeway available to umpires; discretion can still be well used.⁷¹

66. See *supra* note 19 and accompanying text. In the Clemens case itself, Commissioner Vincent concluded that the report submitted by umpire Cooney contained inaccuracies. VINCENT, *supra* note 8, at 5. Some of the statements that Cooney asserted he heard Clemens make prior to the ejection were not uttered at that time. *Id.* For example, at least one of the highly offensive statements included in Cooney's report was made after, rather than before, the ejection. *Id.*

67. Roger Angell, *The Sporting Scene: Tell Me A Story*, THE NEW YORKER, Dec. 3, 1990, at 71-72 (offering an account of prudent discretionary techniques which might be appropriate in a Clemens-type flap). See also WILL, *supra* note 35, at 63-64 (illustrating the nuances of this kind of governance inside the game).

68. In basketball, for example, professional referees will call fouls more closely when they want to get a rough game "under control."

69. Along the same line, it may be argued that we are discussing a problem which cannot be resolved by a change in the rules; i.e., good umpires can handle rhubarbs while bad ones can not. See Sokolove, *supra* note 29, at 6.

70. The testament to well-functioning informality raises questions of description and politics. First, is that an accurate rendition of the present system? I am dubious. Second, is it likely that present baseball forces will yield such a functioning system? Third, if the formal arrangement being proposed has advantages over the present operating arrangement, is it likely that baseball politics will approve of it? More precisely, will these politics more likely yield the improvement of a formal arrangement than the improvement of well-functioning informality?

71. Better training of umpires, of course, is always a desirable end. While a number of baseball commentators have expressed concern about player-baiting and an increasingly hostile attitude by umpires towards players, there appears to be agreement that the general quality of umpiring is very good. The road to the majors is fiercely competitive and begins in the umpire schools. These schools, located in California and Florida and run by former umpires, were formed in the late 1940's and represented a substantial advance in the training process. For one ex-umpire's account of these schools and the route through the minor to the major leagues, see RON LUCIANO & DAVID FISHER, *STRIKE TWO* (1984).

While acknowledging the caliber of these schools, one experienced, astute observer suggests that progress toward greater umpire accountability and player-umpire relations marked by mutual respect requires baseball ownership to wrest the development process from these schools and to start searching for and developing umpires themselves. See Gammons, *supra* note 6, at 49.

Undoubtedly the umpire's job is a difficult one. In the nature of things, the umpire's reaction must be immediate and conclusive.⁷² If he has made an error (or even appears prejudiced), the game must go on. No immediate review is practicable.⁷³ Historically, an umpire's

72. But see generally ROBERT C. BERRY ET. AL., *LABOR RELATIONS IN PROFESSIONAL SPORTS* 48 (1986) (noting that Japanese umpires seek to explain their decisions to the crowd).

73. The long term remedy is to find a reliable umpire. Presently, umpires are hired by the leagues. Each league has a Supervisor of Umpires who interviews players and managers as part of the process of supervision of umpire performance. At the end of each season, teams do evaluations of all the umpires, but apparently team executives do not take this task very seriously in light of the perception that significant league action is unlikely. The players' union notes that umpires are not graded publicly, and it complains that "when an umpire has a problem with a player, he has recourse, but a player who has a problem with an umpire does not. Umpires are protected." Claire Smith, *Clemens Receives Penalties For Run-In*, N.Y. TIMES, Nov. 21, 1990, at B13 (statement by Donald Fehr, executive director of the Players' Association).

Many press accounts portray umpire independence and league (and commissioner) support of umpires as largely a result of the job security enshrined in the collective bargaining agreement and the strong union leadership of Richie Phillips. See Gerald Eskenazi, *Officials Under the Microscope*, N.Y. TIMES, Dec. 16, 1990, § 8 at 7. In fact, the formal obstacles to umpire discipline are overstated. The most recent collective bargaining agreement provides that umpires with five or more years of service cannot be discharged without a statement of the league's reasons for the action. In addition, the umpire is entitled to a hearing before the league president. See A. Bartlett Giamatti et al., *Basic Agreement Between The National League Of Professional Baseball Clubs and The American League of Professional Baseball Clubs and The Association Of Major League Umpires*, § VIII(A), at 13 (Jan. 1, 1987) (on file with the Seton Hall Journal of Sport Law). Neither the umpires' union nor the leagues were willing to provide a copy of the present collective bargaining agreement signed in April 1991, but the union did confirm that the agreement did not alter the existing job security provisions. While these provisions accord more security than was previously available, they do not erect substantial procedural impediments to discipline by management. After all, the required hearing is before an executive who has already made an initial decision to fire the employee. Umpires without five years of service do not receive even this protection. The system stands in striking contrast to that which safeguards player employment. Players may only be disciplined for "just cause," and they are entitled to resort to an independent grievance process to challenge disciplinary actions. Apparently, then, a fear of undermining umpire authority (and a corresponding desire not to acknowledge fallibility publicly) play a major role in explaining management behavior.

If we look at player-umpire interactions from a broader systemic perspective, we might say that the provision of off-field avenues for complaint and relief would not only provide an assured channel for "voice" aimed at improvement of the enterprise's shortcomings but would also make more justified an expectation of restraint by players (and managers) on the field. See generally Albert O. Hirschmann, *Exit and Voice: An Expanding Sphere of Influence*, in *RIVAL VIEWS OF MARKET SOCIETY AND OTHER RECENT ESSAYS* 79 (1986). Even though the overturning of particular calls is impracticable, this vehicle would provide another escape route for players' "steam." See generally JUDITH SHKLAR, *THE FACES OF INJUSTICE* 93 (1990); Murray Chass, *Disclosing The Errors Of Umpires*, N.Y. TIMES, Aug. 20, 1991, at B11. As a result, its availability might produce a marginal reduction in the chances for on-field conflagration. Taking this process or structural view — not surprisingly a lawyer's perspective — makes somewhat less turn on the ongoing argument over the proper definition of umpireal attitude. Of course, it may not be politically possible, in light of the probable stance of the umpire's union, to create this kind of review structure. On the other hand, it may be that the owners are unwilling to pay the economic price in terms of necessary higher wages, or the public relations price, in terms of

working conditions have offered hard, lonely travel and low wages, even at the major league level until the past decade when unionization began to bring higher wages.⁷⁴ Verbal histrionics by players and fans at the umpire's expense (i.e. Kill the umpire)⁷⁵ are an accepted part of baseball's folklore.⁷⁶ Thus the umpire, his representatives and baseball officials have been concerned not only with the protection of his authority but also with safeguarding his physical security.⁷⁷

admission of umpire fallibility, in exchange for umpire accountability. Gammons, *supra* note 6, at 49.

74. The tortuous road to unionization is described succinctly in DAVID Q. VOIGHT, *AMERICAN BASEBALL: FROM POSTWAR EXPANSION TO THE ELECTRONIC AGE* 290-97 (1983). The key collective bargaining achievement for the umpires was the agreement reached in May 1979. Preceded by the hiring of Richie Phillips as the union negotiator and by a six week strike, this three-year contract provided for the institution of a tenure system, increased salaries based on years of service and in-season vacations for all umpires. Subsequent agreements further increased salaries and benefits and defined and altered the authority of the league presidents with regard to post-season assignments. A rotation system, which permitted all umpires to share in all-star and post-season revenues, determined which umpires worked in these games. The present collective bargaining agreement, a four year pact concluded in April 1991, features hefty pay raises and the restoration of the right of league officials to choose which umpires will work post-season games.

A major effect of strong union leadership and the collective bargaining agreements has been increased umpire independence and a decrease in the power of the league presidents in their dealings with the umps.

75. Some sociological commentators have noted the class aspects of baseball characterizing it as a sport for underdogs:

Baseball may not be an occasion for the wretched of the earth to revolt against their oppressors, but it is at least an opportunity for the downtrodden and frustrated American to admire the successful trickster or, at the very least, to stand up and scream: "Kill the umpire!" You can't do that at Lord's [cricket club].

GUTTMAN, *supra* note 3, at 55-58. ("Baseball, Social Class, and Fair Play"); see also THE NATIONAL BASEBALL HALL OF FAME AND MUSEUM, INC. ET AL., *THE BASEBALL HALL OF FAME 50TH ANNIVERSARY BOOK* 42-43 (1988) [hereinafter *BASEBALL HALL OF FAME*] (discussing the tradition of disrespect for authority).

76. Umpires, though, have frequently "given as well as they have got" in rhubarbs. Telephone interview with Bill White, president of the National League (December 1990). The recent debate about umpire behavior has not gainsaid umpires their say in these arguments but has questioned whether they are now more provocative than they were and should be, unnecessarily goading players on. Eskenazi, *supra* note 73, at 7.

Umpires, in fact, have not always been an accepted target of abuse. Interestingly, in the early years of organized baseball, prior to the emergence of popular professional teams and leagues, the umpire's authority was both well defined and strongly endorsed by the individual clubs. "Arguing" with the umpire was prohibited. In fact, the clubs had elaborate systems of fines to insure that players behaved respectfully, and team captains were charged with the responsibility of controlling their players. See HAROLD SEYMOUR, *BASEBALL: THE EARLY YEARS* 17, 35 (1960).

77. See, e.g., *BASEBALL HALL OF FAME*, *supra* note 75, at 42-43; ROBERT SMITH, *BASEBALL IN AMERICA* 84-88 (1961); DAVID Q. VOIGHT, *AMERICAN BASEBALL, FROM GENTLEMAN'S SPORT TO THE COMMISSIONER SYSTEM* 186-87, 192 (1966).

In recent years, many observers of the game have noticed (and have deplored) a more aggressive attitude among umpires.⁷⁸ Indeed the Clemens ejection came at the end of a season featuring several major confrontations between players and umpires.⁷⁹ This series of incidents pushed to the fore the question of the proper role of the

Clemens' subsequent punishment by American League president, Bobby Brown, was in part stimulated by the fact that Clemens apparently had shoved crew chief John Evans ("making significant physical contact with an umpire"). VINCENT, *supra* note 8, at 4.

Umpires have not been alone, among game officials, in their physical precariousness. Eskenazi, *supra* note 73, at 7, col. 3. Indeed, outside the United States soccer referees have been at serious risk from crowd behavior, especially when the fortunes of national teams are in play. See e.g., KELLY, *supra* note 4, at 220. ("Referees, umpires and officials have been frequently attacked and occasionally killed. Sports and sportgrounds have become highly visible battlefields for political activism, social protest and even, as with Glasgow Rangers and Celtic soccer teams, a contemporary variant of religious warfare.")

78. See, e.g., CHARLES C. ALEXANDER, *OUR GAME: AN AMERICAN BASEBALL HISTORY* 305 (1991); Bob Hertz, *Vincent Must Wrest Control From Umpires*, THE SPORTING NEWS, Sept. 17, 1990, at 13; Madden, *supra* note 7, at 41; Scott Ostler, *Roger Uncool For Blowing Cool*, THE NATIONAL SPORTS DAILY, Oct. 11, 1990, at 7; Smith, *supra* note 73, at B13 (players' union contends umpires have become increasingly aggressive and emotionally involved); Steve Wulf, *Yer-r-r-r Out Of Line!*, SPORTS ILLUSTRATED, June 4, 1990, at 100. But see Eskenazi, *supra* note 73, at 1 (umpires dispute that they are more provocative, contending players have become more combative).

Of course, the same activity may be interpreted differently depending on the lens through which it is viewed. Thus, from the umpires' perspective, a young umpire must establish himself. From the players' perspective that young ump has too short a fuse. See Sokolove, *supra* note 29, at 11.

A longitudinal study of the frequency of ejections might offer relevant evidence on the question of whether umpires have become more visible and confrontational. However, this data would be of little utility because of the impossibility of controlling for other relevant variables. That is, even if the numbers showed an increase in ejections in recent seasons, the changes could be due to a host of factors unrelated to umpireal demeanor, self-image and role conception. In fact, the trend of ejections over the past decade has been down. See Eskenazi, *supra* note 73, at 7.

79. On August 9, 1990, during a bench-clearing brawl between the New York Mets and the Philadelphia Phillies, National League umpire, Joe West, a 270 pound off-season bouncer and country-and-western music performer, threw Phillies' pitcher, Dennis Cook, to the ground in an effort to break up the fray. Tom Barnidge, *Umps Should Be Ejected From Center Stage Act*, THE SPORTING NEWS, Sept. 10, 1990, at 3. On August 22, West ejected Phillies' baserunner Von Hayes, not for a comment directed at West, but for something he purportedly said about another umpire. *Id.* Shortly thereafter, National League President Bill White criticized West, announcing that West was "no longer to physically touch a player" and that he "did not agree with West's handling of the Von Hayes situation." *Id.* White's criticism then drew a public rebuke from Richie Phillips, the director of the umpires' union, who expressed his dissatisfaction to Commissioner Fay Vincent and lamented the league president's lack of support for the umpires. *Id.*

At the initiative of the players' union, the issue of umpire behavior has been placed on the agenda of the Labor-Management Committee established under the Basic Agreement to provide a forum for discussion of questions of mutual concern to owners and players. Eskenazi, *supra* note 73, at 7, col. 1.

umpire. Should the umpire be a facilitator, one who turns the other cheek and sustains authority by dignity, doing his job best when he goes relatively unnoticed? Or should the umpire demand recognition on the field, accept minimal verbal abuse and conceive of himself as, in part, a performer? The issue is a fundamental one. The increased visibility of umpires (assuming it exists) may be tied not only to their greater job security but also to the presence of two basic elements underlying professional sports, elements which are sometimes in conflict. On the one hand, as a sport they involve the paradigmatic pursuit of athletic excellence. On the other hand, they serve as a major form of commercial entertainment, a show.⁸⁰ The key issue for us here, however, is whether one answer or another to this role question affects the merit or shape of our proposal. That is, if baseball opts for role conception number one versus role conception number two (or some third role conception), is the proposal less or more desirable? Or need it be modified in important ways? The answer to those questions, I believe, is that for our purposes, little turns on the resolution of these role questions, important as they are for the game on their own terms.⁸¹

A final possible objection to the proposal originates in the conservatism of the game. Put simply, baseball's rules should not be easily changed. While this traditionalism is apparent and worthy of respect (the designated hitter rule, instituted in the American League in 1973, was the first major change in the playing rules in eighty years) it can be overstated, particularly with respect to its relevance to our proposal.⁸² One of the characteristics of modern sports is ra-

80. See generally JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 55-56 (1990). When Clemens was ejected, broadcaster and former player, Tim McCarver, criticized Cooney on the ground that Clemens' stature as a player should have influenced the umpire, i.e., he should have held his hand longer than he would for another, less star player. Eskenazi, *supra* note 73, at 7, col. 3. Others objected to this line of criticism in terms of "equality before the law." *Id.* Obviously baseball cannot have a formal rule which distinguishes superstar pitcher from utility infielder. However, attention to the entertainment value of the player would offer justification for an umpire (or a basketball referee) being particularly cautious before removing a star player. Such caution would not then be seen as baldly unprincipled.

81. Of course, if it is true that umpires have become more provocative and that more contentious umpires are likely to misuse the ejection response, then a proposal which insists on initial recourse to an intermediate sanction becomes more attractive.

82. Rule changes have been infrequent in modern times. This infrequency, in part, reflects baseball's organizational structure. Because certain teams will have specialized in hitting, pitching or other skills as a strategy for winning, they will have a vested interest in protecting those rules' imbalances which they have exploited to their advantage. A team with strong hitting and weak pitching will treat a rule which favors hitting as a "property right" to be protected and will try to block any rule change that weakens the role of hitting even if it is for the

tionalization, the constant scrutiny of rules and their revision from a means-ends point of view.⁸³ In fact, rationalization dictated a constant revision of the rules in the early years of baseball. Between 1876 and 1889, for example, the base on balls rule was changed seven times.⁸⁴ Moreover, the change proposed here should have no significant effect on the way the game is played and managed.⁸⁵ Its impact, as compared to the impact of the DH Rule, in particular, will be minuscule.⁸⁶

V. CONCLUSION

To some extent, one's response to my proposal rests on empirical questions that I cannot answer with complete assurance, such as, how clear the present line between permissible and impermissible behavior is. To some extent, it involves value judgments, some of which have only been implicitly addressed here, such as what should constitute a capital offense, how much of a commitment to deterrence is appropriate and what quantum of ventilation by disgruntled players should be permitted. With respect to these judgments, though, the historical place of argument in baseball, the almost hallowed traditions of "jawing with the ump" and "bench jockeying" of the opposition, decidedly point to conclusions in support of the proposal.

general good of baseball. Since changes in the playing rules require a two-thirds vote of the Rules Committee and nothing in the leagues is changed unless three-fourths of the owners desire the change, a minority of owners can block any playing rule change that is not in their interest. SCULLY, *supra* note 54, at 51-52.

83. GUTTMAN, *supra* note 3, at 5-7. This process of scrutiny and revision has been most apparent in recent years in professional basketball.

84. *Id.* at 54-55 ("The static technology of [cricket] was in marked contrast to baseball's constant experimentation with balls (lively and 'dead'), bats (wooden and metal), and gloves (bigger and bigger).") "Baseball has been played with the pitcher's mound at a distance of 45 feet and with a nine-ball, three-strike rule. Within fairly broad limits, nothing is sacrosanct in the playing rules." SCULLY, *supra* note 54, at 52. See OKRENT, *supra* note 46, at 240-42 offering an account of the numerous rule changes throughout the nineteenth and twentieth centuries designed to help the hitter and the pitchers' creative response to them.

85. See generally BERNARD DE KOVEN, *THE WELL PLAYED GAME* 59-61 (1978). See also, *supra* note 25 and accompanying text noting that formal warnings and progressive reaction to offensive behavior now play a role in baseball's operational scheme.

86. The designated hitter rule removes the necessity of making a major managerial decision — whether to pinch hit for a good pitcher in a game where your team is losing. In addition, it downgrades the value of a good hitting or bunting pitcher. As such, to its many critics it impoverishes the game. On the other hand, to its proponents it eliminates the unaesthetic sight of a pitcher "waving" at the ball when he comes up to hit; and it creates a specialty, prolonging the careers of some hitters. See SCULLY, *supra* note 54, at 51-69 discussing the effect of changes in the playing rules on player performance statistics over time; WILL, *supra* note 35, at 57-60, 121-22 for a discussion and evaluation of the arguments pro and con the designated hitter.

Baseball should introduce a formal intermediate step before ejection. The potential benefits of this change to all of its constituencies are clear. The balk model is available as a desirable starting point. Acceptable details are imaginable. Consideration by Major League Baseball's processes, including input by management, players⁸⁷ and umpires,⁸⁸ can alter and refine the outline of the proposal offered here.⁸⁹

87. Basic Agreement Between The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs and Major League Baseball Players Association, Art. XVIII, at 44 (Jan. 1, 1990).

88. Umpires are not now represented on the Rules Committee. However, for this change to work their input and support are required. See Giamatti, *supra* note 73, § XVII, at 29.

89. A number of conclusions in response to the Clemens incident is conceivable, of course. One might be satisfied with the system in place and untroubled by Clemens' ejection. Or one might be satisfied with the present structure and troubled by the Clemens' episode but view it as an aberrant misfiring of a sound system. Clemens would then be deemed much ado about nothing and change regarded as unnecessary because the costs of any change would exceed its benefits. Or one might be dissatisfied with the present framework and see it as in need of change—one might believe that Clemens was appropriately ejected, but still deem the present system unsound and change required—but reject as unsound the particular response to its defects that is offered in this article.