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EDITOR'S NOTE

The Sports and Entertainment Law Journal is proud to complete its eleventh year of publication. Over the past decade, the Journal has strived to contribute to the academic discourse surrounding legal issues in the sports and entertainment industry by publishing scholarly articles.

Volume XIX has five featured articles discussing issues and proposing solutions for hot topics we face in the sports and entertainment industry.

The first article, written by Andrew Buttaro, discusses the intersection of antitrust's movement toward a focus on consumer welfare and the subsequent resistance of professional sports to this shift.

Moving into a discussion on intellectual property, Jon Garon writes the second article regarding the factors that helped shaped the Golden Age of Broadcast Television and offers comparisons for its potential replacement.

The third article, by Gregory M. Huckabee, is the final installment of a two-party study identifying and addressing the ethics of scheduling Football Bowl Subdivision and Football Championship Subdivision teams. Part II, in particular, provides qualitative data, acquired through interviews with 10 Division I university presidents and chancellors, addressing 14 questions involving the ethics of sports scheduling.

The fourth article, written by Mike Rogers with additional commentary by Kelli Masters, offers insight and perspective into prevalent questions and matters related to student-athletes, their interactions with perspective agents, as well as their entry into the National Football League draft.

Continuing with the discussion of the sports industry, the fifth article, by Cedric Vanleenhove and Jan De Bruyne, explores the

situation in which an American judge has awarded punitive damages for a crushing football (soccer) tackle and the plaintiff is seeking to enforce this judgment in England.

We are truly pleased with Volume XIX's publication and would like to the thank the authors for all of their hard work. We would also like to thank our wonderful faculty advisor, Professor Stacey Bowers, and our two outstanding Deans, Dean Emmerich and Dean Moffat, for their invaluable advice and guidance. To the editorial board and staff editors, I appreciate the endless effort and hard work that has perfected the Journal.

Lastly, I would like to thank my parents, Leo and Jodi Vincent, as well as Brianna Miller, Cora Best, Seif Ammus, and Lydia Morton for their continuous support throughout law school. I truly could not have achieved my accomplishments without your help!

ERICA VINCENT
EDITOR-IN-CHIEF (ACADEMIC YEAR 2015-2016)
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ANTITRUST'S OUTLIER: CONSUMER WELFARE AND WAGE RESTRAINTS IN PROFESSIONAL SPORTS

Andrew Buttaro*

INTRODUCTION

It is an axiom that the guiding objective of antitrust law is to enhance consumer welfare.[1] While now canonical, this consensus is a relatively recent legal innovation, spurred mainly by Robert Bork's arguments in *The Antitrust Paradox* (and to a lesser extent, some of Richard Posner's writings).[2] By the late 1970s, the consumer welfare goal had become accepted by the Supreme Court, meaning a host of previously illegal arrangements—like vertical resale restrictions, for instance—were permissible if they offered demonstrable benefit to consumers.[3] In the context of

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* Andrew Buttaro, J.D., 2012, University of Virginia School of Law; M.A., 2012, University of Virginia; B.A., 2007, Boston College. I am grateful to Donald Dell and David K. Baumgarten for their guidance and feedback on this article, which was originally drafted while enrolled in their course on professional sports and the law at the University of Virginia School of Law. Considerable thanks are also due to Mark S. Levinstein of Williams & Connolly, who generously shared his time and provided significant insight into how sports law fits within a larger antitrust framework.

[1] *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (noting that the antitrust laws form a "consumer welfare prescription").

[2] *See* ROBERT BORK, THE ANTITRUST PARADOX (1978); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976). *See also* Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J.L. & PUB. POL'Y 449, 451 (2008) ("When Bork's article was first published in 1966, his thesis was novel; by 1977, it had become the conventional wisdom of the federal courts.").

[3] Continental Television v. GTE Sylvania, 433 U.S. 36, 56 (1977) (concluding that GTE's behavior transgressed the Sherman Act only if it was an unreasonable restraint of trade that would diminish competition and promote inefficiency, essentially adopting a method of analysis proposed by Bork in a 1966 law review article and further explained in the manuscript to his book). In a concurring opinion, Justice Byron White directly

sports, a similar argument can be made that agreements among teams to restrict player salaries would reduce costs, pass on savings to consumers, and thereby enhance consumer welfare.[4] By this logic, one could reasonably argue that the law surrounding sports is anomalous when judged against the wider antitrust jurisprudence, and therefore more aggressive wage restraints than current salary cap schemes should be permitted—and perhaps implemented.

This article explores the intersection of antitrust's movement toward a focus on consumer welfare and the resistance of professional sports to this marked shift. Ultimately, this writing offers two cheers for the status quo. Although there is a case to be made that sports, particularly in the context of player salaries, should be treated more like other areas of antitrust, in the final analysis the argument is more provocative than persuasive, as the relationship between aggressive wage restraints and consumer welfare is tenuous at best. This article proceeds as follows. First, it briefly surveys the key scholarship undergirding antitrust's shift to consumer welfare as the lodestar of enforcement, focusing on Bork's seminal efforts in particular. Second, it outlines the way in which sports law generally departs from antitrust orthodoxy. Third, the article scrutinizes the handful of cases that address the narrow issue of the pro-competitive effects (*i.e.*, consumer welfare gains) offered by salary controls. Finally, it concludes with a weighing of the merits of the present arrangement against a hypothetical system in which professional sports leagues would have wider latitude to restrict player salaries.

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cited Bork's article to support the Court's holding. *Id*. at 69 (White, J., concurring). *See also Reiter, supra* note 1.

[4] *See, e.g.*, PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW 130 (1993).

I. A Primer on the Consumer Welfare Revolution

No individual was more responsible for centering modern antitrust enforcement on consumer welfare than Robert Bork.[5] Though remembered more in the public imagination for the contentious confirmation hearings that thwarted his 1987 nomination to the United States Supreme Court, Bork's early career was defined by his pioneering efforts to reshape antitrust law.[6] Bork's proposed antitrust reforms were first outlined in a 1966 scholarly article,[7] which was later expanded into a highly influential book, *The Antitrust Paradox*.[8] Bork's critique began with one central question: What is the guiding objective of antitrust law? Wading into the history of the Sherman Act, the 1890 statute that is the foundation of antitrust law, Bork argued that the answer was clear: Congress intended the courts to implement "only that value we

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[5] ROBERT PITOFSKY, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 50 (2008) (acknowledging Bork's influence by saying antitrust "analysis almost always begins with Chicago" school ideas); Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835 (2014) ("Of all Robert Bork's many important contributions to antitrust law, none was more significant than his identification of economic efficiency, disguised as consumer welfare, as the sole normative objective of U.S. antitrust law.").

[6] Linda Greenhouse, *Legal Establishment Divided Over Bork Nomination*, N.Y. TIMES (Sept. 26, 1987), http://www.nytimes.com/1987/09/26/us/the-bork-hearings-legal-establishment-divided-over-bork-nomination.html; Adam J. Di Vincenzo, *Editor's Note: Robert Bork, Originalism, and Bounded Antitrust*, 79 ANTITRUST L.J. 821 (2014) ("It is difficult to overstate Robert Bork's impact on law and politics in the second half of the 20th century. As most readers of this Symposium are aware, Bork is widely credited with upending long-standing principles governing the aims and methods of antitrust law and policy.").

[7] Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).

[8] ROBERT BORK, THE ANTITRUST PARADOX (1978).

would today call consumer welfare."[9] While late nineteenth century legislators did not speak of the concept with the precision of a modern economist, "their meaning was unmistakable."[10] A full consideration of the legislative history "contains no colorable support for application by courts of any value premise or policy other than maximization of consumer welfare."[11] This was the essential starting point for Bork's antitrust reform campaign.

Bork's investigation into the legislative history scrutinized the first draft of the Sherman Act, which proscribed "arrangements, contracts, agreements, trusts, or combinations" that "prevent full and free competition" by design, or which "tend to advance the cost to consumer."[12] Bork contended that Senator John Sherman employed these two criteria of illegality in every measure he presented to the Senate.[13] The first test, of "full and free competition," can be understood only as a consumer welfare prescription in Bork's reading.[14] The second test, measuring the "cost to consumer," makes this even more apparent. For Bork, this was strong (and nearly dispositive) evidence that Sherman drafted his bill with consumer welfare in mind. Bork also pointed to a floor statement made by Sherman on the subject of monopolistic mergers and predatory practices:[15]

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[9] Bork, *supra* note 7.
[10] *Id.* at 10.
[11] *Id.*
[12] Sherman Antitrust Act, 15 U.S.C. § 1 (2012).
[13] Stephen Labaton, *Administration Plans Tougher Antitrust Action*, N.Y. TIMES (May 11, 2009), http://www.nytimes.com/2009/05/11/business/11antitrust.html (sketching a brief biography of the sponsor of the eponymous Sherman Act).
[14] BORK, THE ANTITRUST PARADOX, *supra* note 8, at 10.
[15] For an excellent summation of the uses (and misuses) of legislative history materials like floor statements, *see* George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39 (1990).

> The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry ... it tends to advance the price to the consumer of any article produced, it is a substantial monopoly injurious to the public .... [T]he individuals engaged in it should be punished as criminals.[16]

Bork justifiably concludes that the "emphasis in this passage is upon harm done to consumers."[17]

Some scholars have criticized this inference.[18] Law professor Barak Orbach, for instance, curiously responds that Bork "did

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[16] BORK, THE ANTITRUST PARADOX, *supra* note 8, at 10.

[17] *Id.*

[18] Two particularly persistent critics are Robert H. Lande (who contends that the legislative intent behind the Sherman Act was to prevent wealth transfers from consumers to businesses) and Herbert Hovenkamp (who asserts that the Sherman Act was intended to protect small businesses). *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 68 (1982); John B. Kirkwood and Robert H. Lande, *The Fundamental Goal of Antitrust*, 84 NOTRE DAME L. REV. 191, 192 (2008); Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L.

not consider the possibility that the politician Senator Sherman simply addressed his audience while discussing concerns to competition," as "every novice politician knows that he can gain some political capital by arguing that his agenda also promotes consumer interests."[19] This may well have been the case, although for legislative history purposes, it is also largely irrelevant.[20] If one is prepared to use legislative history in construing a statute—a controversial technique in itself[21]—one must take a legislator's statement at face value.[22]

REV. 1, 23–24 (1989). *See also generally* PITOFSKY, *supra* note 5 (collecting essays from scholars more or less opposed to Bork, Posner, and other free-market theorists of the Chicago School); RICHARD HOFSTADTER, "What Happened to the Antitrust Movement," *in* THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 192 (1965).

[19] Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 155 (2011).

[20] D.C. v. Heller, 554 U.S. 570, 605 (2008) (noting that "[l]egislative history," in the judicial sense, "refers to the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding").

[21] Justice Antonin Scalia had been one of the most persistent critics of what he perceived as the judiciary's overreliance on legislative history, stating, for instance, that "most legislative history" is "less than crystal clear." McDonald v. City of Chi., Ill., 561 U.S. 742, 834 (2010). Less tepidly, he wrote: "I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of law." ANTONIN SCALIA, A MATTER OF INTERPRETATION 31 (1998). Bork himself acknowledged the "difficulties inherent in the very concept" of legislative intent. Bork, *supra* note 7, at n.2.

[22] At the risk of belaboring the point, it simply does not matter what Sherman *really* meant when he made the statement above. If Sherman did not believe at all in consumer welfare on a personal level, but expressly invoked consumer welfare in his public defense of the bill, it is of no import: It is the public justification that matters. It is nearly impossible to know what politicians really intend by passing bills, and looking beyond the four corners of floor statements would invite metaphysical

Other objections to Bork's consumer welfare model are more normative. For example, some argue that serving consumer welfare may not be socially desirable. Orbach gives the example of tobacco products. For these goods, "the efficiency of tobacco companies and competitiveness of markets are not related to consumer welfare. Low prices and more cigarettes can only harm consumers."[23] Again, Orbach's criticism is somewhat idiosyncratic. A court hearing an antitrust case need not—and should not—evaluate whether an activity is considered socially desirable, as Congress has already made that threshold determination.[24] The only question before the court is how to maximize the industry's efficiency; or said another way, to advance consumer welfare. But whatever the merits of the scholarly criticism, Bork's framework endures. As Judge Douglas Ginsburg has noted, "the academy has failed to persuade the judiciary, and Bork's consumer welfare

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speculation of unknowable questions. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 30 (1989) (Scalia, J., dissenting) ("It is our task, as I see it, not to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be both lawful and effective—but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times."); *see also* Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) ("[W]hile it is possible to discern the objective 'purpose' of a statute ..., or even the formal motivation for a statute where that is explicitly set forth ..., discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task.").

[23] Orbach, *supra* note 19, at 152.

[24] The issue is one of judicial competence. It is not the task of judges to decide what industries are beneficial or what products are morally proper goods for consumers; Congress implicitly does that through its lawmaking power (*e.g.*, heroin is illegal while tobacco is not). One may disagree with the legislative classification, but that is part and consequence of the democratic process. Orbach seems to envision the antitrust judge as an amalgam of the Food and Drug Administration and the legislative branch.

thesis has become one of his many enduring contributions to U.S. antitrust law."[25]

Though the argument that consumer welfare should guide antitrust may seem straightforward, implementation is often complex. The best way to think of the utility of the doctrine is to envision it as setting guideposts for judicial decision-making. "Consumer welfare operates to allow courts to decide whether there's a claim or not," explains Mark Levinstein, an antitrust attorney with Williams & Connolly in Washington, D.C. "If so, judges will take into account how long the disruption has lasted."[26] If a judge has strong reason to believe that market forces will correct a temporary disruption, then the court likely will be reluctant to intervene. "Essentially, the court is trying to determine who is getting hurt," says Levinstein. "Once that's established, the court needs to consider whether the violation is so serious that the law should correct it."[27] Thus, consumer welfare offers a useful yardstick to judges confronted with antitrust problems. The uniqueness of the law surrounding professional sports, however, presents some special difficulties.

II. The Unique Position of Antitrust Law in Sports

The world of sports has long been an outlier from larger jurisprudential trends, and nowhere has this been more conspicuous than in the realm of antitrust.[28] A classic example of this relative insulation can be seen in the Supreme Court's opinion in

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[25] Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J.L. & PUB. POL'Y 449, 453 (2008).

[26] Telephone Interview with Mark S. Levinstein, Partner, Williams & Connolly (May 7, 2012) [hereinafter "Interview with Mark. S. Levinstein"].

[27] *Id.*

[28] Cyntrice Thomas et al., *The Treatment of Non-Team Sports Under Section One of the Sherman Act*, 12 VA. SPORTS & ENT. L.J. 296, 296 (2013) ("Sports have introduced a unique problem in the application of the Sherman Act.").

Flood v. Kuhn.[29] A groundswell in the history of both law and baseball, *Flood* had two major implications. First, baseball was granted broad immunity from many tenets of antitrust law, and the Court held that only Congress could remove this immunity.[30] Second, the Court affirmed that all other professional sports (besides baseball) were subject to antitrust law's traditional strictures.[31]

The degree to which a sports league is insulated from—or subject to—antitrust law turns largely on the "single entity" question. In other words, this inquiry asks whether a league is acting as a unified collection of teams (*i.e.*, a single entity) or an assortment of individual parties when it is making business decisions on salaries and other matters.[32] This characterization determines the reach of the Sherman Act.[33] Section 1 of the Sherman Act expressly requires a "contract, combination, or conspiracy" in order for the legislation to apply.[34] The writ of the second section is broader, applying to "every person who shall monopolize."[35] The key difference between the two sections is that while the first requires the involvement of two distinct parties to a collusive arrangement that restrains trade, the second may implicate a single party. When applied in the sports law context, then, "[t]he obvious question" is "whether the league—the NFL, the NBA or the NHL—when it adopts intra-league policies is a single entity subject only to section 2 of the Act or a combination of separate clubs whose internal arrangements are exposed to section 1 scrutiny."[36] The answer to this question has far-reaching effects. While typically the issue has

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[29] Flood v. Kuhn, 407 U.S. 258 (1972).
[30] *Id.* at 412. The reserve system upheld by the Court, however, was ultimately dismantled by collective bargaining, not congressional action.
[31] *Id.* at 418.
[32] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
[33] Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012).
[34] *Id.* § 1.
[35] *Id.* § 2.
[36] WEILER & ROBERTS, *supra* note 4, at 128.

been raised in connection with suits brought against the league by franchise holders (Oakland Raiders owner Al Davis providing one of the more colorful examples[37]), the single entity determination also informs league practices regarding the players market.[38]

Even more important to understanding antitrust in the sports context is the so-called labor exemption.[39] The labor exemption to the federal antitrust laws removes from antitrust scrutiny restraints on trade that are the product of a collective bargaining agreement between labor and management.[40] Courts have by and large accepted that restraints of trade exist not just in the product

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[37] *See, e.g.*, Bruce Weber, *Al Davis, the Controversial and Combative Raiders Owner, Dies at 82*, N.Y. TIMES (Oct. 8, 2011), http://www.nytimes.com/2011/10/09/sports/football/al-davis-owner-of-raiders-dies-at-82.html ("Davis, who became the team's principal owner in 2005, sued the N.F.L. several times, once attacking the league as an unlawful cartel for forbidding him to move the Raiders from Oakland to Los Angeles to take advantage of a larger market.").

[38] In the landmark *American Needle* case, the Supreme Court held that, at least as far as intellectual property rights connected with team merchandise are concerned, the NFL's attempt to operate as a "single entity" in order to offer exclusive merchandising rights amounted to concerted action that is not categorically beyond Section 1's coverage. As the Court wrote, "it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property. An ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label." Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 197 (2010). In other words, the Court focused on substance, not form, in analyzing the single entity question.

[39] *See, e.g.*, Kieran Corcoran, *When Does the Buzzer Sound? The Non-statutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1045 (1994).

[40] *See* Douglas L. Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183, 1184 (1980). It is often referred to as the "non-statutory labor exemption" because it is a judicial practice, not a legislative mandate. *See* Joseph T. Casey, Jr. and Michael J. Cozzillio, *Labor-Antitrust: The Problems of Connell and a Remedy that Follows Naturally*, 1980 DUKE L.J. 235, 235 (1980).

market, but in the labor market as well. This conclusion troubles some observers, particularly as the judiciary tends to assume this proposition without engaging in serious consideration of its merits. Commentators like Gary Roberts observe that the trade and commerce that antitrust seeks to protect from collusive restraint (or monopolization) does not include the labor market. And indeed, placing labor within the ken of the Sherman Act seems to contradict one of the defining features of antitrust law of the last four decades—namely, the notion that the guiding purpose of antitrust enforcement should be the enhancement of consumer welfare. As Roberts articulates it, the idea that the Sherman Act bars restraint of trade in the labor market "raises significant questions within contemporary scholarly and judicial analysis which presumes that the principal, if not exclusive, aim of antitrust law is to enhance consumer welfare through a more efficient allocation of economic resources."[41]

The applicability of this iteration of the consumer-welfare paradigm to sports law varies depending upon whether monopoly or monopsony power is at stake. Monopoly power typically imposes two costs. First, because one firm controls market power, consumers must pay a higher price for goods and services, and thus there is a transfer of wealth from consumers to producers.[42] Second, the amount of the good or service produced will drop, which inflicts a deadweight loss upon the economy as a whole (*i.e.*, some factors of production that would be most efficient at creating the monopolist's product are diverted into areas for which they are less suited).[43] The latter consequence of monopoly power—the

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[41] WEILER & ROBERTS, *supra* note 4, at 128.

[42] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) ("Monopoly power is the power to control price or exclude competition.").

[43] Albert A. Foer, *The Spectrum of Monopolism: An Introduction to the Future of Monopoly and Monopolization*, 2008 WIS. L. REV. 225, 226 (2008) ("[S]tandard economics teaches that monopoly creates a deadweight loss that is of negative value to the society compared to a

deadweight loss—tends to animate Chicago School economists like Bork more than the former.

Where there is monopsony power, however, the harm is inverted.[44] Sellers are forced to accept a lower price, given that there is only one purchaser, and this transfers wealth from the seller to the buyer.[45] Given the diminished profit margins presented by a monopsony, sellers will tend to produce less of the good being sold, which also imposes costs on society.[46] As with monopoly power, most agree that the societal costs are concerning; unlike monopoly power, fewer observers fret over the wealth transfer effect. Further, monopsony power can be difficult to evaluate. One writer notes that the existence of monopsony power "may actually lower the cost and enhance the quality of output of that factor of production—in particular, labor—for the benefit of consumers who almost invariably outnumber the producers of any one

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competitive model because it means that goods and services for which there would be a demand at a competitive price will not be produced.").

[44] A monopsony is "A market situation in which one buyer controls the market." *Monopsony*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Monopsony is often thought of as the flip side of monopoly. A monopolist is a seller with no rivals; a monopsonist is a buyer with no rivals. A monopolist has power over price exercised by limiting output. A monopsonist also has power over price, but this power is exercised by limiting aggregate purchases. Monopsony injures efficient allocation by reducing the quantity of the input product or service below the efficient level." LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 137–38 (2000).

[45] Laura Alexander, *Monopsony and the Consumer Harm Standard*, 95 GEO. L.J. 1611, 1613 (2007) ("In monopoly and monopsony, the quantity of goods transacted decreases and wealth is transferred to the parties with market power.").

[46] Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 599 (2005) ("As a result, producers in the monopsonized market with average costs between the competitive price and the monopsony price will withdraw from production, causing supply in the final goods market to be less than demand at the competitive price.").

product."[47] This last point is crucial to understanding the *Kartell* case discussed in the following section, which analyzes judicial consideration of potential pro-competitive benefits from wage controls in sports.

III. The Courts

A. Decisions Accommodating Wage Restraints

Kartell v. Blue Shield of Massachusetts, Inc. offers an interesting platform for discussion of some of these issues.[48] The case—aptly named given the antitrust context—considered whether Blue Shield, then the leading provider of health insurance in Massachusetts, violated the Sherman Act by requiring all doctors who performed services for patients insured by Blue Shield to accept its fee schedule. The First Circuit held it did not. Blue Shield had demanded that wages paid according to its scale be treated as full payment for services rendered, and doctors were prohibited from charging patients any additional fees.[49] The court upheld the arrangement despite evidence that the restriction dissuaded at least some young doctors from practicing medicine in Massachusetts (thus reducing the *quantity* of medical services available) and caused other doctors not to authorize sophisticated-but-more-expensive treatments for certain afflictions (thereby reducing the *quality* of medical services).[50] Nonetheless, the court found no antitrust violation, reasoning that the overall impact of this arrangement was to lower medical and insurance costs for consumers.[51] The court's discussion is worth excerpting at length:

> First, the prices at issue here are low prices, not high prices. Of course, a buyer, as well as a seller, can possess significant market power; and courts

[47] WEILER & ROBERTS, *supra* note 4, at 129.
[48] Kartell v. Blue Shield of Mass., 749 F.2d 922 (1st Cir. 1984).
[49] *Id.* at 923, 934.
[50] *Id.* at 924.
[51] *Id.* at 925.

> have held that *agreements* to fix prices—whether maximum or minimum—are unlawful. Nonetheless, the Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too *high,* not too low. And, the relevant economic considerations may be very different when low prices, rather than high prices, are at issue. These facts suggest that courts at least should be cautious—reluctant to condemn too speedily—an arrangement that, on its face, appears to bring low price benefits to the consumer.[52]

Kartell essentially draws a clear distinction between monopoly and monopsony power. Monopoly power strikes the court as invariably threatening the interests of consumers, and is therefore verboten. Monopsony power, on the other hand, does not engender a commensurate level of antitrust scrutiny for the simple reason that it tends to improve the situation of consumers in the marketplace.

The application of this reasoning to the world of sports is readily apparent. Sports leagues are effectively functional monopsonies. Players are selling, in the form of labor, a unit of production to these single purchasers. This arrangement explains the near-universal opposition of professional sports unions to curtailments of players' contracting power (*e.g.*, the draft or free-agent restrictions), because the more latitude a league has to limit a player's services to a single team, the closer the league comes to attaining monopsony power. Monopsony power, or at least the elements of it, grants the buying team the leverage to offer players lower salaries than they would otherwise command in an open market where all teams could bid for any individual's athletic

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[52] *Id.* at 930–31 (emphasis original). Notably, the court cited Bork for the proposition that "the Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too *high,* not too low." (emphasis original).

services.[53] Players, of course, are only tangentially concerned—if at all—with the impact of this setup on consumer welfare, whether consumer welfare is judged to be the prices that fans pay for tickets, the amount networks are willing to pay for broadcasting rights, or the overall quality of the product available to fans. Players and their representatives are acting more immediately to maximize their incomes and to enhance their share of aggregate wealth vis-à-vis team owners.

Although discerning the effects of monopsony power on consumer welfare is not a frequent judicial inquiry, *Kartell* is not the only case to grapple with the question. In *Fraser v. Major League Soccer, L.L.C.*, a federal district court expressly considered the issue in the context of sports.[54] The plaintiffs, players in the most prominent professional soccer league in the United States, challenged the league's "transfer fee," which authorized a player's former team to demand compensation from his new team for costs associated with "training and/or development."[55] The rule applied to players whose contracts with their former clubs had expired ("out-of-contract-players") as well as to players whose contracts were still in effect ("in-contract players").[56] Plaintiffs argued that as applied to out-of-contract players, the fee was a horizontal agreement in restraint of trade that limited the terms under which players may engage in price competition, and consequently was a per se illegal restraint of trade under Section 1 of the Sherman Act.[57] Defendant Major League Soccer ("MLS") countered that it had never paid or requested a transfer fee for an out-of-contract player, and had no intention of doing so in the future.[58] The court

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[53] In this pure free-market system, the best players in a major league would almost certainly be paid higher salries than under the current arrangement. *See infra* note 83.

[54] Fraser v. Major League Soccer, L.L.C., 7 F. Supp. 2d 73 (D. Mass. 1998).

[55] *Id.* at 75.

[56] *Id.*

[57] *Id. See also* 15 U.S.C. § 1.

[58] *Fraser*, 7 F. Supp. 2d at 75.

denied that the restraint was per se illegal. Instead, it evaluated it according to the Rule of Reason, meaning that the plaintiffs were required to show that the anticompetitive effects of the rule outweighed any putative pro-competitive benefits.[59]

Interestingly, the court took its cue from *Kartell* to acknowledge that pro-consumer benefits were potentially implicated in the arrangement. Citing the language from *Kartell* quoted above (*i.e.*, that courts are rightly reluctant to condemn an arrangement that appears to offer price benefits to the consumer), the *Fraser* court offered: "While it is not immediately clear that the transfer fee rule actually has this effect, it is not obviously out of the question that one of the effects of lower player salaries is lower prices for the consumer."[60] Accordingly, the court was prevented from deeming the transfer fee a per se violation of the Sherman Act, and instead conducted the more expansive Rule of Reason analysis. Though the comment was largely dicta, it was nonetheless novel for a court to contemplate potential consumer benefits from player wage restraints.

The *Fraser* case stands as the clearest example of a court acknowledging pro-competitive benefits from a wage restraint in sports. Thus, it may have struck some readers as a harbinger of things to come; or at the very least, an exemplar of a compelling alternative school of thought. Two cautionary notes should be sounded, however. The first is contextual. MLS faced unique challenges as a young league, in an arguably saturated viewership market, showcasing a sport of less-than-overwhelming popularity

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[59] *Id.* at 76. The Rule of Reason is defined as "[t]he judicial doctrine holding that a trade practice violates the Sherman Act only if the practice is an unreasonable restraint of trade, based on the totality of economic circumstances." *Rule of Reason*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[60] *Id.* at 78. *See also* State Oil v. Khan, 522 U.S. 3, 12 (1997) (emphasizing that low prices "benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition").

in the United States.[61] Given such circumstances, the league had to make special concessions to draw investors, including offering owner-protections that would be non-starters in other major sports leagues. "The MLS could basically say, 'look, we're a fledgling organization, and without this restraint we won't be able to have a league at all,'" observes Levinstein.[62] "If the MLS couldn't attract sufficient owners, then there is no league, so the issue over wages seems moot."[63] Thus, to get the league off the ground, the league had to limit price competition among owners. Second, and more prosaically, there is a tendency in all litigation to press as many arguments as possible into one's case; as a result, Levinstein notes, judges "often throw in the kitchen sink" when it comes time to write the opinion.[64] Thus, it is worth reiterating that the sentence in the *Fraser* opinion referencing "pro-competitive justifications" was essentially dicta; at the very least, it was hardly central to the court's holding.[65] As time proved, *Fraser* did not inaugurate a revolution in antitrust litigation in sports, although the opinion will surely be mined by a future court willing to uphold player wage restraints on consumer welfare grounds.[66]

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[61] *Fraser* was decided in 1998, and it is worth noting that the sport has grown considerably in popularity since then. "Major League Soccer, the top North American men's professional league, has had average per-game attendance of 21,023 this season, an increase of almost 40% over the past 10 years. The league's title game, the MLS Cup, pulled in 1.6 million viewers in December, its biggest audience since 1997, the league's second season, according to Nielsen." Jonathan Clegg, *Has Soccer Finally Made It in the U.S.?*, WALL ST. J. (July 8, 2015), http://www.wsj.com/articles/has-soccer-finally-made-it-in-the-u-s-1436395661.

[62] Interview with Mark S. Levinstein, *supra* note 26.

[63] *Id*.

[64] *Id.*

[65] *Fraser,* 7 F. Supp. 2d at 78.

[66] Some contemporary commentary was more effusive about the implications of the case for a range of antitrust issues. *See, e.g.*, Edward Mathias, *Big League Perestroika? The Implications of Fraser v. Major League Soccer*, 148 U. PA. L. REV. 203, 203–04 (1999) ("The importance of *Fraser v. MLS* for the future of professional sports leagues, however,

B. Decisions Disallowing Wage Restraints

On the whole, however, most courts have declined to adopt the argument that aggressive wage restraints enhance consumer welfare.[67] One particularly vivid example of this judicial reticence emerged in the legal saga that enveloped football player Maurice Clarett.[68] Clarett, a standout running back at Ohio State, was a tremendously gifted athlete pegged by many analysts as an early-round draft pick.[69] Clarett's success on the field, however, was matched by repeated impropriety off of it, and school officials ultimately dismissed him from the program.[70] Determined none-

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transcends the continuing legality of the MLS regulations challenged in the suit. *Fraser* is momentous because it is the first antitrust challenge to a 'single entity league,' a league that is organized as a single corporation rather than as a group of individually owned teams.").

[67] It is worth remembering, however, that observers are working with a small sample size given the relative dearth of decisions in this area.

[68] Mike Freeman, *Citing Antitrust, Clarett Sues N.F.L. To Enter Its Draft*, N.Y. TIMES (Sept. 23, 2003), http://www.nytimes.com/2003/09/24/sports/football-citing-antitrust-clarett-sues-nfl-to-enter-its-draft.html.

[69] Mike Freeman, *When Values Collide: Clarett Got Unusual Aid in Ohio State Class*, N.Y. TIMES (July 13, 2003), http://www.nytimes.com/2003/07/13/sports/colleges-when-values-collide-clarett-got-unusual-aid-in-ohio-state-class.html?pagewanted=all ("Clarett is also thought likely to leave college for the National Football League before exhausting his four years of eligibility.").

[70] *Id.* ("Clarett walked out of a midterm exam last fall in an introductory course in African-American and African studies without completing the exam. He never retook the midterm and did not take the final exam. But he passed the course after taking oral exams instead, an Ohio State official said."). *See also* Damon Hack, *Lawyer Says Clarett Prefers Return to Buckeyes Over Draft*, N.Y. TIMES (Jan. 17, 2004), http://www.nytimes.com/2004/01/17/sports/colleges-lawyer-says-clarett-prefers-return-to-buckeyes-over-draft.html?_r=0 (recalling that Clarett was "charged with filing a police report that exaggerated the value of items stolen from a car he had borrowed … pleaded guilty to a misdemeanor charge of failing to aid law enforcement and was fined $100"). *See also* Mike Freeman, *Citing Antitrust, Clarett Sues N.F.L. To Enter Its*

theless to play professional football, Clarett moved to Los Angeles and sued to overturn a National Football League ("NFL") rule that prohibited players from entering the draft until they have been out of high school for at least three years.[71] The suit argued that the league's rule violated federal antitrust law and petitioned Federal District Judge Shira Scheindlin strike the mandate as an unlawful restraint. Clarett also sought to be declared eligible for the 2004 NFL draft (or alternatively, to force the league to hold a special supplemental draft sooner).[72] As the rules stood at the time, Clarett would not have been eligible until the 2005 draft.[73]

Draft, N.Y. TIMES (Sept. 23, 2003), http://www.nytimes.com/2003/09/24/sports/football-citing-antitrust-clarett-sues-nfl-to-enter-its-draft.html ("[A]n Ohio businessman had given Clarett a $500 check and paid at least $1,000 of his cellphone bills. It was those alleged extra benefits that led to an N.C.A.A. investigation into Clarett's finances and ultimately his suspension from the team for at least one year.").

[71] Tom Friend, *Clarett's Call Came Two Hours Before Arrest*, ESPN THE MAG. (Aug. 16, 2006), http://espn.go.com/nfl/columns/story?id=2545078 (recounting Clarett's troubled history after leaving Ohio State). *See also* Freeman, *Citing Antitrust*, *supra* note 69.

[72] The suit contended: "Had Clarett been eligible for the 2003 draft, it is almost certain he would have been selected in the beginning of the first round and would have agreed to a contract and signing bonus worth millions of dollars." *Id.* Also, Clarett's attorneys argued that the rule is not contained in the collective bargaining agreement and that the rule's purpose is to "perpetuate a system whereby college football serves as an efficient and free farm system for the N.F.L. by preventing potential players from selling their services to the N.F.L. until they have completed three college seasons." *Id.*

[73] The NFL is one of the only major professional sports organizations with such a stringent age requirement for entering players. League executives have maintained that the rule is in place to protect younger, smaller players from competing against older and presumably more physical opponents. *Id.* Clarett's lawyer Alan Milstein offered his personal take on the NFL's regulations in an interview: "I see Maurice's case as a league trying to make certain players, young players, who are often poor, wait on earning a living, while the N.F.L. and colleges, either

The court agreed that the NFL's rule was an unlawful restraint, but interestingly, near the end of the opinion, it considered the league's pro-competitive justifications for the rule. Since the case was decided under the Rule of Reason, the anti-competitive effect of the restriction had to be weighed against the league's arguments that the arrangement enhanced competition (a key tenet of Bork's framework). The NFL argued that the three-year requirement helped its member teams save money, as it streamlined the pipeline of players entering the league and prevented a free-market bidding war from sparking potentially ruinous competition. "The fact that the League and its teams will save money by excluding players does not justify that exclusion," wrote the court. "Indeed, the vast majority of anti-competitive policies are instituted because they will be profitable to the violators."[74] The court reasoned that such a holding risked upending the entire structure of antitrust law:

> The exercise of market power by a group of buyers virtually always results in lower costs to the buyers—a consequence which arguably is beneficial to the members of the industry and ultimately their consumers. If holding down costs by the exercise of market power over suppliers, rather than just by increased efficiency, is a pro-competitive effect justifying joint conduct, then section 1 can never apply to input markets or buyer cartels. That is not and cannot be the law.

Clarett's legal victory proved short-lived, however.[75] In an opinion written by future Supreme Court Justice Sonia Sotomayor, the

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directly or indirectly, make millions off of them," Milstein said. Mike Freeman, *The Case for Clarett*, N.Y. TIMES (Sept. 25, 2003), http://www.nytimes.com/2003/09/25/sports/football/25milstein.html.

[74] Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 409 (S.D.N.Y. 2004).

[75] Damon Hack, *Judge Orders N.F.L. to Permit Young Athletes to Enter Draft*, N.Y. TIMES (Feb. 6, 2004),

Second Circuit held that the NFL's eligibility rules were immune from antitrust scrutiny under the non-statutory labor exemption.[76] Unfortunately, the appellate court did not comment on the district court's weighing of the lower-costs-to-consumers argument excerpted above.

The courts, however, had rejected the NFL's consumer welfare argument prior to the *Clarett* decision. In *Brown v. Pro Football, Inc*., the federal district court for Washington, D.C. also swatted away the NFL's argument that wage controls convey price

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http://www.nytimes.com/2004/02/06/sports/football-judge-orders-nfl-to-permit-young-athletes-to-enter-draft.html (noting that the opinion proved deeply divisive, with one observer commenting "the labor exemption is just about as clear as can be on this point").

[76] Clarett v. Nat'l Football League, 369 F.3d 124, 125 (2d Cir. 2004). In the wake of the decision, Clarett's once-promising career continued to deteriorate. He was a surprise third-round pick by the Denver Broncos in 2005, but news reports indicated that his temperament and work ethic created friction in the organization and he was released without a single regular season carry. Clarett was alleged to have robbed two people of a cell phone early on New Year's Day in 2006; later that year, he was found parked near the home of a key witness in the upcoming robbery trial, wearing a bulletproof vest, with an automatic weapon in the car. In 2010, he was released from jail and was scheduled to begin classes at Ohio State. JoAnne Viviano, *Clarett Arrested With Four Loaded Guns*, WASH. POST (Aug. 10, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/08/09/AR2006080900316.html. *See also* Michael Wilbon, *The Clarett Saga Is a Wake-Up Call for Us All*, WASH. POST (Aug. 10, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/08/09/AR2006080902074.html; Associated Press, *Clarett Agrees to Plea Deal, Will Serve Three-And-A-Half Years,* ESPN (Sept. 20, 2006), http://espn.go.com/nfl/news/story?id=2593068; Erick Smith, *After Release from Prison, Clarett Back as Student at Ohio State*, USA TODAY (July 26, 2010), http://www.cleveland.com/buckeyeblog/index.ssf/2010/07/maurice_clarett_back_at_ohio_s.html.

benefits to consumers.[77] The *Brown* case involved a challenge to the NFL's wage scale for "development squad" players, or players who participate in practices to help the starters sharpen their schemes for regular Sunday opponents.[78] To head off competition among teams for the best development squad players, a league-wide rule leveled their salaries at $1,000 per week. The plaintiffs, a class of practice squad players, challenged this uniform wage provision as violating the Sherman Act. The court rebutted the NFL's assertion that wage-fixing restraints imposed by employer groups on employees do not implicate antitrust laws, finding them "price-fixing restraints subject to the antitrust laws," particularly Section 6 of the Clayton Act.[79] Thus, the court found "no discernible reason, given that the Sherman Act applies to services as well as goods, why wage-fixing by purchasers of services should be treated differently than price-fixing by sellers of goods."[80] Applying the Rule of Reason, the court granted the plaintiff players' motion for summary judgment.

The National Collegiate Athletic Association ("NCAA") has also proffered consumer welfare arguments to defend wage restrictions, albeit without much success.[81] Beginning in 1992, the NCAA had a rule in place that limited the number of coaches a program could have and specified pay ceilings for assistants.[82] A

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[77] Brown v. Pro Football, Inc., CIV. A. 90-1071(REL), 1992 WL 88039, at *1 (D.D.C. Mar. 10, 1992), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996).

[78] Linda Greenhouse, *Supreme Court Considers Antitrust Case Against N.F.L.*, N.Y. TIMES (Apr. 5, 1996), http://www.nytimes.com/1996/04/05/sports/pro-football-supreme-court-considers-antitrust-case-against-nfl.html.

[79] *Id.* at 5. *See also* Clayton Act § 6, 15 U.S.C. § 17 (1982).

[80] *Brown*, 1992 WL 88039, at *5.

[81] Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998).

[82] Kirk Johnson, *Assistant Coaches Win N.C.A.A. Suit, $66 Million Award*, N.Y. TIMES (May 5, 1998),

class of college basketball coaches that fell into this "restricted earnings" group challenged the rule, alleging that limiting annual compensation for certain Division I assistant coaches at $16,000 was an unlawful restraint of trade. The court found the NCAA's argument that the regulation lowered operational costs unconvincing, as "cost cutting by itself is not a valid pro-competitive justification."[83] If it were, said the court, any group of competing buyers could agree on maximum prices.[84] Lower prices cannot justify a cartel's control of prices charged by suppliers, "because the cartel ultimately robs the suppliers of the normal fruits of their enterprise."[85] The court also noted that as a general matter, setting maximum prices reduces the incentive of suppliers to improve their products.[86]

The court's assumption seems reasonable, as it is certainly conceivable that coaches would be less inclined to improve performance absent the chance for increased pay. At the same time, however, entry-level coaches are likely motivated more by the opportunity to get exposure and experience than actual compensation, as is the case for many industries in which the supply of enthusiastic would-be participants outstrips demand.[87] Indeed, the

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http://www.nytimes.com/1998/05/05/sports/colleges-assistant-coaches-win-ncaa-suit-66-million-award.html.

[83] *Id.* at 1022.

[84] *See, e.g.*, Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235 (1948).

[85] *Id.*

[86] *Id.* ("As the Supreme Court reiterated in *Superior Court Trial Lawyers*, 'the Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services ... This judgment recognizes that all elements of a bargain-quality, service, safety, and durability-and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.'") (citation omitted).

[87] *See, e.g.*, Fred Thys, *Coaches at Some Liberal Arts Colleges Struggle with Low Pay*, WBUR (Aug. 13, 2015), http://www.wbur.org/2015/08/11/coaches-salaries-liberal-arts-colleges ("College coaches at big Division I schools can pull in big salaries. Last

NCAA claimed to have devised the rule in part to help streamline the career ladder for coaches.[88] Regardless, the court prohibited the NCAA from implementing the rule in question (or devising a similar rule) to regulate entry-level coach salaries and rejected the consumer welfare argument.

CONCLUSION

What, then, to make of the argument that expansive salary restrictions in professional sports should be permitted—and perhaps even encouraged—as beneficial to consumer welfare? Adherents of this point of view observe that player labor services are a component of the total price equation for a professional sports team, and therefore it is commonsensical for teams to fix prices for player services. By restricting wages, costs are lowered, and teams may reduce prices charged to consumers (or at the very least, there would be no need for an increase in what consumers are charged). However compelling in theory, such a position has proved a tough sell in reality. The Supreme Court and the lower federal courts have clearly stated that price fixing by purchasers is per se illegal

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year, for example, Derek Kellogg, the head coach of men's basketball at the University of Massachusetts Amherst, made $1.1 million. But at mid-sized liberal arts colleges around New England, compensation for coaches is often a very different story. … [One assistant coach], who worked at Williams until this year, says he was paid $18,000 a year by the college. ... Coaches at Williams and Dartmouth say the colleges are able to pay the salaries they do because they always have a plentiful supply of passionate young coaches.").

[88] Kirk Johnson, *Assistant Coaches Win N.C.A.A. Suit, $66 Million Award*, N.Y. TIMES (May 5, 1998), http://www.nytimes.com/1998/05/05/sports/colleges-assistant-coaches-win-ncaa-suit-66-million-award.html ("The rule restricting salaries, approved by the N.C.A.A.'s board at its national convention in 1991, took effect in August 1992. It was aimed at controlling costs, but also, the association said, at providing a career ladder for beginning coaches. The new rules eliminated one coaching position from Division I rosters, cutting the number of assistants to four from five, and capped the salary of the fourth and lowest member of the staff.").

on the grounds that such agreements restrain trade, reduce competition, and distort the proper functioning of competitive markets. Moreover, even if such wholesale wage restraints were permissible, they would not necessarily lead to lower prices for consumers. Unlike a linear supply chain in which input units are clearly and closely interrelated, profits in sports do not move in such a direct fashion. Owners, reasonably enough, are interested in maximizing profits, and do not sell players to consumers on a unit-by-unit basis (stated more aphoristically, a shortstop is not a refrigerator). Thus, while stricter wage restraints may result in increased savings to owners, it is not at all clear that they would result in reduced prices for consumers. Owners might simply pocket the difference, especially given the relative inelasticity of sports ticket prices.

Of course, most major sports leagues already exercise wage restraints through the use of a salary cap.[89] Without a cap in place, salaries for professional athletes would look dramatically different than they do today. In such a universe, the top players would be at worst unaffected and at best would be paid a premium for their services. Superstars like Lebron James[90] or Michael Jordan would

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[89] Internationally, professional sports leagues have an even greater range of rules and regulations to restrain player wages. *See* Stephen F. Ross, *Player Restraints and Competition Law Throughout the World*, 15 MARQ. SPORTS L. REV. 49, 49–50 (2004) ("In most professional sports leagues around the world, participating clubs compete among themselves to sign players, subject to rules imposed by the league or agreed to among themselves. Rules imposed by leagues often significantly restrain competition for players.").

[90] Allen St. John, *What Would LeBron James Be Worth In A Free Market NBA?*, FORBES, July 11, 2014 ("But James and a small handful of other mid-career superstars are simply worth lots more than any team can pay them under the salary cap."); Arash Markazi, *What Could LeBron James, Stephen Curry Make Without Salary Cap?*, ESPN (July 5, 2015), http://espn.go.com/nba/story/_/id/13182761/what-lebron-james-stephen-curry-kevin-durant-make-salary-cap ("James will once again be the most underpaid athlete in professional sports. There's nothing James or the Cavaliers can do about this. He plays in a league with maximum contracts and salary caps. James, who is expected to make about $22 mil-

command astronomical salaries while in their prime, and would benefit from this pure free-market system if evaluated from a purely contractual standpoint (indeed, Jordan was paid over $30 million under the soft cap in place during the 1997–98 season, an enormous sum relative to his colleagues).[91] The real cost of a free-market system would be borne by the least desirable players—who also happen to be the most fungible—who in the absence of a collective bargaining agreement would lose their minimum salaries, and potentially healthcare and other benefits as well. "In sports, the union gives up the rights of the rich to assist the less rich," says Levinstein. "The agreement helps the average journeyman but hurts the star."[92] Because of the wage-depression effect that the salary cap exerts on elite players, Levinstein criticizes it as "simply indefensible price fixing."[93]

Antitrust is a complicated discipline, and it only grows more complex when overlaid on the world of sports. Numerous carve-outs, like the non-statutory labor exemption and the single-entity defense, have muddied the legal waters as the ceaseless tug-of-war between sports leagues and players carries on. While the argument evaluated in this article (*i.e.*, consumer welfare is enhanced by restraining the salaries of professional athletes) is ultimately unconvincing, it is not meritless. Certain restrictions on player wages may well be good for the game. For instance, while few are pining for a return to the bad old days of the reserve clause, it is an open question as to whether unrestricted free agency

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lion next season, can try and squeeze as much out of the current system as possible, but it will always shortchange him at least half of his actual worth, according to estimates from industry experts.").

[91] Joe Flood, *NBA Parity? History Shows New Labor Deals Achieve the Opposite*, SPORTS ILLUSTRATED (Sept. 7, 2011), http://www.si.com/nba/2011/09/07/nba-parity ("During the 1997–98 season, the salary cap was $26.9 million, but the soon-to-be-retired Jordan was making more than $30 million thanks to the [Larry] Bird exception.").

[92] Interview with Mark S. Levinstein, *supra* note 26.

[93] *Id.*

has been an unfettered good for baseball and other professional sports.[94] The annual reshuffling of rosters, lament many owners and some fans, erodes team loyalty and detracts from viewer enjoyment of the game[95] (as the inimitable Jerry Seinfeld put it, modern fans are left "rooting for laundry").[96] Still, while wage restraints are not without their benefits in the context of professional sports, the costs they impose have proved to be too much to bear. Given the popularity and wealth of sports in the United States and the prodigious creativity of attorneys representing both leagues and players, however, it is clear that this debate is far from settled.

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[94] *See, e.g.*, *Flood*, 407 U.S. at 258; Federal Baseball Club v. Nat'l League, 259 U.S. 200 (1922).

[95] "Baseball's owners have argued strongly for decades … that 'free agency [leads] to league domination by teams with the largest markets, destroying [the] competitive balance' of the game. Indeed, even the fans have shared such worries, going so far as to say that free agency threatens the 'very essence of sport.' The basic argument is that in a free market for player services, rich teams from large markets would dominate the market for the most talented players, leaving the less wealthy small market clubs to field their teams from a pool of less desirable players. The resulting uncompetitive baseball games would diminish attendance and revenues across the board—even in the dominant markets, where fans would quickly tire of lopsided scores and uncontested pennant races." Jesse Gary, *The Demise of Sport? The Effect of Judicially Mandated Free Agency on European Football and American Baseball*, 38 CORNELL INT'L L.J. 293, 316–17 (2005). After summarizing those arguments, the author observes "such destruction has not befallen baseball" and indeed "this prediction defies general economic and statistical reason." *Id*.

[96] Scott Ostler, *For A's Fans, A Clean Start in Rooting for Laundry*, S.F. GATE (Feb. 8, 2015), http://www.sfgate.com/sports/ostler/article/For-A-s-fans-a-clean-start-in-rooting-for-6070074.php ("Jerry Seinfeld famously noted that sports fans cheer for their teams despite wholesale roster changes, so you're really rooting for laundry.").

HIDDEN HANDS THAT SHAPED THE MARKETPLACE OF IDEAS: TELEVISION'S EARLY TRANSFORMATION FROM MEDIUM TO GENRE

Jon M. Garon*

ABSTRACT

In a few decades from the beginning of national radio broadcasts to the Post-War cultural explosion, artists, politicians, lawyers, and spies forged the Golden Age of Television. Conflicting pressures of media censorship, modernist design, American hegemony, expressionist art, anti-communist legislation, and TV ownership limitations clashed and reshaped the cultural identity of the American viewer. These forces competed for dominance, shaping the content, empowering new producers, and setting new standards for artist and viewer alike.

Studies on the broadcast industry marketplace assessed the efficiency of broadcast licensing but failed to identify either the influences or goals of the emerging television market. This article develops the origins of television from its beginning in radio and film innovations. It then chronicles the surprising influences of modern art as part of the government's strategy to address Cold War concerns. Cold War politics, nascent marketing strategies, and cutthroat business practices combined to shape the Golden Age of Television. This article adds a legal and business commentary to television's early engagement with expressionist art and the risk-taking in the dynamic new medium.

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> The hand that rules the press, the radio, the screen and the far-spread magazine, rules the country.
>
> – Learned Hand[1]

INTRODUCTION

The early years of commercial television triggered a transformation in art, culture, law, and politics which redefined both domestic and international culture. These changes were not inevitable, but they were inexorable; each domino toppling the next in line as the technology opened our eyes to the world. It is generally accepted that television has shaped American culture more than any invention,[2] so it is critical to understand that the shape of television was not itself pre-ordained. Rather, the political, regulatory, and creative influences on television combined to make a new medium, unlike that of the theatre, film, or radio that had earlier mediated U.S. culture. These influences defined television, which in turn reshaped civilization. As such, these influence and choices must be clearly understood because we stand again at a precipice regarding transformative new media.

> If we wish to have any clear notion about the machine, we must think about its psychological as well as its practical origins; and similarly, we must appraise its esthetic and ethical results. . . . The vast material displacements the machine has made in our physical environment are perhaps in the long run

[1] Judge Learned Hand, Memorial Service for Justice Brandeis (Dec. 21, 1942).

[2] *See*, *e.g.*, U.S. HISTORY ONLINE TEXTBOOK, LAND OF TELEVISION, http://www.ushistory.org/us/53c.asp, (last visited Jan. 30, 2016).

> Perhaps no phenomenon shaped American life in the 1950s more than television. At the end of World War II, the television was a toy for only a few thousand wealthy Americans. Just 10 years later, nearly two-thirds of American households had a television. . . . Television forever changed politics. The first president to be televised was Harry Truman. When Estes Kefauver prosecuted mob boss Frank Costello on television, the Tennessee senator became a national hero and a vice presidential candidate.

> less important than its spiritual contributions to our culture.[3]

Television is at once a machine and yet something much greater. It transmitted sporting events, news, entertainment, and political campaigns while at the same time, it quickly emerged as its own medium. Pioneering eighteenth century economist, Adam Smith tried to explain the origins of such markets in an earlier age, but even as Smith described the self-interest that motivated economic actors, he did so without taking into account the redefinition of the marketplaces they would engender.[4]

If television has had as great an influence on culture as industrialization, then the call to understand its structural implications should be met. The role of the government, through Congressional hearings, regulatory licensing, and covert operations must all be taken into account. In the current market, broadcast television is in significant decline while non-broadcast media is becoming the dominant cultural ethos. Therefore, it becomes critical to understand the pressures shaping these new media and learn lessons from televisions earlier rise and fall.

This article highlights the salient factors that shaped the Golden Age of Broadcast Television and offers comparisons for its burgeoning replacement. Each of the factors – business, technology, war, regulation, politics, art, and culture – combined at a unique moment following World War II to awaken an America that itself was moving to the center of the world stage. Perhaps surprisingly, the role of the Hollywood Blacklist and the Central Intelligence Agency's ("CIA") response to the Cold War were among the most critical of factors that intersected with more traditional battles over technology and finance to shape the most transformative invention in media history. Taken together, these influences capture American culture and hold the keys to its future.

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[3] LEWIS MUMFORD, TECHNICS AND CIVILIZATION, at xv (1964).

[4] *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (EDWIN BULLOCK ED. 1909).

I. Business and Technology

"It is naturally given to all men to esteem their own inventions best."

— Thomas More

The battle to control the television industry was fought through a series of interdependent battles; fights over technology; competition for content; influence over the artists; and finally a race to win over the public. Each of these battles established the framework for the next competition, as the players shifted in their influence and power. In each battle, there was an "invisible hand" of self-interest[5] motivating the participants to challenge the status quo in order to corner the market for the new medium, both to reap its financial benefits and to dominate the competitors.

At its origins, the battle to control television was understood merely as a race to establish and patent a new technology.[6] But even this introductory step combined technology with finance and management. RCA,[7] led by David Sarnoff, won the competition because RCA combined these elements at a time when no other competitor had mastery of all three.[8] It was the combination of all

[5] *See* SMITH, *supra* note 4, at 351 ("By … directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.").

[6] *See* ROBERT CAMPBELL, THE GOLDEN YEARS OF BROADCASTING: A CELEBRATION OF THE FIRST 50 YEARS OF RADIO AND TV ON NBC 50 (1976).

[7] *History of RCA*, RCA, http://rca4tv.com/company/history.asp (last visited Jan. 30, 2016). RCA originally stood for the Radio Corporation of America, which was formed in 1919. Conceived as a *marriage of convenience* between private corporations and the U.S. government for the development of wireless communication, the RCA company soon grew in a different direction, becoming an innovative leader in broadcasting and entertainment products. *Id.*

[8] CAMPBELL, *supra* note 6, at 56 (in the spring of 1941, the Federal Communications Commission granted NBC the first commercial television license).

these elements rather than innovation in just the patentable elements of television that gave RCA its dominance.[9]

Sarnoff began as an employee at the predecessor of RCA, working as a telegraph operator and manager. He moved quickly through the ranks of the company as he developed the models for creating a national broadcasting company with original programming.[10] By 1915 he had conceived radio as a "household utility" utilizing "Radio Music Box" and arranged for several different wavelengths, which would be changeable with the throwing of a single switch or pressing of a single button."[11] Sarnoff went beyond the standard radio, describing in a business memo to his superiors the outline of what eventually developed as the national broadcast network system.

> [Sarnoff] invented the system of providing programs for [radios] by calling for "… a chain of national broadcasting stations . . . simultaneously radiating the same program, what it may be, to reach every city, every town, every village, every hamlet, every home in the United States and with an organization capable of measuring up to the responsibilities of that character of a national service."[12]

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[9] *See* David Halberstam, *CBS: The Power and the Profits*, THE ATLANTIC (Jan. 1976), http://www.theatlantic.com/magazine/archive/1976/01/cbs-the-power-and-the-profits/305304/. David Sarnoff had been a poet of technology, the protégé of Marconi, a visionary in a new and revolutionary field. In the early twenties he had dreamed of installing something called the Radio Music Box in every American home, and by the thirties, when radios were finally arriving in people's homes, he was already pushing for something called television. *Id.*

[10] CAMPBELL, *supra* note 6, at 22.

[11] Jerome B. Wiesner, *Forward*, *in* DAVID SARNOFF, LOOKING AHEAD, at vii (1968) (quoting letters of David Sarnoff). *See also* CAMPBELL, *supra* note 6 at 22 (Sarnoff proposed "'a radio music box' and outlin[ed] a plan of development that he believed "would make radio a household utility." He suggested that such a device could carry lectures, music, major national events, baseball scores, and other matters of interest . . . .").

[12] Wiesner, *supra* note 11, at viii; *see also* CAMPBELL, *supra* note 6, at 29.

In 1922, Sarnoff was general manager of RCA, then owned in part by General Electric ("GE"). He wrote to the GE ownership that a "specialized organization would be needed" to maintain a national broadcast supporting news, events, and entertainment.[13] In June 1922, he also wrote to GE that the "solution to the broadcasting problem" required a national broadcasting system in which "broadcasting represents a job of entertaining, informing, and educating the nation and should, therefore, be distinctly regarded as a public service."[14] In shaping what would become the business plan for national radio and television broadcasting, Sarnoff also framed his business as the distribution of a public good as well as a private enterprise.

RCA established a national broadcast model in 1921 by nationally broadcasting a boxing prizefight, dubbed "the "battle of the century" by boxing enthusiasts, the fight between Jack Dempsey and Frenchman Georges Carpentier."[15] The fight established the national broadcasting model and the leadership of RCA. Nonetheless, AT&T was the leading corporation in broadcasting until 1925 because it had the transmission lines to relay broadcast signals from station to station, but it was not focused on the business of entertainment, so it sold its broadcast station–WEAF to RCA–which later became RCA's NBC station.[16] Sarnoff understood that

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[13] CAMPBELL, *supra* note 6, at 29.

[14] DAVID SARNOFF, LOOKING AHEAD 41 (1968) (Letter to E. W. Rice, Jr., Honorary Chairman of the Board, General Electric Company, June 17, 1922).

[15] Carmela Karnoutsos, *Dempsey Carpentier Fight*, NEW JERSEY CITY UNIVERSITY, https://www.njcu.edu/programs/jchistory/Pages/D_Pages/Dempsey_Carpentier_Fight.htm (last visited Jan. 31, 2016) ("The "battle of the century" is also celebrated as the first sports event broadcast on the radio, the new mass communications medium of the decade. . . . Telephone lines and a temporary radio transmitter, sponsored by the Radio Corporation of America, were installed . . ."). SARNOFF, *supra* note 14, at 34.

[16] CAMPBELL, *supra* note 6, at 29. *See also* John McDonough, *First Radio Commercial Hit Airwaves 90 Years Ago*, NPR (Aug. 29, 2012), http://www.npr.org/2012/08/29/160265990/first-radio-commercial-hit-airwaves-90-years-ago (". . . AT&T sold WEAF to the National Broadcasting Company and left radio for good. But it left behind the financial structure on which American commercial broadcasting would grow rich through advertising. WEAF

the model he developed for radio would apply equally well to the emerging technology of television and sought to develop the technology essential for television from its earliest beginnings.[17]

RCA based its technology on patents by Vladimir K. Zworykin, a Russian engineer who was hired by Sarnoff to develop RCA's television system for its NBC broadcast system.[18] Zworykin was a very early pioneer in electronic television. He earned his electrical engineering degree in 1912 and studied the potential of cathode ray tube technology from one of the pioneers in the field.[19] Zworykin's initial iconoscope patent was filed in 1923, giving Zworykin and RCA the legal priority for television.[20]

Modern technology historians often point to Philo Farnsworth as the true inventor of television,[21] but this approach takes too nar-

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would become the flagship station of the NBC network. It became WNBC in 1946 and disappeared in 1988.").

[17] SARNOFF, *supra* note 14, at 88 (quoting Memorandum, "Radio Broadcasting Activities," to RCA Board of Directors, "I believe that television, which is the technical name for seeing instead of hearing radio, will come to pass in due course").

[18] CAMPBELL, *supra* note 6, at 55.

[19] Robert McG.Thomas Jr., *Vladimir Zworykin, Television Pioneer, Dies At 92,* N.Y. TIMES (Aug. 1, 1982), http://www.nytimes.com/1982/08/01/obituaries/vladimir-zworykin-television-pioneer-dies-at-92.html ("In 1912 he earned a degree in electrical engineering from the St. Petersburg Institute of Technology, where he studied under Prof. Boris Rosing, whose belief that the future of television lay in the direction of the cathode ray tube and not mechanical systems . . . .").

[20] *See* McCreary v. Zworykin, 55 F.2d 445, 446 (C.C.P.A. 1932) ("[Zworykin] filed on Dec. 29, 1923. [Zworykin] therefore is the senior party. The principal questions before us relate to the transmitter cathode ray tube disclosed by Zworykin . . . .").

[21] *See Philo Farnsworth*, NNDB, http://www.nndb.com/people/662/000024590/ (last visited Jan. 30, 2016) ("Farnsworth built his first television camera and receiving apparatus, and on 7 September 1927 he made the first electronic transmission of television, using a carbon arc projector to send a single smoky line to a receiver in the next room of his apartment.") *but see* ALBERT ABRAMSON, ZWORYKIN, PIONEER OF TELEVISION 210 (1995) (discussing the foundational patents by Zworykin on the iconoscope and picture tube whereas Farnsworth's contributions included "his many basic patents covering low-

row an understanding of television. In 1922, at the age of fifteen, Farnsworth explained his theory for how a combination of photoelectric cell and cathode ray tube would allow the transmission of electronic signals that could reproduce live, moving images.[22] By 1927, the young Farnsworth had begun to test his electronic system.[23]

Brilliant though it was, and perhaps developed without the aid of reference to prior research, Farnsworth was not the first to conceive the innovation of television. "As early as 1897, German scientist Karl Ferdinand Braun developed the first cathode ray tube scanning device, otherwise known as an oscilloscope."[24] An American inventor, Charles Francis Jenkins also pioneered the television. He published an article on "Motion Pictures by Wireless" in 1913 and by 1923 he transmitted moving silhouette images for witnesses.[25]

In contrast, Sarnoff's RCA began broadcasting from the top of the Empire State Building in 1931, despite the limitations of operating a mechanical system rather than an electronic one.[26] The RCA broadcasts from the Empire State Building switched to electronic two years later, in 1933.[27] As a result, during the late 1920's and early 1930's, Farnsworth had the technological edge, but neither company had anything near a commercial product.

Farnsworth's many patents and innovations eventually led to successful patent claims of his own and he eventually negotiated a successful patent royalty agreement with RCA.[28] Farnsworth was a

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velocity beam scanning, synchronizing, generating the high voltage from the horizontal scan frequency, and maintaining a constant black level . . . .").

[22] GEORGE EVERSON, THE STORY OF TELEVISION: THE LIFE OF PHILO T. FARNSWORTH 22–24 (1949).

[23] *Philo Farnsworth*, *supra* note 21.

[24] JON PEDDIE, THE HISTORY OF VISUAL MAGIC IN COMPUTERS 137 (2013).

[25] *See Charles F. Jenkins*, OHIO HISTORY CENTRAL, http://www.ohiohistorycentral.org/w/Charles_F._Jenkins (last visited Jan. 30, 2016).

[26] CAMPBELL, *supra* note 6, at 55.

[27] *Id.* at 55.

[28] EVERSON, *supra* note 22, at 249.

successful patent owner and used the patent system to develop his company's own business structure.[29] At the same time, Farnsworth's success as an inventor did not extend to console manufacturer or broadcaster, however, so while Farnsworth's contributions were essential to the technological development of early television prior to World War II, he was not part of television's emergence after the war.

In the race for supremacy between David Sarnoff and Philo Farnsworth, there is an explanation other than Sarnoff's thievery or Farnsworth's self-delusion. "The pages of the history of science record thousands of instances of similar discoveries having been made by scientists working independently of one another."[30] This may be triggered by competition or by the prerequisite conditions of invention becoming available to the scientific community.[31] The potential for television had been popularized throughout the 1920's so there was undoubtedly a great many inventors who attempted to be part of its development.[32] The creative convergence and rush to

[29] *Id.* at 245 ("After spending thirteen years in building a patent structure, [Farnsworth] faced the all-important question of whether [RCA] the leader among the possible customers, who would set the pattern for all the rest, would agree to pay for it.").

[30] Robert K. Merton, *Multiple Discoveries as Strategic Research Site*, (1963), *in* ROBERT K. MERTON, THE SOCIOLOGY OF SCIENCE: THEORETICAL AND EMPIRICAL INVESTIGATIONS 371 (1973).

[31] *Id.* ("Such occurrences suggest that discoveries become virtually inevitable when prerequisite kinds of knowledge and tools accumulate in man's cultural store and when the attention of an appreciable number of investigators becomes focused on a problem, by emerging social needs, by developments internal to the science, or by both.")

[32] *See*, *e.g.*, John Logie Baird, who first broadcast British television in 1925 using a mechanical system and U.S. inventor, Charles Francis Jenkins who published an article on "Motion Pictures by Wireless" in 1913 and transmitted moving silhouette images in 1923; Bell Telephone Laboratories inventors Herbert E. Ives and Frank Gray demonstrated another system in 1927. J. Fred MacDonald, *The Race for Television in One Nation Under Television: The Rise and Decline of Network TV*, J FRED MACDONALD, http://jfredmacdonald.com/onutv/race.htm (last visited Jan. 30, 2016) (noting Ernst F. W. Alexanderson, Lee de Forest, U. A. Sanabria, C. F. Jenkins, and Allen B. DuMont).

a market is perhaps another aspect of the invisible hand of the market.

Farnsworth naively believed that being unencumbered by relationships in radio or motion pictures was an advantage,[33] but history proved this theory wrong. Success hinged on much more than just effective technology.

To win in the marketplace for television, the victor had to first establish that marketplace. Economist Adam Smith was no stranger to markets and monopolies, explaining that the "monopoly of the home-market frequently gives great encouragement to that particular species of industry which enjoys it, and frequently turns towards that employment a greater share of both the labour and stock of society than would otherwise have gone to it . . . ."[34]

Farnsworth also naively believed that being excellent at technology would enhance his position in the market, but did not take into account the limited nature of the marketplace and the other elements essential to succeed.[35] "Farnsworth and his backers were practically the only ones doing television experimental work who did not have conflicting interests in radio and whose whole heart and interest were in the commercial exploitation of the new art."[36] Farnsworth could place only his technological acumen into the new market; nothing more.

RCA, in contrast, was in a position to invest not only the research needed to perfect and continually improve the broadcast of television but also the manufacture of the home television consoles and the content development in performers, scripts, and events to make the market essential to the new viewers.[37]

Sarnoff succeeded where Farnsworth and others failed because he brought more than just technical expertise. Sarnoff built RCA

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[33] EVERSON, *supra* note 22, at 249.
[34] SMITH, *supra* note 4, at 348.
[35] EVERSON, *supra* note 22, at 249.
[36] *Id.*
[37] *See, e.g.*, U. S. FEDERAL COMMUNICATIONS COMMISSION, No. 5060, REPORT ON CHAIN BROADCASTING (1941) [hereinafter CHAIN BROADCASTING REPORT].

into the dominant leader in radio. Writing in 1938, the Federal Communications Commission explained that "[t]he largest and oldest national organization is the National Broadcasting Company, Inc., founded in 1926, a subsidiary of the Radio Corporation of America. NBC operates two network systems, known as the "Red" and "Blue" networks."[38] The FCC ultimately passed regulations forcing NBC to divest itself of two networks, resulting in the sale of the Blue network, which was renamed and grew into ABC.[39]

The seminal market study by Ronald Coase provided great insights into the market of broadcast spectrum sales.[40] The theoretical start of the broadcast market analysis was the simple assumption that "radio, by virtue of the interferences, is a natural monopoly; either the government must exercise that monopoly by owning the stations, or it must place the ownership of these stations in the hands of one concern and let the government keep out of it."[41] The assumption of a natural monopoly created by radio spectrum limits drove much of the regulatory model until near the end of the twentieth century.[42]

Over the ensuing decades this resource has only grown in national importance. "The Commission has been charged with broad

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[38] CHAIN BROADCASTING REPORT, *supra* note 37. *See also* Nat'l Broad. Co. v. U.S., 319 U.S. 190**,** 190 (1943).

[39] 47 C.F.R. § 3.101–108. *See Radio Program Controls: A Network of Inadequacy*, 57 YALE L.J. 275, 296 (1947).

[40] *See* R. H. Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. (1959); Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967–68).

[41] *Id.* at 4 (quoting Commander Hooper before House Committee on the Merchant Marine and Fisheries, H.R. 13159, 65th Cong. (3d Sess. 1918)).

[42] *See*, *e.g.*, Nat'l Broad. Co. v. U.S., 219 U.S. 190, 213 (1943) (requiring control of spectrum use); Red Lion v. F.C.C., 395 U.S. 367, 376 (1969) (upholding scarcity doctrine as basis for regulating broadcast despite role of First Amendment concerns); Turner Broad. System, Inc. v. F.C.C., 512 U.S. 622 (1994) (recognizing continued television distribution through over-the-air broadcast to meet the compelling government interest standard); Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180 (1997) (upholding must-carry rules to compel cable operators to include broadcast television).

responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population."[43] In the early days of radio, however, these assumptions were hardly tested.

II. The Invention of the Public Interest

Neither the importance nor the news and entertainment nature of broadcast radio and television were preordained. Failures to update the Radio Act and court decisions limiting the Secretary of Commerce's power to refuse the issuance of a license led to chaos among earlier broadcasts.[44] After Zenith won a court decision determining the Sectary of Commerce could not even control the allocation of spectrum, Congress stepped in with a ninety day moratorium on the issuance of new licenses, giving itself the opportunity to finally enact new, comprehensive legislation.[45]

The updated law effective in February 1927 created the Federal Radio Commission (later transferred to the Federal Communications Commission ("the FCC or Commission")).[46] The law provided broad regulatory authority to control the licensing of broadcast stations – though not networks – and establish the basis for ownership of the broadcasters. "The Commission was authorized to issue a license if the "public interest, necessity or convenience would be served" by doing so.[47] The Radio Act of 1927 was incorporated as one of the titles into the Communications Act of 1934.[48] The 1934 law was not a further revision of radio regulation. Instead "its main purpose was "to extend the jurisdiction of the existing Radio Commission to embrace telegraph and telephone communications

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[43] U.S. v. Sw. Cable Co., 392 U.S. 157, 177 (1968).
[44] *See* Hoover v. Intercity Radio Co., 286 Fed. 1003 (App. D.C. 1923); U.S. v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926). *See also* Coase, *supra* note 40, at 4–5.
[45] *See Zenith Radio Corp.*, 12 F.2d at 617–618. Coase, *supra* note 40, at 5–6.
[46] Coase, *supra*, note 40, at 6.
[47] *Id.* (quoting the Radio Act of 1927).
[48] 47 U.S.C. §§ 151 *et. seq*.

as well as those by radio."[49] Professor Coase noted that little changed either at the time of the 1934 enactment or at the time of his analysis in 1959.

The goal of Congress was to give the government control of the broadcasters, not merely to create a more efficient marketplace for broadcasters to complete. Professor Coase correctly notes that by 1959, television and motion pictures were both considered media protected by the First Amendment.[50] He elides past the actual jurisprudential history in which the First Amendment had not been extended to broadcast or film in 1934.[51] At the time, entertainment such as theatre, circuses, and broadcasts were highly regulated and heavily censored amid government concerns of their insidious, corrupting influences rather than protected as exemplars of civic discourse.[52] While this situation changed in the decades following World War II, at the time of the enactment of the Radio Act or the Communications Act, there was little concern that broadcast regulations were subject to limitations by the First Amendment. During America's involvement in World War I, for example, the U.S. Na-

[49] People v. Broady, 5 N.Y.2d 500, 507–508 (1959).
[50] Coase, *supra*, note 40, at 8.
[51] *See* Gitlow v. People of State of N.Y., 268 U.S. 652 (1925) (first recognizing the First Amendment as applying to the states); Winters v. People of State of N.Y., 333 U.S. 507, 510 (1948) ("What is one man's amusement, teaches another's doctrine."); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (extending First Amendment protection to film).
[52] *See*, *e.g.*, Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 242 (1915).

> [Motion pictures] may be used for evil, and against that possibility the [censorship] statute was enacted. Their power of amusement, and, it may be, education, the audiences they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose. Indeed, we may go beyond that possibility. They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to.

vy took control of all amateur and commercial radio broadcast from April 7, 1917 until the end of the war on November 11, 1918.[53]

Secretary of Commerce, Herbert Hoover (later to become U.S. President) had this to say about the scope of the Radio Act regulation: "[T]he ideal situation, as I view it, would be traffic regulation by the Federal Government to the extent of the allotment of wave lengths and control of power and the policing of interference, leaving to each community a large voice in determining who are to occupy the wave lengths assigned to that community."[54] In this statement, Hoover outlines what became the governing model, namely government control over the policing of the marketplace and public input regarding the distribution of licenses. The "large voice" of public input was likely not intended to grant any actual authority to localities, despite later statutory reference to localism as a goal under the statute.[55] Instead, the public input outlined by

[53] NORMAN J. MEDOFF & BARBARA K. KAYE, ELECTRONIC MEDIA: THEN, NOW, AND LATER 231 (2d Ed. 2011) ("After the war, the federal government was in the position to keep control of radio. Many people believed the government should do just that, considering the vicious competition between telephone and telegraph companies, the monopolistic leanings of radio companies, and examples in Europe of government control."). The United States declared war on April 6, 1917 which lasted until November 11, 1918.

[54] Coase, *supra* note 40, at 8.

[55] *See* U. S. FEDERAL COMMUNICATIONS COMMISSION, No. 07-218, REPORT ON BROADCAST LOCALISM AND NOTICE OF PROPOSED RULEMAKING (2008). *See also* Jon M. Garon, *Localism as a Production Imperative*, *in* SEAN A. PAGER & ADAM CANDEUB, TRANSNATIONAL CULTURE IN THE INTERNET AGE 356 (2012) ("Localism became one of the fundamental regulatory assumptions of Congressional and FCC policy during the development of terrestrial radio and television."). Cheryl A. Leanza, *Essay: Monolith or Mosaic: Can the Federal Communications Commission Legitimately Pursue a Repetition of Local Content at the Expense of Local Diversity?*, 53 AM. U. L. REV. 597, 598 (2004) ("Historically, the FCC has interpreted its animating legislation, the Communications Act, to embrace two fundamental goals – that the American media should be comprised of many competing owners (called 'diversity') and that media should serve local interests ('localism').").

Hoover was incorporated into the act through the public comment process in license renewal.[56]

From the earliest enactment of the law, government gave itself additional access to the airwaves. "If a licensee permitted a legally qualified candidate for public office to broadcast, equal opportunities had to be offered to all other candidates."[57] Congress understood the potential for the new medium to affect the electoral process; something they would not open to the highest bidder.

Television developed during a tumultuous time in U.S. history. Key technological work occurred during the 1930's. Although the Great Depression was fading, unemployment and economic distress remained very high. By 1939, NBC was broadcasting from the Empire State Building and CBS had just acquired access to broadcast from the Chrysler Tower.[58] Sarnoff again stepped in.

> David Sarnoff, taking the leadership for the industry, reported to the F.C.C. that his company had spent $10,000,000 on television development and others had also spent large sums for the same purpose, and he urged the Commission to take some action. Sarnoff felt that he could not justify such vast expenditures with his stockholders unless something concrete in the way of commercial returns were forthcoming in the near future. The Farnsworth Company took the same position.[59]

Even in the short time between the Radio Act of 1927 and the Communications Act of 1934, the importance of improving the broadcast quality of the licensees. With the advent of the FCC, the Commission "set about tackling the problem of substandard programming in radio, which ranged from fortune-telling, huckerster-

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[56] *See* 47 U.S.C. § 309(e).
[57] Coase, *supra* note 40, at 6. 47 U.S.C. § 315.
[58] REPORT ON CHAIN BROADCASTING, *supra* note 37.
[59] EVERSON, *supra* note 22, at 253.

ing medicinal cure-alls, and excessive advertising to issues of obscenity and religious intolerance.[60]

The government continued to make efforts to make the license renewals competitive, forcing all licensees to remain operating in the best interests of the public.[61] As a result, the Sarnoff model of creating a broadcast license as a resource to be held in public trust became the governing model. He acquired the talent, identified the public interest, and funded the technology essential to dominate the market he created.[62]

The stakes for radio and the potential for television were well known. "Some analysts even argued that radio was the 'paramount

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[60] MEDOFF & KAYE, *supra* note 53, at 232 ("Between 1934 and 1941, the FCC examined many stations, but only two licenses were revoked and only eight others were not renewed.").

[61] *See* Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945). *See also* U.S. Federal Communications Commission, *In the Matter of Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996*, No. 96-172, Broadcast License Renewal Procedures, *available at* https://transition.fcc.gov/Bureaus/Mass_Media/Orders/1996/fcc96172.txt.

> Under comparative renewal procedures, if one or more such competing applications were filed, the Commission was required to consider the applications comparatively to determine which applicant would best serve the public interest, convenience and necessity. The Commission is required to afford renewal applicants and competing mutually exclusive applicants a full comparative hearing under Section 309(e) of the Communications Act, 47 U.S.C. §309(e) and Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

[62] *See* KEVIN HILLSTROM & LAURIE COLLIER HILLSTROM, THE INDUSTRIAL REVOLUTION IN AMERICA - OVERVIEW/COMPARISON 171–72 (2007) ("Zworykin convinced Sarnoff that he would be able to develop a television system for RCA in just two years. Sarnoff granted him $200,000 for the two-year project, but by the time Zworykin had completed his work, RCA has spent almost $50 million to fund his efforts."). CAMPELL, *supra* note 6, at 58 ("By the close of 1950, NBC-TV had accumulated some staggering operating losses, an estimated $18 million. It was not until 1952, the twenty-fifth anniversary of the National Broadcasting Company that the time turned and the first profit was generated.").

information medium of the war, both domestically and internationally.'"[63]

Adam Smith famously explained that the collective effect of the self-interest of business owners in a marketplace, investing only for their own gain, will be "led by an invisible hand to promote an end which was no part of his intention."[64] The invisible hand explains the efficiency that comes when each individual's self-interest allows the marketplace to operate in an efficient and self-regulated manner.[65] Sarnoff's model, in contrast, assumed that the self-interest of broadcasters would lead away from news and education and towards direct government control of radio.[66] Sarnoff objected to radio receiver taxes or other devices to further control the broadcaster from government.[67]

The hand steering television was not invisible. The ability of the FCC to break up RCA even before the first television station licenses were issued highlighted the close regulation that would be upon the industry. As further described below, both the Congress and the courts were actively pursuing complaints against the motion picture industry[68] and these heightened concerns about abuses among the motion picture producers may have had a great influence on the growing partnership between early television producers and the federal government.

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[63] DAVID S. ALBERTS & DANIEL S. PAPP, THE INFORMATION AGE: AN ANTHOLOGY ON ITS IMPACT AND CONSEQUENCES 20 (1997) (quoting JOSEPH STRAUBHAAR & ROBERT LAROSE, COMMUNICATIONS MEDIA IN THE INFORMATION SOCIETY 179 (1996)) ("[G]overnments used radio to inform—and sometimes misinform—their citizens about the progress of the war, to promote nationalism, and to spread propaganda.").

[64] SMITH, *supra* note 4, at 351.

[65] *See* Heinz Lubasz, *Adam Smith and the 'Free Market*,' 62, *in* ADAM SMITH'S WEALTH OF NATIONS NEW INTERDISCIPLINARY ESSAYS, STEPHEN COPLEY & KATHRYN SUTHERLAND, ED. (1995) (describing the invisible hand of nature as distinct from laissez-faire economics or free markets, but rather a power of natural law).

[66] *See* SARNOFF, *supra* note 4, at 52–54.

[67] *Id*. at 54.

[68] *See infra*, note 14 and accompanying text.

As one brief illustration of the FCC influence, despite strong the industry support amongst all competitors, the regulations to issue television station licenses were not approved to go into effect until July 1941.[69] By this time the demands of defense manufacture shifted the innovations of television technology to the war effort. The race for television was shelved as all the participants shifted to defense efforts.[70]

Following the war, the competition for ownership of commercial television began again. Farnsworth, perhaps the leading independent, shifted his own focus toward nuclear energy based on his innovations during the war effort.[71] Although the company continued for some time, the lack of funding and other resources limited its growth. Financial demands also largely sidelined other competitors.

By the end of World War II, a different television race had formed. The once invisible hand of the market was now the open hand of Congress. Farnsworth had little content and no ownership in equipment manufacturer, so his company's role diminished. Instead, the focus shifted to the three dominant national radio networks: NBC, CBS, and fledgling ABC. They were joined by a fourth competitor, DuMont Laboratories (later the DuMont Television Network), which broadcast original content, licensed television stations, and manufactured high quality television consoles.[72]

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[69] EVERSON, *supra* note 22, at 253–55.

[70] *Id.* at 255 (despite a lack of preexisting government military contracts, the Farnsworth Company assembly lines were "running at full capacity on government work" as a result of subcontracts and eventually direct contract, which refocused efforts away from television).

[71] *See* PAUL SCHATZKIN, THE BOY WHO INVENTED TELEVISION 3 (2002) ("[I]n 1965, Philo Farnsworth had made more progress toward controlling nuclear fusion than anybody before or since.").

[72] J. Fred MacDonald, *One Nation under Television: The Rise and Decline of Network TV*, J FRED MACDONALD, http://jfredmacdonald.com/onutv/programming.htm (last visited Jan. 31, 2016).

> Of the two smaller networks, ABC and DuMont, only the former had any lasting impact. The DuMont network was programmatically underdeveloped, poorly positioned in terms

DuMont began broadcasting in 1946 and featured content including comedian Ernie Kovacs and Jackie Gleason in the Cavalcade of Stars. Within a decade, the golden age of television would be nearly over.

III. How Politics Sidelined the Motion Picture Industry

The battle for control of the television industry should have been a story of technologies clashing over transformation. Instead it became the model of government control of a new marketplace. And while the government may have been a reluctant supporter of the emerging broadcast industry, the government had very definite opinions about the leading entertainment of the day, namely the morally corrupt motion picture industry.[73]

The motion picture industry recognized the broadcasters as a threat. For example, to promote commercial television, NBC signed a five year contract with Bob Hope, based on his longstanding relationship with the radio network.[74] As Hope explained, "I defected from motion pictures. In those days, television and pictures were mortal enemies."[75] A defection by a popular film start like Bob Hope signaled a shift in the tension between these two industries.[76]

While the motion picture studios could have competed for dominance on television, they instead tried to shut it down.

> [T]he [m]otion-picture industry at one time seriously considered taking effective steps to boycott

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of its affiliates, and insufficiently supported by advertisers. With no radio network to build on, DuMont lacked the entertainers and the affiliated stations needed to compete against CBS and NBC. When DuMont did develop a talent of any consequences, such as Jackie Gleason, CBS and NBC had little trouble outbidding DuMont for his services.

[73] *See* Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 242 (1915).
[74] CAMPBELL, *supra* note 6, at 14.
[75] *Id.*
[76] EVERSON, *supra* note 22, at 246–47.

> television. A meeting was called by the motion-picture moguls in New York to devise ways and means to accomplish it. Legend has it that Walt Disney's company refused to go along with any such strangling tactics, and the plan fell through.[77]

The approach to stop the competition and control the marketplace was nothing new. The motion picture industry was founded on the aggressive exploitation of monopoly power.[78] By acknowledging the patents owned by Thomas Alva Edison and cross-licensing a number of patents held by other companies, the Motion Picture Patents Company members[79] were able to control a significant amount of the motion picture production.[80] Known as "the Trust," the goal was control.[81] The Motion Picture Patents Company arranged horizontal and vertical arrangements to approve production and distribution among the Trust's members.[82] To enforce this power over non-members, the Trust also sought to control the manufacture of movie projectors and stock film.[83] The controls

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[77] *Id.*

[78] MICHAEL CONAN, ANTITRUST IN THE MOTION PICTURE INDUSTRY 18–20 (1960) ("The Motion Picture Patents Company was organized in 1908 and the next year began to control production and marketing in the entire industry. . . . Eastman Kodak Company, the largest producer of raw film stock, contracted to sell raw film only to the licensee of the Patents Company.").

[79] *Id.* at 18 ("Members were the seven largest American producers, two French producers, and George Kleine–the leading importer-distributor . . . .").

[80] *See* RICHARD CAMPBELL, CHRISTOPHER R. MARTIN & BETTINA FABOS, MEDIA AND CULTURE: AN INTRODUCTION TO MASS COMMUNICATION 192 (2011).

[81] *Id.*

[82] NEAL GABLER, AN EMPIRE OF THEIR OWN 55-58 (1989) ("Under the proposed arrangement, the companies would drop all litigation and pool their patents in a single holding company . . . . Film distributors and exhibitors who rented out or showed movies photographed with patented equipment would also be licensed and forced to pay a royalty based on footage of film.").

[83] CONAN, *supra* note 78, at 20. ("The Motion Picture Patents Company was organized in 1908 and the next year began to control production and marketing in the entire industry. . . . Eastman Kodak Company, the largest producer of raw film stock, contracted to sell raw film only to the licensee of the Patents Company.").

went well beyond the technology of the motion picture production and distribution in an attempt to control all filmed content being distributed so "that no play would be written, or dramatically enacted, except by authors and artists favored by the [Trust]."[84]

The attempt by Edison to control U.S. motion pictures was cultural as well as financial.

> [The Trust members] never seemed to understand that they were engaged in much more than an economic battle to determine who would control the profits of the nascent film industry; their battle was also generational, cultural, philosophical, even, in some ways, religious. The Trust's members were primarily older white Anglo-Saxon Protestants who had entered the film industry in its infancy by inventing projectors. . . . The Independents, on the other hand, were largely ethnics, Jews and Catholics, who had entered the industry by opening and operating theaters. For them . . . movies would always be much more than novelties; they would be the only means available of demanding recognition and exorcising failure.[85]

The cultural aspect of the fight to control Hollywood was a theme that did not disappear in the battle between Edison's Protestant

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[84] U.S. v. Motion Picture Patents Co., 225 F. 800, 811 (E.D. Pa. 1915).

> [T]he defendants did, in furtherance of the scheme of the combination so to do, directly impose upon the trade undue and unreasonable restraint, and that such restraint was the end proposed to be directly reached, and was not merely incidental to efforts to protect the rights granted by the patents, but went far beyond the fair and normal possible scope of any efforts to protect such rights, and that as a direct and intended result of such undue and unreasonable restrictions the defendants have monopolized a large part of the interstate trade and commerce in films, cameras, projecting machines, and other articles of commerce accessory to the motion picture business.

[85] GABLER, *supra* note 82, at 59.

conservatism and the ethnic diversity of Hollywood. That cultural war would return to shape both motion pictures and television.

The efforts to control the growing motion picture industry did not go unnoticed. In 1917, the Supreme Court stopped the illegal tying of the Motion Picture Company Patents to the exhibited films.[86] As the Court explained:

> A restriction which would give to the plaintiff such a potential power for evil over an industry which must be recognized as an important element in the amusement life of the nation, under the conclusions we have stated in this opinion, is plainly void because wholly without the scope and purpose of our patent laws, and because, if sustained, it would be gravely injurious to that public interest, which we have seen is more a favorite of the law than is the promotion of private fortunes.[87]

The loss of the illegal tying by the Motion Picture Patents Company was a tremendous blow to the early, New York based motion picture industry.[88] But the antitrust actions were not the only pressure on the Trust. "There was too much demand for films, too much money to be made, and too many ways to avoid the Trust's scrutiny."[89] The new competitors geographically separated themselves from Edison's New York base, shooting in Cuba and Florida before discovering Hollywood, California as the new home of the industry.[90] "In 1908 the Trust had a virtual monopoly on the

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[86] Motion Picture Patents Co. v. Universal Film Co., 243 U.S. 502, 517–519 (1917).
[87] *Id.* at 519.
[88] *See* William F. Whitman, *Anti-Trust Cases Affecting the Distribution of Motion Pictures*, 7 FORDHAM L. REV. 189 (1938), *available at* http://ir.lawnet.fordham.edu/flr/vol7/iss2/3.
[89] CAMPBELL, MARTIN, & FABOS, *supra* note 80, at 192.
[90] *Id.* ("Wanting to free their movie operations for the Trust's tyrannical graphs, two Hungarian immigrants – Adolph Zuckor, who would eventually run Paramount Pictures, and William fox who would found the Fox Film Corporation . . . played a role in the collapse of Edison's Trust.)

movies. By 1912 the Independents had gobbled half the market and were closing in on a monopoly of their own."[91]

Whether as a reaction to Edison's early control or simply to extend their own power, Adolph Zukor of Paramount Pictures, William Fox, Carle Laemmle who founded Universal, and the other studio leaders began to control the first-run theatres, the venues where major productions premiered. "The major studios (which would eventually include MGM, RKO, Warner Brothers, Twentieth Century Fox, and Paramount only needed to own the first-run theaters (about 15 percent of the nation's theaters), which … generated 85 to 95 percent of all film revenue."[92] Each studio had its own production and distribution. Each studio also controlled most of the movie stars through long-term employment agreements and a practice of allowing actors to appear in films of other studios through loan-out agreements, provided these loan-outs were approved by the studios.[93] Finally, the studios standardized and controlled the distribution through an industry trade association which established a standard form agreement which controlled the non-studio distributors.[94]

The new studio system of the 1930's was an oligopoly rather than a monopoly because there was fierce competition among the major studios to control stars and make motion pictures.[95] This competition, however, did not extend to the distribution or exhibition of the films.[96] The rise of the Hollywood studio system and the dominance of Jewish ownership also gave rise to strong anti-Semitic rhetoric and calls for its destruction or control.[97]

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[91] GABLER, *supra* note 59, at 59.
[92] CAMPBELL, MARTIN, & FABOS, *supra* note 82, at 195.
[93] *Id*. at 194–195.
[94] *See* Whitman, *supra* note 88, at 192–194.
[95] *See* U.S. v. Paramount Pictures, 66 F. Supp. 323, 330 (S.D.N.Y. 1946).
[96] *Id.*
[97] *See*, *e.g.,* ALEXANDER MCGREGOR, THE CATHOLIC CHURCH AND HOLLYWOOD: CENSORSHIP AND MORALITY IN 1930S CINEMA (150–52) (suggesting that the relentless anti-Semitic attacks from Christian and Catholic sources shifted the Jewish-owned film studios to acquiesce to more Catholic-based censorship. "[O]f all the religious groups in the United States, the American Catho-

"Protestant reformers advocating federal censorship of the movies had begun to enunciate the charge shortly after World War I. Throughout the 1930s, the charge electrified the formation of such pressure groups as the Catholic Legion of Decency and, in the early 1940s, the isolationist American First."[98]

Congress regularly held hearing during the 1920's and 1930's about antitrust issues in Hollywood and the Jewish influence of these collaborations.[99] Attempts to create the Federal Motion Picture Commission did not result in a federal film board, but did push the industry to create a self-regulatory body, the Motion Picture Producers and Distributors of America ("MPPDA"), headed by ex-Postmaster General Will Hays.[100] Pressure continued to mount. "In February 1929, as religious organizations issued demands for control, Hays learned that press baron William Randolph Hearst would throw his considerable influence behind the movement for federal censorship."[101]

The Production Code was launched by the MPPDA in 1929 but took some time before it became the dominant form of motion picture censorship.[102] The MPPDA was initially slow to actually censor its members' films, but a threatened boycott by the Catholic Legion of Decency in 1934 and growing complaints of association with communism by some and anti-Nationalism by others resulted in the creation of the heavily enforced Production Code.[103]

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lic Church was the most anti-Semitic, and . . . the most organized and militant. . . . As a corollary, it was the American Catholic Church that most passionately argued for power to be removed from these cultural producers.").

[98] STEVEN ALAN CARR, HOLLYWOOD AND ANTI-SEMITISM: A CULTURAL HISTORY UP TO WORLD WAR II 5 (2001).

[99] *Id*. at 72–73.

[100] JILL NELMES, AN INTRODUCTION TO FILM STUDIES 42 (3d Ed. 2003).

[101] LEONARD J. LEFF & JEROLD L. SIMMONS, THE DAME IN THE KIMONO: HOLLYWOOD, CENSORSHIP, AND THE PRODUCTION CODE 8 (2001).

[102] *Id.* at 13–15.

[103] *See* NELMES, *supra* note 100 at 42–43 (discussing establishment of Production Code); McGregor, *supra* note 97 at 151–53 (Joseph Kennedy "encouraged the studio heads to "stop making anti-Nazi pictures or using the film medium to

By 1938, the major Hollywood studios[104] also had significant antitrust issues with which to contend.[105] The studios have been accused of concerted action to monopolize the production of motion pictures, the distribution of those films, and the eventual exhibition of those films. "By March 1939, over thirty antitrust lawsuits had been filed against the majors in federal, state, and local courts, and the Senate's Interstate Commerce Committee had resumed hearings on legislation to stop the film industry practices."[106]

At trial, the evidence established that the studios competed for the production of films, so that aspect of the case was dropped.[107] The remaining claims of vertical and horizontal restraints of trade were established through two cases, one of which was decided by the Supreme Court a decade after the litigation began.[108]

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promote or show sympathy to the cause of the 'democracies' versus the 'dictators'.").

[104] *Id.* ("Paramount Pictures, Inc., Loew's, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., [and] Twentieth Century-Fox Film Corporation, which produce motion pictures, and their respective subsidiaries or affiliates which distribute and exhibit films. These are known as the five major defendants or exhibitor-defendants.").

[105] U.S. v. Paramount Pictures, 334 U.S. 131, 140 (1948) (Sherman Act violations against the major motion picture studios and other distributors.).

[106] *The Motion Picture Industry in 1940–1941 - Prologue: January 1940, The 1940 Consent Decree, Labor Pains*, ENCYCLOPEDIA, http://encyclopedia.jrank.org/articles/pages/2905/The-Motion-Picture-Industry-in-1940-1941.html (last visited Jan. 31, 2016) [hereinafter *The Motion Picture Industry in 1940–41*].

[107] *Paramount Pictures*, 66 F. Supp. at 330 (it "appeared upon the trial that there was no violation of the Sherman Act in respect to production of motion pictures and that there was on the contrary active competition in production, the charge in respect to production was formally abandoned by the plaintiff.").

[108] *See The Independent Producers and the Paramount Case, 1938-1949, Part 6: The Supreme Court Verdict That Brought an End to the Hollywood Studio System, 1948*, COBBLESTONE ENTERTAINMENT, http://www.cobbles.com/simpp_archive/paramountcase_6supreme1948.htm (last visited Jan. 31, 2016.)

The oligopoly scheme developed by Hollywood was even more comprehensive than that of Edison's Trust.[109] The majors and other distributors fixed the ticket prices to consumers, so all theaters charged approximately the same amount.[110] The conspirators extended the exclusive windows in which movies were made available to theaters to control the exhibition of the films, maximize profits, and preclude competitors from access to those theaters.[111]

The vertical ownership of the first-run movie halls guaranteed exhibition of all the important studio films, eliminating a significant financial risk of the independents film companies. Access to these film exhibitors made the independent film producers and distributors beholden to the major studios. As the Court described the cabal, "[t]he practices were bald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor-defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine."[112]

The most significant of the Supreme Court findings of restraint of trade focused on the ownership by the major studios of the first-run motion picture exhibition chains. The Court remanded the case to the district court to complete what ultimately became a divestiture of many theatrical exhibition holdings by the motion picture studios.[113] RKO and Paramount entered into consent decrees with the justice department to divest their theater chains while MGM,

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[109] Among the many restraints of trade was the use of copyright monopolies to extend beyond a single copyright, much like the Motion Picture Patent Company used its patents. *Paramount Pictures*, 334 U.S. at 157–158 ("The court enjoined defendants from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features.").

[110] *Id.* at 141 ("defendants in the licenses they issued fixed minimum admission prices which the exhibitors agreed to charge . . . . The District Court found that two price-fixing conspiracies existed—a horizontal one between all the defendants, a vertical one between each distributor-defendant and its licensees.").

[111] *Id*. at 146–147 ("many clearances had no relation to the competitive factors which alone could justify them").

[112] *Id.* at 149.

[113] *Id.* at 177.

20th Century Fox, and Warner Bros continued to fight through additional litigation before ultimately agreeing to divestiture.[114]

The consequences were far reaching for Hollywood. The scale of the antitrust actions gained these companies many enemies in Washington.[115] Some in Congress were angry with the anticompetitive practices of the industry.[116]

A third wave of criticism rocked Hollywood in the wake of World War II. This began with investigations of the U.S. Senate's Special Committee Investigating the National Defense Program, chaired by Harry S. Truman.[117] "The committee wanted to know, among other things, how some of the [Hollywood] moguls and their staff had wangled officers' commissions, how much other movie industry was profiting from the production of military training films, and whether the major studios exercised monopolistic control over government-contract filmmaking."[118] Other questions

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[114] *See* George Hodak, *May 3, 1948: Court Rules on Hollywood Antitrust Case*, AMERICAN BAR ASSOCIATION JOURNAL (May 1, 2012 05:20 AM CDT), http://www.abajournal.com/magazine/article/may_3_1948_court_rules_on_hollywood_antitrust_case/. Brian J. Wolf, *The Prohibitions Against Studio Ownership of Theatres: Are They an Anachronism?*, 13 LOY. L.A. ENT. L. REV. 413 (1993).

[115] *See The Motion Picture Industry in 1940–41*, *supra* note 106.

[116] *Id*.

> Senator Matthew Neely of West Virginia [was] an outspoken critic of motion picture trade practices. In past years, Neely had sponsored bills against the block booking of pictures, a practice by which the studios forced exhibitors to take a studio's entire annual output, sight unseen, in order to get the more desirable A-class pictures. Neely's anti-block-booking bills had passed the Senate in 1938 and again in 1939, only to fail in the House. Neely vowed in January 1940 to reintroduce that legislation and to sponsor additional bills outlawing double features and, on a more serious note, prohibiting studios from owning theater chains.

[117] *See* ROBERT SKLAR, MOVIE-MADE AMERICA: A CULTURAL HISTORY OF AMERICAN MOVIES 249–250 (citing U.S. Cong., Senate Special Committee Investigative Committee Investigating the National Defense Program, Investigation of the National Defense Program, 6896–97 (1943)).

[118] *Id.* at 249.

focused on the "recent citizen" status of the Hollywood filmmakers.[119]

At the same time, the House Un-American Committee of the House of Representatives ("HUAC") turned its attention to the films and filmmakers of Hollywood. In 1942, the Federal Bureau of Investigation ("FBI") began its own report on "Communist Infiltration of the Motion Picture Industry."[120] The FBI fed the information to the HUAC.

HUAC began in 1938 under the chairmanship of Martin Dies.[121] The HUAC had broad authority to investigate:

> (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.[122]

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[119] *Id.* (quoting Senator Ralph O. Brewster).

[120] Daniel J. Leab, *Introduction*, *in* A GUIDE TO THE MICROFILM EDITION OF FEDERAL BUREAU OF INVESTIGATION, CONFIDENTIAL FILES, COMMUNIST ACTIVITY IN THE ENTERTAINMENT INDUSTRY, FBI SURVEILLANCE FILES ON HOLLYWOOD, 1942–1958 (1991), *available at* http://cisupa.proquest.com/ksc_assets/catalog/1708_FBIFilesCommActsEntertain.pdf.

[121] Erica Bose, Comment, *Three Brave Men: An Examination of Three Attorneys Who Represented the Hollywood Nineteen in the House Un-American Activities Committee Hearings in 1947 and the Consequences They Faced*, 6 UCLA ENT. L. REV. 321, 323 (1999) ("H.U.A.C. first appeared as a special committee in 1938. . . . [I]t spent much of its first six years trying to prove that Communists dominated such New Deal organizations as the Federal Theatre Project, the C.I.O., and the Tennessee Valley Authority.").

[122] H.R. Res. 282, 75th Cong., 83 Cong. Rec. 7568 (1938). *See also* Martin H. Redish & Christopher R. McFadden, *HUAC*, *the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669, 1678 (2001).

The focus of the investigations were predominately focused on communist influences and heavily influenced by J. Edgar Hoover's FBI investigations. Hollywood had been an HUAC target a number of times, but the focus grew with the FBI reports, culminating in particularly explosive hearings in 1947 and again in 1951–52.[123]

The 1947 investigation was triggered by FBI and HUAC investigations that identified Gerhart Eilser, a Hollywood composer, as a spy for the Communist International Party.[124] As a Hollywood composer, Eilser opened the door to more Hollywood investigations and accusations.

Given the tension between Hollywood and the broadcasters, the Hollywood investigation also served as another victory for radio and television. "Eisler's hearings precipitated HUAC's subsequent, broader investigation of Hollywood. . . . [T]he hearings attracted the widespread attention of the media, especially the fledgling television broadcasters."[125] Hollywood's misery served to fuel the political agenda of the HUAC members and economic

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[123] Leab, *supra* note 120, at vi.

> [T]he FBI throughout much of the 1940s and 1950s "was selling its own brand of anti-Communism"—and one of its most important clients was HUAC, through which material from the bureau's confidential files became "public information" that could spread fears about radicalism "without compromising the FBI's image of a disinterested, nonpartisan, investigative agency." It is therefore not surprising that the 1947 HUAC hearings dealing with the movies and obviously based on FBI information was called by the committee "[h]earings dealing with Communist infiltration of the movie industry." Related hearings held in 1951-52 dealt with "Communist infiltration of [the] Hollywood motion picture industry." (internal footnotes omitted).

[124] ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 359-415 (1998) ("By the end of the war, the FBI believed it had a big fish on the line. Eisler's apparently furtive behavior . . . gave plausibility to that characterization. . . ."). *See also* Redish & McFadden, *supra* note 122 at 1680. Eisler v. U.S,, 170 F.2d 273, 276 (D.C. Cir. 1948).

[125] Redish & McFadden, *supra* note 122, at 1680.

agendas of the radio and television stations broadcasting the political tragedy.

The human toll throughout Hollywood was significant. The HUAC initially subpoenaed 41 individuals.[126] "Over the course of five days, a total of twenty-two witnesses eventually denounced over one-hundred men and women as members of the Hollywood branch of the Communist Party."[127] Studio heads, including Louis B. Mayer, Walt Disney, and Jack Warner all vowed to expunge the communist influence from the motion picture industry and each named individuals thought to be associated with the Communist Party.[128]

The Screen Actors Guild, represented by Robert Montgomery, read a statement into the record that it will "rigorously oppose by every power which is within its legal rights, any real Fascist or Communist influence in the motion-picture industry or in the ranks of labor."[129] The anti-communist beliefs of many studio heads were quite genuine. Hollywood was undergoing tremendous labor disputes in the post-war era and many of those involved political as well as economic dimensions.[130] The studios may have welcomed the opportunity to show their patriotism in general and support for Congress in particular.

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[126] *Id.*

[127] *Id.* (quoting ROBERT VAUGHN, ONLY VICTIMS 72 (1972)).

[128] VAUGHN, *supra* note 127, at 76–80.

[129] *Id.* at 84. Ronald Reagan, later to become president of the Screen Actors Guild, and later still president of the United States concluded his testimony before the questions of Richard Nixon, he offered a statement that "I abhor their philosophy . . . but at the same time I never as a citizen want to see our country come urged, by either fear or resentment of this group, that we ever compromise with any of our democratic principles through that fear or resentment." *Id.* at 88.

[130] *See* Redish & McFadden, *supra* note 122, at 1678 ("the Conference of Studio Unions (CSU), a Communist-dominated union of screenwriters, technicians, studio painters, and machinists, had fought two successful strikes against Walt Disney Studios and Warner Brothers Studios. The CSU also was involved in a bitter jurisdictional dispute against the competing International Alliance of Theatrical Stage Employees (IATSE) . . . .").

But the hearings were not a showcase of Hollywood's embrace of congressional policies. The creative community was deeply split over the HUAC investigations. Many believed the hearings were political propaganda, witch-hunts, and grandstanding all offered at the cost of real people's livelihoods and freedom.

Against this backdrop, John Howard Lawson, founder and president of the Screen Writers Guild was interrogated by HUAC counsel Robert Stripling. Lawson offered a prepared statement which began "[f]or a week, this committee has conducted an illegal and indecent trial of American citizens, whom the committee has selected to be publicly pilloried and smeared."[131] Unlike Warner and Mayer, Lawson's statement would not be read.[132] Asked whether he was a member of the Screen Writers Guild or a member of the Communist Party, Lawson shouted that "the raising of any question here in regard to membership, political beliefs, or affiliation is absolutely beyond the powers of this committee."[133]

The shouting match grew between Lawson members of the HUAC. Lawson "I am not on trial here, Mr. Chairman. This Committee is on trial here before the American people. Let us get that straight."[134] Lawson analogized to Hitler, adding, "[y]ou are using the old technique, which was used in Hitler's Germany, in order to create a scare here in order that you can smear the motion-picture industry, and you can proceed to the press, to any form of communication in this country."[135]

James Dalton Trumbo was next to testify. He attempted to introduce twenty screenplays into evidence, challenging the HUAC to identify the introduction of the insidious and communistic propaganda of which he and the other communist sympathizers stood accused. The chairman of the hearing refused, complaining that it

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[131] MARC NORMAN, WHAT HAPPENS NEXT: A HISTORY OF AMERICAN SCREENWRITING 272 (2008).
[132] *Id.*
[133] *Id.* at 272–73.
[134] *Id.* at 373. Redish & McFadden, *supra* note 122, at 1680.
[135] MEDOFF & KAYE, *supra* note 53, at 273.

was "too many pages."[136] Trumbo was asked of his Screen Writers Guild membership and Communist Party membership. Not getting a direct answer, he was also dismissed. Very shortly thereafter, both men were cited for Contempt of Congress for refusing to answer the questions in response to the subpoena.[137]

Contempt citations were also served on Albert Maltz, Alvah Bessie, Samuel Ornitz, Herbert Biberman, Edward Dmytryk, Adrian Scott, Ring Lardner, Jr., and Lester Cole. Eight of these individuals were writers.[138] Together, these Hollywood creative leaders became known as the Hollywood Ten.

The stand for free speech and association of the Hollywood Ten did not bode well for either them or the industry. The early and aggressive question regarding membership in the Communist Party suggested the HUAC was hoping to end these hearings with criminal contempt citations and the members neatly walked into that trap.[139] The studio owners and management had a public relations nightmare on their hands and responded with a blacklist designed to distance themselves and root out Communism.[140]

The turmoil within Hollywood did little to mollify those in Congress who believed the motion-picture industry was infiltrated by Jews and Communists and the blacklist ruined lives without changing the public perception.[141] "The heads of the major studios – including Louis B. Mayer, Samuel Goldwyn, Harry Cohn, Bar-

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[136] *Id.* at 275.
[137] *Id.* at 375; Redish & McFadden, *supra* note 53, at 1680.
[138] VAUGHN, *supra* note 127, at 112.
[139] *See id.*
[140] *See id.* at 170 ("The blacklist was a public relations gimmick in motion pictures and television. . . ."). *See also* MEDOFF & KAYE, *supra* note 53, at 278–279 (using the morals clauses in studio contracts enabled the studios to enforce the blacklist without violating laws).
[141] MEDOFF & KAYE, *supra* note 53, at 278–279 ("The threat of boycotts from customers who were offended by the notion of paying money to support Communist sympathizers soon led to the 'Waldorf Statement,' in which every major studio announced they were firing the Hollywood Ten and pledged not to 'knowingly employ a Communist or a member of any party or group which advocated the overthrow of the Government of the United States.'")

ney Balaban and Albert Warner – signed the declaration in part simply to look like they, the leaders of the industry, were getting out in front of the supposed problem by taking what they termed 'positive action.'"[142] The Waldorf Statement and the blacklist were designed to regain the support of the public and Congress. Their efforts failed—creating a lasting legacy of distrust for the motion picture industry as an industry of free speech or of government support.[143]

The motion picture studios were not going to be provided the public trust of the broadcast airwaves for the new medium of television. Although both the Hollywood studios and the broadcast networks established loyalty oaths and screening systems, there was little opportunity for Hollywood in the post-war political environment.[144] An open license marketplace was the last thing Congress wanted.[145]

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[142] Gary Baum & Daniel Miller, *The Hollywood Brass Who Endorsed the Blacklist*, HOLLYWOOD REPORTER (Nov. 19, 2012), http://www.hollywoodreporter.com/news/blacklist-hollywood-brass-who-endorsed-391979.

> The so-called Waldorf Statement -- named for the New York hotel where it was drafted on Nov. 24-25, 1947, by MPAA president Eric Johnston on behalf of 48 movie executives -- decreed that the 10 Hollywood men who had just been cited for refusing to testify before the House Committee on Un-American Activities would not be allowed to work in the business until each had "purged himself of contempt and declares under oath that he is not a communist.

[143] *See* MEDOFF & KAYE, *supra* note 53, at 273; Reddish & McFadden, *supra* note 122 at 1680.

[144] *See, e.g*, LYNNE OLSON & STANLEY W. CLOUD, THE MURROW BOYS: PIONEERS ON THE FRONT LINES OF BROADCAST JOURNALISM 302-03 (1997) (describing the process of requiring news reporters such as Edward R. Murrow to sign loyalty oaths and a "screening procedure intended to root out employees with suspected Communist leanings. . . .").

[145] *See* Coase, *supra* note 40, at 18–19 ("The 'novel theory' (novel with Adam Smith) is, of course, that the allocation of resources should be determined by the forces of the market rather than as a result of government decisions.")

In stark contrast to the preferred, economically driven market outlined by Professor Coase, the government's focus on the entertainment industry was over its content, its concentration, and its influence.[146] Coase acknowledges that "[c]ontrol of monopoly is a separate problem," and concedes that "[t]o increase the competitiveness of the system, it may be that certain firms should not be allowed to operate broadcasting stations."[147]

As Coase notes of the FCC, the governmental position remained that "[i]t is, however, a necessary and constitutional abridgment [of free speech] in order to prevent chaotic interference from destroying the great potential of this medium for public enlightenment [*sic*] and entertainment."[148] Coase challenges the comment, stating "[i]t is not clear to me what the Commission meant by this. It could hardly have been the intention of the Commission to pay a tribute to the "invisible hand."[149] Indeed, in this regard the hands of Congress and the FCC are anything but invisible. They are carving the broadcast industry into their preferred shape by chipping away those producers and broadcasters the government believes are un-American or excessively liberal-leaning.[150]

If there was any question whether the FCC was in the thrall of the HUAC, then the FCC's own battle with the committee should help illustrate the Commission's difficulty. From 1940 through 1943, a series of actions by the HUAC and other Senate and House committees held hearings, withheld appropriations, and sought the ouster of FCC staff under the banner of eliminating pro-communist

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[146] *See id.* at 9–11 (discussing "the clash with the doctrine of freedom of the press" with numerous examples of FCC actions enforced without regard to potential free speech limitations).
[147] *Id.* at 16–17.
[148] *Id.* at 10 quoting Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1257 (1949) (notation of error in quotation).
[149] *Id.*
[150] *See* SUSAN L. BRINSON, THE RED SCARE, POLITICS, AND THE FEDERAL COMMUNICATIONS COMMISSION 2–4 1941–1960 (2004) (describing the post-war Communist scare as largely motivated by a conservative backlash against the progressive social landscape of President Roosevelt's New Deal.)

leanings in government.[151] "[T]he FCC played a pivotal role in the political and social crisis that enveloped the United States regarding the Red Scare."[152] The battles between the FCC and Congress took their toll on the staff members and political will of the FCC, so that eventually, the individuals targeted withdrew from the agency and the political stance reversed itself, supporting a more politically conservative agenda sought by those involved with the fight. "[A]s early as 1945 [the FCC] began the slow transformation toward more conservative, pro-business regulations … an agency that increasingly acquiesced to industry wishes in its decisions and policy making."[153] As World War II ended and the FCC shifted towards a more pro-industry stance, the industries that helped win the war were well-positioned to take advantage of the new environment. Unlike in Hollywood, where the political fights continued, the industry of radio and television was well-positioned to take advantage of the emerging new marketplace.

IV. Television Technology as an Essential Service to WWII

In contrast to the motion picture industry, the radio and emerging television industry had a very different relationship with the U.S. government.[154] Unlike the relatively modest role motion picture propaganda had on the Second World War, the technology of radio and television was foundational to developing the technolo-

[151] *See* BRINSON, *supra* note 150, at 85–89.
[152] *Id.*
[153] *Id.* at 89.
[154] *Cf. id.* at 4.

> Thus, the reality of anti-Communism was that it was a public mask for a political backlash. As the 1940s progressed and the Red Scare escalated, it was increasingly clear that those who supported the New Deal and advocated significant social and political change during the Depression were particularly at risk for being accused of Communist sympathies. Several people at the FCC fit his bill. . . .

gies necessary to winning the war.[155] The U.S. Navy had long understood the foundational role that radio communications played in maritime navigation.[156] Throughout the 1930's, RCA and AT&T were working with the U.S. military to begin developing systems for radar and sonar to better track the movement of ships, planes, and bombs.[157] In a 1931 report, engineers working on RCA's television broadcast from the top of the Empire State Building had recognized that they could measure signal strength of the broadcast and use it to "monitor the motion of the elevator in their building and the automobile traffic in the street below, stop and go conditions being clearly discernable."[158]

Following the attack on Pearl Harbor, the "American electrical industry slowly converted to total war production."[159]

> David Sarnoff of RCA had immediately telegraphed President Franklin Roosevelt: "All our facilities and personnel are read and at your instant service. We await your commands." RCA's scientists and engineers would play a major role in the development of radar and sonar and of the electronic navigation systems known as LORAN and SHORAN. . . . In fact, most of the wartime advances in television weaponry were spearheaded by RCA in collaboration with the Office of Scientific

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[155] *See generally* LOUIS BROWN, TECHNICAL AND MILITARY IMPERATIVES: A RADAR HISTORY OF WORLD WAR 2 (1987); ALBERT ABRAMSON, THE HISTORY OF TELEVISION, 1942 TO 2000 3–5 (1999).

[156] *See* MEDOFF & KAYE, *supra* note 53 at 231 (discussing the naval seizure of all U.S. radio in World War I).

[157] *See* BROWN, *supra* note 155, at 65–68 ("RCA had had an interest in radar . . . but for the men from Bell Telephone Laboratory, representing AT&T, it was all new and quite astounding."); Abramson, *supra* note 155, at 3 (in 1935, RCA began work on guided missiles "based on a design of a flying torpedo by Dr. Vladimir Kosma Zworykin in 1934.").

[158] BROWN, *supra* note 155, at 43.

[159] ALBERT ABRAMSON, THE HISTORY OF TELEVISION, 1942 TO 2000 3 (1987).

> Research and Development (OSRD) of the armed forces.[160]

In addition to improvements in missile navigation, sonar, and radar, RCA's television systems were use as closed-circuit television, remote viewing systems to enable nuclear scientists to conduct research from more safe distances. The equipment was installed in the facilities of the Manhattan Project, helping speed the development of the atomic bomb.[161]

RCA, like the rest of the electronics industry, was fully committed to the war effort. The role of the developing television was transformed from entertainment to essential industry. And the NBC radio network, like its chief competitor at the Columbia Broadcast Network ("CBS") were both developing news networks throughout the 1930's.[162] Both NBC and CBS expanded their news programming and with the expansion of German aggressions in 1938, NBC and CBS developed expansive foreign news coverage.[163] Led by the journalistic and on-air efforts of Edward R. Murrow, the development of top talent, helped CBS eclipse NBC in news programming.[164]

CBS Radio was created in 1928 by William S. Paley after the purchase of Philadelphia radio station WCAU.[165] Paley had earned his experience and financing at the Congress Cigar Company, owned by his family. Paley helped develop its aggressive market-

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[160] *Id.*
[161] *Id.* at 9–10.
[162] *See* GERD HORTEN, RADIO GOES TO WAR 28 (2003).
[163] *Id.* at 30–31.
[164] *Id.* at 29–30 ("most European countries were only familiar with state-owned broadcasting, and officials generally assumed that NBC was the official national broadcasting station of the United States. . . . Murrow and the CBS staff would soon outshine the NBC news team, establishing themselves as the premier news network . . . by the early 1940s.").
[165] *See*, e.g., MICHAEL D. MURRAY, ENCYCLOPEDIA OF TELEVISION NEWS 28 (1998); SALLY BEDELL SMITH, IN ALL HIS GLORY: THE LIFE AND TIMES OF WILLIAM S. PALEY (1990); BROADCAST PIONEERS OF PHILADELPHIA, http://www.broadcastpioneers.com/wcauhistory.html (last visited Dec. 31, 2015): CHAIN BROADCASTING REPORT, *supra* note 37, at 21–25.

ing strategies, first in print and later on radio. His familiarity with the fledgling commercial medium drew him to enter the business.[166] The station was part of the Columbia Phonograph and Records Company which changed its name to the Columbia Phonograph Broadcasting Company, which Paley then changed to the Columbia Broadcasting System after the purchase.[167]

As CBS grew, it challenged NBC in both the news and the entertainment divisions. "Paley's fledging radio network was profitable by 1932 and he later successfully challenged NBC for leadership in the medium by stealing many stars from the network in what became known as "Paley Raids."[168]

"Mr. Paley . . . soon proved to be a vigorous challenger to David Sarnoff of dominant NBC, hiring away from him, at then-astronomical salaries, every major star in the radio galaxy: Jack Benny, Kate Smith, Red Skelton, Bing Crosby, Lucille Ball and a host of others."[169] Paley brought a focus on advertising and market to radio that was fundamentally different than the technological and industrial focus brought by Sarnoff. In their rivalry, each pushed the other to shape and expand first radio and then television.

Just as Sarnoff jumped into the war effort personally and on behalf of RCA and NBC, Paley did the same for himself and for CBS. Paley was given the honorary rank of colonel in the Psychological Warfare Branch of the Office of War Information. "He helped prepare the information campaign for the Normandy invasion, gained executive broadcasting experience, and supervised the

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[166] *See* BERNARD F. DICK. ENGULFED: THE DEATH OF PARAMOUNT PICTURES AND THE BIRTH OF CORPORATE HOLLYWOOD 28 (2001).
[167] *See* Harold L. Erickson, *CBS Corporation*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/topic/CBS-Corporation, (last visited Jan. 31, 2016).
[168] ROBERT REED & MAXINE REED, THE ENCYCLOPEDIA OF TELEVISION, CABLE, AND VIDEO 408 (1992).
[169] Kenneth R. Clark, *Broadcasting Legend William S. Paley, 89, Guided CBS More Than 50 Years*, CHICAGO TRIBUNE (Oct. 28, 1990), http://articles.chicagotribune.com/1990-10-28/news/9003300213_1_mr-paley-william-s-paley-united-independent-broadcasters.

de-Nazification of German media."[170] As later summarized in his obituary, "Paley served first with the Office of War Information and then, with the rank of colonel, as deputy chief of psychological warfare under Gen. Dwight Eisenhower." [171] Eisenhower later recommended that Paley be placed in an oversight position for the U.S. post-war psychological warfare campaign.[172]

The two men who led NBC and CBS had strong personal and professional relationships with the leaders in the U.S. military and political establishment. The growth of radio coverage of the news effort became an essential part of the war effort.[173] Radio became "America's dominant wartime entertainment medium . . . ."[174] Sarnoff's support for the technology was essential to win the war and Paley's active involvement in psychological warfare that protected U.S. troop landings at Normandy gave each man tremendous personal importance to the government.

As American politics shifted from the war footing of the Second World War to the anti-communist hysteria of the Cold War, Sarnoff and Paley were far more trustworthy than the motion pic-

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[170] TOM MASCARO, INTO THE FRAY: HOW NBC'S WASHINGTON DOCUMENTARY UNIT REINVENTED THE NEWS 20 (2012).

[171] Kenneth R. Clark, *Broadcasting Legend William S. Paley, 89, Guided CBS More Than 50 Years*, CHICAGO TRIBUNE (Oct. 28, 1990), http://articles.chicagotribune.com/1990-10-28/news/9003300213_1_mr-paley-william-s-paley-united-independent-broadcasters.

[172] ALFRED H. PADDOCK, JR., U.S. ARMY SPECIAL WARFARE, ITS ORIGINS: PSYCHOLOGICAL AND UNCONVENTIONAL WARFARE 1941-1952 50–51 (2002) (to head up a psychological warfare unit, Eisenhower wrote the Army suggesting Brigadier General Robert McClure "who had extensive experience in this field during the war in Europe" and who "was closely associated with Bill Paley and others of similar qualifications.")

[173] *See generally* GERD HORTEN, RADIO GOES TO WAR: THE CULTURAL POLITICS OF PROPAGANDA DURING WORLD War II 41–45 (2003); R. LEROY BANNERMAN, WORLD WAR II: THE RADIO WAR: RADIO REFLECTIONS OF THE USA HOME FRONT 67 (2013) (discussing Paley's radio messages sent throughout Europe).

[174] BOB BATCHELOR, AMERICAN POP: POPULAR CULTURE DECADE BY DECADE: POPULAR CULTURE DECADE BY DECADE 186 (2009) ("During World War II radio broadcasts . . . played an integral role in America's predominant national attitude of unity as it entered World War II.").

ture studio heads who failed to control the Hollywood Ten and continued to fuel FBI fears of communist infiltration. The radio broadcasters had the technology, creative talent, and regulatory support to wrest the future of visual story-telling away from the motion picture industry.

V. The Television Market of the Golden Age

The leadership of CBS and NBC during World War II was insufficient, however, to guarantee that these two companies would continue to dominate broadcasting. Prior to the U.S. declaration of war in 1941, the FCC was actively pursuing concerns regarding the monopolistic tendencies of the broadcast networks or "chain broadcasters."[175] The target of much of this concern was, in fact, RCA.[176] The consequence of the chain broadcaster proceedings resulted in NBC being forced to divest itself of its second broadcast network, the Blue network.[177] "The Chain Broadcasting Rules mostly regulated the large national radio networks, CBS and NBC, in their behavior with regard to local stations, in particular, the networks' control of individual broadcasters' decisions."[178]

The FCC also enacted a rule which prohibited the national broadcasting networks from requiring exclusivity as a condition of

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[175] *See* BRINSON, *supra* note 150 at 51–52; CHAIN BROADCASTING REPORT, *supra* note 37.

[176] BRINSON, *supra* note 150 at 37 ("Faced with trying to strike a balance between encouraging the development of television without simultaneously strengthening RCA's concentration of power, the FCC reached a decision that almost managed to accomplish both" regarding rules related to television receiver standards designed to promote technological innovation rather than to lock in RCA's lead in commercialization).

[177] CHAIN BROADCASTING REPORT, *supra* note 37. *See* Nat'l Broad. Co. v. U.S., 319 U.S. 190 (1943).

[178] Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS LAW REV. 1547, 1557 (2008). *See also* SARNOFF, *supra* note 14, at 55 (ironically, these rules were very consistent with the position taken by Sarnoff in 1924, when he was first conceiving the network system. "A few superpower stations . . . would enable all units to send out the same program simultaneously. . . . On the other hand, [the] smaller stations could continue to send out their individual programs, as at present, when they so desired.")

carrying network content.[179] The ruling "was designed to 'prevent monopoly and perpetuation of the control of various broadcasting stations.'"[180] Both NBC and CBS brought an action to overturn the rule,[181] but smaller broadcasting groups welcomed the FCC efforts to limit NBC and CBS.[182]

The FCC continued to be the champion of individual stations and small networks as it extended rules prohibiting concentrations of ownership.[183] "In the 1950s, the FCC . . . adopted what became known as the "Rule of Seven," which limited common ownership to seven FM, seven AM, and seven TV stations nationally (up to five of which could be VHF stations)."[184] The Rule of Seven created the potential for ABC, the former NBC-Blue network, Farnsworth Television, or other competitors to emerge as national broadcasters, and it kept the system of locally owned and operated stations operating as licensed affiliates of the broadcast networks rather than transforming all the stations into wholly owned and operated stations under NBC or CBS control.

Despite the congressional distrust, during this time, the studios were watching and dabbling in the television market. Paramount had an early investment stake in CBS but it never had any pro-

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[179] *See* SUSAN BRINSON, THE RED SCARE, POLITICS, AND THE FEDERAL COMMUNICATIONS COMMISSION, 1941–60 52 (2004)

[180] *Radio Chains Ask Court Void FCC License Ruling*, CHI. DAILY TRIB., Oct. 31, 1941, at 33 (quoting F.C.C.).

[181] *Id.*

[182] *See* BRINSON, *supra* note 150 at 51–52.

[183] *See* 1944 FEDERAL COMMUNICATIONS COMMISSION TENTH ANNUAL REPORT 10-11 (1944). In re Amendment of Sections 3.35, 3.240 & 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM & Television Broad. Stations, 18 F.C.C. 288, 295–96 (1953). Candeub, *supra* note 178 at 1555–1556.

[184] Candeub, *supra* note 178 at 1555–1556. *See also* In re Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM and Television Broad. Stations, 18 F.C.C. 288, 294, 297 (1953) (adopting ownership limit on AM stations). In this order, the limit was set at five television stations. One year later, it was changed to seven. Report and Order, 43 F.C.C. 2797, 2798, 2800–01 (1954).

gramming authority.[185] In addition, "[i]n 1938, Paramount purchased substantial ownership interests in the Alan B. DuMont Laboratories Company . . . as well as forming a subsidiary called Television Productions, Inc."[186] Paramount Pictures was an active participant in early television development, though history is unclear whether its efforts were designed to further the industry or slow its progress.[187] Nonetheless by 1948, Paramount and its partner DuMont had sufficient stations and programs to be a viable competitor to NBC and CBS.[188]

Nor was Paramount the first media conglomerate to be in both radio and film. Again it was David Sarnoff who in 1928 moved into the motion picture production business.[189] Driven by the need to get RCA's audio system adopted as one of the technologies for motion picture sound, RCA acquired rights from Keith-Albee-

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[185] *See* CHAIN BROADCASTING REPORT, *supra* note 37.

[186] Janet Wasko*, Hollywood and Television in the 1950s: The Roots of Diversification*, *in* HISTORY OF THE AMERICAN CINEMA 128 (2003).

[187] Clarke Ingram, *Introduction*, DUMONT TELEVISION NETWORK, http://www.dumontnetwork.com/2.html (last visited Jan. 31, 2016).

> Needing additional funds to continue his research, Dr. DuMont sold an interest in his fledgling company to Paramount Pictures in 1939. DuMont's involvement with Paramount ultimately proved to be a big mistake. Eager to hinder the development of television, which it perceived as a serious threat to the motion picture industry, Paramount thwarted DuMont's plans on many occasions. In later years, Paramount even owned and operated its own TV stations, which competed with DuMont's own affiliates.

[188] Wasko, *supra* note 186. ("By the end of the 1940s, Paramount was distributing filmed television programs to a few stations through its Paramount Television Network, with plans to develop a full-fledged network. Although additional station ownership was planned, the FCC denied Paramount and DuMont's claim that they were separate companies and they were forced to adhere to the FCC limit of five stations.").

[189] *See* MAURICE ESTABROOKS, ELECTRONIC TECHNOLOGY, CORPORATE STRATEGY, AND WORLD TRANSFORMATION 31 (1995).

Orpheum, the Film Booking Office, and Pathé.[190] The merged company, Radio-Keith-Orpheum ("RKO"), provided RCA with a technological platform in motion picture manufacture, a division dedicated to sound motion picture production, and a distribution deal with The Walt Disney Company—one of the few other movie studios that embraced television.[191] So although RCA was the preeminent radio company, its manufacturing business and motion picture business allowed it a unique position to straddle all these competing industries.[192]

The FCC pattern was to develop rather ad hoc determinations based on particular companies or applications and later translate those rulings into policy.[193] While tensions regarding Communist sympathizers were occurring within the FCC itself,[194] these concerns were also playing across the broadcasters and film companies. It is against this backdrop that a new federal agency begins to shape the evolution of television.

Developed from the staffing of the Office of Strategic Services ("OSS"),[195] the Central Intelligence Agency ("CIA") was author-

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[190] James P. Snyder, *The RKO Story*, OLD RADIO, http://www.oldradio.com/archives/prog/rko.pdf (last visited Jan. 31, 2016) ("RCA purchased its way into the motion picture business to have an outlet for its new variable density optical sound-on-film system, RCA Photophone. All of the major studios . . . had already signed exclusive contracts to use the other sound-on-film system, AT&T Western Electric division's Westrex . . . system.").

[191] *See id.*

[192] *See* ESTABROOKS, *supra* note 189, at 31–32.

[193] *See* Candeub, *supra* note 178, at 1556 ("the FCC used diversification of ownership informally on a case-by-case basis, laying the groundwork for adoption of an across-the-board rule. In general, the FCC's rules . . . followed a tortuous path of unofficial licensing practices that developed into formal rules and then changed again under various political pressures.").

[194] *See* BRINSON, *supra* note 150 at 51–52.

[195] The Office of Strategic Services itself evolved from a short-lived, civilian department. "The office of the Coordinator of Information [(COI)] constituted the nation's first peacetime, nondepartmental intelligence organization." After the U.S. entrance into WWII, "[t]he remainder of COI then became the Office of Strategic Services (OSS) on 13 June 1942. The change of name to OSS marked the loss of the 'white' propaganda mission, but it also fulfilled Donovan's wish for a title that reflected his sense of the 'strategic' importance of intelligence and

ized by Congress in 1947 as a response to the Cold War concerns.[196] The CIA operations included the active responsibility for running spies, for conducting paramilitary operations, engaging in psychological warfare, and providing analysis.[197]

The role of psychological warfare directly involved the activities of journalists (and later artists) throughout World War II and later during the conflicts of the Cold War and police action in Vietnam.

"No doubt important to the high regard officials came to hold of the OSS is the advocacy of it provided by United States General Dwight David Eisenhower."[198] Eisenhower came to believe in the importance of psychological warfare as a tool in the "military arsenal."[199] Some of the media resources were covert, while others were acknowledged content produced on behalf of the U.S. Gov-

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clandestine operations in modern war." COI Came First, CENTRAL INTELLIGENCE AGENCY (Jun. 28, 2008 01:09 PM), https://www.cia.gov/library/publications/intelligence-history/oss/art02.htm.

[196] *See* National Security Act, Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified at 50 U.S.C. §§ 401-405 (2015)); Sherri J. Conrad, *Executive Order 12,333: "Unleashing" the Cia Violates the Leash Law*, 70 CORNELL L. REV. 968, 990 (1985)

[197] NOTES FROM OUR ATTIC: A CURATOR'S POCKET HISTORY OF THE CIA, CENTRAL INTELLIGENCE AGENCY 29–30 (2014), *available at* https://www.cia.gov/library/publications/resources/a-curators-pocket-history-of-the-cia/Curator%20Pocket%20History%20CIA.pdf [hereinafter CIA POCKET HISTORY].

> CIA took over an organization that had grown out of the OSS, the Office of Special Operations, which was mainly responsible for running spies. In 1948, the National Security Council created the Office of Policy Coordination (OPC) to conduct paramilitary and psychological warfare, two more OSS functions. OPC first operated under joint CIA-State Department supervision before becoming an integral part of CIA in 1950.

[198] ROBERT J. KODOSKY, PSYCHOLOGICAL OPERATIONS AMERICAN STYLE: THE JOINT UNITED STATES PUBLIC 68 (2007) ("Eisenhower overcame his "soldierly distrust . . . watching [OSS] spread rumors he deemed as effective throughout first North Africa and then Europe.")

[199] *Id.*

ernment, such as Voice of America, "which played a major role in broadcasting propaganda during World War II and the Cold War…. During the war, the major news networks NBC and CBS produced programs for the VOA, continuing to supply some 40 percent of their programming through 1946–47."[200]

> While [President Harry S.] Truman acknowledged the importance of propaganda as a peacetime instrument of foreign policy, it was primarily the Cold War that institutionalized propaganda as a permanent instrument of U.S. foreign policy. A widespread belief developed that the United States was losing the "war of ideas" to the Soviet Union's supposedly superior propaganda apparatus. As Cold War tensions intensified, the United States gradually expanded its propaganda capabilities.
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> In 1948, the information program received permanent legislative sanction with the passage of the Smith-Mundt Act—the first legislative charter for a peacetime propaganda program. The act gave the State Department jurisdiction over both international information operations and cultural and educational exchange programs. Additional propaganda activities were conducted by the newly created Central Intelligence Agency, the economic assistance agencies (forerunners to the Agency for International Development), and the armed forces, especially the army.[201]

President Truman continued to expand the role of psychological warfare during the last days of his administration and these pol-

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[200] RODNEY CARLISLE, ENCYCLOPEDIA OF INTELLIGENCE AND COUNTERINTELLIGENCE 354–55 (2015).

[201] *Propaganda–Cold War*, ENCYCLOPEDIA OF THE NEW AMERICAN NATION, http://www.americanforeignrelations.com/O-W/Propaganda-Cold-war.html#ixzz3w6PUAEpS (last visited Jan 31. 2016).

icies were then greatly expanded by President Eisenhower.[202] As the CIA grew, its role in shaping the struggle with the Soviet Union took on greater urgency for Eisenhower.

> Our aim in the Cold War is not conquering of territory or subjugation by force. Our aim is more subtle, more pervasive, more complete. We are trying to get the world, by peaceful means, to believe the truth. That truth is that Americans want a world at peace, a world in which all people shall have opportunity for maximum individual development. The means we shall employ to spread this truth are often called 'psychological.' Don't be afraid of that term just because it's a five-dollar, five-syllable word. 'Psychological warfare' is the struggle for the minds and wills of men."[203]

The imperative of the expanded cultural cold war required a strong relationship between the covert government operators and the legitimate creators of content.[204] Noted journalist Carl Bernstein reported in 1977 that "more than 400 American journalists who in the past twenty-five years have secretly carried out assignments for the Central Intelligence Agency, according to documents on file at CIA headquarters."[205] "Some media organizations provided "cover" for CIA personnel overseas by allowing CIA officers to pose as reporters, while others used stringers or freelancers who also worked part-time for the CIA. Other journalists received occasional gifts or reimbursements from the CIA in exchange for information."[206]

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[202] *See* FRANCES STONOR SAUNDERS, THE CULTURAL COLD WAR 147–48 (1999).
[203] *Id.*; NIALL FERGUSON, KISSINGER: 1923–1968: THE IDEALIST Ch. 8 (2015).
[204] *See* SAUNDERS, *supra* note 202, at 105–08 ("Acquiring a niche in the competitive market-place of Cold War culture required a substantial investment.").
[205] Carl Bernstein, *The CIA and the Media*, ROLLING STONE, Oct. 20, 1977, at 55, *available at* http://www.carlbernstein.com/magazine_cia_and_media.php.
[206] KATHRYN S. OLMSTED, CHALLENGING THE SECRET GOVERNMENT: THE POST-WATERGATE INVESTIGATIONS OF THE CIA AND FBI 21 (1996) ("The number of journalists and news organizations that helped the CIA is hotly

Bernstein's expose built upon declassified hearing of the Church Committee Report,[207] revealing the longstanding interrelations between the CIA and the news media. Of the many news outlets two stood out, the New York Times and CBS.[208] The CBS relationship was, in large part, a personal one built from the relationship between Paley and CIA director Allen Dulles.

> CBS was unquestionably the CIA's most valuable broadcasting asset. CBS president William Paley and Allen Dulles enjoyed an easy working and social relationship. Over the years, the network provided cover for CIA employees, including at least one well-known foreign correspondent and several stringers; it supplied outtakes of newsfilm to the CIA; established a formal channel of communication between the Washington bureau chief and the Agency; gave the Agency access to the CBS newsfilm library; and allowed reports by CBS correspondents to the Washington and New York newsrooms to be routinely monitored by the CIA. Once a year during the 1950s and early 1960s, CBS correspondents joined the CIA hierarchy for private dinners and briefings.[209]

Paley's personal "friendship with CIA Director Dulles is now known to have been one of the most influential and significant in the communications industry. . . ."[210] Paley was not quick to admit

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contested, partly because of the secrecy of the records and partly because of definitional battles over what it meant to "work" for the agency.").

[207] FINAL REPORT OF THE SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK 1, S. REP. NO. 755, 94th Cong., 2d Sess. 71, 128 (1976) [hereinafter CHURCH COMMITTEE REPORT].

[208] Bernstein, *supra* note 205, at 205.

[209] Carl Bernstein, *The CIA and the Media*, ROLLING STONE, Oct. 20, 1977, at 55, *available at* http://www.carlbernstein.com/magazine_cia_and_media.php.

[210] DEBORAH DAVIS, KATHARINE THE GREAT: KATHARINE GRAHAM AND THE WASHINGTON POST 175 (2d Ed. 1987).

his role, but he was proud of it.[211] "He provided cover for CIA agents, supplied out-takes of news film, permitted the debriefing of reporters, and in many ways set the standard for the cooperation between the CIA and major broadcast companies which lasted until the mid-1970s."[212]

Although the practice of collaboration between the CIA and news media was officially ended in 1976 by CIA director George Bush (later U.S. President), the practices had waned during the more tumultuous period of the late 1960's and early 1970's.[213] "The most active period of CIA-media cooperation had been in the cold-war days of the 1950s . . . ."[214] In 1977, Paley even acknowledged his personal role in assisting the CIA while others within the CBS news division admitted various types of involvement.[215]

There is no overt, documented link between the license renewal system and the CIA, but it is hard to imagine that the FCC, struggling in the 1950s with an internal anti-Communist investigations and a highly politically engaged set of FCC Commissioners[216] were not influenced toward those broadcasters that had been so

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[211] *See* Daniel Schorr, *The CIA at CBS: Cloak-and-Camera at Black Rock*, NEW YORK MAG., Sept. 26, 1977, at 40.

[212] DEBORAH DAVIS, KATHARINE THE GREAT: KATHARINE GRAHAM AND THE WASHINGTON POST 175 (2d Ed. 1987).

[213] Schorr, *supra* note 21, at 40.

[214] *Id.*

[215] *Id.* at 42. Paley acknowledged his own role in helping the CIA, at least in part:

> "I cooperated with them, was helpful to them a few times on a very personal basis, and nothing whatsoever to do with CBS . . . . I was approached as somebody who could cooperate with them to their advantage. And this was back in the early fifties, when the cold war was at its height and when I didn't hesitate for a second to say, 'Okay, it's reasonable, I'll do it.' "

[216] The FCC had other issues regarding influence peddling. Chairman John Doerfer was indicted in 1958 "on charges of conspiring to influence the award for a television channel in Miami to Public Service TV, Incorporated, a subsidiary of National Airlines." GEORGE KOHN, THE NEW ENCYCLOPEDIA OF AMERICAN SCANDAL 111 (2000).

supportive during World War II and the ongoing Cold War and diligently rooting out those potential licensees who had communist leanings.[217] As Professor Coase noted, "[w]hat seems clear is that a newspaper which has an editorial policy approved of by the Commission is more likely to obtain a radio or television license than one that does not."[218] The FCC often used informal procedures and letters to shape licensees behavior without resort to public actions.[219]

In addition, there was another calculus at play — the relationship between new reporting and political sensitivity.

> As the 1950s began, the Cold War was producing a domestic backlash, McCarthyism, and an accompanying political sterility—creating stories CBS's star reporters insisted on covering. Television was arriving as a new national medium and the greatest advertising vehicle in history. Thus the political threat generated by serious newsmen doing their job coincided with the proliferation of commercial profits beyond the imagination of anyone at CBS. . . . The very reporters who made CBS so respectable during the war now threatened the network's commercial success. . . .Year by year, as CBS News became more controversial and

[217] *See, e.g.*, *Radio Program Controls: A Network of Inadequacy*, 57 YALE L.J. 275, 294 (1947) ("Representative, democratic government hypothesizes an electorate jealous of its freedom and possessed of information sufficient to make its policy decisions. Apparently, however, theoretical recognition of these conditions far exceeds their operational significance.").

[218] Coase, *supra* note 40, at 11 (Coase also noted the consequence of this relationship: "The threat to freedom of the process in its strictest sense is evident."). *See also* WBNX Broad. Co., 12 F.C.C. 805 (1948).

[219] *See, e.g.*, Lili Levi, *The FCCs Regulation of Indecency*, 7 FIRST REPORTS 1, 10–11 (2008) (noting formal indecency regulations did not emerge until 1970, perhaps because of "the cultural conformity of the 1950s, the private codes of conduct adopted by the National Association of Broadcasters, the FCC's ability to address the issue of indecency indirectly, under other regulatory rationales, or some combination of factors . . . .").

> more troublesome to its superiors, it also became a smaller and smaller part of the corporation.[220]

VI. Making New Markets – the CIA's Influence on Culture

As Professor Coase acknowledges "[i]t is difficult for someone outside the broadcasting industry to assess the extent to which programing has been affected by the views and actions of the Commission."[221] While television was fast growing to become the dominant cultural medium in the 1950s, the CIA and its allies were involved in other areas of psychological and cultural warfare.[222] These examples also serve to show how the heavy, hidden hand of the government has sometimes supplanted the invisible hand of the market and the interest of the public.

The hallmark of the program was the development of the Congress for Cultural Freedom, a CIA-funded front organization dedicated to promoting U.S. cultural organizations in Europe.[223] The Congress for Cultural Freedom "helped to solidify CIA's emerging strategy of promoting the non-Communist left--the strategy that would soon become the theoretical foundation of the Agency's political operations against Communism over the next two decades."[224]

The efforts of the CIA-funded cultural organization were quite robust. The CIA "published more than twenty prestigious magazines, held art exhibitions, operated a news and feature service, organized high-profile international conferences, published numerous books, and sponsored public performances by musicians and artists."[225] The CIA was more than a mere participant in the devel-

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[220] Halberstam, *supra* note 9.
[221] Coase, *supra* note 40, at 12.
[222] *See* CHURCH COMMITTEE REPORT, *supra* note 207; SAUNDERS, *supra* note 202. at 353–358.
[223] *See Propaganda-Cold War*, *supra* note 173.
[224] *Origins of the Congress for Cultural Freedom, 1949-50, Cultural Cold War,* CENTRAL INTELLIGENCE AGENCY (Jun. 27, 2008 09:48 AM), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/95unclass/Warner.html#ftl.
[225] *Propaganda-Cold War*, *supra* note 173.

opment of these literary works. The publications produced or financed by the CIA included both the Paris Review and the Partisan Review, both highly influential intellectual journals.[226] The CIA created the International Organizations Division ("IOD") under the direction of Tom Braden. The activities included a highly influential 1952 European tour by the Boston Symphony Orchestra.[227]

Among the various cultural markets created by the CIA, the most influential was the creation of the expressionist art market, wholly invented and promulgated as a psychological warfare propaganda strategy.[228] "In the manner of a Renaissance prince — except that it acted secretly — the CIA fostered and promoted American Abstract Expressionist painting around the world for more than 20 years."[229]

The CIA did not invent abstract expressionism,[230] but the CIA and its supporters were instrumental in creating the market for it. Donald Jameson was the CIA staff member responsible for promoting the field directly on behalf of the CIA.[231] Abstract expressionism was well suited to serve as a counterpoint to Soviet-

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[226] SAUNDERS, *supra* note 202, at 158–164, 246.

[227] *See* Thomas M. Troy, Jr., *The Cultural Cold War: The CIA and the World of Arts and Letters, Intelligence in Recent Public Literature*, CENTRAL INTELLIGENCE AGENCY (Jun. 27, 2008, 07:22 AM), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol46no1/article08.html.

[228] *See* Frances Stonor Saunders, *Modern Art was CIA 'Weapon'*, INDEPENDENT (Oct. 21, 1995), http://www.independent.co.uk/news/world/modern-art-was-cia-weapon-1578808.html.

[229] *Id.*

[230] *See* BONNIE CLEARWATER, THE ROTHKO BOOK 26-27 (2007) ("The Ten" expressionist artists came together in 1935 in what became Gallery Secession promoting an art form opposed to both social realism and geometric abstractionism.)

[231] *Id.* ("'Regarding Abstract Expressionism, I'd love to be able to say that the CIA invented it just to see what happens in New York and downtown SoHo tomorrow!' he joked. 'But I think that what we did really was to recognise the difference.'").

promoted Social Realism, an increasingly rigid and stylized formalistic form.[232]

The CIA did not need to be the actual market-maker for abstract expressionism. Instead it needed a partner in the private sector who shared its philosophy and goals.[233] During World War II, Nelson Rockefeller part of the Inter-American Affairs office, "responsible for propaganda in Latin America."[234] After World War II, Nelson Rockefeller, among other roles, served as the president of the Museum of Modern Art ("MoMA") in New York (and later Vice President of the United States).[235] MoMA had been co-founded by Nelson Rockefeller's mother Abby Aldrich Rockefeller.[236] Tom Braden, who had been appointed head of the CIA's International Organizations Division, was serving as a MoMA board member and its executive secretary.[237]

Rockefeller also served in the Eisenhower administration. In both his personal art collection and through the auspices of MoMA, Rockefeller was one of the significant market makers for expressionist art in the 1950's.[238] "Rockefeller was one of the biggest backers of Abstract Expressionism (which he called "free enterprise painting"). His museum was contracted to the Congress for

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[232] *See* SAUNDERS, *supra* note 202, at 255–257.

[233] An earlier attempt to purchase artworks directly and tour a collection, the 1946 Advancing American Art show met with a uniformly poor reception in both Europe and Washington, D.C. *See* Louis Menand, *Unpopular Front, American art and the Cold War*, NEW YORKER, Oct. 17, 2005, at 32-33 *available at* http://www.newyorker.com/magazine/2005/10/17/unpopular-front.

[234] RODNEY CARLISLE, ENCYCLOPEDIA OF INTELLIGENCE AND COUNTERINTELLIGENCE 354–55 (2015).

[235] *Museum of Modern Art,* THE ART STORY, http://www.theartstory.org/museum-moma.htm#sthash.qiLVrZC2.dpuf, (last visited Jan. 31, 2016) ("In 1939, Nelson Rockefeller (son to Abby and John D.) was appointed as MoMA's new president.")

[236] Jeffrey Frank, *Big Spender, Nelson Rockefeller's Grand Ambitions*, NEW YORKER (Oct. 13, 2014), http://www.newyorker.com/magazine/2014/10/13/big-spender-2.

[237] *See* Saunders*, supra* note 228. BRIAN KANNARD, STEINBECK: CITIZEN SPY 31–32 (2013).

[238] *See* Saunders, *supra* note 228; KANNARD, *supra* note 237, at 31–32.

Cultural Freedom to organise and curate most of its important art shows."[239] Perhaps even more important was fellow MoMA board member and CBS president, William S. Paley.[240] Other exhibits and many other CIA activities funding cultural events and programs utilized the Rockefeller Foundation to launder the funds and hide the involvement of the government.[241]

In retrospect, MoMA may not have required the CIA to promote its agenda of discovering, curating, and presenting new artists, and MoMA hesitates to acknowledge any overt relationship between the museum and the government.[242] But of course, like all markets, at the time the marketplace is being funded, the financial need is very significant. After the market is mature, a sufficient number of other purchasers have joined the market and it becomes self-sustaining.

Purchases by Rockefeller, Paley, and MoMA represented the acquisition of thousands of works.[243] The prominence of the purchasers and the aggressive promotion and display of these works was intended to create attention to the United States as the preeminent site of avant garde artwork and to shift the focus of the creative community from Europe to the United States. As MoMA breathlessly explains "Abstract Expressionism developed during the vibrant post-World War II years when New York City became

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[239] JAN GOLDMAN, THE CENTRAL INTELLIGENCE AGENCY, AN ENCYCLOPEDIA OF COVERT OPS, INTELLIGENCE GATHERING, AND SPIES 82 (2015). *See also*, Mike Harman, *The Cultural Cold War: Corporate and State Intervention in the Arts*, LIBCOM (Sept. 11 2006 15:07), https://libcom.org/history/articles/cultural-cold-war (the phrase "free enterprise art").

[240] *See* WILLIAM RUBIN & MATTHEW ARMSTRONG, THE WILLIAM S. PALEY COLLECTION: A TASTE FOR MODERNISM ix–x (1992).

[241] *See* CHURCH COMMITTEE REPORT, *supra* note 207.

[242] *See* KANNARD, *supra* note 237, at 31–32.

[243] *See*, e.g., WALTER ROTH, AVENGERS AND DEFENDERS: GLIMPSES OF CHICAGO'S JEWISH PAST 64–65 ("[Paley] died on October 6, 1990. He left his magnificent art collection, was valued at several hundreds of millions of dollars, to the William S. Paley Foundation, which in turn cage the collection to the New York Museum of Modern Art").

the center of a cultural transformation unprecedented in American history."[244]

The intersection of interests between Nelson Rockefeller, William S. Paley, the museum they controlled, and the government they supported aligned to create a market for U.S. artworks that created a powerful narrative which served the psychological warfare goals of the American government.[245] The hand was indeed invisible, but not initially because of free market interests. At play was the outstretched arm of government manipulation and interference. The Ten, Jackson Pollack, and the other artists who benefitted from the government funding and private support of Rockefeller and Paley may have fared no worse had the CIA not been interested, but it is likely the funds and international support helped define this market through its "unprecedented transformation."[246]

The art market was certainly not the only market affected by the CIA. In fine art, news broadcasting, literary publications, the CIA made an international difference. Through its partners in corporate America and in the elite nonprofit foundation community, the network promoted by the CIA had a direct effect on the rise of America as a global culture and the shape of both television and expressionist art.[247] The full extent of this interaction remains in documentation that has yet to be declassified.[248]

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[244] ANN TEMKIN, ABSTRACT EXPRESSIONISM AT THE MUSEUM OF MODERN ART 7 (2010).
[245] *See* Saunders, *supra* note 228, at 264–265.
[246] *See* TEMKIN, *supra* note 244, at 7.
[247] *See* CIA POCKET HISTORY, *supra* note 197 at 42; Saunders, *supra* note 228, at 252–301.
[248] *See generally* CIA POCKET HISTORY, *supra* note 197 at 42. The CIA readily acknowledges many of these incidents. Regarding the publications supported by the CIA, the story of Doctor Zhivago is particularly telling:

> Renowned Russian author Boris Pasternak won the 1958 Nobel Prize in Literature for his "lyrical poetry an . . . epic" writing, particularly in his masterpiece Doctor Zhivago, a love story set against the backdrop of the Russian Revolution. So-

Recent scholarship has highlighted the "rich relationship between modern art and television in its formative years in the United States."[249] The works of modern art both appeared on television and influenced its content.[250] Led by William Paley's CBS, the television network hired such artists as Andy Warhol and Richard Avedon "to create publicity station IDs, on-screen title art, and other visual attractions."[251] Given Paley's influence on broadcast advertising, it is not surprising that the influence of the modern art movement was on the advertising content even more than the TV programming itself.[252] "[A]dvertising turned out to be the hallmark of artistic experimentation."[253]

The reason for modern arts influence on the Golden Age of television is likely a combination of influences.[254] From the perspective of government influence, the promotion of modern art reinforced the CIA's goals of promoting the genre and undermining the influence of the Social Realism movement.[255] From the

> viet authorities suppressed the book as "a malicious libel of the USSR." In 2008, a broadcaster and literary historian named Ivan Tolstoy, himself the scion of a famous Russian literary family, published a book alleging that the CIA had secretly arranged for the publication of a limited-run, Russian-language edition of Doctor Zhivago. According to The Washington Post, Tolstoy concluded that "Pasternak's novel became a tool that was used by the United States to teach the Soviet Union a lesson." He argued that it was part of an ongoing US campaign to promote authors who told the truth about the harsh realities of life in the Soviet Union. CIA declassified its activities related to Doctor Zhivago in 2014.

[249] MAURICE BERGER & LYNN SPIGEL, REVOLUTION OF THE EYE: MODERN ART AND THE BIRTH OF AMERICAN TELEVISION ix (2014).
[250] *Id.*
[251] *Id.* at XIII.
[252] *See id.*
[253] *Id. See also* Halberstam, *supra* note 9; BERGER & SPIGEL, *supra* note 249, at 222–226 ("The cultural contacts between [TV commercial] directors, intellectuals, poets, novelists, graphic artists, musicians, and filmmakers provided a context in which advertising critics developed their own auteur system.").
[254] *See* BERGER & SPIGEL, *supra* note 249, at 221–28.
[255] *See* Saunders, *supra* note 228, at 262.

perspective of the broadcasters, modern art was fresh, new, and creative — natural resource for the newest medium. For the artists in both television and art, these were new media that both needed to be explored. The relationship was symbiotic and explosive.[256]

VII. Implications for Understanding Markets and anticipating the New Media

The market originally regulated by the Communications Act of 1934 had grown by the 1950's to become one of the most influential in world history. "By the early-mid 1950s, as television erupted on the American landscape, joining and surpassing radio broadcasting in its ubiquity and inescapability, mass culture theorists became even more concerned about the debilitating effects of mediated messages on American individualism and intellectualism."[257]

The changes wrought by television were profound and being steered by hands that were molding the messages and reshaping the cultural norms. "In some ways it is obvious that ideas and cultures evolve — that is, changes are gradual and build on what went before. Ideas spread from one place to another and from one person to another."[258] Marshall McLuhan summed up the transition simply enough: "Taken in the long run, the medium is the message."[259] The fear of broadcast's universal power, combined with the rela-

[256] *See* BERGER & SPIGEL, *supra* note 249, at 221–28.
[257] BRINSON, *supra* note 150 at 18.
[258] SUSAN BLACKMORE, THE MEME MACHINE 24 (2000).
[259] MARSHALL MCLUHAN & STEPHANIE MCLUHAN, UNDERSTANDING ME: LECTURES AND INTERVIEWS 3 (2005).

> So that when, by group action, a society evolves a new medium like print or telegraph or photo or radio, it has earned the right to express a new message. And when we tell the young that this new message is a threat to the old message or medium, we are telling them that all we are striving to do in our united social and technical lives is destructive of all that they hold dear. The young can only conclude that we are not serious. And this is the meaning of their decline of attention.

tively few corporations involved in the broadcast industry repeatedly raised concerns about who was controlling the message. For governments fearful of competition and goals of hegemonic world dominance, television was a legitimate theatre of war.[260]

Congress and the courts initially ignored the First Amendment and then later transitioned to an assumption that that First Amendment goals were achieved by active FCC review instead of a marketplace free of government intervention.[261] As explained in *FCC v. Pottsville Broadcasting Company*,[262] there has been a "widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field."[263]

Professor Coase challenged this fundamental assumption, suggesting instead that the government's primary role as regulator is to make the marketplace efficient. From this vantage point, there is no governmental interest in who is creating the content made available to the public.[264] Coase expanded on this position by

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[260] *See* United States Information and Educational Exchange Act of 1948, P.L. 402 Pub. L. No. 80-402, 62 Stat. 6 (1948). Allen W. Palmer & Edward L. Carter, *The Smith-Mundt Act's Ban on Domestic Propaganda: An Analysis of the Cold War Statute Limiting Access to Public Diplomacy*, 11 COMM. L. & POL'Y 1, 34 (2006).

[261] *See, e.g.*, F.C.C. v. Pottsville Broad. Co., 309 U.S. 134, 137–38 (1940) (upholding regulation of broadcast without application of the First Amendment); Red Lion Broad. Co. v. F.C.C., 395 U.S. 367 (1969) (upholding regulation of broadcast under the First Amendment because of the scarcity of spectrum which makes regulation essential).

[262] F.C.C. v. Pottsville Broad. Co., 309 U.S. 134 (1940).

[263] *Id.* at 137.

[264] *See* Coase, *supra* note 40, at 17-18.

> This "novel theory (novel with Adam Smith) is, of course, that the allocation of resources should be determined by the forces of the market rather than as a result of government decisions. Quite apart from the malallocations which are the result of political pressures, an administrative agency which attempts to perform the function normally carried out by the pricing mechanism operates under two handicaps. First of all, it lacks the precise monetary measure of benefit and cost provided by

pointing to a history of FCC actions he characterized as mild and unlikely to affect broadcaster content. Professor Brinson's research described in THE RED SCARE, POLITICS, AND THE FEDERAL COMMUNICATIONS COMMISSION, 1941–1960[265] directly contradicts Professor Coase's supposition that "it would seem improbable that the Commission's cautious approach would intimidate many station owners."[266] Both the broadcasters and the FCC regulators were intimidated by the anti-Communist threats and purges.

While Professor Coase was incorrect regarding the influence of the FCC, that does not mean he was wrong that the public interest standard of the Federal Communications Act was less evenhanded than a marketplace driven solely by selling licenses to the highest bidder.[267] An auction-based market has the obvious risk of market consolidation, but there is a solution to this concern as well.

Coase suggests specific rules to restrict the number of stations any one operator can own or operate.[268] Rather than more amorphous rules about the public interest, limitation on ownership get directly at the concern of market concentration. Such rules have, in

> the market. Second, it cannot, by the nature of things, be in possession of all the relevant information possessed by the managers of every business which uses or might use radio frequencies, to say nothing of the preferences of consumers for the various goods and services in the production of which radio frequencies could be used.

[265] *See generally* BRINSON, *supra* note 150.

[266] Coase, *supra* note 40, at 12.

[267] *See* Thomas W. Hazlett et. al., *Radio Spectrum and the Disruptive Clarity of Ronald Coase*, 54 J.L. & ECON. 125, 129 (2011).

> Coase confronted the Supreme Court's "misunderstanding of the nature of the problem" and made a remarkable discovery. First, the limited nature of frequencies simply suggested a scarcity constraint. Countless other scarce resources were efficiently allocated by the price system. Second, whatever spectrum use rights were assigned to wireless users could be assigned by auctions rather than fiat. (quoting Coase, *supra* note 40 at 14).

[268] *See id.* at 16–17.

fact, been adopted by the FCC and continue to limit the number of stations a network can control in the aggregate across the country or in a particular market.[269]

The concern of market dominance during the pre-war period was a concern that RCA—and later its radio networks under NBC—would dominate the marketplace. As CBS grew to become a worthy competitor to NBC, the fear grew of the potential duopoly. Unlike the oil industry referenced by Coase, or the agricultural production studied by Adam Smith, a significant portion of the public's news and information was under the control of only William Paley and David Sarnoff. The power held by the networks to select news stories and shape the public narrative was a tremendous source of influence.[270]

"The news automatically becomes the real world for the TV user and is not a substitute for reality, but is itself an immediate reality."[271] At CBS, Edward R. Murrow had been the voice shaping the U.S. understanding of World War II.[272] Later, his successor

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[269] *See* 2014 Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4527–4545, ¶¶ 340–372 (2014).

[270] *See* Kristine A. Oswald, *Mass Media and the Transformation of American Politics*, 77 MARQ. L. REV. 385, 392–393 (1994) ("'If a tree falls in the forest, and the media are not there to cover it, has the tree really fallen?' . . . By deciding what is 'news,' the media create their own definition of 'reality' for the public.); Colin Vandell, *Words Signifying Nothing? The Evolution of S 315(a) in an Age of Deregulation and Its Effect on Television News Coverage of Presidential Elections*, 27 HASTINGS COMM. & ENT L.J. 443, 444 (2005) ("The electronic media–a 'small and unelected elite'–play a substantial role in influencing the choice of elected leaders in the United States."); Christa Corrine McLintock, *The Destruction of Media Diversity, or: How the FCC Learned to Stop Regulating and Love Corporate Dominated Media*, 22 J. MARSHALL J. COMPUTER & INFO. L. 569, 574 (2004) ("While the power of media influence, over nearly all aspects of modern life from morality to politics is surprising, the alarming issue is not the growing media power itself, but the centralized media power nexus that has resulted.").

[271] ERIC MCLUHAN & FRANK ZINGRONE, ESSENTIAL MCLUHAN 272 (1995)

[272] OLSON & CLOUD, *supra* note 144, at 387 ("In their day their influence was enormous. But their medium was radio, and their day was short.").

Walter Cronkite was considered by many to have changed the U.S. role in Vietnam when he publicly announced his opposition to the war.[273] More than the politicians and statesmen of the twentieth century, broadcast journalists shaped the nature of our society.

Had the government's fear of an oligopoly been the only concern, then an auction to distribute spectrum combined with limits on market concentration and cross ownership would have been sufficient. But the CIA's involvement with the production of culture changed the calculus.

As a theoretical issue, the government was entirely correct to identify the use of art, culture, and media as the means to wage the Cold War.[274]

> By the end of World War II, the technologies of the first modern information revolution had had a massive impact on the way people lived and worked; on the way that businesses and governments conducted their affairs; and on the way that

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[273] *See* JAMES W. ROMAN, FROM DAYTIME TO PRIMETIME: THE HISTORY OF AMERICAN TELEVISION PROGRAMS 253 (2005). *Final Words: Cronkite's Vietnam Commentary*, NPR, http://www.npr.org/templates/story/story.php?storyId=106775685, (last visited Jan. 31, 2016).

> To say that we are mired in stalemate seems the only realistic, if unsatisfactory conclusion. On the off chance that military and political analysts are right, in the next few months we must test the enemy's intentions, in case this is indeed his last big gasp before negotiations.
> But it is increasingly clear to this reporter that the only rational way out then will be to negotiate, not as victors, but as an honorable people who lived up to their pledge to defend democracy, and did the best they could.
> This is Walter Cronkite. Good night.

[274] *See* MARSHALL MCLUHAN, THE GUTENBERG GALAXY 222 (1967) ("[I]t is nationalism, far more than any other expression of human gregariousness, which has come to the fore in modern times . . . The citizen armies of Cromwell and Napoleon were the ideal manifestations of the new technology.").

> wars were fought and peace was pursued. With their efforts to communicate less hampered by distance, time, and location than ever before, people knew more about what was happening nearby and far away than they had in the past, factored this knowledge into decisions that they made, and changed their perspectives on local, national, and international affairs.[275]

The government anticipated the continued influence of the media that shaped the Cold War. The United States was going to take no chances in managing this transition.[276]

The approach was consistent with classical economics. The prerequisites for a functional market established by Smith also provide for a significant governmental hand in shaping the market-place under certain conditions. Smith recognized the state's role in protecting society through the "defense of the territory," among other roles for the government.[277] Without overstating the CIA's case, it can be understood that a healthy pro-governmental agenda by the U.S. media would play a significant role in thwarting the expansion of the Communist and Socialist influences in Europe.[278]

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[275] ALBERTS & PAPP, *supra* note 63, at 21.

[276] *See* G. John Ikenberry & Charles A. Kupchan, *Socialization and Hegemonic Power*, 44 INT'L ORGANIZATION, 283, 301 (1990) ("After World War II, U.S. officials were more successful in embedding a set of norms among European elites.").

[277] GEOFFREY INGHAM, CAPITALISM: WITH A NEW POSTSCRIPT ON THE FINANCIAL CRISIS AND ITS AFTERMATH (2008) (other reasons for government participation in the market are to provide necessary public goods that would not be produced by individuals under normal market conditions, and to uphold the rule of law).

[278] *See, e.g.*, *VOA in the Postwar Years,* INSIDE VOICE OF AMERICA (Jan. 18, 2016 12:09 P.M.), http://www.insidevoa.com/content/a-13-34-2007-post-wwii-history-111602679/177529.html ("With the outbreak of the Korean War in 1950, VOA added new language services and developed plans to construct transmitter complexes on both the east and west coasts of the United States. By mid-1951, VOA's broadcasts expanded to forty-five languages, and nearly 400 hours weekly on the air.").

This was a market demand that made spectrum auctions unattractive.

The "cacophony of competing voices"[279] feared by the government were not merely the competition from commercial actors but rather the fear that one or more of the broadcasters could become the mouthpiece for the Soviet Union or one of the left-leaning allies in Europe.

Under the classical understanding of markets by Adam Smith, the government was correct in manipulating the broadcast market for the defense of the realm. Coase challenged this position by identifying the growing role of the First Amendment as a limitation of the government. The very slow expansion of the First Amendment, however, had certainly not reached the government during the early years of television and the covert nature of the CIA's involvement made any limitation difficult to enforce.[280] Moreover, the HUAC's influence was designed to intimidate and interfere with the individuals who worked in the broadcast and entertainment industries rather than to regulate openly the content on the airwaves or the broadcasters who held those licenses in public trust. The manipulation by the HUAC and the CIA should have been the target for reform. Such manipulation would likely extend into any spectrum auction just as readily as it did in the public licensing process of the FCC.

The goal of efficiency presented by Professor Coase may have had the salutary effect of stripping Congress and the CIA of their undisclosed agendas. At least on the face of the proposal, an open auction would eliminate the manipulation of the public interest doctrine to benefit those corporations which most aggressively bowed to the political pressure of Congressional committees or those which acted most cooperatively in furthering covert political goals.

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[279] Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 376 (1969).

[280] *See, e.g.*, F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502 (2009) (continuing to enforce FCC broadcast regulations); F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978).

At the same time, there remains the ability of these forces to manipulate any process. If the federal government chose to award a multi-billion dollar military contract to a particular broadcaster so that it had the financial resources to outbid all others for broadcast licenses, the government could achieve the same level of control with even less of an appearance of public oversight. In the end, so long as the government controls the allocation of broadcast spectrum it has the tools to assure that those resources are held in the hands of the companies it most desires.

The history of monopolists vying for control over the scare resource of broadcast spectrum could seem quaint in an age of virtually unlimited and unregulated Internet content.[281] But many of the forces that were at work during the beginnings of the Cold War have not disappeared. The Voice of America, which originated to push Allies propaganda to Nazi-held Europe continues to broadcast today.[282] In fact, a decades old prohibition of U.S. broadcasting government propaganda into the U.S. was eliminated in 2013, permitting the federal government to directly promote a federal agenda as a U.S. broadcaster.[283]

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[281] *See* Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 659-660 (2004) (upholding Internet service providers challenge to the Child Online Protection Act as a violation of the First Amendment). *See generally* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1816 (1995) ("The new system will reduce the role of the record stores and the labels, but the other sources of information, such as reviewers, will remain."); Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 501 (1999) ("The Court has not fully repudiated Red Lion, although it has struggled to balance its First Amendment objectives with governmental control of the content offered by media providers."); Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1559 (2012) ("Given the amplifying character of the Internet and social media, and in light of the decline in authority of the institutional press, there is good reason to be concerned about the impact of uncorrected inaccuracy.").

[282] *About VOA,* INSIDE VOICE OF AMERICA, http://www.insidevoa.com/info/about_us/1673.html, (last visited Jan. 31, 2016) ("VOA will present the policies of the United States clearly and effectively, and will also present responsible discussions and opinions on these policies.").

[283] John Hudson, *U.S. Repeals Propaganda Ban, Spreads Government-Made News to Americans*, FOREIGN POLICY (July 14, 2013, 7:06 PM),

The factual history provides a powerful counter-narrative to the idealized rhetoric of the First Amendment. These tropes often drive Free Speech jurisprudence as well as theoretical models of the First Amendment marketplace.[284] Whether this is Justice Holmes declaring that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"[285] or Justice Brandeis declaring that "[t]he fitting remedy for evil counsels is good ones,"[286] there is little the market can do from covert manipulation until that manipulation is made public.

In debates ranging from Net Neutrality standards[287] to U.S. patent policy,[288] today's innovators at Google, Apple, Microsoft, and Amazon are playing by the same playbook as their predecessors at Edison Labs, RCA, and CBS. GE, a founding partner of RCA, con-

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http://foreignpolicy.com/2013/07/14/u-s-repeals-propaganda-ban-spreads-government-made-news-to-americans/ (reporting the Smith-Mundt Modernization Act of 2012 was passed under the 2013 National Defense Authorization Act).

[284] *See* Volokh, *supra* note 281, at 1846 ("These premises may often be true, but sometimes they simply aren't. Sometimes the supporters of a thought have millions of dollars, while opponents are too poor to compete effectively. Some markets are monopolized by one speaker, for instance a single cable system.").

[285] Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[286] Whitney v. Cali., 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[287] *See* Verizon v. F.C.C., 740 F.3d 623, 628 (D.C. Cir. 2014) (addressing the FCC "effort to compel broadband providers to treat all Internet traffic the same regardless of source—or to require, as it is popularly known, 'net neutrality.'"); Protecting and Promoting the Open Internet, GN Docket No. 14-28, Feb. 26, 2015, (released Mar. 12, 2015), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf. C. Douglas Jarrett, *The Federal Communications Commission's Network Neutrality Order*, 71 BUS. LAW. 373, 379 (2016).

[288] *See* Issie Lapowsky, *What Tech Giants Are Spending Millions Lobbying For*, WIRED (July 23, 2015, 7:00 AM), http://www.wired.com/2015/07/google-facebook-amazon-lobbying/, ("In the second quarter of 2015, Google spent a whopping $4.62 million on lobbying efforts. That's just slightly less than the $5.47 million they spent in the first quarter, but it still makes the search giant the third largest corporate lobbyist."); Gene Quinn & Steve Brachmann, *Google Collects Patents While Lobbying Against Them*, IP WATCHDOG (May 3, 2015), http://www.ipwatchdog.com/2015/05/03/google-collects-patents-while-lobbying-against-them/id=57302/.

tinues to be a dominant corporate player in these markets more than a century after it started.[289]

Any regulatory system must anticipate both the use and the misuse to which it will be put. As Justice Holmes famously summarized the common law, "[t]he life of the law has not been logic: it has been experience." [290] The experience of television's emergence as the world's dominant medium is one of powerful voices and even more powerful manipulation. "Upon this point a page of history is worth a volume of logic."[291] The names will change and the corporate entities will merge and reform, but the battle for control of the medium will continue.

Conclusion

Perhaps the story of television regulation would best be told as a Shakespearean history, with each man a merchant prince vying for control of the kingdom.[292]

> As Thomas Edison over-reached with the Motion Picture Patents Company, Hollywood studios rose in concert to wrest control of domestic film production, building a West Coast empire. A young David Sarnoff emerged from the mundane world of telegraphy to seek dominance in radio and television broadcast, both in technology and in content. His chief competitor was William Paley, another upstart seeking to emerge through radio. Hollywood

[289] Steve Lohr, *G.E. is Moving Headquarters to Boston and into the Digital Era*, N.Y. TIMES, Jan. 14, 2016, at B1 (G.E. predicting it "would be a 'top 10 software company' by 2020").

[290] OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark D. Howe ed., Belknap Press 1963) (1881). *See generally* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 123 (1992).

[291] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.).

[292] A more fitting literary reference may be GEORGE R. R. MARTIN, A GAME OF THRONES (1996) (each player in the film and television monopoly fights associated with one of the literary houses: Paley as House Lannister, Sarnoff as House Baratheon, Edison house Greyjoy, Farnsworth house Tully, and Goldwyn and Meyer houses Tyrell and Stark).

> did not see a worthy opponent in radio and waited too long. Instead, Hollywood's moguls sought for monopoly power amongst themselves and failed to control their star-studded world of political and social excess.
>
> As war arose, Hollywood was distrusted by the government. Sarnoff and Paley each moved to support the Allies. Sarnoff's growing dominance of technology was matched by Paley's ingenious development of broadcast journalism and his voracious campaigns to steal Sarnoff's talent away from NBC and onto CBS. At the same time, unbeknown to the public, Paley—and to a lesser extent Sarnoff—had partnered with the government to use their media empires to dominate the countries struggling to rebuild after World War II, enriching Paley and Sarnoff while granting their adopted nation world domination throughout the end of the twentieth century. Their competition, their regulator, and their own organizations would all suffer from the attacks of the HUAC, but the network broadcasters would survive less damaged than the others.
>
> CBS rose to become the most powerful and most profitable broadcaster in the world, eclipsing even NBC and RCA. Paley sits as Chairman of CBS as well as president of the Museum of Modern Art. The CIA stands at his side. Through both highly respected institutions, he transforms the culture of the world. As the Golden Age of television rises and sets, CBS and its competitors at NBC, ABC, and DuMont reshaped the world.

The covert Cold War fought using broadcasting, modern art, and journalism has been increasingly documented. But the intersection of that covert history with the role of the HUAC requires that lawyers and regulators reconceive the broadcast marketplace

in terms of its actual landscape rather than the idealized marketplace of ideas.

The understanding Professor Coase brought to the FCC licensing regime in 1959 echoes the original conceptualization that Adam Smith first brought to agrarian and commodity markets over a century earlier. Even then, Smith recognized that the government's interest in national defense would play a more important role to transform or recast a market for which the government had such interest.

More than a mere play of history or tragedy, the story of television's origins belie a surprising convergence of monopoly, invention, regulation, and personality. The situations were unique to their time and place. But in the global battle for media domination of the twenty-first century, the patterns of history and the potential for this history to be repeated requires all media students to study this history and carefully scrutinize the industry for the faint but omnipresent fingerprints of the invisible hands continuing to shape our news, entertainment, politics, and culture.

THE ETHICS OF NCAA DIVISION I SPORTS TEAM SCHEDULING: UNIVERSITY PRESIDENTS TAKE THE FIELD PART II

Gregory M. Huckabee[1]

"Signor Antonio, many a time and oft in the Rialto you have rated me about my moneys and my usances. Still have I borne it with a patient shrug, for sufferance is the badge of all our tribe."[2]

I. INTRODUCTION

Do ethics play a role in intercollegiate sport when it involves Football Bowl Subdivision ("FBS") higher competitive tier teams that pay Football Championship Subdivision ("FCS") lesser tier teams for games? Research reveals that these games are considered noncompetitive.[3] Proponents argue competitiveness does not matter because these games are played by college athletes and other economic values take precedence over considerations of competitiveness. Data reflect that over 90% of games played between FBS and FCS teams are statistically noncompetitive.[4] Do economic factors moot ethical considerations in scheduling such

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[2] William Shakespeare, *The Merchant of Venice*, Act 1, Scene 3, at 5.

[3] Gregory M. Huckabee, *Is It Ethical to Sell a Lower Tier College Sports Team to Play Another Team of Far Greater Competitive Skill?,* 16 U. DENV. SPORTS & ENT. L.J., 89-135 (2014) [hereinafter Huckabee, *Is It Ethical*].

[4] *Id.*

FBS versus FCS football contests when judged by university presidents and chancellors?

This is a two-part study. Part I involved identifying and addressing the ethics of scheduling FBS versus FCS games and an analysis of intercollegiate sport and its purpose. It discussed factors that affect intercollegiate sport and its true educational purpose, but also the purported ethics that surround it. The study also addressed the factors affecting why these games are noncompetitive and why such competition may be unethical in FBS versus FCS games.[5] It is recommended Part I be reviewed prior to considering Part II's analysis to obtain a more informed understanding of the issue.

Part II of the study provides qualitative data, acquired through candid interviews with 10 Division I ("DI") university presidents and chancellors addressing 14 questions involving the ethics of sports scheduling. Most, but not all, were conducted face-to-face. Ultimately responsibility for what happens and fails to happen on college campuses should be attributed to the leadership and decision-making of the campus chief executive. The interviews provide insight as to why these university executives believe intercollegiate sport exists, the ethics that apply to this subject in higher education, what they have learned from unethical conduct in the college sports arena, and whether they believe FBS versus FCS scheduling as currently practiced is ethical. In order to gain access and candor in the interview process, the responses are anonymous, with one exception.

One respondent, Robert J. Spitzer, S.J., retired president of Gonzaga University, a DI school (but without football), agreed to answer questions on the record. He has special qualifications that make his responses thought provoking, if not authoritative, in that he is not only the President of the Spitzer Center of Ethical Leadership, dedicated to helping Catholic and for-profit organizations develop leadership, constructive cultures, and virtue ethics, but also

[5] *Id.*

the President of the Magis Center of Reason and Faith, a non-profit organization dedicated to developing educational materials on the complementarity of science, philosophy, and faith.[6] Respondents will be referred to as P1 through P10, with Fr. Spitzer being P10. Due to space limitations, questions and responses have been edited. Interviews ran 45 minutes to one hour, therefore, it is not feasible to provide them in their entirety.

II. STARTING POINT

A. Ethics

Contrary to some opinion, the concept of ethics can be defined. Whether it is understood may be a different matter. Socrates, 2,500 years ago, observed "Ethics consists of knowing what we ought to do."[7] Robert Solomon suggests the Greek word *ethos* (meaning character or custom) "…[B]egins with a concern for the individual — including what we blandly call "being a good person" — but it is also the effort to understand the social rules which govern and limit our behavior, especially those ultimate rules — the rules concerning good and evil — which we call morality."[8]

Aristotle argues "It is thought that every activity, artistic or scientific, in fact every deliberate action or pursuit, has for its object the attainment of some good. We may therefore assent to the view which has been expressed that `the good' is `that at which all things aim.'"[9] If we consider ethics in terms of simple rectitude, "Ethics has also been called the study and philosophy of human

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[6] *See Spitzer Center*, SPITZER CENTER, www.spitzercenter.org (last visited Oct. 26, 2015); *Our Mission*, MAGIS CENTER, www.magiscenter.com (last visited Oct. 26, 2015).

[7] *See* Claire Andre & Manuel Velasquez, *Can Ethics be Taught?*, SANTA CLARA UNIV. (Mar. 8, 2014), http://www.scu.edu/ethics/publications/iie/v1n1/taught.html.

[8] ROBERT C. SOLOMON, MORALITY AND THE GOOD LIFE 3 (1984).

[9] F.H. SANDBACH, THE ETHICS OF ARISTOTLE 25 (J.A.K. Thompson trans. 1953).

conduct, with an emphasis on determining right and wrong."[10] Collectively using these definitions as a baseline of knowledge and fact, ethics is not only about doing good, it should also be about doing right. Knowing how university presidents and chancellors understand this key point is a lens through which management decisions are made and judged.

Our first question asked of all 10 respondents inquired: **"How do you define ethics?"** While P1 simply observed it is "A set of moral principles that frame right versus wrong,"[11] P2 said:

> I guess in the context of this conversation I would use it as a kind of working definition of ethics as behaving in a manner that is respectful of the individuals affected by the activities that you are undertaking, that means the individuals that are both directly involved in it, but also in this case the spectators and the fan base, the university community, the city and all that, conducting business in a way that is respectful of all the people potentially affected by the activity that we are talking about, and abiding by sort of core principle that you are going to generally consider the welfare and the feelings of the people who are engaged in the activity. Again either as participants or spectators or whatever.[12]

P3 was more succinct stating "I'm a practical person, not a philosopher, so in my mind ethics would be doing the right thing — defined by being able to say what you did in a public setting and not blink when you say it."[13] P4 followed a similar train of thought reflecting: "Well I gave that some thought, I'm looking for sort of a simplistic definition that one could use on a daily basis. I

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[10] O.C. FERRELL, JOHN FRAEDRICH & LINDA FERRELL, BUSINESS ETHICS: ETHICAL DECISION MAKING & CASES 5 (2005).
[11] Interview with P1 (Jun. 2, 2015) [hereinafter P1 interview].
[12] Interview with P2 (Apr. 7, 2015) [hereinafter P2 interview].
[13] Interview with P3 (Jan. 26, 2015) [hereinafter P3 interview].

guess I think doing the right thing, I don't know that I can be any more specific than that without particular sets of facts or whatever, but in generally speaking, is it the right thing?"[14] As if there is a presidential ethics primer and quiz for all campus chief executives, P5 also said "Doing the right thing. Individual, personal integrity, and doing the right thing."[15] P6 was far more philosophical about this subject offering:

> To me, ethics is a system. It's a framework that is rooted in and oriented toward a particular set of values, that should be, can be engaged in coming to a determination of when a virtuous moral decision is to be arrived at. And I really think that it is essential, whether it's embedded and implicit, or whether it's explicit, that university administrators, and that includes those in leadership in athletics, work to uncover and understand what the system of ethics that they are making decisions along is. Because there are going to be, I think, very challenging questions that emerge in the complex environment of the kind of competing desires, that without having done that work or at least having very clear and significant sense of what guides one, can allow really horrific consequential decisions to occur as a result. So to me it's kind of a stem of framework, again rooted and based in a set of values about what one believes will lead to a virtuous decision.[16]

Surprisingly one interviewee, P7, declined to engage in the definition analysis: "I'm not going to attempt to define *ethics* or *sport*," perhaps not wanting to engage in a perceived polemic.[17] It is noteworthy though that a college president would decline even

[14] Interview with P4 (Jun. 10, 2014) [hereinafter P4 interview].
[15] Interview with P5 (Nov. 17, 2014) [hereinafter P5 interview].
[16] Interview with P6 (Apr. 9, 2014) [hereinafter P6 interview].
[17] Interview with P7 (Mar. 26, 2015) [hereinafter P7 interview].

an attempt to define either poignant term. What might that leader's decision-making philosophy be in supervising what is a multi-million dollar football enterprise at a DI school? P8 had no reluctance taking on this definition observing "…I always figure it's doing the right thing even when no one is looking. And all too often that's a tough decision. I got 12,000 18-23 year olds who, unfortunately in the characteristic age group, the research would show don't make wise decisions. But I think ethics is all about right things, doing it right, living with doing it right…."[18] P9 had a similar view offering "Well I think ethics can be defined as the boundaries of behavior beyond which you will not cross. It's the way we interact with each other on an upright and moral basis."[19]

Among the 10 campus chief executives, P10 is an ethicist by training and profession currently serving as the president of the Spitzer Center of Ethical Leadership. Serving perhaps as a baseline for comparison, he says "Well of course ethics is the study of good conduct, but it generally involves three areas. Virtues are habits or attitudes that we carry with us that lead towards the good and away from what might be called evil or the unjust or the bad.[20] This is a good start.

B. Sport

As part of the definitional foundation serving as a precursor for succeeding questions, the interviewees were asked to define sport as well. We can probably find agreement among sports aficionados that there is a distinct difference between professional and amateur sport. What is that difference and does that matter?

[18] Interview with P8 (May 4, 2015) [hereinafter P8 interview].
[19] Interview with P9 (May 6, 2015) [hereinafter P9 interview].
[20] Interview with P10 (Sep. 8, 2015) [hereinafter P10 interview]. Continued "So principle virtues that Socrates and Aristotle would have talked about would have been justice or fairness, courage and that more or less referred to as moral courage, prudence or wisdom, knowing what matters. Then fortitude which really comes down to you—know stick-to-it-ness and commitment to get things done when the going gets rough and temperance, that means staying away from things that are going to cause you trouble, or that will get you into bad conduct."

Understanding what sport is and how it relates to the transformative educational experience would seem an indispensable qualification for every collegiate president or chancellor. But consider if they did not appreciate the true meaning of sport; would that matter in their supervision and administration of students' participation in athletic and academic programs?

A good baseline definition of sport is provided by a historiographer who has given a great deal of thought to what it truly means: "In summary it can be said that sport, as a culturally valued practice, can be thought of as: A competitive rule-bound physically demanding activity in which its internal goals and standards are pursued in a moral way for their own sake."[21]

Clearly there is a misunderstanding of sport and its role in education among some national tier schools as the Wall Street Journal ("WSJ") reported in "Dark Days in Chapel Hill." Its finding observed "If you ran a college and knew there was substantial money to be had from sports but no requirement to educate athletes, you might cut corners — that's exactly what the University of North Carolina ("UNC") did for nearly two decades."[22] A book has been written by Jay Smith and Mary Willingham titled "Cheated" that documents an all too vivid example of what the WSJ characterizes as a "shameful record."[23] What does this "shameful record" involving sport at UNC look like?

> A report commissioned by the university and issued last year found that, over nearly two decades, 3,100 Chapel Hill students, about half of them athletes, took fake classes that required no work. The average grade in the fake classes was a A. No-show

[21] PETER J. ARNOLD, SPORTS, ETHICS, AND EDUCATION 16 (1997) [hereinafter ARNOLD].
[22] Gregg Easterbrook, *Dark Days in Chapel Hill,* WALL ST. J., Mar. 1, 2015, at C5 [hereinafter Easterbrook].
[23] *Id.*; JAY M. SMITH & MARY WILLINGHAM, CHEATED (2015) [hereinafter CHEATED].

> grades pulled up the GPAs of sports stars who otherwise would not have met the NCAA's modest eligibility standard of a C-minus average.[24]

Two decades is a long time. How many UNC employees in the academic, athletic, and administrative operations voluntarily, intelligently, knowingly, and willingly knew and participated in this corruption? Co-author Willingham writes with authority as she is a history professor at UNC and served for many years as an academic counselor, which is a routine duty for faculty at most DI institutions. In this capacity she brought to light the knowing ethical and unlawful conduct of UNC personnel when she granted interviews with the Raleigh News & Observer.[25] The authors of this expose "…accuse their state's prestige public campus of 'broad dishonesty' and of stocking its teams in football and basketball — the 'revenue sports' — with athletes to generate a profit, then breaking its promise to educate them."[26] As with many whistleblowers, the authors "recount being shunned in Chapel Hill for helping bring the scandal to light…."[27] Professor Willingham resigned and sued the school. UNC subsequently settled the litigation with her.

So what role does UNC's president, and his understanding of sport, play in a two decades old practice of "cheating?" Like the Watergate era and its persistent media and congressional investigative inquiry, what did the chief executive know or what should he have known about the purpose of sport and its role on his campus? One researcher has argued at its most basic formulation "…[T]he historical normative framework associated with sport is essentially an ethical one."[28]

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[24] Easterbrook, *supra* note 22; CHEATED, *supra* note 23.
[25] Easterbrook, *supra* note 22; CHEATED, *supra* note 23.
[26] Easterbrook, *supra* note 22; CHEATED, *supra* note 23.
[27] Easterbrook, *supra* note 22; CHEATED, *supra* note 23.
[28] ARNOLD, *supra* note 21, at 39.

When asked to define "sport," P1 offered that sport is "An athletic endeavor that entails a combination of mental and physical skill, mental and physical stamina, and competition with others."[29] P3 took a more thoughtful approach observing:

> I think the origins of sport — you can go back to Greek times, and what still should be the case now, is the opportunity for someone to prepare, train, and test their preparations and training against an opponent in an athletic venue, and if you will, place themselves with the outcome of the game. Not necessarily winning, but competing, and you know why students enroll in sports? The thrill of victory — the agony of defeat. Nonetheless some of my most memorable experiences whether in athletics or in life have come from losing and what I've learned from losing as much as what I have from winning, probably more so the losing side.[30]

P4 was less incisive in defining sport indicating "You know I thought that was a really interesting question and I don't really know that I can answer it other than a competitive exercise in one way or another that involves athletic ability, although I don't really think that that's a particularly good definition."[31] P5 seemed to appreciate a deeper meaning believing sport to be: "Individual and team competition in an organized fashion to allow the competitors to experience the game, but yet also have an opportunity to experience the agony of defeat and the glory of victory. It so happens in an organized way early on in the U.S. culture, much more so than it has before. There's no pick-up games at the local parks anymore."[32] Why is that do you suppose?

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[29] P1 interview, *supra* note 11.
[30] P3 interview, *supra* note 13.
[31] P4 interview, *supra* note 14.
[32] P5 interview, *supra* note 15.

P8 offered "I don't know, I'm going to give you a simple answer. I mean, if you go back 3,000 years, competitive physical activity, competition, partition, rules, and some outcome in mind. Sport is something that you engage in with, I won't say win or lose, but some outcome in mind, even if it is only the competition. I'm one of those guys who never felt like it was so bad to tie. We've kind of gotten away from that, you know someone's got to win."[33] P9 had a surprising different answer. "I think sport is the playing of any league game for personal satisfaction guaranteed by winning."[34] Guaranteed by winning? Sport is not true sport unless you win, is that true? That is a poignant view by a campus chief executive. How might this view affect his athletic program decision-making?

The P10 ethicist defines sport as: "Well you know sport can have a couple different meanings. Sometimes sport is just development of competitiveness and fair play, to use a sports analogy 'on a level playing field.'" Sport is meant to be physical, but the physical part is not an end in itself. The key element of sport is to use sport to develop a sense of competitiveness, but competitiveness that is fair at the end of the day."[35]

III. MORAL VALUES

A. Intrinsic Values

Our third question posed to our campus chief executives asked **"What are sports' intrinsic values?"** The concept of the practice of sport, it has been argued, is intrinsically concerned with moral value.[36] Historically there is a consensus that a number of identifiable values can be viewed as intrinsic to sport. Those intrinsic values are *"Respect, leadership, generosity, courage, compassion, teamwork, self-reliance, self-discipline, perseverance, fair*

[33] P8 interview, *supra* note 18.
[34] P9 interview, *supra* note 19.
[35] P10 interview, *supra* note 20.
[36] ARNOLD, *supra* note 21, at 5.

play, sportsmanship, magnanimity, concern for others."[37] (Emphasis added). When sport is viewed as a transformative part of the overall collegiate educational experience, the moral values previously listed can be characterized as important in learning and character development, in and of themselves — all good educational objectives.

How well do university presidents' and chancellors' appreciation of these intrinsic values of sport correlate (i.e., do they know what we get out of sport that gives it a rightful place in the institution's transformative education experience program)? Using the above listed 13 intrinsic values as a reference point, it is useful to see how many values a chief campus executive may readily identify. P1 identified "Physical fitness, teamwork, followership, leadership, and mental toughness,"[38] essentially 4/13. P2 characterized intrinsic values more thematically:

> …[t]he intrinsic value is that it is a lifestyle that is satisfying to them and challenging to them and in many cases adds vibrancy to their life and adds core existence to many of their lives and so I think the intrinsic values in that case for the student athletes themselves is just a personal lifestyle choice and that's important. I think the intrinsic value to the campus community of sports is one in which people take great pride in having a vibrant and enthusiastic work environment that's a part of, along with the arts and culture, the entertainment aspects of the campus…For the fan base whether they are alumni or community members, I think the inherent value of sports is, I don't know, it's part of the human psyche—that's why half the world sat around the TV last night watching Wisconsin and Kentucky. There's just something about the human makeup

[37] *Id.*
[38] P1 interview, *supra* note 11.

> that enjoys, is entertained by, is challenged by the notion of competition.[39]

Assuming "lifestyle" is related to self-reliance and self-discipline, this president captured 1/13. P3, provided a slightly different perspective:

> Well, I think we give ourselves the opportunity to be tested and it is easy to look in the mirror and see one thing, but when you look in the mirror after an athletic competition it's hard to deny what happened. I'm stretching the analogy too far there, but whether you play an opponent who's weaker than you, evenly as matched as you, or better than you, it's an opportunity to test yourself, test your preparation, test your training, test your level of competiveness, and get a reality check on where that's at... Much more complicated though in the example of football where it's you, and sensibly at one time ten other people. One person with different goals and aspirations than the other ten can have dramatic impact on the game both positive and negative.[40]

Assuming we see courage, self-reliance, self-discipline, and perseverance here, this respondent identified 4/13 intrinsic values. P4 took a different tack:

> I guess I think that intrinsic values is contributing to the growth of the individual participant in some way or another, hopefully in more than one way. Hopefully not only physically, but hopefully academically if nothing else because you usually can't play football for instance if one isn't in college…but I think building physical and moral character I sup-

[39] P2 interview, *supra* note 12.
[40] P3 interview, *supra* note 13.

> pose is developing skills as well. That's as good an answer as I can give.[41]

If we see respect, self-reliance, self-discipline, perseverance, and sportsmanship as involving growth physically and morally, this campus leader identified 5/13. P5 offered a broader perspective observing:

> I think that participants enjoy doing it… As an individual you enjoy it, so that's an intrinsic value. From participating you can gain some experiences that will serve you well in other applications—teamwork, strategy, understanding that work and effort might have good outcomes, and if you lack applying yourself, the outcomes might not be as good if you worked hard at it. I think those are some intrinsic values in participating in sports. You can't undersell the value of just enjoyment from the participants. And we organize the heck out of them these days so parents get enjoyment out of them as well.[42]

If we equate enjoyment with self-reliance and perseverance, with teamwork and self-discipline, this leader captured 4/14. P6 went deeper in his analysis:

> I think fundamental to sport is a sense of how it can contribute to one's sense of identity—their construction of an individual's sense of one's capabilities, one's ability to be competitive, to be successful in a competitive environment, to have the ability to measure agency in relationship to environment. We have, as a family, encouraged all three of our [children] to engage in sports, team sports, and their sense of self-confident identity has been a big part

[41] P4 interview, *supra* note 14.
[42] P5 interview, *supra* note 15.

> of what has been at the core of that encouragement. I think that particularly in the team sport environment a sense of how one can learn how to cope with adversity to gain the capacity for greater resilience, to understand what defeat feels like and that it doesn't necessarily equate to failure, are all really important components of what, for me as a psychologist, are sort of ego identity issues.[43]

If we view "identity" as encompassing self-reliance, self-discipline, magnanimity, and concern for others, together with teamwork and courage, P6 identified 6/13. P8 captured some but less with 3/13 offering "Well on the one hand I think competition and on the other hand it's almost like, I was thinking about this the other day it's like even in prison you have the inmate rules, there's certain crimes you don't want to commit when you go to prison because you're going to be put over here. I would say that an intrinsic value of sport is the short word 'fair'."[44] P9 again seemed to focus on "winning" as an intrinsic value observing "…I think maybe individual students, others, gain a great deal of personal satisfaction by competing …, and the satisfaction that comes with winning, with defeating your opponent. I think there's a great deal of personal satisfaction in that… Sport is a never ending circle of competition and achieving personal best against an opponent that might be a little bit better."[45] Is it interesting to note this campus chief executive did not identify any of the 13 values involving *"Respect, leadership, generosity, courage, compassion, teamwork, self-reliance, self-discipline, perseverance, fair play, sportsmanship, magnanimity, concern for others."* (Emphasis added). How much has he thought about the role of sport as a component in his transformative educational experience program? P10 identified three intrinsic values of significance to him:

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[43] P6 interview, *supra* note 16.
[44] P8 interview, *supra* note 18.
[45] P9 interview, *supra* note 19.

> Well I think there are certainly the big three. The number one value, of course, from which we take the analogy right out of sports is to have a level playing field. In other words to be fair, not to cheat, to make sure everyone competes on the same footing… The second idea… of course, fair play coinvolves with justice. Not just not cheating, being just to people giving them their due, making sure you don't take something that doesn't belong to you. I think fair play really comes under the rubric of justice… The third area gets into these cardinal virtues that we talked about, and this wouldn't necessarily be a principle, it's more of a virtue—a habit… It's also part of the whole idea of ethics and one of the key habits . . . are what I call moral courage and temperance. The whole idea of learning what can undermine you and the idea of having the courage and fortitude to pursue things to the point of excellence.[46]

Fair play and justice can equate to sportsmanship as well as courage and temperance/fortitude involves magnanimity, so our Jesuit ethicist finds 4/13 of Arnold's values in sport.

While comparison of these academic leader responses to the 13 intrinsic values posed by Peter Arnold in his treatise Sports, Ethics, and Education may be viewed as arbitrary, the qualitative nature of these responses should give pause. How deeply have these presidents and chancellors thought about the intrinsic value of sport in what is a burgeoning multimillion dollar business being conducted on their campuses? If viewed in its most favorable light, the UNC Chapel Hill chancellor had no idea what was going on for two decades on his campus regarding fake classes involving 3,100 students, while literally hundreds of faculty, administrators,

[46] P10 interview, *supra* note 20.

and athletic staff participated in this ruse. Is not that remarkable, or is it creditable?

> Like many large universities, Chapel Hill has a committee that grants admission waivers to top sports recruits. "Cheated" says that the committee admitted players who scored below 400 on the verbal SAT—that's the 15th percentile [nationally], barely north of illiterate—or who were chronically absent from high school except on game days. There is no chance that a student so poorly prepared for college will earn a diploma. All he can do is generate money for the university.[47]

How could a chancellor miss all this? In view of the ever increasing importance of money and its corruption in collegiate sports, are the intrinsic values of sport something presidents and chancellors should be thinking more deeply about? Did UNC's chancellor give any consideration to the role and importance of sport's intrinsic values on his campus at all? The evidence would indicate otherwise. Does this have impact?

B. Extrinsic Values

What external values might be connected to an intercollegiate sport, in particular football, that can undermine the internal ones discussed above? *Power, status, prestige, and money* have been identified as external values that can corrode or corrupt the sport of football's intrinsic values.[48] (Emphasis added). "Put dif-

[47] Easterbrook, *supra* note 22.

[48] *Id.* at 17. "Whereas a practice is concerned with its own internal good, standards of achievement and conduct, institutions, although expressing concern with these same things, are characteristically concerned as much, if not more, with the control and distribution of external goods in the form of power, status, prestige and money. When a practice like sport becomes institutional, its organization and administration become bureaucratized. Officials are expected to fulfill a number of particular functions concerned with such matters as its promotion, sponsorship, and ritualization." *Id*.

ferently institutions are likely to corrupt practices when they demonstrate an undue interest in the promotion and extension of external goods at the expense of the preservation and cultivation of internal ones."[49] Does this sound like UNC Chapel Hill? Let's examine this case in point more closely.

> Last year, according to [U.S.] Education Department data, UNC-Chapel Hill cleared $30 million in profit on football and men's basketball, a number that does not include whatever part of the $297 million in gifts and grants received by the school last year prompted by athletics, or $130 million in assets held by the athletic foundation affiliated with the college.[50]

Is the UNC-Chapel Hill case an anomaly or illustrative of a contagion? Money, money, money, show me the money. The Wall Street Journal reports "Across the big-college landscape, around $3 billion annually flows from networks to schools in rights fees for national TV broadcasts of football and men's basketball. Ticket sales and local marketing add to the total. Meanwhile, the NCAA almost never sanctions colleges that don't educate scholarship athletes."[51] This must be the worst kept secret in college football and basketball.

Does it seem intrinsic values are being sacrificed on the altar of extrinsic ones? The National Collegiate Athletic Association ("NCAA") received about $800 million alone from broadcasting rights from this year's March Madness Tournament (2015).[52] This is not only a 500% increase from two decades ago, but is only a small portion of $12 billion in revenues that are generated by col-

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[49] *Id.* at 19.
[50] *Id.*
[51] *Id.*
[52] Allysia Finley, *A March Madness Underdog: Free Enterprise,* WALL ST. J., Mar. 28-29, 2015, at A11 [hereinafter *March Madness*].

lege athletic programs, principally football and basketball.[53] Is the matchup fair between intrinsic and extrinsic values? Former Duke basketball player and current ESPN sports analyst Jay Bilas reveals another worst kept secret: "This is a multibillion-dollar business. It's professional in every way except in how the athletes are treated…When you are profiting off someone else while restricting them from earning a profit, that's exploitation."[54]

As Part I of this study documents, intrinsic moral values and ethics are subject to being overwhelmed by external ones.[55] As college presidents and chancellors will testify, it has almost become an arms race when it comes to generating revenue in intercollegiate sports. The University of California, Los Angeles ("UCLA") generated $84 million in 2013 while the university spent $31 million on coaching and staff. Even their head football coach Jim Mora commanded $3.25 million which turns out to be four times what the head coach made in 2006. On top of this, UCLA spent $136 million renovating its Pauley Pavilion basketball stadium. What is striking is that UCLA only spent $11.6 million on all its sports scholarships.[56]

C. Sport and Moral Value

The concept of the practice of sport, it has been suggested, is intrinsically concerned with moral value. Our fourth interrogatory asked **"Is that true? If so, what moral value?"**
P1 said "I don't believe this is true. It depends on how one approaches the effort as to whether or not it has moral value."[57] P2 provided a deeper explanation:

> I guess I'm not sure that I see sports motivated any more or less by moral value than the rest of the ac-

[53] *Id.*
[54] *Id.*
[55] Huckabee, *Is It Ethical, supra* note 3.
[56] *March Madness*, *supra* note 52.
[57] P1 interview, *supra* note11.

> tivities that we engage. I don't think somebody who views himself or herself as a particularly moral person is attracted to sports necessary or vice versa. I guess I'm not sure that it is uniquely or distinctly connected to moral issues relative to the rest of what we do in society. I mean I don't know that there is anything more moral about sports and athletics than there are arts and entertainment, or business or whatever.[58]

P4 had a different view saying "I think it should be, I'm not entirely sure that it is. I suppose it's the NBA versus the chariots of fire as a view of athletes as pure, at least not professional athletics, pure form of competition where there is a set of values that have to be adhered to, and winning isn't necessarily the only thing… I think that is a moral value — Sportsmanship.[59] P5 was more distanced responding "I don't know what moral value is. Well we just talked about intrinsic values so if intrinsic value has virtue in the eyes of the holder, then in fact they inspire to capture those values by participating."[60] P6 offered a more in depth philosophical description about moral value in sport:

> Well that's an interesting issue. I would suggest it can be, but not necessarily innately connected to the development of or experience of moral values building. I think that sport is largely looked at objectively, an activity and the way in which sport is contextualized and the ways in which individuals are taught within that context can translate, as is the case with many activities, into tremendous opportunities for the development of a system of morals or, alternatively, the opposite. I think about, for example, these incidents that were videotaped a couple of years ago of this young female soccer player who

[58] P2 interview, *supra* note 12.
[59] P4 interview, *supra* note 14.
[60] P5 interview, *supra* note 15.

> was caught in the context of a competitive, highly competitive, kind of high school sport environment of bullying and physically assaulting other players on the opposing team and thinking, as I think many people did, "I wonder where she got the idea that that was appropriate behavior in the context of this environment?" Alternatively, I think that there are, in particular from the influence of coaches, many opportunities for young women and young men to develop through modeling, and through the ways in which the construction of practice and sport and engagement and also other related activities have down time to spend, so social activities create opportunities for people to really build a very solid system of morals, so I'm not sure that its intrinsic to the sport, but I think it creates the possibility for that.[61]

P8 was more pragmatic reflecting "I think there's an intrinsic concept of, there's a set of rules that govern the game, you play it and at the end of the game there's an outcome, win, lose, or draw, it was competitive it was fair… So I think the moral value surrounds all the things we do about the press and the reporting of sport. Do kids on campus get an undue advantage because they are student athletes? That's part of the moral value of sport. I would fall on the stick no more than a kid that does well in any other class gets an advantage in terms of what they're doing.[62] A similar view was provided by P9 observing "…[I] think the moral value is fundamental honesty…[h]ave you prepared yourself honestly and well or do you enhance your abilities through a variety of physiological advantages—steroids, deceit, cheating; so I think the main thing about ethics in sport is to compete on a honest open level playing field."[63]

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[61] P6 interview, *supra* note 16.
[62] P8 interview, *supra* note 18.
[63] P9 interview, *supra* note 19.

There was some agreement that sport involved moral value with P10 arguing "Yes. Certainly the ones that I was mentioning—fair play is incredibly important. Honesty is incredibly important, and of course, I think another one in light of today's sports is do not do harm to others, don't injure anyone, don't harm anyone unnecessarily, is an incredibly important value…[t]hese three things for sure are at the top of the list."[64] He went on to poignantly add "The idea that you can be honest on the playing field and not be honest in your personal life, but somehow you have this compartmentalized personal and professional ethic, is you know, a complete fiction."[65]

It appears not all of these educational leaders see sport as intrinsically concerned with moral value, but left open the possibility that it could, depending on the context of coaching and the nature of the particular sport's competitive environment. Admittedly the athletic environment is quite different in football when compared to tennis or swimming or crew.

IV. WINNING

After laying a descriptive foundation of sport and ethical moral relationships, the 10 interviewees were probed about the role of winning in sport. They were asked **"Is winning the primary or central criterion of a sport team's success?"** P1 was succinct and to the point: "It is a central criterion. We play the games to win."[66] Do other campus leaders see it the same way — is that what sport is all about in the educational realm? P2 agreed with P1, but offered more context.

> Well, that's a good question. I think that in the context of athletics that you know the fundamental tentative of athletics is competition, and in competition there are winners and losers. Whether it's team

[64] P10 interview, *supra* note 20.
[65] *Id.*
[66] P1 interview, *supra* note 11.

> based, whether it's individual based, I mean I think that kind is almost by definition what athletics in the context of competitive sports is about. So winning is, I would say, approaching the sport with an idea of winning is inherent in athletics. That does not mean `not winning' is that there is something wrong with that, or that it means that you have failed an overall sense of quality of life or whatever. But I think winning is important to athletics almost definitionally—it is about coming out on top. That doesn't mean that everything about athletics has to be geared toward winning. I think it's geared towards getting the best out of people as individuals, getting the best out of a collection of individuals that make up the team, but with the goal of performing better than the other guys.[67]

Perhaps demonstrating reasonable minds can legitimately disagree, P3 contrasted the above views arguing:

> Oh no, absolutely not…It's the challenge of that competition in placing one's self that is core and central. Winning is essentially the goal, but I wouldn't define winning is having the most points or the fastest time. Winning, for an example, winning for someone who is physically handicapped could possibly be running, and running successfully and running at the best time for people with a handicap… They are accomplishing things that perhaps they thought they could never accomplish or told they could never accomplish. So again it's facing the challenge, preparing for it, training for it, performing essentially to the best of your abilities given those set of parameters. That's the intrinsic core

[67] P2 interview, *supra* note 12.

> value of competition and athletics, at least in my mind.[68]

P4 said "It is primary, but it isn't everything."[69] P5 flatly said "no" that it is not a primary or central criterion to a sport team's success.[70] P6 disagreed saying "I think it is one, yes."[71] P7 provided a more nuanced observation:

> Winning—and thus losing—are central components of traditional sports. However, student athletes at universities I'm familiar with typically stay enrolled and graduate with GPAs equivalent to or better than those of non-athletes. They are engaged with the university and with community service in ways that many other students aren't. I would argue that a college team could be termed successful through their academic success and contributions to the campus and community— definitions of success that would not pertain to a professional team.[72]

The concept of winning drives sports programs. But is it the only thing or primary objective that is sought from these programs? Preoccupation with winning by itself can be a corrosive external force. Therein lies the pitfall. "Their collective message is that the intrinsic values of sport are replaced by those that are external to it, there is the distinct possibility that it will be manipulated or worse irredeemably undermined and corrupted."[73] P8 countered, "At this place, no… So I think character, integrity, winning and losing are critical elements of sport that I see causes different kinds of people that come out of the other end… There's nothing better than winning. There's nothing better than getting a

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[68] P3 interview, *supra* note 13.
[69] P4 interview, *supra* note 14.
[70] P5 interview, *supra* note 15.
[71] P6 interview, *supra* note 16.
[72] P7 interview, *supra* note 17.
[73] ARNOLD, *supra* note 21, at 5.

hundred on a test, but in the same way I think part of something we have to do more of in a celebrated sport is the fact that I lost and I got back up tomorrow and I put the soccer shoes on, the baseball cap on, swimming suit on and I went back out and did it. Again I think that builds character, strong bones, and teeth and good citizens for the next 50 years."[74]

Similar to P8, P9 responded, "No, I would have to say that in the ideal world the way you play the game, if you do your personal best, …whether you win or lose it's what you walk away with from that field of competition…."[75] P10 went deeper connecting winning at a higher level.

> Well when you're looking at sport just from the vantage point of physical competitiveness and excellence, winning is of course important. But it cannot be an end in itself. Two thoughts about this. The first is the old principle of Saint Augustine which most of us still hold in our ethical lives today. The end does not justify the means. So we may have the end of physical excellence, the end of winning, the end of bringing pride to our team, our region, or whatever it may be, but this is an objective, and an end we're seeking, but we have to use means of getting there that are fundamentally eth ical.[76]

He further qualified "winning" within a narrow context:

> So for all intents and purposes winning is not the sole end. And second, we have to call the end of sports 'winning with good character', with fair play which develops good leadership, is a good example for those who are being entertained by it, and …

[74] P8 interview, *supra* note 18.
[75] P9 interview, *supra* note 19.
[76] P10 interview, *supra* note 20.

> role modeling for the children who are not only being entertained by it, but are being informed by it. It's all of those things wrapped up into the objective of winning, and without those other things—winning is meaningless. Winning is basically empty, period.[77]

As these campus chief executives reveal, they see a connection between winning and the positive learning outcomes produced by competition. While it is a truism that everyone involved in sports competition — athletes, coaches, staff, and spectators, view success in terms of winning, it is refreshing to see that at least some institutional leaders see value in competition by itself. In all athletic competitions, especially football, there are winners and losers. What do losers take away from the experience? Some might argue nothing, but these interview responses indicate something more. These campus leaders see value, perhaps even moral value in competition alone. That is a good thing.

IV. WHAT ELSE BESIDES WINNING?

Our collegiate presidents and chancellors were next asked to **"Rank order your top three criteria for determining success in sport."** This required deep reflection. P1 succinctly stated "The contest was fair; participants did their best; a sense of accomplishment was realized by the participants."[78] P2 viewed the criteria differently:

> That's easy and I won't rank them in order, I will give the three of them to you that are all equally critical. And its excellence in competition, its excellence in the classroom, and its excellence in the community. And I have that mantra that I tell every time I get together with any athletic related group whether it's the students or the boosters or whoev-

[77] *Id.*
[78] P1 interview, *supra* note 11.

> er—it's those three things… By the community we mean responsible behavior, we mean public outreach, community service, those kind of things. And the lack of any one of those is less than a successful program.[79]

This is a broader view than that taken by other interviewees. P3 opined:

> Preparation to the best of your abilities, and knowledge and experience prepared for the competition, facing that competition, and how you handle that competition, and again whether you're the superior, equal or lesser force in that competition. And third and last would be the winning aspect. There are certainly pundits who would argue that nice guys finish last, or it's all about you either won or you lost, and I simply don't see it that way. An example here is we would have had an undefeated season if we didn't lose to [identification deleted] University, that was very important for us to achieving a historic [deleted] championship. We had had players who have never known a loss since they have been on the team—juniors who had been on the team. We had players who had forgotten what it was like to lose a game. It leaves an undoubtable bad taste in one's mouth. To lose when you're used to winning. And they learned far more by losing that game than if they would have squeaked it out and won. I think most coaches would say sometimes losing is a good thing. It teaches you that you have to prepare, that you have to train, and that you have to apply that to succeed to win the game. It's not just about showing up, and there are undoubtedly some great examples of athletic upsets across the

[79] P2 interview, *supra* note 12.

> span of sports where teams thought they'd win by showing up and found out that a better prepared team was more competitive and won… Because motivation, preparation, and training can be factors that change everything.[80]

This is insightful. Yet, P4 viewed the criteria differently focusing on winning, fairness, and related values.

> …[I] don't know if it's one, two, or three, but winning is important. Winning in a fair fashion is important. And developing the athlete in so doing is important. I mean double shots of steroids prior to the game and winning doesn't contribute to the physical and academic growth of the athlete. Maybe it's not right, but it is really hard to say winning isn't the top criteria, it is, but also winning in a fair fashion and a sportsmanlike fashion is important, and a program that contributes to the physical and moral well-being of the student, physical, academic, moral well-being of the athlete.[81]

P5 offered a similar view.

> First, I think is student athletes have to be successful students. If we are going to engage in intercollegiate athletics, we have to provide the opportunity for those students to be successful athletically and academically. So they then need to have that avenue that they can see that they can pursue to achieve their aspirations both as students and athletes. And team success or individual success, depending on the sport, is part of the criteria for determining success in that sport.[82]

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[80] P3 interview, *supra* note 13.
[81] P4 interview, *supra* note 14.
[82] P5 interview, *supra* note 15.

P6 related a more individually nuanced view to the concept of sport as distinguished from the criterion of winning:

> My personal first one is a sense of fulfillment and individual achievement in relationship to the experience. I think, I can't help but think about this in terms of our collegiate environment, because everything we do should in some way be related to human development and education. And regardless of where it happens, otherwise in my view it doesn't belong in the collegiate environment. I think that success, the second element of success, is the ability to gain a sense of fulfillment in team sports as an individual experiencing oneself as part of a collective, and a sense of ability to really experience fulfilment as a part of a collective identity, as well as that individual identity. I think the third element of success actually does come down to an ability to claim a fulfilment in the context of virtue, rather than as a tradeoff. I think about the immense pride I've seen teams who have lost really important contests having as they walk off the court or off the field defeated in a sense that they didn't win the game, but filled with pride that they gave it their all, that there were moments and opportunities and they were seized and fulfilled for success in the midst of the contest, and a sense that who they are as a program manifested itself throughout the experience. So, without question others are going to look at the ultimate criteria of success as winning or its alternative, but I don't.[83]

P8 was an outlier arguing, "I wrote that down. I wrote down teamwork success, character building, and competitiveness. And no, winning and losing are not in the top three."[84] P9 said,

[83] P6 interview, *supra* note 16.
[84] P8 interview, *supra* note 18.

"Well I think putting in your best performance is number one… It doesn't matter whether you win or lose…I think the second thing might be how you conduct yourself… professionalism, with dignity, integrity as you play the game. I guess the third thing is that . . . it is good to win once in a while."[85] P10 valued similar points without rank ordering them accentuating their co-equal importance:

> …[Y]ou would have to have physical excellence in competitiveness towards winning. Number two—I would say co-equal…the character and the fair play and honesty at which that winning was pursued. And number three, again not rank ordering it, but co-equaling it at the same time, being a good role model—an example, so as to develop excellent leaders and the group, especially the young, who are being entertained by that sport.[86]

Is not the difference in view by these campus executives fascinating? While winning is one of the top three criteria for gauging athletic program success in many of these responses, these experienced institutional leaders connect other goals as well. Those other goals may even be viewed as equal to or superior to the goal of winning. Heresy!

V. THE LESSONS OF PENN STATE

When considering the above discussion, together with the proposition that external values (i.e., power, status, prestige, and money) might be connected to the intercollegiate sport of football that can undermine internal ones, our interviewees were next asked **"What have you learned about the Penn State scandal involving football, coaches, and university presidents?"** P1 drew a leadership lesson stating: "Athletic programs must always be carried out consistent with an institution's values and mission. No

[85] P9 interview, *supra* note 19.
[86] P10 interview, *supra* note 20.

program or coaching staff, no matter how successful, can be allowed to set itself apart from the university's regular governance structures and practices, or from the management and leadership of senior administrators."[87] And yet, the prestigious and well-funded Penn State did just that. How many people at Penn State in the athletic, academic, and administration willingly, knowingly, voluntarily, or at least negligently, aided, abetted, contributed to the transgressions that occurred? As investigation reports reveal, it is not a small number, which says something about the institution's culture and the corrosive effect of external values overwhelming internal ones. P2 also approached this incident from a leadership perspective:

> Well I think from my position as university president, I have learned that attentiveness and oversight are absolutely essential on the part of the president. That there are enough people involved in athletics that things can definitely go wrong whether they are intentional or through negligence or what have you, things can go wrong. Just like they can with any other aspect of society. I think if we are not attentive to the ethics in the classroom, athletics aside, if we are not attentive to ethics and morals in the classroom, things can go wrong there. Things can go wrong downtown. I mean I think attentiveness and responsible oversight are absolutely essential in everything. It's just absolutely fundamental.[88]

P3 shockingly was not surprised by what happened at Penn State. He provides a chilling inside reality check of what it is like to be the chief executive of an institution where external and internal values collide.

> It wasn't anything that was new to me, for better or for worse, as I mentioned earlier. In some of the

[87] P1 interview, *supra* note 11.
[88] P2 interview, *supra* note 12.

> larger BCS level football programs in the nation, and also basketball schools, I knew the extraordinary pressures that go from being an expectation to literally being a demand which presidents and university leaders would be likely to lose if they tried to challenge it head on. It's easy to say why don't university presidents stand up to this, but unless you're in a culture where winning is the lowest standard you can achieve, winning everything is the goal — where there is no excuse for doing anything less, where that becomes a cultural belief of the institution and that anything less than that will be ruin for the institution.[89]

Candid, observant, honestly insightful, P3 revealed a truth most campus chief executives fear to address continuing:

> The power of that, when it becomes a collective social psyche, is hard to understand unless you've experienced it. And hard to deny if you have experienced it. It had the leadership of Penn State assuming it would presume that they knew of this, and frankly I find it hard to believe that they didn't, and particularly knowing Coach Paterno and how he ran his program and the high level of ownership he had for everything that happened around that program, standing in the way of that program would have led to virtually immediate removal of anyone who dared do that. In fact, one vice president at Penn State several years prior to the scandal did try to stand up and was summarily dismissed very quickly, very efficiently. The culture would not hear of it. On the other end of the spectrum, another major football program that was very used to being in national championships was the culture of the

[89] P3 interview, *supra* note 13.

> entire state when they only won 9 games. They fired the head coach at the time. It was another 10-15 years before they won 9 games again. But they were so obsessed with doing more than what was anywhere else considered very good…[90]

This is a discerning warning of the subjugation of sport's intrinsic values by extrinsic ones. The experienced campus chief executive went on to conclude:

> This collective social consensus becomes so powerful no one could get in the way of it. I don't think the president at the time or the athletic director at the time would have fired that coach with nine wins, but the culture and society around it demanded that, and anyone who said "no" would have been sacrificed in the process with the head coach. The cagey president or institutional leaders faced a real dilemma there. In my experience, most presidents know what they ought to do, but if they do it, they will no longer be the president, so the question then becomes "what can I best do to get toward what I ought to do." Oftentimes that is very little or nothing as this turned out to be.[91]

This graphically illustrates the danger faced by collegiate executives when athletic programs, especially the multi-million dollar generating football ones, become fiefdoms unto themselves essentially renting space on their campuses to conduct their profiteering. How strong a force is it on some campuses?

Michael Stern, the chairman of Auburn's economics department and a former member of the faculty senate, said athletics is so powerful at Auburn that it operates like a "second university." Whenever athletic interests intersect with an academic matter, he

[90] *Id.*
[91] *Id.*

said, "it's a different kind of process."[92] "What does this look like at Auburn? In August 2012, according to documents, the political science faculty voted 13-0 to remove public administration as an active major. The following March, Auburn's academic program review committee, the final faculty body to review such proposals, voted 10-1 to place the major on "inactive status" for five years."[93] In fall semester 2013, 51% of the 111 students pursuing public administration as a major were athletes. Among them was Auburn's football quarterback, running back, its leading wide receiver, and the three defensive players who led the team in interceptions, tackles, and sacks.[94] In 2014, 26 football players comprised 32% of the public administration majors.[95] Despite the academic faculty decision to discontinue the major, the athletic department had begun a campaign to reverse it.[96] But the Southern Association of Colleges and Schools Commission on Colleges, which accredits Auburn, requires that "primary responsibility for the content, quality and effectiveness of the curriculum with its faculty" and decisions about majors must be made by people who are qualified in the field.[97] When pitting the "second university" against the academic first one, who prevails? In September 2014 "when Patricia Duffy, the chairwoman of Auburn's curriculum committee, asked the provost's office for an update, she received an email that said: 'The Provost and the Dean have agreed to keep the Public Administration program open.'"[98] The Wall Street Journal poignantly notes that "This season, Auburn is ranked No. 6 in college football's preseason polls and is the early favorite to win the SEC title. Public Administration is still the team's most popular major."[99]

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[92] Ben Cohen, *At Auburn, Athletics and Academics Collide,* WALL ST. J., Aug. 27, 2015, at D6.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] Ben Cohen, *At Auburn, Athletics and Academics Collide,* WALL ST. J., Aug. 27, 2015, at D6.
[97] *Id.*
[98] *Id.*
[99] *Id.*

While football success begets monetary gain in the form of increased gifts, tickets, concession, TV rights, and athletic apparel sales, to name only a few external goals, the rise of the football *king-skin,* illustrated by the sordid Penn State case, puts the institution not only in legal and reputational jeopardy, but eviscerates the intrinsic values of sport. P4 agreed with this saying:

> That it is not enough to simply pass the information on and to pretend as if you have done your duty. That's not enough. You have to bring to the forefront the issue that you discovered, Period. And if one person won't listen, then you need to go higher and keep on going, otherwise you're gullible. Another thing the collegiate academic culture can be is a very tone deaf culture, and in that case it certainly was. It was all about protecting the institution, not what was better for the institution or best for the institution, certainly not what's best for the child.[100]

P5 viewed the Penn State scandal as a flat out integrity failure.

> Integrity is a very important thing. If you lose your integrity, you don't have much value. And the people involved in the Penn State scandal lost their integrity. They weren't very solid in their thinking, in what their responsibilities were. The bad news is that the outcome was scandalous. The good news is eventually the perpetrator was exposed and everyone involved became identified. And I haven't seen things recently about the AD [athletic director], and Spanier, whether or not they're still being prosecuted . . . but I'd expect they are. Integrity is the rock of all people and of the organizations, and the people who are supposed to be overseeing.[101]

[100] P4 interview, *supra* note 14.
[101] P5 interview, *supra* note 15.

P6 analyzed the Penn State episode from two perspectives—hiring and personal responsibility.

> I learned two things. One is, and I've spoken with our board [of trustees] about this one, is that it is imperative that the president is in every area of the institution focused upon hiring people who are honest and nurturing in the environment of communication and that particularly, when it comes to athletics, that the president cannot be hands off. Because it's the one area of the university unique to all other areas of the university that has the largest amount of money involved with it as a single entity, and it's irresponsible of a president to be anything but hands on.[102]

None of the other leaders interviewed saw this lesson as one of personal responsibility where, in true British fashion, the leader should be expendable and needs to take personal responsibility for the institution's failure resulting in termination.

> This was before Penn State, but one of the first decisions I made as president was to have athletics report directly to me and it had previously never reported to the president; it always reported to an ancillary of the institution. The second thing I learned out of that experience, and then I expressed again, is sometimes even if everybody believes at the leadership level that they have done everything that they could, that they've done everything they believe is right, the president is expendable. Sometimes the board [of trustees] needs to exorcise itself of the president in an act of self-defense, and it doesn't matter if the president knew and disclosed and worked very hard behind the scenes and under-

[102] P6 interview, *supra* note 16.

> neath to try to address and protect people and so on, so forth. The role of the president is a symbolic political role and as the leader of the organization sometimes the president has to be sacrificed. And so what I have said to the board here is I want you to know that I know that, and therefore it is incumbent of me to be very upfront with you about what I know because even though you know that, I know I have to be expendable to you, that's just part of the work.[103]

P7 viewed the Penn State experience as an obvious leadership failure observing, "I learned nothing that I didn't know before: we are all responsible for reporting any activity that indicates unwanted or illegal sexual activity or other acts of violence. Every campus needs clear policies and protocols and a culture that does not tolerate acts of violence."[104] Easily said, but this seems to contradict the campus realities addressed by P3 above. How do you reconcile virtue and reality in the context of multi-billion-dollar collegiate football? The conflict is palpable and real. As already attested, most presidents may not possess the power or tenacity to ethically choose the harder right over the easier wrong.

P8 had an insider's seat of this sport program's catastrophe relating observations derived from first-hand experience:

> Well, you have the good fortune, I guess, for your study to be talking to somebody who was in Pennsylvania when all of that went down. So I spent seven years with president of [deleted], University in Pennsylvania… Up-close, personal, emotional, governor, legislators. Still to this day "oh that's not fair", "you can't fine us 60 million dollars blah blah blah." What have I learned?

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[103] *Id.*
[104] P7 interview, *supra* note 17.

> We have to continue to educate faculty, staff, students, the community about what's right, what's wrong in what we are doing… You can follow the scenario in the Sandusky deal. The red headed kid was the assistant football coach, goes into the locker room sees something he thinks is fishy… I'm sure he was full of emotion. He didn't know what the hell to do. What does he do? Goes home and talks to dad… Then dad says "oh, we will go see Joe [Paterno] because Joe is in charge and Joe will make it right."… And I think there was an underlying assumption that once I did that I'm good. I think there's a fear in our society for reporting what we think might look like crime, and we are going through a real interesting phase now with the police about what you do and how you do it, with all the videos and everything about questions…[105]

But the story continues with deeply troubling revelations.

> For who's in trouble — the red headed kid gets fired. He gets let go. This is me at the institutions I've been at… You check the history and apparently back in the late 90's, early 2000's there was some knowledge that there was something goofy going on. I'll throw in some variables. One of the stories on the street was Graham Spanier is a brand new president at Penn State University, finds something out in 1998, the system is so strong he was fearful of crossing Joe Paterno so he didn't say anything…[106]

So what is to be learned from this powerful intersection of football and money from a campus chief executive who has seen the ethical conflict at all too close range?

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[105] P8 interview, *supra* note 18.
[106] *Id.*

> I'll circle back what I've learned and I would hope I would come through on this. You have to draw it out of other sand, back to your first question. What's the right thing to do? And if the right thing to do is something fishy is going on and I've got the most powerful football coach in the country, I say something. I don't care how pleasant or unpleasant or goofy it is, I say something. Now when you get into the other variable of that place the question has to become how powerful is the sport of football at Penn State University? Obviously is was pretty powerful.[107]

Relating the Penn State experience to yet another similar institution facing similar ethical dilemmas, this president continued:

> There's an interview with a lieutenant from the Notre Dame Police department who claims that sport was so powerful on the Notre Dame campus that he was specifically instructed as a police officer that if a complaint ever came through him about any student athlete, it immediately went over to the athletic department. So one of the things I have learned is that it just makes good sense that you don't treat anybody, any student organization, any campus, any differently than anybody else. If something happens, it happens.
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> …The other thing I find about the whole Penn State thing if you look closely at it, in my opinion, there's one significant missing piece and that is little or no police reports…[108]

[107] *Id.*
[108] *Id.*

As strange as it sounds, why might that be, do you suppose?

> But the Penn State governance system is incestuous in the state of Pennsylvania… At Penn State University there was a 32 member board of trustees, only three of whom are appointed by the governor.[109]

This is different from all other Pennsylvania state universities which have a system of checks and balances represented on each campus by a 20-member board of governors, an 11 member council of trustees, and a strong chancellor. But not so at Penn State:

> Ergo the incestuous nature, ergo if you're an outsider you are an enemy, you don't understand Penn State, you don't understand football. You don't understand what we do, you don't understand Joe Paterno, you know… And it's interesting, fast forward Penn State University just hired the former president of Florida State who was making 400,000 dollars a year at Florida State. He's now on a 5-year 6 million-dollar contract at Penn State — a million dollars a year and another million dollars if he stays for 5 years… To sum all that conversation up, I learned a lot, but I learned a lot about its preventive medicine. You keep doing the right things on a regular basis you keep doing.[110]

Does money matter in football and higher education today? P8 testifies it is the elephant in the room and he does know how to throw his weight around. With the national play-off games, involving only four teams established in 2015, ESPN purchased broadcast rights for $7.3 billion over 12 years. This works out to be about $600 million annually.[111] For the schools involved, and

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[109] P8 interview, *supra* note 18.
[110] *Id.*
[111] GILBERT M. GAUL, BILLION DOLLAR BALL 20 (2015) [hereinafter GAUL].

those who aspire to be, does this type of money affect ethical judgment?

P9 summed up the argument well saying:

> Well I think the take-home message there is that you cannot sit on issues that have criminal overtones, ethical overtones, and social acceptability overtones. There are certain things that you just cannot tolerate in the world of sport no matter how badly you want to win. No matter how much you have invested in your teams and in your athletic department. There are moral and ethical values that should precede all that and I think that's where a president has to be very careful in acting upon his or her values and his or her moral and ethical principles. You just can't subjugate those sort of pressures of an athletic game or the pressures of wanting to win by whoever is pushing you whether that be the alumni or the students or yourself. You just have to recognize that you have to stay on a higher moral ground.[112]

Some would argue "easy for him to say" perhaps being at a school that is not in one of the power five conferences with endless mouths to feed. Yet, does he see or value something greater than money ball?

P10 focused on presidential leadership and the need to know what is really going on in the institution's athletic program. What is the Achilles heel of all campus executives?

> Well the one thing that sure came out is University presidents are responsible for the character of their programs and their coaches… The president is the

[112] P9 interview, *supra* note 19.

> primary moral agent of that school… So the idea though is presidents should make it their business to know and to try to find out or have a report that they trust and can find out. And secondly, if something is egregious, they have to take care of this. They basically have to go to the board [of trustees], say what's going on, and tell the board what the ethical issue is, and get support of the board to get the problem redressed, particularly if there's an unwillingness to do so on the part of the coaching administration. I think that's what we can all learn from the Penn State scandal. I have a lot of feeling about Penn State, Coach Paterno is obviously a tremendous person, but again there are Achilles heels and the president has to make sure that those Achilles heels are not going to become his or her Achilles heel, and just ruin the school because of egregious conduct.[113]

University of Texas football coach Mack Brown viewed the situation differently observing, "When you hear presidents and athletic directors talk about character and academics, none of that really matters. The truth is, nobody has ever been fired for those things. They get fired for losing."[114] While on the subject of losing, are there significant costs when coaching staff are fired that adds fuel to the fire for more revenue, however it can be obtained. "In a decade, the total annual amount spent on severance by athletic departments at 48 public universities in the 'Power Five' conferences increased from $12.9 million combined in 2004, adjusted for inflation, to $28.5 million in 2014."[115] When viewed as one athlet-

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[113] P10 interview, *supra* note 20.

[114] Marc Tracy & Tim Rohan, *What Made College Football More Like the Pros? $7.3 Billion, for a Start*, N.Y. TIMES (Dec. 30, 2014), http://www.nytimes.com/2014/12/31/sports/ncaafootball/what-made-college-ball-more-like-the-pros-73-billion-for-a-start.html?_r=0.

[115] Will Hobson and Steven Rich, *College Sports' Fastest-Rising Expense: Paying Coaches Not to Work,* WASH. POST (Dec. 11, 2015), https://www.washingtonpost.com/sports/colleges/college-sports-fastest-rising-

ic program, "That 120 percent jump *outpaced* rises on larger athletic budget items such as facilities spending (89 percent), coaches pay (85 percent) and administrative staff pay (69 percent)." (Emphasis added).[116] Numbers matter, especially financial numbers of this magnitude that impact scholar-athletes. The need for insatiable revenue drives decision-making, and erodes intrinsic values in favor of extrinsic ones. Where does this leave ethics, and schools that do not generate the Big Five football conference revenues?

If numbers tell stories, a "Huffington Post/Chronicle analysis found that subsidization rates tend to be highest at colleges where ticket sales and other revenue is the lowest — meaning that students who have the least interest in their college's sports teams are often required to pay the most to support them."[117] Does it sound ethical that "Many colleges that heavily subsidize their athletic departments also serve poorer populations than colleges that can depend more on outside revenue for sports. The 50 institutions with the highest athletic subsidies averaged 44 percent more Pell Grant recipients than the 50 institutions with the lowest subsidies during 2012-13, the most recent year available."[118] How does the pressure build to create a football program's insatiable need for more revenue?

VI. MONEY, MONEY, SHOW ME THE MONEY!

Given the conflict between intrinsic and extrinsic values, the insatiable sports appetite for revenue presents an endless arms race for intercollegiate sports and their institutions. It has been observed that ". . . [M]oney was the new metric for success in college

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expense-paying-coaches-not-to-work/2015/12/10/ec856b42-9d33-11e5-bce4-708fe33e3288_story.html.

[116] *Id.*

[117] *See* Brad Wolverton, Ben Hallman, Shane Shifflett & Sandhya Kambhampati, *Sports at Any Cost - How College Students Are Bankrolling the Athletics Arms Race,* HUFFINGTON POST (Nov. 15, 2015), http://projects.huffingtonpost.com/ncaa/sports-at-any-cost.

[118] *Id.*

sports."[119] Is that true? "At Texas, football accounts for nearly two thirds of the athletic budget. At Auburn, it accounts for almost three quarters. At Georgia, Penn State, and LSU, eight of every ten dollars the athletic department generates come from football."[120] Does a pattern begin to emerge and does this affect ethical judgment?

Looking back at past ethical sport scandals addressed in *Is It Ethical to Sell a Lower Tier College Sports Team to Play Another Team of Far Greater Competitive Skill?,*[121] and now looking forward, campus chief executives were asked **"With the trajectory of athletics' costs accelerating, like football, where do you see the destiny of this intercollegiate program?"** If money is the extrinsic value that is overwhelming intrinsic ones with increasing frequency, the status quo of the increasing need for sports revenue generation is not going to stall. P1 responded, "Fragmented into the haves and have much less. It is hard to imagine a future where institutions remain aligned around a national sports governance structure to any significant degree. The big five conference (i.e., big football) schools have already made it clear they will chart their own path separate and apart from all others."[122] "The NCAA itself reported $872 million in revenue in the 2011-2012 school year. TV rights for the NCAA men's basketball tournament and football bowls are worth nearly $18 billion."[123] P2 viewed his school as being perhaps in a different tier and insulated to some extent in the athletic arms race. He appeared to have a firm expectation on what cost and revenue level his program needed to be at, observing:

> Well, I would say first of all we are at exactly the right level of play for this university. The FCS level

[119] GAUL, *supra* note 111, at 24.
[120] *Id.*
[121] Huckabee, *Is It Ethical, supra* note 3.
[122] P1 interview, *supra* note 11.
[123] Ray Henry, *Legal Showdown Looms Over NCAA's Ban on Paying Athletes,* ARGUS LEADER, Aug. 23, 2015, at 3D.

> of play is consistent with our goals for athletics and consistent with the identity that this campus has and consistent with the identity that this community, and by community I don't just mean [deleted], but the state of [deleted] and our fan base and so on. So we are not, at least by the moment, driven by a financial reason to do something else. I mean we are at a point where we have a program, it's a financially responsible program, it's a program we can afford, it's a program we can compete in and do very well in an ongoing way. And so it is a level of activity, a level of play that works really well for this university. Going up to the FBS level wouldn't work well for this university, so I wouldn't have any intention to do that. We had that opportunity to do that right when I came in as president and we declined. So we are at the right level of play. Now the financial picture of athletics is consistently changing and probably as dynamic right now as it has been in my career in higher education with what's happening with the top five conferences and that kind of stuff. So I will say we are keeping a very close eye on all of that, including the financial aspect of it, to make sure that the financial picture or the other aspects of the landscape don't change around us without us knowing about it and making intentional decisions about it.[124]

How realistic is this view?

Gilbert Gaul has made a detailed study of football revenue generation. At the richest schools they have doubled and tripled in the last decade.[125] "Back in 1999, when I had started collecting data, the ten largest football programs had reported $229 million in revenue. By 2012 revenues for those same ten schools had swelled

[124] P2 interview, *supra* note 12.
[125] GAUL, *supra* note 111, at 25.

to $762 million. Meanwhile, profit margins had ballooned to hedge-fund margins."[126] P3 recognized the dilemma, but did not want to take the bait as to destination other than to predict a cliff was out there somewhere:

> Two answers to that. One is that I think we tend to cast out on all collegiate athletics as being what FBS football has become, and at some levels Division I men's basketball...I am profoundly troubled, and I think most presidents including FBS presidents if you got them to speak in candid or in confidence they would say they are extremely troubled about every step we are taking towards professionalization of college sports. That was never its intention, that's not its history and it will change in an uncomplimentary way at least what FBS football means… Where is the end point—where you've gone too far? …What point will it become from some definition of too expensive? Will it be too expensive for universities to even host sports, or at least FBS sports? . . . It's where is the turning point where that goes from good to bad?[127]

P4 agreed with his peers that there is a significant spending difference between FBS and FCS level schools. A perceptible financial tier difference exists:

> I think you have to separate the big boys from the regulars. I mean our budget has increased probably from six to seven million to ten to eleven million in the last sixteen or seventeen years, but I think the percentage of our total budget is about the same. It's a little like coaches' salary. The public kind of paints it with a broad brush for instance. For at least the FCS, I think that the salaries are not inap-

[126] *Id.*
[127] P3 interview, *supra* note 13.

> propriate, in fact they might even be a little low, ours are a little low. So I don't think that the statement that the costs are accelerating, it implies that they are accelerating inappropriately. I'm not sure that is correct at least for FCS schools. I can't talk about them all. It seems the teams of the Missouri Valley football conference and the teams in the Summit League are reasonable in terms of what their costs are. That's my sense of it. But I think that's a whole different ballgame when you're talking about the top five conferences. It's basically going to be professional athletics, whether they think so or not, because it's all tied to television revenues….[128]

P5 took a different tack arguing, "Well, football will spend all the money they have. A function of revenue, not a function of expenditures, so whatever revenue they have will get spent… whatever that is."[129] A professor in charge of Penn State's Honors College corroborated this observation relating "Football pays for itself…They get to spend as much as they want… Football operates according to its own rules, and the rest of us go along for the ride."[130] DeLoss Dodds, longtime athletic director at bigtime football University of Texas asserted, "Football is the train that drives everything and pays for everything. It just is. Everything begins and ends with football."[131] The University of Texas philosophy of spending on athletics is "We eat what we kill."[132] Gilbert Gaul in his searching investigation of football financing concludes:

> Less visibly, the new financial model had inspired a radical shift in the economics of football, with the largest and richest programs pocketing about $2.5

[128] P4 interview, *supra* note 14.
[129] P5 interview, *supra* note 15.
[130] GAUL, *supra* note 111, at x.
[131] *Id.* at xii.
[132] *Id.* at 1.

> billion from television broadcasts, luxury suite rentals, seat donations, and corporate advertising while all the others scrapped over what few leftovers remained. In effect, the game had devolved into a zero-sum experience, with clear financial winners and then everyone else, mirroring what seemed to be occurring in the larger economy.[133]

How does this become a self-fulfilling prophesy of the ever increasing need for more football revenue?

While Alabama is said to be a poor state with a median household income of $43,253, some $10,000 less than the national average, public funding for higher education in the state was reduced by $556 million, a 28% reduction from 2008 to 2013.[134] Yet Alabama appears to value football more than higher education itself. Last year Alabama football coach Nick Saban earned $7.2 million, 11 times the university's president. While the athletic department made $153million in 2013-14, Alabama football produced $95 million of that, giving $9 million to the university.[135] While the players earn no salary, Mr. Sabin and his staff do earn a nice sum.

Now that the five top tier D1 football schools can offer cash payments to players for cost of attendance beyond tuition, fees, room, board, and books, FCS schools are joining the arms race. "North Dakota State will pay its full-scholarship athletes $3,400 per year…All scholarship athletes in all sports, male and female, will receive the same stipend…."[136] South Dakota State's football coach John Stiegelmeier said about this new player compensation issue: "It's just another budget item. We're going to

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[133] *Id.* at xiii.
[134] Monte Burke, *College Coaches Deserve Their Pay,* WALL ST. J., Aug. 31, 2015, at A13.
[135] *Id.*
[136] Matt Zimmer, *Stipends in College Athletics – Jacks, Coyotes Could Follow NDSU's Lead*, ARGUS LEADER, Aug. 28, 2015, at 1A.

have to figure out a way to do it, not to keep up with NDSU, but to treat our players as well as we can within the rules."[137]

But is this not providing college athletes cash compensation never before provided, inching them closer to semi-pro status? Notre Dame's president Rev. John I. Jenkins argues "Our relationship to these young people is to educate them, to help them grow," he says. "Not to be their agent for financial gain."[138] Yet, are other scholarship students being provided cash compensation, in addition to their scholarship, to cover the difference between their scholarship and actual cost of education for being cheerleaders, working on the school newspaper or yearbook, or other student activities? One suspects not. Why is that?

Is the trajectory of football expenditures reaching a zenith or point of no return for many schools at both levels? "Perhaps institutions will make decisions about where they want to go – a semipro model or a different, more educational model – and I welcome that," Fr. Jenkins says. "I wouldn't consider that a bad outcome, and I think there would be schools that would do that." Furthermore, he puts Notre Dame in that latter group: "And if that somehow comes to pass, he says, Notre Dame will leave the profitable industrial complex that is elite college football, boosters be damned, and explore the creation of a conference with like-minded universities."[139]

P6 presciently foresaw an increasing cleavage between the "haves and have-nots" suggesting the demise of football at institutions that could not afford to compete in the burgeoning financial arms race.

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[137] *Id.* at 1A, 4A.

[138] Dan Barry, *Notre Dame President Stands Firm Amid Shifts in College Athletics,* N.Y. TIMES (Sep. 11, 2015), http://www.nytimes.com/2015/09/11/sports/ncaafootball/notre-dame-president-stands-firm-amid-shifts-in-college-athletics.html.

[139] *Id.*

> I see a significant number of institutions pulling out of it. The higher education landscape of the 20th century was a landscape that was significantly and very, very positively supported by federal dollars. That in mind, this is not the future of higher education. The development of football is something that has been made possible by a combination of two major factors. One is the fundamental subsidization of higher education by government, which is clearly on the downward trend, which itself is going to obligate institutions to really begin rethinking how the cost structure of institutions allow them to survive in view of greater dependence upon student and family dollars. And alternatively, the second force has been media. And what gets media dollars are programs that are successful and people want to watch. And I think what's going to end up happening is, and not similar to the consolidation that we're seeing in the NCAA, is it represents both the "haves" and a whole bunch of the "have-nots," and I think a whole bunch of institutions, starting with the small ones, in our conference the [omitted], which is the last vestige institution, [omitted] the one before it that has football, is just going to say we can't do this anymore….[140]

Recent decisions by large NCAA institutions involving football support this observation. It has been said that the most unpopular man in Birmingham, Alabama is Dr. Ray Watts, the president of the University of Alabama-Birmingham ("UAB"). Recently Watts announced that the school was going to eliminate its football team.[141] "Our athletic budget is $30 million. Of that amount, $20 million comes directly from the school — either

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[140] P6 interview, *supra* note 16.

[141] Joe Nocera, *When Football Gets the Ax,* N.Y. TIMES, Dec. 16, 2014, at Editorial Page.

through student fees or direct subsidies from the overall university budget. A consultant Watts hired concluded that it would cost an additional $49 million over the next five years to keep the football team competitive with the other schools in Conference USA."[142] President Watts argued he made the right decision observing "We could not justify subsidizing football if it meant taking away from other priorities," he said. Then he added, "This is driven significantly by the changing landscape of intercollegiate athletics."[143] What was the response to his decision? Mark Emmert, the president of the N.C.A.A., described Watts's decision as "unfortunate." When comparing the intrinsic and extrinsic factors of sport, which side did Mr. Emmert favor?

A group of important donors wrote a letter to the chancellor of the Alabama university system, calling for an investigation into Watts' decision. Another big supporter, a Birmingham restaurateur, canceled his $45,000 sponsorship of a television network that aired UAB games and ended the use of his restaurant as the locale for the basketball coach's weekly radio show. "This is so tragic," he told a reporter. "It's like a death."[144] But that was not the end of the story.

"After making what was described by UAB president Ray Watts as an agonizing decision to terminate the football program in December (2014), he and the university reversed field and announced Monday that they would reinstate the program, along with bowling and rifle."[145] Watts originally disbanded football and two other athletic programs based largely on a reported lack of financial solvency. Miraculously Watts announced there were recent changes in private support through individuals and the business community that made the reinstatement possible. The UAB presi-

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[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *See* Alex Scarborough, *UAB Reinstates Football for 2016*, ESPN (Jun. 2, 2015), http://espn.go.com/college-football/story/_/id/12991674/uab-blazers-football-return.

dent reported "an estimated $27 million has been raised through the UAB Football Foundation, the city of Birmingham and the UAB Undergraduate Student Government Association."[146] From death to resurrection, even football has an afterlife.

Is this what football pressure and its extrinsic money factor mandate? New York Times columnist Nocera presciently observes:

> But what I always thought would happen when this day came — when the financial difference between the power schools and everybody else became overwhelming — is that the smaller schools in Division 1 would be forced to rethink their priorities, just as U.A.B. has. Maybe not get out of football altogether, but de-emphasize it so that the tail finally stops wagging the dog. But so far, at least, that is not turning out to be the case. At a college sports conference last week in New York, nobody gave U.A.B. any credit for pulling out of football. On the contrary: most of the athletic directors in the room were adamant that they would pay whatever they had to pay to keep pace with the big boys. "Our board is totally committed to athletics and competing at the highest level," said Chris May, the athletic director at Saint Louis University. "We are going to be very aggressive." "There is no pressure to drop football," said Mike O'Brien of the University of Toledo. "It is too important to our university."[147]

Is it really? At least some campus chief executives are not only seeing the ethical and financial tensions, they are taking action to address it, despite the rancor. Is this a trend or a prudent decision by a few?

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[146] *Id.*
[147] *Id.*

> But the prevailing mentality among the smaller leagues is that they must follow whatever changes the so-called Big 5 institute during the N.C.A.A. convention in January. Even with bleak financial outlooks for many of these athletic departments, a certain consensus seems to have been reached. "We're going to fight speed with speed," Sean Frazier, the athletic director at Northern Illinois, said. The cost will be steep, particularly for teams in the American Athletic, Mid-American, Mountain West and Sun Belt Conferences and Conference USA — the five football leagues not among the Big 5 in the Football Bowl Subdivision, Division I's top tier. Many of their athletic departments require student fees to support their teams, and some people worry students will be squeezed even harder.[148]

Reflecting on all this, P8 offered:

> The quick answer is I have no clue. I worry because we are talking now about full cost of attendance. What does that mean? . . . We do not have the resources. We do not have the facilities. We don't have the money. We are going to play football at the second level of football as long as we can, as long as it exists. Do I worry that a kid will get recruited away by another school because they have more money?. . . So I worry about it, but I guess I don't have enough money or resources or time to spend a lot of time worrying about it. I'm going to make our voice known at the NCAA level….[149]

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[148] Ben Strauss & Zach Schonbrun, *It's a Game of Spiraling Costs, so a College Tosses Out Football*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/03/sports/ncaafootball/uab-cancels-football-program-citing-fiscal-realities.html.

[149] P8 interview, *supra* note 18.

Gazing over the football horizon, P9 sang a similar football tune predicting an increasingly problematic sport for the NCAA to manage. This may sound more like an National Football League ("NFL") farm club league than a collegiate sport.

> . . .I'm not sure I see much change coming from FBS. I think they're going to move far more aggressively into the more elite football leagues. And I think the challenge is going to be for the FCS Division I teams that are in the next tier down outside of those elite power leagues, how do we pay for the game [that we lose]? Because we frankly don't have the financial revenues to even begin to compete with the upper power five in the FBS. Even though I think we may get to a point where we'll be like some teams that can have pure dominance in the FCS for a few years, I think with the waxing and waning and the amount that it's going to take to recruit against the elite teams in the FBS, I just don't see much change; I see the FBS stronger. I see the power five getting even more influential in the NCAA, and I see the FCS teams in division I struggling to try to compete, and I don't think in many ways they should even try to compete. We have got to find a different resolution to the power five versus the rest of the division I teams.[150]

Our P10 ethicist offered an even more apocalyptic view arguing we have reached a tipping point, predicting an inability to police the insatiable thirst for money, trading collegiate amateurism for professionalism.

> Well, I still see it's going to keep moving ahead on this level. It's kind of interesting — can we police it in the same way the NCAA has wanted to do so in

[150] P9 interview, *supra* note 19.

> the past, in other words calling it amateur sports? Boy, I'll tell you there's so much demand with the amount of money being spent, the amount of people being entertained, the amount of reputation being gleaned from it. There's a tremendous pressure on players to win, to spend most of their time in athletics rather than on academics. When you have that much money being put into it, that many people being entertained by it, it's going to get harder and harder to police it in the way that the NCAA has tried to do it. There may have to be some kind of caps and intrinsic limits. How much more can you go? Maybe we have already exceeded any decent intrinsic limit. Maybe we have to back away from things because without those kinds of intrinsic limits, we may turn big time football into not amateur, but professional sports.[151]

While the first postseason football bowl game occurred in 1902 with Michigan and Stanford making hardly any money, there are more than 40 bowl games today with ESPN creating almost a dozen to provide its own cable network with programming.[152] "These contests generate more than $250 million for the schools, with teams in the Rose Bowl receiving about $15 million each."[153] What should this tell us about the trajectory and commercialism of this sport?

Fr. Spitzer confronts the out of control spending and revenue generation observing from first-hand experience "Just call it what it is. It's like professional collegiate entertainment with the idea of having an amateur network…anyway at some point the NCAA sits down with its presidents and just says how much is too much? How much money is too much money?"[154] He suggests that

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[151] P10 interview, *supra* note 20.
[152] GAUL, *supra* note 111, at 16.
[153] *Id.* at 17.
[154] *Id.*

the time has come for placing intrinsic caps on sport spending. Is this realistic? Has the train already left the station with campus executives having already lost control over what have become independent self-supporting financial enterprises renting space on college campuses? The NCAA today, albeit an alleged non-profit organization and watchdog over college sports, has annual revenue of $700 million separate from its member schools' take.[155] Is there a palpable conflict of interest when this much money is in play?

> The television revenues alone are simply extraordinary. We may have to rethink how we do things, but I do think putting intrinsic limits and caps on is going to be important. I do think the players have to be protected from the amount of pressure that's being put on them to perform in these big things, in these big programs because, honestly, I just don't know what they can get academically and in their social lives, even their ethical lives—the pressure to win is so immense even with the stakes being what they are.
>
> I just think we have to really rethink this, and we really have to have some good presidents, some good ethicists, some people really sitting down trying to think how do we take the pressure off some of these kids and take the pressure off some of these programs which are sub units of professional sports almost. How do we want to do that so that it can be really intercollegiate, even more at least it can be a collegiate sporting activity which is still an amateur activity…how do you protect ethics in programs that are that big and have that much pressure? We have to rethink that.[156]

[155] GAUL, *supra* note 111, at 17.
[156] *Id.*

VII. ACADEMIC VS. SCHOLAR ATHLETE SPENDING

Especially at the FBS level, when you factor in the cost of the football program for scholar-athletes versus non-athletes, the budgets are a little different — another worst kept secret. Yet, and this is illustrated here, some campus chief executives deny the difference in cost. They were asked **"How do you justify in your own mind the trajectory of spending more on student-athletes (when factoring in the entire athletic budget) than spent on academic students?"** P1 says there is value in the difference.

> When done correctly, there is great value in a university athletic program. Student-athletes acquire enhanced skills in teamwork, followership, leadership, mental stamina, resilience, and time management. Fans have a wonderful time cheering on the student-athletes and celebrating their success on and off the playing field or court. Universities have a means to showcase their programs and activities, and to inspire others to become connected to their institutions (new students, new community partners, new donors, etc.).[157]

While conceding the economic difference, P2 also sees value in the brand identification, loyalty base, and community benefit as appropriate justification.

> Well, I think because what you're spending on and it's probably true on a per student basis — if you look at what gets spent in the athletic program on a per student basis compared to what gets spent on the school of business or the college of fine arts on a per student basis. One, I'm not convinced that the expenditure — what we think of as our general fund budget is that much different. I mean I would

[157] P1 interview, *supra* note 11.

> have to look at that. Certainly the total expenditure, when you take that into account, ticket revenue and all the other sources of funding for our program for the roughly 400 student athletes at this university, if you add that whole budget up on a per student basis, it probably does exceed any other group of students. But, I think you have to keep in mind you are spending that money on more than those student athletes. You are spending that money on the campus community, you're spending that money on the fan base that attends those sports, you're spending that money on really a connection to a university that spreads out over a lot more than the 300 or 400 student-athletes that are involved. So I guess that's how you justify it in my mind. Having a positive impact on far more than just those 300 to 400 hundred students.[158]

P3 dispels the notion that most football coaches are extravagantly compensated arguing:

> Well, and again I think this is where we cast the FBS light on everything else. No argument the coaches' salaries are absolutely out of control in FBS football. I can see that agreement in the sense that that's what the market will bear, and until the market doesn't bear it, as an economist I would say all is fair. And also point out…that with a few rare exceptions most highly paid FBS football coaches, and frankly head coaches and even head basketball coaches, don't have a real long life span, so it's real easy to then take the coach who's making a couple million dollars a year and project that on everyone. But first, most coaches don't make a couple million dollars a year and certainly the associate and assis-

[158] P2 interview, *supra* note 12.

> tant coaches even at the BCS levels aren't bringing down those types of salaries…Our coaches make salaries very similar to our faculty members. So it's misleading to suggest that they are dramatically overpaid and that's in a revenue sport such as football and basketball…When you look at the compensation of faculty, at least at research universities that's not necessarily at all or even most FCS schools, but many coaches are pretty comparable if not less compensated than people in equivalent higher positions within the faculty.[159]

P5 takes a similar position observing from experience that there are pronounced tiers in college football, yet recognizes uneven spending exists:

> I don't think you can put all of intercollegiate athletics in the same bucket. I think you have to take the equity 5—the 65 universities that are in the big five conferences and then you can also take and separate from them the next five, which are FBS conferences that are kind of wanna-be conferences than the Division I conferences that have no football. Then there are the Division I programs like [deleted] and [deleted] that have FCS football, and then there's the Division II and then the Division III, so you can't treat all of them the same.
>
> If you look at our level Division I athletics with FCS football, the expenditures on student athletes are quite different than the other conferences. And the expenditures on athletics per student isn't much different between the Division II uppers and us with football, so then the question becomes whether revenues support expenditures. And the second tier of

[159] P3 interview, *supra* note 13.

> FBS Schools like the MAC and Sunbelt, the investment into those students will sometimes be called into question. If you look at some of those budgets, 70% of those budgets come from student athletes. That's not sustainable. It would be interesting to watch that. I'm pretty comfortable where we are with the level of investment from the student side, but more importantly how we are able to try to balance and complement that with gate receipts and very generous donor and corporate support to create the type of intercollegiate program that we can be proud of.[160]

P6 concedes the budget expenditure difference, but sees value from an institutional marketing perspective. Institutional marketing often costs significant sums. Utilizing athletes as a form of marketing or brand recognition, makes institutional sense, he suggests.

> [t]hat is a very good question. I think different institutions will have a different perspective on this based on what they actually do. Now, at [deleted] we actually have a significant number of students who really are on full scholarship and they have nothing to do with athletics. So, it is without question the case that a high value for institutions like [deleted] is to have and to be competitive in attracting students in a space where there is a lot of competition for their talent and what I would say is two things. One is, on its own merit, I actually do see our student-athletes effectively performing the equivalent of what most people would consider to be "work." They work hard in their sport, in the spaces where no one watches them. They spend many hours working out, working on strategy, working together in practice, and that, in my view,

[160] P5 interview, *supra* note 15.

> is in part why institutions feel that it is fair to recognize that extraordinary effort relative to the non-student-athlete. It is worthy of recognition.
>
> As a collaborative, there is no question that athletics can be in its own way, athletics and athletic success, a really powerful tool for marketing. Institutions become known in part based upon the success of their teams and based upon the kind of environments they create for their student-athletes and their spectators. So, I think that institutions often consider these both on the individual level to be fair and equitable recognition, and on a collective level to be kind of a marketing investment.[161]

P8 concedes there is concern with so much money sloshing around one sport running the numbers for one big time school: "…[y]eah, I always worry. I always use the Penn State example. Penn State Beaver Stadium holds 110,000. The average ticket price is 75 bucks, that's $7.5 million every Saturday. Concessions are about $3.5 million, that's $11 million, a million in radio, a million in TV, a million in others, so they're making $14, $15 million a Saturday. It costs them a million dollars to operate that Saturday. Net seven home games times $14 million used to be $100 million dollars."[162] Might this become addictive?

Conceding the trajectory, P9 predicted the "have nots" (FCS teams) are not going to be able to keep up with the FBS financial powerhouses. In desperation to keep fans, alumni, and brand polishers happy, where can campus executives turn for more dollars with which to compete? P9 saw a clear demarcation of justification between supporting good academic athletes and those at academic risk.

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[161] P6 interview, *supra* note 16.
[162] P8 interview, *supra* note 18

> At the moment we have a pretty good balance here at the University of [deleted], but I think it's going to be harder and harder to pull dollars away from the academic programs. We have more pressure for the preparation of professional students, engineering students, even students from the liberal arts, performing arts, and sciences. I think it's going to get harder and harder to justify `pay to play' kinds of arrangements with our athletic programs. I do think this is going to be a bigger challenge as times go on for most schools in Division I, but are in that FCS football category... I say that with a small justification that many of our better students are athletes… But the moment we start crossing into the majority of our athletes being an academic risk, and I think in my case it's going to be harder and harder to justify those expenses to keep those teams going.[163]

An ethicist with an undergraduate accounting degree, P10 views the picture quite differently. He sees economic value in such spending — dividend returns on athletic player and program investment. He argues:

> Well here's how I justify it, student athletes are already doing a tremendous service for the school and anybody who says they are not is out of their minds; they are not looking at reality. So the first thing is we have to acknowledge what the student is already doing and what kind of reputation they are bringing, what kinds of student recruitment they are doing, and frankly, I know this sounds crazy, but it's absolutely true that when you have a good sporting team maybe a doctor who graduated from your school is more likely to give money to the new science building, not to the athletic program, but to the science

[163] P9 interview, *supra* note 19.

> building — because they are pleased with the sporting team. I've seen it many times where your benefaction rate goes up because there's that pride of place that comes with a good division one athletic team being in that whole ethos of people of the school, and there's so much pride and so forth in the school.[164]

The ugly financial truth at many universities is that the two revenue sports — football and basketball — pay the bills for the other nonrevenue sports whose existence is required by the NCAA and athletic conferences in order to be eligible for postseason play of all sports. Fr. Spitzer argues:

> Athletics do a lot for fundraising for the university. So I would say it is justifiable and the idea of trying to make comparisons, I don't know how you can possibly make a comparison because the athletic program is basically doing good for the other program, and by the way, big time athletics pay for all the other sports programs that don't make any money on campuses as well. I mean a lot of times you look at it and ask how many of your programs make money and most colleges will say two, division one football and division one basketball. Your division one baseball team doesn't make you any money? Nope, doesn't make me any money. Tennis? No. Golf? No. Soccer? Maybe in one or two cases yes, but by and large the two big programs or the one big program in cases of schools that have division one basketball that don't have football, that program is basically paying for everything else, so I think it can easily be justified, easily.[165]

[164] P10 interview, *supra* note 20.
[165] *Id.*

But what about the intersection of money — enormous amounts of money, ethics, and football scheduling in particular? Is there a conflict of interest that often leads to corruption?

VIII. MONEY, ETHICS, AND FOOTBALL SCHEDULING

"Schools in college football's top division turned a $1.4 billion profit on $3.4 billion in revenue in the fiscal year ended June 2014, according to data schools submit to the U.S. Department of Education."[166] Is there serious money to be made in DI football by scheduling FBS teams to play lower tier FCS schools? "…FBS schools have won more than 90 percent of such matchups every year since 2007…."[167] Why would a coach or athletic director schedule a game with an opponent where statistics reveal your team has at best only a 10% chance of prevailing? The NCAA concedes that football is the most injurious NCAA sport.[168] If the NCAA is to be believed, why would an FCS school schedule a game against an FBS team that is stronger, bigger, faster, more talented, presenting a greater risk of injury? With FBS teams having 85 scholarships to 63 for FCS schools, does this have consequences? A study by Faure and Cranor provides evidence "FBS players are traditionally bigger and stronger. Typically, FCS schools cannot attract the best football players in the country, so the FCS school goes in as the "decided underdog."[169]

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[166] *See* Mason Levinson, *Northwestern Football Players Cannot Form Union, NLRB Rules,* BLOOMBERG BUSINESS (Aug. 17, 2015), http://www.bloomberg.com/news/articles/2015-08-17/northwestern-football-players-cannot-form-a-union-nlrb-rules.

[167] *See* Tom Oates, *Hopefully for UW Fans, FCS Opponents Are On Way Out*, MADISON (Sept. 7, 2013), http://host.madison.com/sports/college/football/tom-oates-hopefully-for-uw-fans-fcs-opponents-are-on/article_a147fa0c-c6cb-519b-be30-d2f119d51341.html.

[168] Randall Dick, et al., *Descriptive Epidemiology of Collegiate Men's Football Injuries: National Collegiate Athletic Association Injury Surveillance System, 1988-1989 Through 2003-2004*, 42 J. OF ATHLETIC TRAINING 221 (2007) [hereinafter Dick et al.].

[169] Caroline E. Faure & Cody Cranor, *Pay for Slay,* 3 J. OF ISSUES IN INTERCOLLEGIATE ATHLETICS 201-202 (2010) [hereinafter Faure].

This leads us to ask an intriguing ethical question. Why is it ethical for an FCS football team to play an FBS team for a big payday when it knows statistically it will face a 90% chance of defeat frequently involving significant physical injuries, but in another sport of boxing it would be unethical to schedule a boxer to fight a vastly superior opponent for money when facing a 90% chance of loss plus physical injury? This is the conundrum faced by FCS institution chief executives. Our interviewees were asked **"Do you believe it is ethical for an FCS (formerly Div I-AA) school to schedule a game with a FBS (formerly Div I-A) school when it knows, or should know based on data, that it is not competitive?"**

P1 attempted to discredit the competitiveness issue saying, "I don't worry too much about the competitive issue. Although the vast majority of these contests are won by the FBS schools, surprising and exciting upsets do occur (e.g., Appalachian State Mountaineers 34, Michigan Wolverines 32, Sept. 1, 2007). I worry much more about smaller, slower, less physically prepared student-athletes being exposed to greater risk of injury."[170] This is precisely the danger identified above. Is the competitiveness issue devalued by the money factor?

P2 conceded the preeminence of the money issue — that it is the controlling factor in scheduling a FBS team. Perhaps this is part rationalization, but there is some truth in the observation FCS football players seek the opportunity to competitively "play up" against opponents who will pummel them, but the chance to play a big name school is memorable. The one distinguishing difference between them and their boxing counterpart is they do not get a share of the money.

> Probably true, you know there are definitely money games, but that doesn't mean the teams can't learn from those games and improve themselves as a re-

[170] P1 interview, *supra* note 11.

> sult from those games. If you took the money away from them, would we have played [named school]? Probably not, but that doesn't mean that the rest of it wasn't without value, I think a team can learn and improve themselves in that kind of game. And again it's sort of like the satisfaction of going up against a tougher opponent. You know intellectually that this is probably not going to result in a win, but there's that chance. You just want to do it. That's just like you getting the opportunity to play golf with Rory [Mcllroy] or any of those guys. Do you think you're going to win? No, but it's a great challenge and it's exciting and it gets you motivated, so I think there are other values to it besides the money.[171]

P3 accentuated the student-athlete desire to "play up," but seemed to minimize the role of money in the scheduling decision. Again, rationalization may play a role when analyzing this ethical question. FBS-FCS games are scheduled primarily for money. To argue other factors supersede this objective conflicts with the evidence.[172]

> No, I don't find that unethical at all. Again, unethical in my mind would be if one of those is being duped by the other in those relationships—no one is being duped by anyone. And in the most extreme example where a team is unlikely to even be competitive, I don't think if you asked a player on that team whether they want to play the game or not, they'd say no. We get to play the University of Alabama or we get to name your institution [pick an institution to play], it will be the thrill of their lifetime. And they will again learn something from it…

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[171] P2 interview, *supra* note 12.
[172] Huckabee, *Is It Ethical, supra* note 3, 20-35.

> I may be looking at my own institution a little too much when I'm answering that but I don't buy the premise. Again I think if they can find a way to play that team, in our case we are proximal to teams that you can argue fit that description, so it would be affordable for us to get to their venue and play them. We would play them with or without the money, I don't kid myself that the money is important. But again I think our players would say the opportunity to play even what they perceive to be a vastly superior team, to a real athlete that is an incredibly exciting challenge.[173]

P3 makes a legitimate point about football athletes wanting to "play up" against a big name school. But the athletes do not make football schedules, coaches and athletic directors do. They never ask their teams "who would you like to play next season?" Scheduling just does not work that way, which brings us back to the true motive for FCS teams wanting to play FBS teams and vice versa, and its corrupting influence. Why would a team like New Mexico State want to play bigtime University of Texas? If you responded with "it's the money", your powers of perspicacity are alive and well. "Texas paid the Aggies $900,000 to fly down from Las Cruces and take a whooping [56-7]. Indeed, New Mexico State was so bad at football it had to pay its own students to come to the games. And even then they rarely came."[174] Why is that, do you suppose? "In 2012 the Aggies had a record of 1-11, and most of the scores were so lopsided that it was easy to mistake them for basketball results."[175] How did 2013 go? 2-10; 2014 fared no better with 2-10 that included a 63-7 trip to Louisiana State University ("LSU") for an undisclosed amount. Despite a legion of similar examples, P4 seemed to play down the monetary motive as well asserting:

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[173] P3 interview, *supra* note 13.
[174] GAUL, *supra* note 111, at 4.
[175] *Id.*

> Well I think we would play them [for no money]. I think we might play them, but the custom is not to. We played the University of Nebraska for years without money. I suspect if they would play us today we would still do it even though we preferred to get paid because it helps us balance our budget. And the way the ranking rules are you have to have certain Division I schools, FBS schools, you'd have a certain number of guaranteed wins, so that's why they are scheduled that way. I don't know if that makes it unethical.[176]

Custom or not, present day football schedules are designed to augment athletic budgets, not to provide players the opportunity to "play up" for the fun of it.[177] "In 2012 football generated a remarkable $103 million for the Texas athletic department, with $78 million falling to the bottom line. Note that I didn't say that this windfall went to the university itself. As at many other elite football powers, the Texas athletic department was nominally part of the university but in reality functioned as an autonomous business, free to raise and spend as much as it wanted."[178]

Reflecting on the campus chief executive's earlier observation that the athletic budget is by far one of the largest, if not the largest, part of an institution's budget, at Texas "Football was by far the largest, richest department on campus — the department of College Football, if you like. It was overseen by a CEO/coach, Mack Brown, who received millions more than the university president. His nine full-time assistant coaches averaged $555,000, or about four times what a full professor earned."[179]

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[176] P4 interview, *supra* note 14.
[177] John Feinstein, *College Football: FBS vs. FCS Games Need to be Limited,* WASH. POST (Sep. 22, 2013), https://www.washingtonpost.com/sports/colleges/college-football-fbs-vs-fcs-games-need-to-be-limited/2013/09/22/c93b1c5e-23c3-11e3-ad0d-b7c8d2a594b9_story.html [hereinafter Feinstein].
[178] GAUL, *supra* note 111, at 6.
[179] *Id.*

If profit margins mean anything, and in business they certainly do, Texas' nontaxable football business is a model. "The program's profit margin wildly exceeded those of Apple and Exxon/Mobil, two of the nation's richest, best-known companies. And Texas football didn't do it for just one year; it did it *every* year, consistently. Moreover, the size of its take was growing — up sevenfold in a decade. Even by Texans' gaudy standards it was an absurd amount of money."[180]

P5 deprecated the money issue preferring to focus on the student-athlete experience. Is this disingenuous or possibly rationalization for an ethically questionable decision? Would these schools really "play up or down" for no money?

> I think it is a great opportunity for the student athletes who are playing at our level to experience a game that is larger than you, and occurs in more than just football. It occurs in basketball, men's and women's basketball, probably those are the only sports where you have to buy-in competition, but it goes the other way too. Institutions at our level, because of schedule challenges, often have to. We played the University of [deleted] in football this year. Last year we played [omitted] which is a non-scholarship football program. In the future we will be playing [omitted] which is a non-scholarship Division I football school, because of the experience that gives their students and we recover some of the costs; the likelihood of them doing that are pretty slim. In fact, the experience that students have is usually a positive one. And we come to look too much into the budget issue instead of a student experience issue and they both go hand-in-hand now because they both have become integrated. Those schools that have more of a dependence on gate re-

[180] *Id.* at 7.

> ceipts will often play two games up; that's their choice.[181]

P9 concurred in the athletic value of an FCS team playing up against a FBS opponent, but did perceive the presence of an ethical dilemma where others discounted it. Can the ethical boundary routinely be seductively camouflaged in the "playing up-team improvement argument"?

> I think to put a FCS team up against a FBS team there is a risk you're going up against a faster, stronger, more powerful team. But if you want your own team to improve, I think that might be about the best way to do it to compete against a faster, stronger, more powerful team. If you're doing it for money, you may have crossed that ethical boundary. If you're doing it to improve your team's experience and to give the young men on your football team a chance to really test themselves and to compete against stronger faster teams, I think you are still in an ethical boundary.[182]

Even the Wall Street Journal is piling on noting a culture problem: "We're grown accustomed to the dollars and obsessiveness surrounding these games — the ridiculous coach-as celebrity worship, the lucrative sponsorship arrangements, the spectacle of grown adults on TV shouting at each other all day over the successes and mistakes of young men still learning on the job."[183] While this is admittedly true, what is the catalyst that produces such behavior? "The polite illusion of amateurism has long been shattered; the spectacle has literally become a multibillion dollar industry."[184] True or false?

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[181] P5 interview, *supra* note 15.
[182] P9 interview, *supra* note 19.
[183] Jason Gay, *The Power Shift in College Sports,* WALL ST. J., Nov. 10, 2015, at D6.
[184] *Id.*

What does the University of Texas ("UT") do with the $170 million generated by football each year? A neutral observer would surmise that UT must have a robust intercollegiate athletic program. In fact, UT sponsors 20 intercollegiate teams with 549 athletes, including their 88+ footballers with an enrollment of 38,437.[185] Princeton, however, with an athletic budget of $20 million sponsors 36 teams with 962 athletes while Harvard has 42 teams with 1,016 athletes.[186] Much smaller Haverford College with 1,205 undergraduate enrollment, sponsors more teams than UT with an athletic budget that pales in comparison to UT's.[187] Where do you suppose Goliath UT's money goes? Does that matter and is it ethical? At least 75 college football coaches make over $1 million per year, with 34 receiving $2 million or more, 15 collecting between $3 and 5 million, and 5 topping $5 million annually.[188] Does a rising tide carry all football boats in trajectory terms and does this ethically matter? The University of Alabama football program and its celebrated Coach Nick Saban have generated not only $209 million since 2007, but general revenues have increased 43 percent.[189] What is important to note, however, is that the football program's profit margin has decreased during Saban's tenure from 72 percent to 54 percent.[190] This means Saban and company are increasing spending at a higher rate than revenue generation. What does this portend regarding trajectory?

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[185] GAUL, *supra* note 111, at 32, 36.
[186] *Id*. at 32 and 36.
[187] *Id*. at 32-33. *See also id*. at 37 for more in depth comparison.
[188] *Id.* at 87.
[189] *Id.*
[190] *Id.* at 88.

IX. THE ALLURE OF GOLD[191]

The succeeding research question focuses specifically on the money seduction issue. Each respondent was asked **"Why is it ethical for an FCS school to schedule a game with a much larger FBS school primarily for money, when they would not play the game without the large payday?"** P1's response connected the ethical question not with the competitiveness issue, but rather with the increased risk of injury factor (i.e., David playing Goliath is more likely to be injured when playing up against FBS teams than playing down or teams of their caliber).

> The payout for participating in the game is simply a reality of the revenue stream that is generated by the public's willingness to support the contest. Both teams should be appropriately rewarded for contributing to producing that revenue stream. Having said this, the big issue is not that the FCS team is highly likely to lose and is guaranteed to make a lot of money doing so, the troubling issue is exposing the FCS players to, what I believe are, greater risks of injury than they would have experienced if they stayed at their competitive level.[192]

P3 focuses on a somewhat different approach, but seems to imply the "playing for free straight-up" proposition would be doable.

> I can assure you our institution regardless would be very excited to measure up against arguably the best

[191] "Commerce has set the mark of selfishness, The signet of its all-enslaving power, Upon a shining ore, and called it gold; Before whose image bow the vulgar great, The vainly rich, the miserable proud, The mob of peasants, nobles, priests, and kings, And with blind feelings reverence the power That grinds them to the dust of misery. But in the temple of their hireling hearts Gold is a living god, and rules in scorn All earthly things but virtue." PERCY BYSSHE SHELLEY, QUEEN MAB (1813).

[192] P1 interview, *supra* note 11

> in the nation. I'm not trying to avoid the economic incentives for both teams to make those arrangements, but at the same time at the end of the day in financial practicality they could happen. I think in many cases they would still happen. And we see that in interstate rivalries around the nation between different teams, even when they are in the same supposed tier, they are oftentimes vulgar mismatches. Texas and a Texas A&M, Michigan and a Michigan State, you know any given season one of them might have no business being in the game — they're not going to be competitive. But you still play the game and you're able to play the game affordably. I'm using an analogy that's even more extreme and upsets happen even when against those mismatches.[193]

P4 took issue with the ethical proposition arguing that it did not present an ethical problem.

> I don't think one is obligated to prove that everything is ethical. It seems to me one has to prove the opposite. I don't understand why playing for a guaranteed game is de-facto unethical. That seems to be your conclusion… If you define competition as having a significant chance to win then that's one thing, but I necessarily don't define it that way exactly. It seems to me we have a couple games each year in which we do, and one of them seems to be clearly beyond our grasp, although once in a while as in [deleted] which our student-athletes will remember for a hundred of years, we do win. I don't think the only value of competitive athletics is winning. I think our students learn a little something every time they play one of those games.[194]

[193] P3 interview, *supra* note 13.
[194] P4 interview, *supra* note 14.

P5 disagrees that money is an important factor in game scheduling. He stresses the point that the student-athletes are the ones that want to "play up" and that would appear to be the driving force in game scheduling. That does strain comprehension as the overwhelming evidence previously cited reveals the primary factor in FBS-FCS football scheduling is money, if athletic directors and football coaches are to be believed.

> I would take issue that it is an important factor, but I think student-athletes enjoy the opportunity. What I said before as one of the important dimensions of intercollegiate sports is giving the students the opportunity to perform well athletically as well as academically. And going to an upscale venue and having to compete with the University of Nebraska, I don't think you'd have any of the student-athletes from our football team who have had that opportunity and say that it wasn't a marvelous experience, even if you didn't get any money, they would have chosen to do so.[195]

P6 directly confronted the question with a candid answer connecting the ethical question of scheduling for money with that of student-athlete safety, as P1 did as well.

> I'm not sure it is. To me, there is an issue of potential harm that is inherent in this and some of the other questions. If you have reason to believe the consequential effects of having that contest are going to be significant injuries to players, if the circumstances are such that there is just a single minded focus on trying to generate money, I'm not sure I would consider that to be an ethical decision at all.[196]

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[195] P5 interview, *supra* note 15.
[196] P6 interview, *supra* note 16.

P7 preemptively attempted to diminish the injury risk between FCS and FBS teams. Does size, weight, speed, strength, talent, experience matter in football? Recruiting coaches seem to think so. Are David football teams more likely than not to suffer injuries from Goliath teams? P7 argues:

> Whenever a team plays a higher ranked team, there is an opportunity for the student-athletes on both sides to hone their skills outside traditional conference competitions. Besides, the outcome isn't certain. [FCS school] beat Oregon State in football and almost beat the University of Washington in fall 2014. [deleted school] men's basketball team beat Indiana this year. If there were clearly disproportionate numbers of injuries in such games, I might argue that such match-ups are potentially problematic. However, I am not aware of any data along those lines. These games don't seem any less appropriate than regular conference games.[197]

Potentially problematic, does this reflect a lack of interest or consideration of the prospect that injuries may be more likely than not between FBS Goliath and FCS David teams? On one Saturday alone, Sep. 21, 2013, 4 FBS teams outscored 4 FCS team matchups 281 to 7.[198] Is it probable overmatched players who are publicly humiliated and beaten up against opponents who are much bigger, stronger and faster at every position might be subject to greater injury? Take for example Savannah State who in 2013 lost to the Miami Hurricanes 77 to 7, lost to Oklahoma State 84 to 0, and lost to Florida State 55 to 0 (but the game was stopped due to rain in third quarter with nine minutes left), for a combined total of 146 to 0. Is it probable, foreseeable, more likely than not that Savannah State's players would be exposed to greater injury in this physical and talent matchup than their FBS opponents? "The excuse given by athletic officials at places like Savannah State is that

[197] P7 interview, *supra* note 17.
[198] Feinstein, *supra* note 177.

the payout for allowing their "student-athletes" to get pummeled this way helps sustain the athletic department financially."[199] Why is this ethical?

P8 corroborates this view to a certain extent: "Not that I necessarily support it or not, but it's the cost of doing business. Go back to my original definition, doing the right thing when no one is looking. The culture around doing it causes the athletic program to be at plus dollars. And the question becomes do you do that on a regular basis? We do it because we would play Iowa and Iowa State even if it wasn't for the money. I'm fairly confident."[200]

While some chief campus executives deny the existence of, or deprecate, an ethical dimension to FBS-FCS game scheduling primarily for money, P9 concedes it is an ethical challenge. It is fascinating these experienced education executives recognize the existence of the same issues, but when it comes to money, arrive at different ethical destinations. University of Illinois law professor John D. Columbo authored a law review article on tax breaks for college sports. His study concludes "The idea that college football evokes a Greek ideal of well-rounded athletes — that's just nuts… The Greek ideal, if there is one, is intramural sports. Big time college football is nothing more than the minor leagues for the pros and everyone knows it."[201]

At least P9 confronts the ethical dilemma squarely. If confession is good for the soul, this is what one looks like:

> Well I think that's an ethical challenge. Again you get down into the reality, just the practical reality of having to pay the bills in your own athletic program. We had an experience a few years ago where we scheduled a game against Texas Tech. We came home with the team and we left one player behind

[199] *Id.*
[200] P8 interview, *supra* note 18
[201] GAUL, *supra* note 111, at 59.

> in the hospital. That has bothered me from an ethical and professional level ever since. I'm not sure I can justify that and that's something I will have to live with because I think we did that possibly for experience, but possibly more for the guarantee on the game. My athletic director and I have had many conversations about the ethics of that. It's a difficult challenge I will admit. I sometimes come away from these games with a bit of an awkward feeling.[202]

P10 took a surprising turn in a different direction.

> It's ethical because in a way even though you are entering into basically a loss … the lower ranked team gets three advantages from it which are probably good advantages: first, they are going to get people looking at their team who would have never of looked at it, so reputationally it will help the school and the team even if it is a blowout; second, obviously there is the money part of it they will be compensated handsomely much more than they would ordinarily have been compensated; and thirdly, if they make it a close game the dividend for the smaller school is enormous….[203]

Does this argument sound convincing, or does it sound like a means to an end justification for a school needing to pay athletic bills? Take even a new FBS school like the University of Massachusetts at Amherst ("UMass") that elected to move up from FCS status in 2012. After four years playing in an independent nonconference status like Notre Dame and Army, they sport an 8-40 record.[204] Assuming this is not what success looks like, UMass has

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[202] P9 interview, *supra* note 19
[203] P10 interview, *supra* note 20
[204] Bob Hohler, *UMass Has Little to Show After Leaping into Big-Time Football*, THE BOSTON GLOBE (Dec. 24, 2015),

fixated on the big-time FBS revenue selling its team to play games they cannot athletically compete in. But does that ethically matter? Next year, UMass will receive $1.5 million to play at the University of South Carolina, $1.25 million to travel to the University of Florida, $400,000 to fly all the way to the University of Hawaii, and $250,000 to play Brigham Young in Utah.[205] Do these match-ups sound competitive for UMass' scholar-athletes? UMass' chief executives even sought a larger stadium to play home games in located in Foxborough, two hours from campus. Even with a capacity of 66,829, nine of ten seats remained vacant on Nov. 7, 2015 when they played the University of Akron.[206] The average attendance of three games in Foxborough is 9,717 in a 66,829 capacity stadium.[207] The expectation that students, faculty, and alumni will travel two hours from campus to watch a home game, with an 8-40 record, says something about the judgment and ethics of these UMass leaders. Yet they were lured by the prospect of moving up and capturing the seductive allure of television and sponsorship revenues. Do the scholar-athletes matter and if so, is this ethical decision-making when it comes to football scheduling?

X. ETHICS AND INJURY

Do stronger and bigger opponents present a greater risk of injury? With FBS teams having 85 scholarships to 63 for FCS schools, does this have consequences? As confirmed in several of the interviews above, some presidents and chancellors recognize the risk, but not to the point they consider it an ethical question. They were asked to consider the related question **"In view that football is the most injurious sport in the NCAA, concussions in the NFL resulted in an initial proposed $760 million settlement, how do injuries ethically affect the primary consideration of money when scheduling games, especially when there is**

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https://www.bostonglobe.com/sports/2015/12/24/umass-football-stalled-and-seeking-solutions/WQ07Rwz1ZfXnlLGZMVBSTI/story.html

[205] *Id.*

[206] *Id.*

[207] *Id.*

over a 90% competitive advantage by FBS teams?" P1 answered the question directly stating:

> Significantly. See my responses to questions 12 & 13 above. [He said earlier "... I worry much more about smaller, slower, less physically prepared student-athletes being exposed to greater risk of injury… The payout for participating in the game is simply a reality of the revenue stream that is generated by the public's willingness to support the contest. Both teams should be appropriately rewarded for contributing to producing that revenue stream. Having said this, the big issue is not that the FCS team is highly likely to lose and is guaranteed to make a lot of money doing so, *the troubling issue is exposing the FCS players to, what I believe are, greater risks of injury than they would have experienced if they stayed at their competitive level.*] (Emphasis added).[208]

Corroborating this observation, athletic directors interviewed for the Faure and Cranor study (cited earlier) conceded "Because of the physical differences among the players, several FCS athletic directors acknowledged having *significant* fear of their players getting hurt while playing FBS teams…[Other interviewed AD's] also felt the threat of injury to their players was significant."[209] Does this ethically matter?

P2 sincerely questioned whether there was evidence of greater exposure to injury for FCS teams attempting to compete with FBS juggernauts:

> Do we know that the injury rate is higher in those games?... I guess I'm not ready to accept the premise that there are more injuries in those kind of matchups than there are in regular games. Maybe

[208] P1 interview, *supra* note 11.
[209] Faure, *supra* note 169, at 203.

> there are, but I haven't seen any data to that effect, maybe you have… I think injuries can happen and I don't know that they have, I don't know that there's evidence that you're more likely to have serious injuries playing up than you are playing in league or playing down. Maybe there is data of that, I just haven't seen it. There is some sort of an intuitive feel to that I agree. It's one thing to sort of get beat up, but in terms of serious injuries, are their more in those games than other games? I don't know the answer to that. Well, I think it's a bit of a David and Goliath in terms of competition, I don't know that it's a David and Goliath in terms of serious injuries. I mean I just don't know that. And I guess I'm not quite willing to speculate we should make decisions about playing up or down based on the notion that injuries might occur because that frankly isn't the antidotal experience; maybe it is, but you'd have to have pretty large data set to look at that.[210]

It is interesting to note that this campus chief executive seized upon the David and Goliath metaphor. While David was the victor in his slingshot contest with Goliath, there are no slingshots in football — physical contests are decided based on size, weight, strength, talent, speed, experience, and other physical characteristics that, when combined together, cause the Goliath to dominate the David in contact force. "During one fifteen-year stretch, more than three hundred players died from injuries suffered in college games, foreshadowing by more than a century today's concerns about concussions and brain trauma."[211] The recent 2015 release of the movie *Concussion* is a biographical sports medical film based on the 2009 GQ exposé *Game Brain* by Jeanne Marie Laskas that documents the NFL's efforts to suppress brain damage suffered by NFL players. Virtually all NFL players are former college players. Yet despite this evidence, college presidents fail to

[210] P2 interview, *supra* note 12.
[211] GAUL, *supra* note 111, at 17.

recognize or appreciate the true injury risk of the sport they sponsor. To what extent does the money involved affect and conflict their ethical judgment? Nevertheless, P3 agreed with P2 wanting to see evidence of the increase in injury rate deflecting the ethical question pending receipt of such data:

> I would want to see evidence that I have never seen suggesting those games are more injurious between FBS and FCS schools. In my experience that's just not the case. A game against a supposed pure institution is just as likely to involve injuries as a supposed superior school, perhaps more so because they seem to be at a league competitive level the future dynamics are more at stake, but I'm extending my answer too far. I don't know of any evidence suggesting that that mismatch results in any more or less injury then a typical game. I would question the premise and I would want to see evidence of that, and in my experience that just hasn't been the case.[212]

While the Faure and Cranor study provides significant data proving the injurious nature of football among all NCAA sports, it is curious that the two-decade NCAA study did not compare injury rates in games between FBS and FCS teams, or between Division I, II, and III teams. They have the data already. Why no analytical comparison might you suppose? Could the extrinsic money factor again play a role?

P4 thought the question interesting, but could not equate it to anything he had experienced:

> That seems like a logical conclusion, maybe the absence of injuries on our part, maybe when you're not taking it seriously as you'd like to be, maybe it

[212] P3 interview, *supra* note 13.

> isn't as competitive in those instances. Maybe the killer instinct doesn't come to the forefront when you're playing a team that you're pretty sure you're going to beat. I don't know, that's a really good question I think. But I asked [our Athletic Director] if he could remember an injury in the years he's been here, that if there was a significant injury during a guarantee game, and he could only think of one, and I could only think of one… Of course I think part of the problem is I don't think we know what the injuries are, we won't know for thirty years, that's the problem. If I thought we were getting beat up, it would be a whole different story. But so far I haven't seen that. I guess I think it was constantly this 62 to 14 without trying very hard. So I don't know maybe the coach tells them don't annihilate the team because we will never get anyone to play us. I have no idea, but that's been our experience, but clearly if you were playing that way all the time, you'd have a problem.[213]

P5 did not question the proposition, but wondered whether the game of football itself could be altered to avoid the injury outcome and potential risk.

> Well I think our athletes can compete very well. It's usually the competitive advantage comes from the depths because they have 85 scholarships and we have 63. It's a game by game matter. Some programs go into a place and don't have the right approach and they never show up and don't play very well. The bigger issue is can you change the game of football to avoid the long term injuries. And it's not the injury perhaps that emerges after an

[213] P4 interview, *supra* note 14.

> intercollegiate athletics experience of a football player.[214]

P5 agreed with the proposition that 22 scholarships make a difference in team and player performance. What about in risk of injury? P7 joined several of the above campus leaders questioning the premise of the inquiry:

> . . . I don't know of any relationship between injuries and games scheduled for money. Student athletes get injured in practice and in regular conference games. The games played for money don't seem any less appropriate than the regular athletic enterprise. There are plenty of teams that lose an inordinate percentage of conference games, but that doesn't make it less problematic for more successful teams to play them.[215]

P8 seemed to agree, arguing:

> Now I will be the professor that I am. I'm not sure the data supports that question because I think you have to look at equal-ness of injury across division. The presumption of that question suggests that you're more likely to get injured with an FBS-FCS competition. I'm not sure that's true. I would want to look at concussions across the board. I would want to look at other injuries across the board. I would suggest that some of the more severe injuries is paralyzed players, death of players has either come in practice or FBS-FBS, FCS-FCS, D2-D2, D3-D3 competition… So yeah the NCAA like any other organization has much room for improvement, and I think the challenge is about some of the scheduling that you're looking at in terms of FCS

[214] P5 interview, *supra* note 15.
[215] P7 interview, *supra* note 17

> schools versus FBS schools. We are probably a good model and we are one of the competitive ones so (A) We don't do it a lot; (B) we do it inside [state]; (C) we would do it for an advantage; (D) we would play [omitted] [University of State], and [omitted] State regardless. The money's nice, but we would still play them because they are 5 busloads down the road an hour and a half, and the citizens of [State] [omitted] would love us, regardless.[216]

If the norm is for better football athletes to seek scholarships at FBS as opposed to FCS schools, and those superior teams have 22 additional scholarships than inferior FCS schools, what implication is there for increased risk of injury? Athletic Directors ("AD") and coaches argue their FCS players accept the risk of increased injury by "playing up", or being outscored on TV by a zillion points. "Most top programs preyed on lesser competition (see Oklahoma 84, Savannah State 0).[217] "They crave the opportunity to play the Goliaths," say the Davids.[218]

Contradicting his colleagues, P9 recognized not only the increased risk in FBS-FCS games, he also conceded the ethical implications:

> So now if you're asking the question if you enhance the risk by going up against a more powerful team… I suppose you could argue that maybe the answer is yes. So I think the ethics are in terms of sport competition versus revenue. If you're risking injury for revenue, I think you have to step back and assess your ethical boundaries. If you're running

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[216] P8 interview, *supra* note 18

[217] *See* Andy Staples, *Cupcake Wars*, SPORTS ILLUSTRATED, Sep. 10, 2012, at 117, *available at* http://sportsillustrated.cnn.com/vault/cover/featured/11834/index.htm.

[218] Faure, *supra* note 169, 199-200.

> the risk of injury in competition for personal best or team best, I think maybe you're within the ethical boundaries.[219]

P10 recognized the same ethical dilemma.

> I'm not sure, has it been true that FCS teams have more injuries than an FBS team in those kinds of games? Because I'm not sure about that. If that's the case, then that would be a definite ethical agreement against playing FBS versus FCS if they do have more injuries . . . If that actually is the case and the intuition is certainly there . . . then that's an ethical problem. Then in that case you should not jeopardize the health of your players especially if there's a possibility of truly an increase of severe concussions and so forth. You cannot ethically justify an increase in injury rate to your players especially if one is predictable.[220]

While injuries are common and a risk in all sports, there are norms of coaching and athletic behavior. Player safety should be first and foremost the primary ethical duty of everyone connected with intercollegiate sport. But as time and the expense of football at the Division I level have proven, commercialism and its economic benefits may have corrupted this duty.

Reasonable minds should agree in a highly injurious sport like football that the NCAA should assume some degree of responsibility for its play and regulation. In its 16-year football injury study (1988-1989 through 2003-2004 seasons), the NCAA reviewed injury surveillance data for men's football to identify potential areas for injury prevention initiatives. Approximately 16% of the schools in NCAA Division I, II, and III sponsoring football participated in the study, so the data are relevant and material.

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[219] P9 interview, *supra* note 19.
[220] P10 interview, *supra* note 20.

There was no comparison, however, involving FBS ("1A") and FCS ("1AA") teams in games with each other or between schools in DI, II, or III. That is a curious omission.

What is fascinating about this NCAA study is that the results show little variation in the injury rates over time."[221] While fall game, fall practice, and spring football practice injury rates were reviewed, the NCAA's confidence intervals are 95%.[222] Not unsurprisingly, injury in football games was 9 times higher than the practice injury rate (35.90 versus 3.80 injuries per 1000 athlete-exposures).[223] The study revealed that player contact was, not unsurprisingly, the primary source of player injury (game 78%, fall practice 57%, and spring practice 69%). "Knee and ankle injuries accounted for the most frequent type, while concussions represented 3% in both fall and spring practice, but 4% in games.[224]

The NCAA study revealed data not found in any other NCAA sport.[225] "The study concludes, based on its statistical

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[221] Dick et al., *supra* note 168, at 221.
[222] *Id.* at 222.
[223] *Id.* at 223-224. "The body parts most frequently injured playing football involved knee internal derangements, ankle ligament sprains, and concussions. So what is the nature of assumed risk of battle wounds on the playing field? In fall games, knee internal derangements accounted for 17.8%, ankle ligament sprains 15.6%, and concussions were 6.8%. In fall practices injuries were less with knee internal derangements being 12.0%, ankle ligament sprains were 11.8%, and concussions totaled 5.5%. Spring practice numbers were higher coming in at 16.4%, 13.9%, and 5.6% respectively. In the game itself when compared to fall practice, a player was 18 times more likely to sustain upper leg contusion (1.27 per 1000 athlete-exposures (A-E)), 14 times as likely to sustain an acromioclavucular joint sprain (.98 per 1000 A-E), 13 times as likely to sustain knee internal derangement (6.17 per 1000 A-E), 12 times more likely to sustain an ankle ligament sprain (5.39 per 1000 A-E), and 11 times as likely to sustain a concussion (2.34 per 1000 A-E)." *Id*.
[224] *Id.* at 224.
[225] *Id.* at 227. "The NCAA football injury study also found that approximately 85% of the knee internal derangements were classified as new injuries. In particular, the research disclosed there were three major types of knee injuries experienced during games and practices: ACL, posterior cruciate ligament (PCL), and menisci. These injuries occurred more frequently in games than practices.

analysis, that not only is football a high-impact collision sport, but players' characteristics (e.g., age, height, weight) vary widely, both within a team and among NCAA divisions." This should not be surprising to anyone familiar with this sport. The study also reveals that "[T]he intensity level and speed are generally considered higher in games than in practices, increasing the magnitude of collisions and thus, increasing the risk of injury."[226] Again, this is not surprising.

There is research that has been done taking a closer look at those FCS schools that typically play 1 to 2 guarantee (are paid to play) games each season. Athletic trainers are the key football staff that treat and monitor player injuries. Daniel Ballou of the University of New Mexico undertook a study involving collection of data from eight FCS athletic trainers consistently involved in guarantee games. He found that since athletic trainers work to prevent injuries, the opportunity to interview them provided insight for this study. In summary, "[t]he majority of FCS athletic trainers (67%) said their student-athletes suffer from increased soreness and are banged up following games against FBS schools. The majority also said that playing multiple FBS opponents in the same season is detrimental to the health of their student-athletes. The athletic trainers who reported that their school had played FBS opponents in consecutive weeks saw an increase in injuries."[227] Why is that you do you suppose? ". . . the general underlying premise was that fatigue and lack of depth from the FCS schools increased

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Are such injuries serious? Using the 10 days of time loss criterion, less than 45% of knee derangements resulted in such loss. But for those with more than 10 days of loss, in the case of ACL injuries 78% were operative; 39% of PCL injuries underwent surgical procedure." *Id*.

[226] *Id.* at 232.

[227] *See* Daniel Ballou, To What Extent is the Safety of College Football-Athletes Compromised by Playing Guarantee Games Against Superior Opponents? (May 2015) (unpublished Ph.D. dissertation, University of New Mexico) (on file with University Libraries MSC05 3020), *available at* http://hdl.handle.net/1928/27760.

the potential for all types of injuries."[228] This would seem to support the David and Goliath characterization.

Logic and personal experience testify that the reason football coaches recruit faster, heavier, bigger, stronger, more agile players is so they can play the game at a higher level of intensity and force. As already mentioned, tackling or hitting in a collision prone game logically produces more injuries as reflected in the testimony of FCS trainers. This violence naturally produces cause and effect results. Is this revelation really that surprising, or does it reflect a lack of consideration of what might be considered intuitively obvious?

Ballou's study also revealed, "None of the trainers reported that FBS games resulted in an increase of season-ending injuries, career-ending injuries, or catastrophic injuries."[229] Bearing in mind this data comes from only eight trainers, a wider sample of trainers more likely than not, using a preponderance of the evidence standard, would provide evidence of more serious injuries inflicted by Goliath FBS players on smaller, slower, weaker, less talented and agile FCS players. Yet, most of those campus executives interviewed failed to consider or appreciate this, while some more astute ones did. Why is that?

Football fans, parents of athletes, and campus chief executives should be asking "What impact have improvements in football equipment had on safety of the game?" The answer is stunning. Research reveals "Despite changes in equipment (e.g., helmets, increased padding, mouth guards), there was little variation in injury rates for games, or fall and spring practices over the 16-year [NCAA] study. The study observes that these results are most likely because the basic characteristics of the game have not changed drastically over the years."[230] Surprisingly, safety of the game has not changed in 16 years.

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[228] *Id.*
[229] *Id.*
[230] Dick et al., *supra* note 168, at 228.

Have improvements in strength and conditioning programs had an impact on injuries? Unfortunately, for the worse. A poignant fact known to most football coaches is that "stronger, faster athletes increase the speed and collision forces, causing more injuries."[231] Between FBS and FCS teams does size, weight, height, strength, talent, speed, and experience matter among football players engaged in a sport where speed and collision cause increased injuries? Again, why do football recruiters seek athletes with these characteristics? It is interesting to note that several campus chief executives picked up on this increased danger risk while others sought empirical evidence that these characteristics possessed by FBS over FCS teams created any risk.

Returning to the boxing analogy, would these same executives agree that a more experienced, faster, stronger, talented, heavyweight pugilist might pose a greater physical injury risk to a 165-pound middleweight boxer? While football is a team sport and boxing an individual one, football frequently has multiple players hitting, blocking, knocking down one player while boxing is a one-on-one physical contest. Which circumstance poses a greater risk of physical injury?

Concussions are an increasing concern in both amateur and professional football. The NCAA study also reports "Games tend to reduce the influence of the coaches over the quantity and nature of body contact, as the game is played at high speed and high intensity and players expect to be involved in contacts."[232] The NCAA report has been corroborated by other researchers such as K.M. Guskiewicz, M. McCrea, and S.W. Marshall that have reached similar data driven conclusions.[233]

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[231] *Id.* at 232.
[232] *Id.* at 229.
[233] Kevin Guskiewicz, Michael McGrea, Stephen Marshall, & Robert Cantu, et. al., *Cumulative Effects Associated with Recurrent Concussion in Collegiate Football Players: The NCAA Concussion Study*, 290 J. OF THE AM. MED. ASS'N. 2549-2555 (2003).

XI. CONCLUSION

Football is admittedly the most popular intercollegiate sport. Fan and student based popularity can affect rational analysis of the ethical implications of football scheduling and the influence of extrinsic monetary factors. Time and cultural shifts influence public opinion. Whereas boxing was probably a sport more popular than football in the 1930's and 1940's with famous athletes such as Joe Lewis, Jack Dempsey, Rocky Marciano being nationally recognized champions, football heroes of similar stature had yet to emerge.

If broadcast and related revenues in the 21st century tell us anything, it is that intercollegiate football now is the most popular college sport. As such, we view it through a lens that is more clouded with emotion than consideration of physical injury. This certainly was the case during boxing's golden era when athletes would take brutal beatings as long as they could stand on their feet. Spectators and participants themselves did not view the sport as prohibitively injurious. Is this not the same phenomenon we see today in college football? Collegiate presidents and chancellors reflect the culture of their campuses and the national preoccupation with a fast moving hard hitting sport. While some recognize the physical danger presented to their athletes, the culture is such that the importance of the safety of the game, like boxing in its day, is lost in the emotional appeal and entertainment provided by the sport.

Scheduling noncompetitive football games between Goliath FBS and David FCS teams primarily for money presents an ethical question few of us, let alone campus presidents and chancellors, want to consider. Like Penn State, other schools such as Baylor are being accused of choosing economics over sexual assault victims. "It's hard for schools to do the right thing…because that reputation (in athletics) is valuable to the school in an economic sense," observed Erin Buzuvis, a law professor at Western New

England University and co-founder of the *Title IX Blog.*[234] It is suggested, like the Civil Rights movement, that we have an ethical culture problem.

Due to space limitations, this qualitative study involving interview of 10 campus chief executives could not include all questions or their responses. The most poignant ones were provided. Pointing out this dichotomy between the ethics of sport to include its safety, and the cancerous infection of the money factor, football scheduling between David and Goliath teams threatens both the athlete and the sport itself. Like the many cited sports commentators, this is a call to action. Our scholar-athletes deserve more consideration of these issues from our collegiate presidents and chancellors than they perhaps are giving us. As previously noted, the pressure "to win" and generate revenue to sustain the "*kingskin"* is enormous. Make no mistake, this is a tough ethical challenge and an even more difficult conversation in need of participants.

[234] Nancy Armour, *Baylor Case Must Be Turning Point,* ARGUS LEADER, at 6D (May 27, 2016).

PAVING THE ROAD BETWEEN NCAA STARDOM AND AN NFL CAREER: A UNIVERSITY ADVISORY PANEL PERSPECTIVE

Mike Rogers[*]
Additional Commentary by Kelli Masters[+]

INTRODUCTION

You, a rising junior, are a talented Division I football student-athlete monitoring your phone calls. Caller I.D. reveals that one of the callers is a famous football agent who wants to recruit you to hire him. A series of questions is raised by this call including: (i) How do I interact with agents and protect/maintain my NCAA eligibility to compete?; (ii) Should I leave early for the NFL draft?; (iii) In hiring an agent, what are some of the important dos and don'ts?; and (iv) When my agent submits a written representation agreement for signature, how do I improve and complete that contract?

I have been addressing these questions and related matters for Baylor University football student-athletes (and their families) since the late 1980s as chair of Baylor's Pro Sports Counseling

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Panel (the "Panel").[1] As examples, I have worked with Santana Dotson, Fred Miller, Gary Baxter, Jason Smith, and Robert Griffin, III ("RG3"). This article seeks to help a much broader audience - knowing that some professional prospects do not have access to a Panel or expert NCAA compliance staff on their campuses. I also hope that this piece helps educate new advisors.[2]

NCAA Bylaw 12, the National Football League Players Association ("NFLPA") Regulations, and the Uniform Athlete Agents Act ("UAAA") all govern interactions between athletes and agents.[3] With three different bodies of law governing this unique process, all involved must proceed with caution and utmost awareness of the implications of these interactions. Also, it is important to know that some universities have agent regulations, which sometimes include a mandatory registration process.[4]

My advice, and this article, is divided into four parts. Part 1 discusses creating and developing a plan for interacting with an agent without jeopardizing collegiate eligibility. Part 2 offers advice on determining whether to stay at the collegiate level or to go on to the NFL. Part 3 provides an explanation of the agent selec-

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[1] *National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaw* 12.3.4 ("it is permissible for an institution to have an authorized institutional professional sports counseling panel").

[2] If you are new to the professional sports advisory business, do not be disappointed if some student-athletes do not follow your advice.

[3] *National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaw* 12, *available at* http://www.ncaapublications.com/productdownloads/D116JAN.pdf. *NFLPA Regulations Governing Contract Advisors*, NFL PLAYERS ASSOCIATION, (June 2012) http://nflparesources.blob.core.windows.net/mediaresources/files/PDFs/SCAA/2012_NFLPA_Regulations_Contract_Advisors.pdf. UNIF. ATHLETE AGENTS ACT 7 U.L.A. 789 (2000).

[4] *See, e.g.,* Athlete-Agent and Advisor Program, BAYLOR ATHLETICS, http://www.baylorbears.com/compliance/bay-compliance-agents.html (last visited Mar. 2, 2016); Agent Advisor Registration, THE UNI. OF OKLAHOMA INTERCOLLEGIATE ATHLETICS, http://www.soonersports.com/ViewArticle.dbml?&DB_OEM_ID=31000&ATCLID=208805731 (last visited Mar. 22, 2016).

tion process and suggestions for selecting an agent who is a NFLPA Contract Advisor. Part 4 sets forth suggested improvements to the current NFLPA Standard Representation Agreement and gives explanations of some contract provisions. Overall, this article is written for you, the professional football prospect. However, with this article, I seek to give insight to prospects, parents of professional prospects, other trusted advisors, and agents alike so that all may benefit from understanding the entirety of the process.[5] You must have a plan in place in order to successfully navigate the process of becoming a professional athlete.

This article contains an unusual feature in that, at my invitation, sports lawyer and experienced NFLPA contract advisor Kelli Masters has given her input part-by-part. As an industry practitioner, her comments add value to this article. You will note that she reinforces some of my points. She also provides supplemental insights and at times, to my delight, disagrees with me. I hope that this article provides you the tools to develop your own plan in pursuit of a professional football career.

PART 1 – INTERACTION WITHOUT LOSING ELIGIBILITY

A. Rule #1

In order to interact properly with agents, you must become familiar with NCAA Bylaw 12.3, which regulates agent activity.[6] A review of Bylaw 12 reveals what most rules educators[7] call Rule

[5] For more information on the infractions process see my article in the Seton Hall Law Review, which garnered media attention: Mike Rogers & Rory Ryan, *Navigating The Bylaw Maze in NCAA Major-Infractions Cases*, 37 SETON HALL L. REV. 749 (2007).

[6] *National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaw* 12.3.

[7] At Baylor University: Josh Lens, Assistant Athletic Director of Compliance; Keith Miller, Associate Athletic Director of Compliance; and Mabrie Hermann, Director of Compliance are the rules educators in the Compliance Office.

#1, which is "do not accept anything of value from an agent."[8] While most student-athletes remain in compliance with this rule until their eligibility is exhausted, this rule has been violated in spectacular fashion with severe consequences. Take, for example, Marcus Camby.[9] While starring at the University of Massachusetts, Camby:

> became deeply entangled in the seamy world that exists behind the scenes of big-time college athletics. The agents supplied him with money, jewelry, rental cars and prostitutes, which he willingly accepted and in some cases requested. Two agents, John Lounsbury of Wolcott, Conn., and Wesley Spears, a lawyer in Hartford, Camby's hometown, believed, or at least hoped, that Camby would allow them to represent him when he turned pro if they lavished gifts on him as a collegian; they were left in the lurch, feeling like jilted lovers, when he exited UMass after his junior year and signed with a high-powered agency, Pro-Serv, which helped him negotiate a three-year, $8 million contract as the No. 2 pick in the 1996 NBA draft.[10]

Discovery of these violations caused all of his basketball records, as well as the University of Massachusetts' trip to the NCAA Final Four in 1996, to be vacated.[11] Thus, the NCAA forced the university to send the trophy back and to take the banner down from the

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[8] *National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaw* 12.3.1.2.

[9] Although a collegiate basketball player, Camby's example is equally applicable to football student-athletes because the basketball and football rule are the same.

[10] Phil Taylor & Don Yaeger, *Tangled Web Marcus Camby was Both Victim and Villain in His Illicit Dealings with Agents While at UMass*, SPORTS ILLUSTRATED, Sept. 15, 1997, at 66.

[11] *Id.*

rafters of the gym.[12] Additionally, the university had to pay back the NCAA tournament revenue of $151,000.[13]

As a student-athlete, you must also be aware of agents that bend, and often times break, the NCAA Bylaws governing athlete-agent interactions. One infamous agent, William H. "Tank" Black, founded a sports agency called Professional Management Incorporated and soon became involved in a scheme to provide loans to college players before they were eligible for the draft.[14] Within a single year, "Tank" Black went from setting the record for having the most first-round picks in the NFL draft represented by a single agent to sitting behind federal bars for nearly seven years.[15] The charges against "Tank" Black ranged from embezzling, money laundering, obstruction of justice, securities fraud, and illegally bribing college players for business.[16] Black's catastrophic fall from prominence serves as a cautionary tale for both professional prospects and rising sports agents.

Parents and Rule #1

Another huge case reminds us that Rule #1 also applies to benefits being accepted by family members. Yahoo! Sports placed the University of Southern California in the national spotlight by alleging that its investigation revealed information indicating that Reggie Bush and his family accepted financial benefits worth more than $100,000 from prospective marketing agents.[17] Ultimately, the NCAA Committee on Infractions severely penalized the Uni-

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[12] *Id.*
[13] Eric Konigsberg, *Marcus Camby Has Nobody to Play With*, N.Y. TIMES (Apr. 22, 2001), http://www.nytimes.com/2001/04/22/magazine/marcus-camby-has-nobody-to-play-with.html.
[14] *Meet William H. "Tank" Black*, THE TANK BLACK STORY, http://www.thetankblackstory.com/author.html (last visited Mar. 4, 2016).
[15] *Id.*
[16] WILLIAM H. BLACK, TANKED! THE TANK BLACK STORY (2d ed. 2009).
[17] Charles Robinson & Jason Cole, *Cash and Carry*, YAHOO! SPORTS (Sept. 15, 2006), https://sports.yahoo.com/ncaa/football/news?slug=ys-bushprobe.

versity of Southern California and Reggie Bush lost his Heisman Trophy.

Having started with examples of egregious violations, do not think that my message is to not sweat the small stuff. NCAA rules compliance starts with the small stuff. When I began giving advice to Coach Grant Teaff's Baylor Bear team over 25 years ago, I mentioned not accepting a free soft drink.[18] I said, "Don't accept anything of value—even a Dr. Pepper, a meal, or a ride home!" In that same vein, a Power 5 school once lost the services of a top defensive back for a game because he had gone to brunch to see a former teammate who was accompanied by his agent (the agent paid for the three brunches). The student-athlete ate only one muffin but had to reimburse a charity in the amount of $30 - the cost of the brunch! Additionally, he was required to sit out a game as a penalty, plus he suffered embarrassing publicity. Do not think the penalty is always small. For example, if agent misdeeds involving huge dollars are discovered while you are still playing in college today, you will be declared ineligible immediately. When huge dollars are involved, reinstatement by the NCAA is not available.[19]

Rule #1 Includes Loans

Also, do not accept a loan from an agent![20] That is a common hook dangled by agents.[21] One of the agents in the Bush case

[18] Support from the head coach is vital to the credibility of a Panel. Grant Teaff supported our Panel from the beginning.

[19] Reinstatement Guidelines relating to a benefit from an agent provide: "For violations in which the value of the benefit is greater than $1,000, the committee indicated that the minimum withholding condition applied should so sit a season, charge a season and repayment, up to permanent ineligibility." *NCAA Division I Student-Athlete Reinstatement Guidelines*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/sites/default/files/Dec2015_DISAR_Guidelines20160204.pdf (last visited Mar. 22, 2016). Agent violations are considered more serious than general extra benefit violations.

[20] *National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaw* 12.3.1.2.

[21] *See* "Tank" Black discussion *supra* Part I.A.

told the media that some of the cash amounts in controversy were just loans not realizing that a loan was a violation too.

In fact, a loan against your potential future earnings as a pro (from anyone) is not allowed, except for the narrow exceptions discussed below.[22] One of my all-time favorite Baylor players is Santana Dotson. After Baylor, he played for the Tampa Bay Buccaneers (1992 NFL Defensive Rookie of the year) and picked up a Super Bowl ring with the Green Bay Packers. During college, Santana came to see me during the summer before his junior year in 1990. He wanted to know if he could go to a bank and borrow spending money for the school year against his large potential professional earnings from a banker who was not a Baylor booster. Remember, this was a quarter of a century before full cost of attendance scholarships. I said no because that would violate Bylaw 12, which I soon confirmed from our compliance staff. He then surprised me by pointing out that he could borrow money to purchase NCAA Disability Insurance with his pro contract being the source of repayment. I smiled thinking that he should be a lawyer. Fortunately, I had the answer. The loan authorized as part of the NCAA Exceptional Student-Athlete Disability Insurance Policy program was, and still is, an exception to the general rule of no loans anticipating payback from professional earnings.[23] That insurance program, which was established for football in 1990, still exists including the loan availability.[24] The program was, in large part, created because agents were secretly loaning money to acquire secret disability policies as a hook to sign still eligible players. The loan professionalized the player who thus, unknown to the university, competed while ineligible.[25]

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[22] *National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaws* 12.1.2.1.6 and 13.2.1.1.

[23] *See Student-Athlete Insurance Programs*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/about/resources/insurance/student-athlete-insurance-programs (last visited Mar. 2, 2016).

[24] Santana was the first (now of many) Baylor student-athletes to obtain disability insurance through the NCAA.

[25] Notice that Santana followed the NCAA slogan of "ask before you act." *See* discussion of the Andre Davis matter *infra* p. 7 for another example.

The insurance carrier for the NCAA is Tokio Marine HCC – Specialty Group. It has its own NFL draft experts and you must be projected to be no lower than a second round pick to be offered coverage. If you qualify for coverage you also qualify for an NCAA arranged bank loan from U.S. Bank, N.A. in Cincinnati. The Compliance Office at Baylor works with the carriers' administrator to learn who is eligible for coverage. You should check with the Compliance Office staff at your school to see whether they offer a similar service.

The media has reported that some athletics departments are using Student Assistance Funds to pay all or part of a premium on a disability policy or loss of value policy.[26] One example is Texas A&M paying a premium in excess of $50,000 to keep tackle Cedric Ogbuehi from turning pro early.[27] This is apparently not a violation, but in my opinion is excessive and contrary to the NCAA amateurism/collegiate model. While the NCAA-sponsored loan program is an exception too, it is more palatable because the student-athlete ultimately pays for his coverage from his earnings

[26] Marc Tracy, *Insurance Doesn't Eliminate Risk for Top College Athletes Who Forgo Draft*, N.Y. TIMES, May 8, 2015, at D6. The increasingly popular loss-of-value insurance can be found at: *National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaw* 12.1.2.4.4. Additionally, more information on it is discussed in an article co-written by Josh Lens of the Baylor Compliance Office. Jill W. Lens and Joshua Lens, *Insurance Coverage for Elite Student Athletes*, 84 MISS. L.J. 127 (2014). Notably, last year there was a $3 million payout to Ifo Ekpre-Olomu, a cornerback at Oregon projected to be the number 12 pick, after he fell to a seventh-round pick in the draft. *Reports: Ex-Duck Collects Record $3M Insurance Claim After Draft Fall,* FOX SPORTS (Oct. 19, 2015), http://www.foxsports.com/nfl/story/oregon-ducks-ifo-ekpre-olomu-collects-3-million-loss-of-value-insurance-cleveland-browns-101915. This is the highest payout collected on a loss-of-value policy to date. *Id.*

[27] Bruce Feldman, *How Texas A&M Paid Over $50,000 to Get Cedric Ogbuehi Back for 2014,* FOX SPORTS (July 16, 2014), http://www.foxsports.com/college-football/story/texas-am-aggies-paid-nearly-60-grand-top-nfl-prospect-cedric-ogbuehi-071614.

as a professional. The loan frees him from undue agent influence and serious rule violations, which are greater evils.[28]

There are other helpful regulations and laws. The NFLPA regulations for Contract Advisors reinforce NCAA legislation in that § 3B(2) prohibits inducements.[29] A violation may lead to de-certification, which is like disbarring the agent.[30] The Uniform Athlete Agents Act also prohibits inducements.[31] Such conduct may lead to a fine or criminal charges.[32] Additionally, in Texas, sports agents have been required to register with the Texas Secretary of State since 1987. A sports agent whose activities compromised the college eligibility of Texas Christian University tailback Andre Davis was fined $16,500 by the state of Texas for violating the athlete-agent law.[33] The fine is the largest levied against a sports agent by the Secretary of State since the statute went into effect in 1987.[34] The agent, Jeffrey Newport of Houston, was suspended from operating as a sports agent in Texas for two years.[35] Newport, 40 years old, was cited for buying a $250,000 disability insurance policy for Davis the day after he finished his junior season at TCU in 1994.[36] Newport also was cited for providing Davis with money and "other things of value."[37] Under recently approved changes to the UAAA, agents may soon be required to register

[28] For an article that provides excellent insight into the availability and effects of insurance coverage for student-athletes *see* Jill W. Lens and Joshua Lens*, supra* note 26.
[29] *See NFLPA Regulations Governing Contract Advisors, supra* note 3.
[30] *See id.*
[31] *See* UNIF. ATHLETE AGENTS ACT*, supra* note 3.
[32] *See id* at §§ 15-16.
[33] Kevin O'Hanlon, *Agent Fined for Giving Money to TCU Star*, ASSOCIATED PRESS (Jan. 19, 1996), http://www.apnewsarchive.com/1996/Agent-Fined-for-Giving-Money-to-TCU-Star/id-586b244f915f1034697a4c166adbd2a8.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*

with a centralized agency, which would share detailed information on the agent across state lines.[38]

B. Rule #2

Rule #2 is: "No agreements with an agent while maintaining collegiate eligibility."[39] Do not agree to allow an agent to represent you in writing or orally. Doing so will jeopardize your eligibility and your scholarship.[40] The prohibition applies even if it is an agreement for representation in the future or if payment for current services is to be deferred.[41] At Baylor, we recently found out that some agents tell our student-athletes that "verbal commitments" in recruiting are permissible under the NCAA Rules.[42] According to our compliance staff, that is not true. Agent conduct is governed by a different set of rules.

The presumed penalty for violating Rule #2 is permanent ineligibility.[43] In nearly all cases one has professionalized himself.

Relatedly, do not allow an agent to perform tasks or provide services for you that an agent typically provides for a football client, such as talking to a professional team on your behalf or set-

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[38] *Revision to Sports Agent Act That Protects NCAA Athletes Get Approved*, ESPN, http://espn.go.com/espn/print?id=13263390 (last visited Mar. 4, 2016). ("The revisions also include an effort to streamline the agent registration process with states, including outlining a structure for a possible central agency to handle the process and share detailed background information provided by agents across state lines.").

[39] *National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaw* 12.1.2(g).

[40] *National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaw* 12.3.1.

[41] *National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaws* 12.3.1.1 and 12.3.1.2.

[42] It is important to note that NCAA legislation often uses the word "verbal" to mean "oral." Do not let this language confuse you. Written *and* oral commitments are both prohibited.

[43] *National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaw* 12.1.2.

ting up a tryout. Even if you deny the existence of a representation arrangement, the agent relationship may be inferred from the facts.[44]

Talking to an Agent

The "NCAA Educational Memorandum" referenced below is correct in that one may talk to an agent.[45] However, the best practice when you see an agent's name on your Caller I.D. is to let the call go to your voicemail. Be polite upon returning the agent's call and ask the agent to only contact you through your university's compliance staff.[46] Why? The compliance staff wants to help you avoid violations and will ensure that all interactions and conversations with an agent are made according to all applicable rules and regulations.

Also, if you are having an in-person discussion, someone may see and report your conversation with an agent perhaps embellishing it or misunderstanding what was happening, e.g., "I saw Agent X and Junior Football Star (you) talking in the stadium parking lot and Junior Football Star accepted an envelope from Agent X. Isn't that a violation?" Per NCAA requirements, the school's compliance staff must investigate. And, you may be withheld from competition during the investigation. On the other hand, if you limit your conversations with agents to agent days or agent interview sessions supervised by the compliance staff or a Panel member, you will avoid the potential hassle caused by an inaccu-

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[44] *See* Chris Howard and Steve Mallonee, *Information Regarding the 2015 National Football League (NFL) Draft, Tryouts and Agents,* NCAA (Nov. 28, 2014), https://www.ncaa.org/sites/default/files/2014%2BDivision%2BI%2BNFL%2BEducational%2BMemo.pdf. *See National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaw* 12 Official Interpretations. *See also Oliver v. Nat'l Collegiate Athletic Assoc.*, 920 N.E.2d 203, 206 (Ct. Com. Pl. 2009).

[45] *See infra* Part 2.A.

[46] Perhaps you should return the call in the presence of a compliance staff member.

rate, (e.g., the envelope was the agent's resume or even an intentionally false, report).

Have a Plan

Protecting your eligibility requires knowing and following the rules so you can complete your third season and have the option of returning for a fourth. A prominent example: RG3, his family, and Baylor's compliance staff established a plan and followed it. The plan included NCAA rules education sessions followed by appropriate action. On one occasion, Mrs. Griffin opened a letter and found cash with a request for Robert's autograph. She turned the cash over to Baylor's compliance staff. The dollars were returned accompanied by a cease and desist letter. Robert participated in supervised agent days. Mrs. Griffin attended an informational session at the Alamo Bowl conducted by the compliance staff for parents of team members. I met her that day. The final stage, which was after the season ended, comprised of lengthy interviews at Baylor's athletics facility with top agents in part selected from earlier supervised meetings. Two members of the compliance staff and the chair of the Panel (me) monitored these interviews. His parents and then-fiancé (now wife) were also present and actively participated.

I have mentioned both the university's compliance staff and its Pro Sports Counseling Panel. They can be valuable sources of information and protection. Additional suggestions follow. Also, see the NCAA Educational Memorandum referenced below.[47]

Compliance Office

Get to know and work with the institution's compliance staff. Circumstances may occur, or be proposed, that require an interpretation of NCAA legislation, which that staff is charged with providing to you. And, they will very much want to help you avoid amateurism violations. Perhaps the office provides extra

[47] *See infra* Part 2.A.

services such as agent days and supervised interviews. In our office at Baylor, Josh Lens has been the front man for the past several years. Before Josh, I had to run the agent days (during years when we had professional prospects before our current embarrassment of riches) and engaged in some of the other activities.

The Compliance Office should generally adhere to a "front-door" policy, meaning that any contact with agents goes through the Compliance Office before reaching the prospect. This approach helps to protect the prospects from distractions and interference with their collegiate careers. By using the Compliance Office as a screening mechanism for any agent-athlete interactions, the risk of prospects breaking Rules #1 or #2 discussed above is reduced.[48]

Pro Sports Counseling Panel

A Pro Sports Counseling Panel is not required but is authorized by NCAA legislation. The bylaw provides:

> **12.3.4 Professional Sports Counseling Panel.** (A) It is permissible for an authorized institutional professional sports counseling panel to:
> (a) Advise a student-athlete about a future professional career;
> (b) Assist a student-athlete with arrangements for securing a loan for the purpose insurance against a disabling injury or illness, or for purchasing loss-of-value insurance and with arrangements for purchasing such insurance;
> (c) Review a proposed professional sports contract;

[48] *See supra* Part 1.A-B.

> (d) Meet with the student-athlete and representatives of professional teams;
> (e) Communicate directly (e.g., in person, by mail or telephone) with representatives of a professional athletics team to assist in securing a tryout with that team for a student-athlete;
> (f) Assist the student-athlete in the selection of an agent by participating with the student-athlete in interviews of agents, by reviewing written information player agents send to the student-athlete and by having direct communication with those individuals who can comment about the abilities of an agent (e.g., other agents, a professional league's players association); and
> (g) Visit with player agents or representatives of professional athletics teams to assist the student-athlete in determining his or her market value (e.g., potential salary, draft status).[49]

Despite this wide latitude, I have not done each and every one of these things over my years on the Panel. I have not been comfortable with putting myself between the student-athlete and a professional team as described in (c), (d), (e), and (g). Why? I am not an agent and those are things that an agent does. I fear I may not have the expertise to provide high quality service to the student or to meet the standard of care of an ordinary prudent agent. I have

[49] *National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaw* 12.3.4.

primarily provided services related to disability insurance, agent selection, and the suggestions relating to the Standard Representation Agreement. In addition, I have acted as a buffer to give some student-athletes time and space from the agents seeking to contact them. The Panel has provided free, neutral advice to dozens of players.[50] Staying familiar with the NFL marketplace 24/7 is hard for an academic (not to mention the NBA, MLB, etc.).

If your university has a Panel, you should get to know the chair. The Compliance Office and I do not compete. The Compliance Office is primary, and we work together to provide help to those who seek it.

A national professional sports counseling panel does not exist, at least not yet. While I was chair of the NCAA Division I Amateurism Cabinet, we discussed the possibility of the NCAA establishing and supporting a national advisory panel to help the student-athletes who lack access to local service or expertise.[51] The Student-Athlete Advisory Committee ("SAAC") liaison to the cabinet, who was an NCAA Division I football player at an Football Champion Subdivision ("FCS") school, strongly supported the concept of NCAA assistance because local help for an FCS player is scarce to non-existent.[52] We did not complete our deliberations on this topic, but I think renewal of discussions on this topic

[50] Because I am a tenured professor, and not an Athletics Department employee, I am able to give neutral advice. There are, however, commentators that believe that a university-run Panel is incapable of being neutral. *See* James F. Reid, *Call to the Bullpen: How the 2012 MLB Draft Shows Why the NCAA Must Make a Change to its Bylaws*, 3 ARIZ. ST. SPORTS & ENT. L.J. 1, at 57, 86.

[51] *See* Libby Sander, *NCAA Considers a National Pro-Sports Counseling Panel*, THE CHRONICLE OF HIGHER EDUCATION (Oct. 19, 2010), http://chronicle.com/blogs/players/ncaa-mulls-idea-of-a-national-pro-sports-counseling-panel/27598.

[52] Each Student-Athlete Advisory Committee is a group of student-athletes brought together to provide insight on the student-athlete experience and offer input on the rules, regulations, and policies that affect student-athletes' lives on campus. *See History of the NCAA Student-Athlete Advisory Committee*, NAT'L COLLEGIATE ATHLETIC ASSOC., http://www.ncaa.org/student-athletes/history-ncaa-student-athlete-advisory-committee (last visited Mar. 22, 2016).

should occur. If the NCAA brought this idea to fruition, the national pro sports counseling panel would likely consist of current and former professional athletes, legal experts, and experienced volunteers from campuses and conference officers. Academic and Membership Affairs and Enforcement Services would probably provide staffing. This would provide a panel free of any local school bias.[53]

The NCAA offers an Educational Memorandum geared towards Division I football student-athletes with remaining eligibility and a desire to pursue a professional football career.[54] In fact, the NCAA staff does an excellent job in its rules education endeavors. The most recent Educational Memorandum may be found on the NCAA website under the "Agents and Amateurism" section.[55] This document provides information and advice via "Frequently Asked Questions" regarding the NFL draft process and interactions with agents. The questions highlight situations in which you may find yourself, such as being invited to the NFL combine or being offered impermissible financial inducements by an agent. The Memorandum confirms that a violation of Rule #1or

[53] While this is not a personal concern of mine, some commentators are concerned that university staffed Panels can give rise to conflicts of interest when the staff is asked to advise student-athletes on whether to stay or go professional. Sarah Staudinger*, The Conflict of Interest Issue with NCAA Student-Athletes and Professional Sports Counseling Panels*, 3 ARIZ. ST. SPORTS & ENT. L.J. 1, at 123, 128; *see also* James F. Reid, *Call to the Bullpen: How the 2012 MLB Draft Shows Why the NCAA Must Make a Change to its Bylaws*, 3 ARIZ. ST. SPORTS & ENT. L.J. 1, at 57, 86 ("Since panel members are full-time employees and representatives of the university, they may be more inclined to sway an elite student-athlete to compete as a student-athlete for another year before turning pro.").

[54] *See Information Regarding the 2015 National Football League (NFL) Draft, Tryouts and Agents, supra* note 44. This memorandum answers many questions that would be asked of a national panel.

[55] *Agents and Amateurism*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/enforcement/agents-and-amateurism (last visited Mar. 22, 2016).

Rule #2, as well as entering the draft and failing to take the proper steps to withdraw, causes a loss of eligibility.[56]

NFLPA Contract Advisors Are Agents; Who Else?

All of the rules above about interacting with an agent apply to anyone who falls within the NCAA's broad definition of an agent. The definition includes not only NFLPA Contract Advisors but also "runners, financial advisors, marketing representatives, business managers, brand managers and street agents who act as brokers for their own personal gain."[57]

All of these individuals and firms can cause you eligibility problems. So, once again, work with the compliance staff. A final note, now that you are an accomplished football player beware of anyone new who tries to befriend you, do favors for you, buy you things, etc. A runner doesn't wear a sign that says, "I am a runner."

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[56] *See Information Regarding the 2015 National Football League (NFL) Draft, Tryouts and Agents, supra* note 44. Another NCAA publication that is still very helpful is the NCAA Agent/Student-Athlete Brochure (now more than 6 years since publication). NCAA Agent/Student-Athlete Brochure, *available at* https://admin.xosn.com/pdf9/2559115.pdf?DB_OEM_ID=31000&pdf. The Guide was produced by the NCAA Agent, Gambling, and Amateurism staff, headed by Rachel Newman-Baker, whom I worked with as Chair of the Amateur Cabinet. *Id.*

[57] Gary Brown, *Amateurism Cabinet Seeks Expanded Definition of Agents*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (July 26, 2011 12:00 a.m.), http://www.ncaa.org/about/resources/media-center/news/amateurism-cabinet-seeks-expanded-definition-agents. Notably, the Uniform Law Commission recently approved changes to the Act, which would expand this definition even further. Under the newly approved definition, "agent" would include marketers and any other persons "who try to sign athletes by providing gifts or services that jeopardize their eligibility." *Revision to Sports Agent Act That Protects NCAA Athletes Get Approved, supra* at note 38.

C. Commentary by Kelli Masters

Student-athletes in the State of Texas are very fortunate, so long as they understand the resources, protections, and systems available to help them through the process as they transition to professional athletics. As a Contract Advisor (certified by the NFLPA since 2005), I have seen first hand the procedural differences between Texas schools and universities in other jurisdictions. And I can attest, Texas schools handle the process in a way that is very effective in producing successful outcomes for athletes and their families. This comprehensive article is just one great example of these efforts to educate and guide athletes through this very important phase of their lives.

As an attorney, agent, and Contract Advisor, my activities in recruiting and representing athletes are governed by a number of laws, regulations, and rules. As mentioned earlier, the NCAA bylaws govern interactions between agents and student-athletes. Each state's athlete-agent laws (typically some form of the Uniform Athlete Agents Act) also govern such interactions and require an agent to be currently licensed and bonded, if required by that state. But beyond that, agents are also subject to extensive regulations promulgated by the NFLPA as well as school-specific policies regarding registration and communication. If agents are also licensed attorneys, they are also subject to rules of professional responsibility within their jurisdiction.

While maintaining compliance with all these layers of requirements can be daunting, every agent knows what is required and should be responsible enough to ensure proper and timely registration as well as adherence to applicable laws and rules. You, as a student-athlete, family member, or advisor can ensure you are speaking only to well-qualified, compliant agents by following the advice in this article, and by following these rules of thumb:

1. Any communication from an agent (or anyone on an agent's behalf, even if the person is a former teammate or

friend) should be reported immediately to your school's compliance department. In the state of Texas, unlike most jurisdictions, agents are not allowed to contact a student-athlete directly. Agents **must** go through the compliance department to initiate contact with you or anyone on your behalf. If they do not, they are in violation of state law. A student-athlete or family member/advisor may initiate contact with an agent, but such contact should still be reported to compliance. This is for your protection, and allows the compliance office to help you navigate the process correctly.

2. Never accept **anything** of value from an agent or someone who is recommending an agent. Play it safe; not even a stick of gum or bottled water. And certainly not a loan or "cash advance."

3. Never make **any** promises or agreements with an agent or someone who is recommending an agent. As mentioned above, even oral agreements will jeopardize your college eligibility.

4. Once communication has been properly established between you and an agent (at an "agent day" interview facilitated by the compliance department), you may continue to stay in touch with an agent. Any meetings should be approved by compliance and you should inform compliance of all conversations. But as long as you are not accepting anything of value or making agreements (oral or written), communication is not prohibited. That being said, allow the compliance office to facilitate as much of the information flow as possible, as they are able to keep the process from getting overwhelming and can help discern good information from bad or incorrect information.

5. Educate yourself. Read the materials provided to you. Attend any meetings or seminars set up by your school re-

> garding agents. You need to be prepared to ask many questions of prospective agents, but you won't know what to ask unless you are educated about the process.

Always keep in mind, throughout this process, that your goal is to find the very best advocate for you; someone you can trust who will guide you through the process in a knowledgeable, caring and protective manner. You want someone who is not only excellent at what they do, but also excellent at putting your best interests first. If a prospective agent is willing to put you and your eligibility in jeopardy by violating (or even bending) the rules and regulations, you must question whether that person will actually put your best interests ahead of their own. Remember, if they can buy you, they can sell you out too.

PART 2 – SHOULD I STAY OR SHOULD I GO?

Enough about eligibility rules, now let's turn to the issue of whether to apply for the draft early.

A. Tryouts: Testing the Waters to Gather Information

There are many questions and answers in the NCAA Educational Memorandum that pertain to tryouts and protecting eligibility.[58] While helpful, that information is far more often applicable to basketball. Tryouts of still eligible basketball student-athletes are common in order to test the waters and can occur following the end of a freshman, sophomore, or junior season. I do not think Baylor has ever had an eligible football student-athlete travel to an NFL city to tryout for a professional team. Apparently, tryouts to test the waters are not part of the football landscape. Three years of game film control. On the other hand, after eligibility is exhausted, football tryouts are common and it doesn't matter

[58] *See Information Regarding the 2015 National Football League (NFL) Draft, Tryouts and Agents, supra* note 44.

(for Bylaw 12 purposes) who pays for the travel. Scouts also come to campus to observe prospects before and after (i.e., Pro Day)[59] eligibility is exhausted.

Getting Accurate Information

You are thinking about leaving a year early because some draftnik projects that you will be a high pick in the next draft. While that projection may be flattering, it also may be wrong. Furthermore, agents often tell potential clients what they want to hear about their draft prospects. But agents are not always right. Get reliable information. The only opinions and projections that really matter are those formed by the NFL teams. Take, for example, Geno Smith who fired his agents immediately after the 2013 football draft.[60] Rumors soon circulated that Smith's agents had told him that he would be the first overall pick in the draft.[61] However,

[59] Pro Days are events put on by individual universities at which both the prospects invited to the combine and other seniors are allowed to work out in front of scouts. This allows the scouts to see many more students and it also allows them to watch top prospects in a "friendly" environment. At Pro Day, NFL teams can "watch the players participate in position workouts and events like the 40-yard dash, the shuttle run and the vertical leap." Staff Report, *NFL-Hopeful Bears Prepare for Pro Day*, WACO TRIBUNE-HERALD, 1C, Mar. 16, 2016. As this article is being written, Baylor hosted its own Pro Day at which 16 players tried out for scouts and coaches. Coach Art Briles told the Waco Tribune-Herald that the players have said that they prefer the "music-blaring, strength coach-hollering atmosphere of Baylor's Pro Day environment to the more sublime, pressure-packed combine." Brice Cherry, *16 Players Demonstrate Skills Before NFL Coaches, Scouts*, WACO TRIBUNE-HERALD, Mar. 17, 2016, at 1C. Thus, it was no surprise that they performed better, with Andrew Billings even running a personal-best 4.92 seconds in the 40-yard dash (shaving time off the time he clocked at the combine). *Id.*

[60] Manish Mehta, *Geno Smith Thought He Should Have Been No.1 Pick in NFL Draft, Fires Agents After He Slips*, NEW YORK DAILY NEWS (Apr. 30, 2013), http://www.nydailynews.com/sports/football/jets/geno-fires-agents-felt-no-1-article-1.1331194.

[61] Mike Florio, *Geno Smith Camp Shares Details on Decision to Fire Agents*, PRO FOOTBALL TALK, NBC SPORTS (May 2, 2013), http://profootballtalk.nbcsports.com/2013/05/02/geno-smith-camp-shares-details-on-decision-to-fire-agents/.

that turned out to be completely incorrect.[62] Instead, the New York Jets drafted Smith with the eighth pick in the second round.[63]

Although tryouts are rare, the really good news is that advice is available from the NFL College Advisory Committee ("CAC").[64] This committee includes high level personnel evaluators from NFL teams and directors from the league's two sanctioned scouting organizations.[65] Go see your head coach to see if it makes sense to apply for an evaluation. Do not apply for an evaluation unless you are a realistic professional prospect. The sports medicine staff members also talk to NFL Scouts and may be helpful in making that decision.

College Advisory Committee Evaluation

If you apply for a College Advisory Committee Evaluation, the evaluation will be based on the committee's best estimate of your potential to be drafted. The CAC's response is non-binding and does not constitute a guarantee that you will even be drafted. [66]

Players are given one of the following messages:

a. They have the potential to be drafted as high as the first round;
b. They have the potential to be drafted as high as the second round; or
c. They should remain in school to develop further as potential professional prospects while continuing their education.

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[62] Mehta, *supra* note 60.
[63] *Id.*
[64] *See A Head Coach's Guide to the Collegiate Advisory Committee*, NFL FOOTBALL OPERATIONS, https://www.nfl.info/transfer/CAC_A%20Head%20Coachs%20guide_Final_0624.pdf (last visited Mar. 22, 2016).
[65] *The NFL College Advisory Committee*, NATIONAL FOOTBALL LEAGUE, http://operations.nfl.com/the-players/the-nfl-draft/the-nfl-college-advisory-committee/ (last visited Mar. 22, 2016).
[66] *See A Head Coach's Guide to the Collegiate Advisory Committee, supra* note 64.

The Committee formerly issued a third round message in addition to the first two round forecasts described above. However, that third round category proved to be too inaccurate to continue. Apparently, nearly all NFL experts agree on most of the top 50 or 60 prospects (so the first two rounds involving 68 draftees are much easier to predict at least in some order) but opinions differ greatly after that. Also, realize that 24 of the 84 underclassmen who declared for the draft in 2015 were not drafted at all!

The CAC's evaluation is based solely upon demonstrated football ability. It does not take into account injuries, the perceived strength or weakness of a particular year's draft class, performance at the Scouting Combine or Pro Days, or any other factor that may influence a player's draft status. Nonetheless, it should be the linchpin of the stay or go decision. And, a first round evaluation almost always results in the prospect deciding to go pro. Other factors should include academic status, enjoyment of college, family financial circumstances, health/injury concerns, and disability insurance availability. Additionally, it is understandable for you to decide to go Pro if your family has great financial need.

I have been suggesting the above factors for many years. This article has caused me to drill down on this subject. One new thought is that recently adopted NCAA Financial Aid Rules make it more comfortable to stay. While the new bylaws don't allow your college to provide resources to meet dire financial needs for your family, you may have noticed that you personally were more solvent this year.[67]

[67] During interviews preceding the national championship game, players and coaches landed the new stipends. Clemson wide receiver Sean MacLain said the money he receives might buy a pizza or a trip to the movies. Eddie Baum, *Pizza and a Movie: Players Say Stipends Help Pay for Basics*, ASSOCIATED PRESS (Jan. 10, 2016), http://collegefootball.ap.org/article/pizza-and-movie-players-say-stipends-help-pay-basics. Some of the money, Clemson tight end Jesse Fisher said, gets socked away in the bank. *Id.*

If you qualified for a Pell Grant, you received $5,700 from the U.S. Government with no strings attached. Regardless of your family's economic status, your scholarship now covers full cost of attendance, which means thousands in extra dollars above the former NCAA grant in aid allowance.[68] The calculation is made by the Financial Aid Office at each school, not the Athletics Department.[69] For example, Alabama players received $550 per month.[70]

And you should have been fed better and more often due to deregulation of the extra benefit rules relating to meals and snacks.[71] Furthermore, there is the additional peace of mind that comes from a disability insurance policy, if you have one. My point is that high profile student-athletes like you are being compensated more fairly now than just a couple of years ago. Under current rules you can earn your degree, enjoy developing your skills, be a "big man on campus" ("BMOC"), and have some pocket money (no receipts required). While it still may make sense to leave (you receive a first round projection or your family has dire financial need), the NCAA financial aid rules no longer encourage it.

Supplemental Thoughts on Academics (If You Decide to Leave Before Graduation)

As Leigh Steinberg says, "be good to your future self."[72] If you have not graduated, finish your fall semester strong. Study for

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[68] *See National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaw* 15.

[69] Baum, *supra* note 67. The additional amount given to each student-athlete varies from school to school due to federal regulation.

[70] *Id.*

[71] *National Collegiate Athletic Association*, 2015-2016 Div. I Manual, *Bylaw* 15.6.2.

[72] Leigh was very good to my Alternative Dispute Resolution class this past Winter 2015 quarter, in which he made a presentation via Skype. He discussed his book on negotiations, Winning With Integrity, which is on my list of recommended books for outside reading. LEIGH STEINBERG & MICHAEL D'ORSO,

and take your finals. Maintain your GPA. That way, if you decide to leave you will be as close as you can be to graduation if you return down the line.

My experience has been that the student-athletes who blow off academics and let their GPAs drop below 2.0 almost never come back to graduate. If you leave ineligible, you also will be hurting the football program's Academic Progress Rate ("APR") because you will be departing without earning either the retention or eligibility points known as an 0-2 APR performance.[73] If you depart eligible and make a pro team, the APR rate for your team is not adversely affected.[74]

When you consider returning to school, be aware that the NFLPA Collective Bargaining Agreement has a tuition assistance plan set out in Article 56.[75] Also, Power Five Conference schools (and some others) have tuition assistance programs for returning student-athletes who meet the institution's criteria.[76] For example, the Big 12 Bylaws provide that "member institutions shall award institutional athletically related financial aid to former student-athletes per institutional policy."[77]

WINNING WITH INTEGRITY: GETTING WHAT YOU'RE WORTH WITHOUT SELLING YOUR SOUL (1998).

[73] *See Academic Progress Rate Explained*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/about/resources/research/academic-progress-rate-explained (last visited Mar. 22, 2016).

[74] *Division I Academic Progress Rate (APR)*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, http://www.ncaa.org/about/resources/research/division-i-academic-progress-rate-apr (last visited Mar. 22, 2016).

[75] COLLECTIVE BARGAINING AGREEMENT Art. 56 (Aug. 4, 2011), *available at* https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.

[76] *See, e.g.,* Pac-12 Conference, *Pac-12 Universities Propose Sweeping Changes to Student-Athlete Benefits*, PAC-12 NEWS (Oct. 1, 2014), http://pac-12.com/article/2014/10/01/pac-12-universities-propose-sweeping-changes-student-athlete-benefits (last visited Mar. 22, 2016).

[77] BIG 12 CONFERENCE HANDBOOK, BYLAW 1.3.3.3 (2015016), *available at* http://www.big12sports.com/fls/10410/pdfs/handbook/ConferenceHandbook.pdf?DB_OEM_ID=10410. *See also Board of Directors Announces Student-Athlete*

Stay or Go Factors Applied

These are some of the factors that I observed being applied while RG3 and Jason Smith each made his decision on whether to stay or go. When making your own decision, you should consider these factors as well.

Stay Factors for RG3:

He was working on a Master's degree. He is from Central Texas. The team's talent was trending sharply upwards. He was enjoying school and being the team leader. There was no financial pressure from family. He had disability insurance.

Go Factors for RG3:

He had just won the Heisman trophy and winning it twice is rare. He had been at Baylor four seasons (including one medical redshirt season) and had already earned a Bachelors degree. He was projected as a high first round pick. For marketing purposes, he would never be hotter. So, he decided to go and was drafted second in the first round.

Go Factors for Jason Smith:

Although he didn't receive a first round evaluation, he would have been drafted and earning a good living soon. He had been at Baylor four seasons (one as a redshirt). He was close to a degree.

Stay Factors for Jason Smith:

He had a limited portfolio of game films as a tackle because he had redshirted, missed some games due to injury, and had played a different position part of his college career. Jason played

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Initiatives, BIG 12 CONFERENCE (Dec. 1, 2014), http://www.big12sports.com/ViewArticle.dbml?ATCLID=209788901.

great in an injury free senior year (13 new game films) and rose to the second pick in the first round.

Applying for the Draft

As a rising junior, you may apply to opt-in to the next NFL draft. Legal challenges to come out for the NFL draft earlier in college have not been sustained because NFL success is closely tied to age and physical maturity. [78]

Cooling Off Period

What if you apply for the draft and then conclude that you made a mistake? You must change your mind quickly or it is too late. The "cooling off" period is short—only three days. This allows you to sleep on the original decision but not much beyond that. And please realize that during such brief time period you must continue to comply with all agent and amateurism rules. The withdrawal period is short because of the need to manage rosters at the collegiate level. Remember that the signing period for football starts in early February and college coaches need to know who is staying and who is going before signing day.

B. Importance of Maintaining Good Character

One aspect in the pursuit of a professional career that is often placed too low on the list of priorities is the importance of good character. One sometimes overlooked source of information is social media. This should not be underestimated. A good reputation takes years to build but can be lost in a single incident or post on social media. Just this year, Laremy Tunsil suffered one of the most bizarre falls down the draft board all because of character issues and social media. Tunsil, an offensive tackle from Ole Miss,

[78] For information on the key dates in applying for an evaluation (mid-December) and applying for the NFL Draft (mid-January) *see* the NCAA Educational Memorandum previously mentioned *supra* note 54.

was at one point considered a likely number one overall pick.[79] But, with mere minutes before the start of the 2016 draft, a reputation-shattering video was posted through his Twitter account.[80] The video showed Tunsil wearing a gas mask and smoking marijuana from a bong.[81] Instead of going in the top three, Tunsil sat by as teams traded up, yet passed on him.[82] He ended up as the thirteenth overall pick; this slide cost him upwards of $13 million in salary.[83] Many other stories exist of student-athletes who have posted on social media after an emotional game or event and regretfully make a statement that has a profound negative impact on their athletic career and reputation.[84] You must keep this in mind as you navigate through the draft process.

It should not surprise you that investigators will comb through your background and perform an in-depth review. Your

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[79] Kevin Seifert, *Laremy Tunsil Slides to Dolphins at No. 13 After Gas Mask Tweet*, ESPN (Apr. 29, 2016), http://espn.go.com/nfl/draft2016/story/_/id/15423201/agent-laremy-tunsil-gas-mask-tweet-was-hacked.

[80] Rodger Sherman, *Laremy Tunsil's Twitter Account Posted a Video of Him Smoking a Bong Minutes Before the NFL Draft*, SB NATION (Apr. 28, 2016), http://www.sbnation.com/nfl/2016/4/28/11533380/nfl-draft-laremy-tunsil-marijuana-bong.

[81] *Id.*

[82] *Id.*

[83] Had Tunsil gone in the top-three, as some sources projected, he would have obtained about $13 million more than the $12.4 million he will likely get from the Dolphins. But, even if he had gone to the Ravens with the number six pick, he would have gotten about $20.4 million — almost $8 million dollars more! Jonathan Chew, *Here's How Much NFL Draft Pick Laremy Tunsil Lost Because of 1 Tweet*, FORTUNE (Apr. 29, 2016), http://fortune.com/2016/04/29/laremy-tunsil-tweet-video/.

[84] Then there are the stories about players posting non-game related material on their social media, such as the three Minnesota men's basketball players who were recently suspended after a sexually explicit video appeared on one of their social media accounts. *See* Dave Campbell and Jon Krawczynski, *Three Minnesota Men's Basketball Players Were Suspended Over the Weekend After a Sexually Explicit Video Appeared on One of Their Social Media Accounts, According to a Person with Knowledge of the Discipline*, ASSOCIATED PRESS (Feb. 29, 2016), http://www.usnews.com/news/sports/articles/2016-02-29/ap-source-minnesota-players-punished-for-illicit-video.

coaches, trainers, and even teachers in college and high school may be asked about you. Any arrest or disciplinary actions will be scrutinized. Keep any such misconduct in the distant past. Recent mishaps are costly, and even past ones are not easily forgiven. For instance, Noah Spence's mistakes from early on in his college career haunted him all the way to the NFL draft.[85] Spence was Coach Urban Meyer's first five-star recruit to commit to the Ohio State Buckeyes and displayed first-round talent while he was there. However, after testing positive twice for the drug ecstasy, he was permanently banned from the Big 10.[86] He then spent a year at Eastern Kentucky attempting to rehabilitate his image, but the media has not forgotten his mistakes as a Buckeye.[87] Regardless of his obvious talent on the field, even local media refuse to overlook his off-the-field indiscretions:

> The Cowboys are in dire need of a pass rush, and the best pass rusher in this draft will be there for the taking at No. 4. But the Cowboys can't take him. They must let Noah Spence of Eastern Kentucky slide. They have little choice – not after the Greg Hardy and Randy Gregory debacles of 2015. . . . Which brings us to Spence. He also has baggage. Too much baggage for the Cowboys to risk at this high a draft pick.[88]

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[85] As this article was being prepared for publication, Noah Spence was selected by the Tampa Bay Buccaneers in the second round. *Noah Spence, Draft,* NFL (2016), http://www.nfl.com/draft/2016/profiles/noah-spence?id=2555312.

[86] *Noah Spence Player Overview*, NFL DRAFT SCOUT, http://www.cbssports.com/nfl/draft/players/1983799/noah-spence (last visited June 05, 2016).

[87] *Id.*

[88] Rick Gosselin, *Cowboys Can't Ignore Character*, THE DALLAS MORNING NEWS, Feb. 29, 2016, at 1C.

Even with my knowledge about NFL background checks, Jason Smith told me a story that surprised me. He was flown first class to St. Louis for a tryout/evaluation with the Rams (after the season but before the draft had ended). He later learned that the Rams had placed a secret observer on the flight to watch him, Jason, interact with the public. Wow! They were being extremely careful. On this subject of character, I really like the point made by Marc Isenberg.[89] "Teams look for reasons *not* to draft an athlete. If playing pro sports is a serious goal, don't give teams an excuse not to draft you."[90]

C. Commentary by Kelli Masters

As this article points out, there are many factors to consider in making the decision to stay in school or leave early to enter the draft. Every player's situation is different. But here are a few important things to keep in mind:

1. Trust the College Advisory Committee, as this will be the most unbiased information available. But also understand how the committee determines the grade it gives you. It is not based on a survey of all 32 NFL teams, only a handful. It is based on an anonymous recommendation given by a member of the scouting/personnel department from each of the teams providing grades. Therefore, it is meant to be informative but not definitive.

2. Do not make your decision based on pressure from people who have their own interests attached to your future. Agents, coaches, and family members may be well-meaning and trying to help or protect you. But always consider their advice in light of their own desires. Make an informed decision, knowing it is **your** life and **your** career. And ultimately you will be the one who lives with the consequences, good or bad.

[89] MARC ISENBERG & RYAN NECE, GO PRO LIKE A PRO (2011).
[90] *Id.* at 22.

PART 3 – AGENT SELECTION SUGGESTIONS

A. Questions & Answers to Consider When Selecting Your Agent

Q1. How Does One Become an Agent for NFL Rookies?

Because the NFLPA is a labor union and the exclusive bargaining representative of NFL players, agents have to be certified as a "Contract Advisor" by the NFLPA to represent veterans or rookies. However, it is not difficult to become a Contract Advisor, nor is it an exclusive club. In fact, there are more agents than NFL rookies. You are a buyer in a buyer's market, which provides leverage when negotiating your fee.

Q2. Which Contract Will You Sign First — The Contract with Your Agent or the Contract with Your Team?

You first sign a contract with your agent (known as the Standard Representation Agreement, a printed form) and you hire an agent to negotiate your NFL Player Contract. The NFL Player Contract is also a standard form; your agent negotiates its term (length), your salary, and bonuses.

Step 1	**Step 2**	**Step 3**
Rookie hires agent	Agent negotiates with club (team) on Rookie's behalf.	Rookie signs contract with club, which incorporates the terms negotiated in Step 2.

Your compensation will be determined by your draft round and the position within the round, not the skill or effort of your agent. This is because the 2011 CBA eliminated the vast majority of negotiating — it sets predetermined contract value and bonus amounts.[91] Under this system:

> [E]ach first round pick receives a four-year contract with a team option for a fifth season. The salaries for each slot in the draft are pre-set. The values are based on the NFL's salary cap for the coming season and the rookie compensation pool in a formula spelled out in the CBA.[92]

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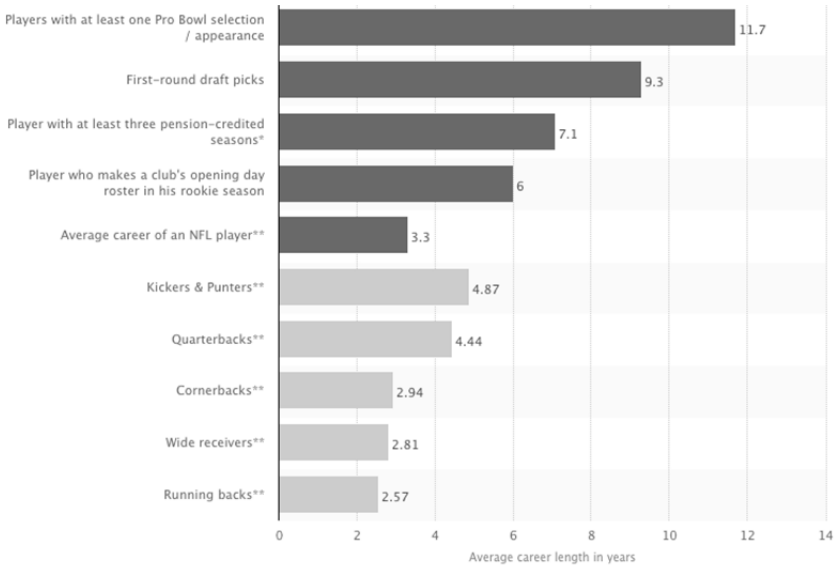
[91] Andrew Brandt, *Easy Math for Rookies*, THE MONDAY MORNING QUARTERBACK, SPORTS ILLUSTRATED (June 4, 2015), http://mmqb.si.com/2015/06/04/nfl-rookie-contracts-cba-agents.

[92] Mark Inabinett, *NFL Draft 2015: How Much Each First-Round Pick Will Be Paid*, ALABAMA (May 01, 2015), http://www.al.com/sports/index.ssf/2015/05/nfl_draft_2015_how_much_each_f.html.

This means that you pay a significant amount of money for a service (Step B above) that is rather routine. In fact, in his recent book *The Agent*, Leigh Steinberg opines that the new CBA has "eliminated creative bargaining" thus underscoring the mundane nature of the service.[93] Shifting away from the top draft prospects, regardless of who your agent is, you will probably receive the minimum salary.

Q3. Are the First Contracts You Sign with Your Agent and Club That Important?

Yes. The average career for an NFL player lasts approximately 3.3 years. The first NFL Player Contract you sign may be your last.



Above: Chart depicting Average Playing Career Length in NFL (in years).[94]

[93] LEIGH STEINBERG & MICHAEL ARKUSH, THE AGENT 282 (2014).
[94] *Average Playing Career Length in the National Football League (In Years)*, STATISTA: THE STATISTICS PORTAL, http://www.statista.com/statistics/240102/average-player-career-length-in-the-national-football-league/ (last visited Mar. 22, 2016).

Q4. How Do the NFLPA Rules Help Me?

First, the Contract Advisor must play by NFLPA rules and regulations. If he doesn't — for example, if he offers a player an illegal inducement in order to become his agent — he may be de-certified. Second, he must attend an annual seminar sponsored by the NFLPA. The purpose of the seminar is to educate the agent about the NFL, its Collective Bargaining Agreement, and other helpful matters, in order to enhance his negotiating capability. Third, the Contract Advisor must use a standard NFLPA contract form — the Standard Representation Agreement — that is drafted to protect the player (e.g., the agent doesn't receive any fee until and unless the player receives the compensation upon which the fee is based). A contract with an NFLPA Member Contract Advisor may be modified in your favor, but it cannot be changed to your detriment.[95] And, it creates a fiduciary relationship under which the agent is required to act at all times for *your* benefit. Because of the fiduciary relationship, perhaps the test that an aspiring NFLPA Contract Advisor must pass should include questions on NCAA legislation pertaining to agents. I do not think this educational effort should be viewed as controversial.

Q5. When should you pick your Contract Advisor?

You now know that you lose your eligibility if you hire an agent prior to the end of your final season. Even an oral agreement would make you ineligible. You may hire an agent as soon as your final season is over. However, some think you do not need an agent until near the NFL draft.[96] There is very rarely a need to sign any earlier. The NFLPA advises that an agent cannot signifi-

[95] *See infra* Part 4 of this article for suggested modifications for your consideration.

[96] And then there are those that do not use an agent at all, like safety Matt Elam. In 2013, he was the only top prospect to enter the draft without an agent and was drafted in the first round! Darren Heitner, *Safety Matt Elam Is Only Top Prospect to Enter NFL Draft Without an Agent*, FORBES (Apr. 21, 2013), http://www.forbes.com/sites/darrenheitner/2013/04/21/safety-matt-elam-is-only-top-prospect-to-enter-nfl-draft-without-an-agent/#511aca521593.

cantly improve your position in the draft. You have been thoroughly scrutinized during your college career. There are pro scouts in the press box during every important game. All games are filmed. Every NFL team has its own scouting system and most also belong to one of the two major scouting combines. Millions of dollars are spent annually in the evaluation of college talent. Further, an unpopular agent may hurt your draft status with certain teams.

The primary rationale to make a quick hire is that you want immediate help from expensive outside experts in preparing for the combine or Pro Days and you need the agent to pay or front the expense. The other reason is to stop the relentless recruitment process you may experience from some agents. This is a poor reason to sign. Agent selection is an important process and you need to take your time. If you are being harassed, ask the compliance staff or Panel to help get the agent(s) off your back.

Remember that you have a lot riding on the selection of your agent. A poor agent selection can cost you big time down the road. For example, in 2013 Elvis Dumervil had to fire his agent over an egregious blunder on the agent's part.[97] Dumervil had been a vital part of the Denver Broncos' defense, but when it came time to re-sign with the team, his agent failed to fax in the agreement by the deadline.[98] The Broncos had to cut Dumervil in order to avoid a $13 million-plus cap charge for the season.[99] Dumervil was left looking for a new job and a new agent! Similarly, Tarell Brown lost a $2 million salary bump and was left without representation all because of his agent's mistake.[100] Brian Overstreet, Brown's

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[97] Jason Chilton, *The Fax Mishap That Cost the Broncos Elvis Dumervil and Its Impact on Super Bowl XLVIII*, SB NATION (Jan. 28, 2014), http://www.sbnation.com/nfl/2014/1/28/5341628/2014-super-bowl-xlviii-broncos-defense-elvis-dumervil-fax-contract.
[98] *Id.*
[99] *Id.*
[100] Josh Katzowitz, *Tarell Brown Didn't Know He Lost $2 Million for Working Out Alone,* CBS SPORTS (July 25, 2013), http://www.cbssports.com/nfl/eye-on-

agent, failed to tell him that his contract with the 49ers entitled him to that money if he elected to train with the team during the summer, instead of at home as Brown elected to do.[101] Brown fired his agent, saying:

> If I would have known the clauses in my contract and that's what agents get paid to do -- to orchestrate the contract and let you know what you can and can't do as far as workouts and [Organized Team Activities] and things of that sort. That's what he got paid to do, he didn't do that, so in my opinion he had to be let go.[102]

To avoid these huge agent mishaps, you must take your time to find an agent that is qualified, a good fit for you, and, most importantly, whom you trust.

Q6. How Ho I Select my Contract Advisor?

Here are my tips on selecting an agent.

a. For several reasons, I would consider hiring an agent who is also a lawyer. First, lawyers are experienced professional negotiators. Second, lawyers are subject to discipline (reprimand, suspension, or disbarment) if they cheat or fail to adequately perform for a client. Third, some lawyers will give you the option of paying them by the hour at their normal hourly rate. If the agent isn't a lawyer, make sure that he is associated with a lawyer. If an agent tells you he has invested a huge amount of time in you, he is in large part discussing his recruiting effort. You have no obliga-

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football/22892226/tarell-brown-didnt-know-he-lost-2-million-for-working-out-alone.

[101] *Id.*

[102] *Id.*

tion to pay for that time and your goal is to hire the best agent, not necessarily the best recruiter.

b. I would suggest that you take the following steps before you select an agent, whether or not the agent is a lawyer.

1. Confirm that the proposed agent is certified as an NFLPA Member Contract Advisor.

2. Confirm that the proposed agent is registered under the Uniform Athlete Agents Act.

3. During the call to the NFLPA suggested above, ask if any complaints have ever been filed against the agent. Call the Director of Agent Administration for the NFLPA to learn if the agent has had problems.[103] He also can give you a list of players the agent represents.[104]

4. "The proof is in the pudding." Talk to present and former clients about the quality of services provided by the agent.[105]

5. The first contract you will sign hires the agent to negotiate your NFL Player Contract. Do not sign this contract unless it is the NFLPA "Standard Representation Agreement."[106]

6. Any contract for supplemental services (i.e., endorsements, money management, etc.) should not

[103] Currently, Mark Levin is the Director for the Salary Cap and Agent Administration Department of the NFLPA. He can be contacted at 800-372-2000.
[104] You can also find this information by browsing the NFLPA website. *See* www.nflpa.org.
[105] *See* Kelli's comments, *supra* Part 3.B.
[106] Also, make sure that it is the most current version. The new one is dated September 9, 2011.

be signed until you have had your lawyer (and not the agent's lawyer) review it. There is no such thing as a "standard" contract for supplemental services. Expert advice in this area might be the best investment you ever make. Also, your lawyer could negotiate your Standard Representation Agreement with your agent.

7(a). If you are a high draft pick, select an agent who has successfully represented high draft picks. The stakes are much higher and the service is not routine. However, do not overpay your agent.

7(b). An undrafted player, or free agent, has very different interests. Your main interest will be getting and keeping a job. Within reason, the percentage you pay your agent isn't that important (e.g., 2.5% versus 3%) because your salary will be on the low end of the salary scale. You may need an agent to help you get into an NFL camp or to work with you on other opportunities, such as in Canada.

8. If your school sponsors one, participate in an Agent Interview Program. This provides a free supervised look at agents who wish to represent you. Use the services of the Panel, if available, before you make your decision. At Baylor, the Agent Day program allows rising seniors in June to conduct 25-minute interviews with interested agents. The Compliance Office provides education on the agent-selection process to the student-athletes and parents of the student-athletes. All agents are required to register specifically with Baylor to attend Agent Day. A member of the Baylor Compliance Office is present at each interview to ensure compliance with NCAA rules and regulations. Under no circumstances are any contract negotiations permitted. The Agent Day

program simply provides an opportunity for the student-athletes to interview agents they may wish to hire in the future. Following the season, the compliance staff supervises longer interviews with agents the student-athlete has selected based upon the Agent Day interviews and other sources of information.

9(a). Remember, only deal with an NFLPA Member Contract Advisor who will play by the rules. Do not choose an agent based upon financial inducements. Good agents do not pay players to hire them! Financial inducements include any form of gifts or bribes. Such conduct violates § 3B(2) of the NFLPA Code of Conduct for NFLPA Member Contract Advisors[107] and, in most states, § 6(b)(4) of the Agents Act[108]. An agent may not give financial inducements to the parents or relatives of the athlete. Also, it creates a conflict of interest. If an agent has loaned you a large sum of money, he will be mindful that he has to get you into an NFL camp in order to get his money back.[109] He might be tempted to recommend that you sign a less-than-fair NFL Player Contract. As running back Fred Taylor has said, "If an agent is going to cheat to get you, he'll cheat to keep you."

9(b). Under no circumstances should you sign a Power of Attorney! This can facilitate the agent's ability to take advantage of you and steal your money or

[107] *See NFLPA Regulations Governing Contract Advisors*, *supra* note 3.
[108] *See* UNIF. ATHLETE AGENTS ACT § 6(b)(4)*, supra* note 3.
[109] Or he may work you to death making paid appearances to sign autographs when you should be focused on playing football.

property. For example, this was one of the tools employed by "Tank" Black.[110]

10. Search the agent's name through computer data services.

11. Interview several different agents and ask them all the same series of core questions. Consider doing several rounds of interviews by narrowing down the agents that you like the most and inviting them for a subsequent interview. Also, among the questions you may ask,[111] consider asking how many other players similar to you the agent plans on signing this year. This question is often overlooked, but if the agent is representing another player who looks and plays similar to you, there could be conflicts of interest down the road.

Q7. Where Will I Train to Prepare for the Combine and NFL Draft? Who Will Train Me?

A recently created hook to attract prospects is using the allure of training in an exotic locale, including having private luxury accommodations, a flashy car, and a personal chef. Coaching and training is done by NFL experienced experts. Training in this

[110] John Altavilla, *Black Cloud Still Lingers, Hilliard a Victim in Case That Put Issue in Spotlight Protecting the Pocket: NFL Players and Money*, HARTFORD COURANT (Apr. 18, 2004), http://articles.courant.com/2004-04-18/sports/0404180544_1_william-tank-black-black-s-defense-drug-ring.

[111] A helpful list of questions to ask prospective agents can be found on the Baylor University Athletics Compliance Office website. *21 Questions to Ask Prospective Agents*, BAYLOR ATHLETICS, http://grfx.cstv.com/photos/schools/bay/genrel/auto_pdf/2011-12/misc_non_event/prospectiveagentquestions.pdf (last visited Mar. 15, 2016). Additionally, Pro Star Online offers a similar questionnaire. *Next Level Agent Questionnaire*, PRO STAR ONLINE, http://www.prostaronline.com/draftee/AgentQuestionnaire_NextLevel.pdf (last visited Mar. 15, 2016).

manner is obviously very expensive and makes little sense if the prospect is not a projected first round pick. The expense outweighs any possible gain. If a top of the first round selection is likely, you may sensibly consider such an arrangement with the primary focus being on the coaches, trainers, and players you will work with.

I still think that even a top prospect should consider training at his university. If not a top prospect, I think the decision to train at school is clear. Many athletes choose to remain at their universities to train for the combine and the NFL draft. This is the most cost efficient option, and the strength trainers at your university already know you as an athlete and may be able to create a more personalized training plan for you. Specifically, at Baylor, we have an expert strength and conditioning staff and a Director of Sports Nutrition to create nutrition plans for Baylor student-athletes. A personal chef sounds appealing, but you may have what you need at your own university.[112]

B. Commentary by Kelli Masters

Reading this portion of the article, from my perspective as an agent, lights a fire within me; probably because I have lived through eleven seasons of recruiting players and representing them in the draft. Becoming a certified agent is actually **not** easy (only 39% of applicants passed the Certification Exam last summer). And maintaining certification, as well as proper licensing and registration, is tedious but must be done. I am surprised each year that players sign with agents who are not properly registered. And players still get recruited by non-certified runners, which violates NFLPA regulations. Make sure that the people you are talking to are, in fact, certified, licensed, bonded, and registered with your school.

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[112] *See* Rachel Stark, *Food for Thought*, NCAA CHAMPION (Summer 2015), http://www.ncaa.org/static/champion/food-for-thought/#sthash.wVr7bVSV.RR4hC5KN.dpbs.

I also highly recommend you choose an agent who is a lawyer, for all the reasons mentioned above. Lawyers are held to a higher standard of professional conduct. Moreover, your communications with your agent/lawyer are protected by attorney client privilege. It is best if the agent actually practices (or has practiced) law and brings that knowledge and practical experience to the table. Some agents have law degrees, but have never practiced law.

When choosing an agent, it is my opinion you should focus on two key areas:

1. What will this agent/agency do for me?
2. What is this agent's reputation in the industry?

With regard to the first question: any certified Contract Advisor should be able to "negotiate" your rookie contract. The language is standard and the economic terms are essentially established the moment you are drafted. This is even true of the first round. While there may be some discussion on the payout terms of the signing bonus, as well as some arguing over offset language, the rookie contract does not require a great deal of time. That being said, you absolutely want an agent who knows how to guide you through the pre-draft process **and** (this is important) will not abandon you after the contract is negotiated.

While I spend a great deal of time recruiting, I spend significantly more time managing my clients' careers. Every client I work with has a pre-draft strategy for success. Most agencies can map out their plan for you (which will cost your agent roughly $30,000-$50,000 out of pocket to provide for you). But it is very important to find an agent that will help you plan for success throughout your career and beyond. Ask those questions. "Besides draft preparation and my contract, what else will you be doing to represent me and help me?" A truly great agent will provide significantly more value by implementing a plan to help you define and achieve your goals both on and off the field. A great agent will make sure you have access to the best legal, tax, and financial advice from the best professionals. A great agent will stay on top

of the issues you will face in the league: injuries, second opinions, worker's compensation, fines, grievances, benefits, development, and community engagement. A great agent will understand and help you brand and market yourself effectively. A great agent will stay engaged with you throughout your career to answer questions and help you deal with each situation you encounter, hopefully educating you along the way. And that agent should be willing to commit to your entire football career, advising you as to your rights, options, and the market if you reach free agency. Ask questions and find an advocate who is willing to do far more than simply "negotiate" a rookie contract.

As to the second question, clients and former clients can be great sources of information regarding an agent and his or her services. But don't stop with just talking to the clients. I've seen clients defend their agent choice out of pride or because they are being incentivized to do so. (Many players accept large loans or "marketing guarantees" up front from agents, and are then trapped in the agent-player relationship, but won't tell you that.) Ask others in the industry: general managers, coaches, your compliance director, and the agent administration director at the NFLPA. Ask the agent for references beyond his or her clients. As mentioned, research agents online (but be aware of the sources you trust). And spend time asking the tough questions face to face with the agent if possible. A student-athlete must reach a point where he feels confident he can trust the agent to be his advocate, protector, and representative to the NFL world.

PART 4 – IMPROVING THE STANDARD REPRESENTATION AGREEMENT

A. Selected Sections of the Standard Representation Agreement and What They Mean

Part 4 will discuss specific provisions of the Standard Representation Agreement.[113] I have provided explanations and suggested improvements regarding each provision worthy of comment. Within each section of the Standard Representation Agreement, the particular provision is stated first within the text box, with the applicable comments and explanations immediately following.

Introduction

This AGREEMENT made this _____ day of _____, 20 ___, by and between _____ (hereinafter "Player") _____ and (hereinafter "Contract Advisor").

WITNESSETH:
In consideration of the mutual promises hereinafter made by each to the other, Player and Contract Advisor agree as follows:

Standard Representation Agreement is the title. The introductory clause states the date of the agreement and the names of the parties, followed by a recitation of consideration (a contract law standard provision).

Section 1 – General Principles

This Agreement is entered into pursuant to and in accordance with

[113] The article discusses only Sections 1-6, 8, and 13. Sections 7 and 9-12 can be found in the Appendix.

the National Football League Players Association (hereinafter "NFLPA") Regulations Governing Contract Advisors (hereinafter the "Regulations") effective September 9, 2011, and as amended thereafter from time to time.

Make sure the form that you sign is the new form of Standard Representation Agreement that has the effective date of September 9, 2011 in this section. A signed agreement on the old form will be rejected and returned by the NFLPA Staff.

Section 2 – Representations

Contract Advisor represents that in advance of executing this Agreement, he/she has been duly certified as a Contract Advisor by the NFLPA. Player acknowledges that the NFLPA Certification of the Contract Advisor is neither a recommendation of the Contract Advisor, nor a warranty by NFLPA of the Contract Advisors competence, honesty, skills or qualifications.
Contract Advisor hereby discloses that he/she (check one): **[ ]** represents or has represented; **[ ]** does not represent and has not represented NFL management personnel, any NFL coaches, other professional football league coaches, or college football coaches in matters pertaining to their employment by or association with any NFL Club, other professional football league club or college. If Contract Advisor responds in the affirmative, Contract Advisor must attach a properly completed and signed SRA Coaches and NFL Personnel Disclosure Form (Appendix G of the Regulations).

The primary purpose of this section is to reveal if your agent also represents NFL management personnel. You are labor personnel (not management) and a conflict of interest may exist if "yes" is checked and an addendum attached. If the answer is "no,"

check the "no" box and move on. Most agents do not work both sides of the street.[114]

[114] *See Detroit Lions v. Argovitz*, 580 F. Supp. 542 (E.D. Mich. 1984) (Jerry Argovitz negotiated with the Detroit Lions on behalf of Billy Sims. However, during these negotiations, Argovitz bid for part ownership in the Houston Gamblers. Argovitz became the president of the Gambler's corporation, received a salary from the club, earned 5% of annual cash flow, and was obligated for 29% of a $1.5 million letter of credit for the Gamblers. After having secured a significant interest in the Gamblers franchise, Argovitz negotiated a contract for Sims with the Gamblers, leading Sims to believe that the Lions were no longer interested. The court found that Argovitz breached his fiduciary duty to Sims for failing to inform Sims of his conflict of interest. The court declared Sims's contract with the Gamblers invalid.).

Section 3 – Contract Services

Player hereby retains Contract Advisor to represent, advise, counsel, and assist Player in the negotiation, execution, and enforcement of his playing contract(s) in the National Football League. In performing these services, Contract Advisor acknowledges that he/she is acting in a fiduciary capacity on behalf of Player and agrees to act in such manner as to protect the best interests of Player and assure effective representation of Player in individual contract negotiations with NFL Clubs. Contract Advisor shall be the exclusive representative for the purpose of negotiating player contracts for Player. However, Contract Advisor shall not have the authority to bind or commit Player to enter into any contract without actual execution thereof by Player. Once Player agrees to and executes his player contract, Contract Advisor agrees to also sign the player contract and send a copy (by facsimile or overnight mail) to the NFLPA and the NFL Club within 48 hours of execution by Player. Player and Contract Advisor (check one): [ ] have [ ] have not entered into any agreements or contracts relating to services other than the individual negotiating services described in this Paragraph (e.g., financial advice, tax preparation). If the parties have, complete 3(A) and 3(B) below."

A. Describe the nature of the other services covered by the separate agreements:

B. Contract Advisor and Player hereby acknowledge that Player was given the opportunity to enter into any of the agreements described in Paragraph 3(A) above and this Standard Representation Agreement, without the signing of one agreement being conditioned upon the signing of any of the other agreements in violation of Section 3(B)(22) of the NFLPA Regulations Governing Contract Advisors.

_____ _____

Contract Advisor Player

If your agent is being hired to negotiate your NFL Player Agreement and nothing else, this section is easy to complete. Check the appropriate box and move on. However, many Contract Advisors provide significant supplemental services such as combine/tryout preparation or marketing services. Supplemental agreements may be included in an addendum, which consists of additional pages attached to your standard contract. If the supplemental agreement is not yet in written form, get it in writing before you sign. Because this type of agreement usually involves payment obligations, it is important that you have your attorney review it. Getting supplemental agreements on file for review purposes has become a point of emphasis for the NFLPA staff.[115]

Section 4 – Compensation for Services

A. If a Contract Advisor succeeds in negotiating an NFL Player Contract acceptable to Player and signed by Player during the term hereof, Contract Advisor shall receive a fee as set forth in subparagraph B below." CONTRACT ADVISOR AND PLAYER AGREE AND ACKNOWLEDGE THAT THE AMOUNT OF SUCH FEE IS FREELY NEGOTIABLE BETWEEN THEM, EXCEPT THAT NO AGREED UPON FEE MAY BE GREATER THAN:

(1) Three percent (3%) of the compensation received by Player for each playing season covered by a Player Contract which is the result of negotiations between Contract Advisor and an NFL Club; or (2) The lesser percentage specified in Section 4(B)(1)(a) of the Regulations in a case where Player signs a one-year tender as a Franchise, Transition, or Restricted Free Agent player.
B. The fee for Contract Advisor's services shall be as follows

[115] In a memorandum dated June 9, 2014 from NFLPA to all Contract Advisors, the staff discussed concerns about the use "pre-combine agreements, marketing guarantees and loan agreements" in recruiting. *See* Liz Mullen, *NFLPA Memo to Agents Part of Rules Review, Not the Result*, SPORTS BUS. DAILY (June 30, 2014), http://m.sportsbusinessdaily.com/Journal/Issues/2014/06/30/Labor-and-Agents/Labor-and-Agents.aspx?.

(Both Contract Advisor and Player must initial the appropriate line below):

	Contract Advisor	Agent
Three Percent (3%)	_____	_____
Two-and-one-half Percent (2 1/2%)	_____	_____
Two Percent (2%)	_____	_____
One-and-one-half Percent (1 1/2%)	_____	_____

In computing the allowable fee pursuant to this Paragraph 4 the term "compensation" shall include only base salaries, signing bonuses, reporting bonuses, roster bonuses, Practice Squad salary in excess of the minimum Practice Squad salary specified in Article 33 of the Collective Bargaining Agreement, and any performance incentives actually received by Player. The term "compensation" shall not include any "honor" incentive bonuses (i.e., ALL PRO, PRO BOWL, Rookie of the Year), or any collectively bargained benefits.

The compensation to be paid to the Contract Advisor is blank and subject to negotiation. Under NFLPA regulations, 3% is the maximum allowable compensation. As to the standard contract form, a recent rule change calls for blanks allowing separate percentage fees to be checked (e.g., 1.5%, 2%, 2.5%, 3%).

It is important to know what the market is. Shop around! Call the NFLPA. The NFLPA distributes information on agent compensation. High draft choices have tremendous leverage because everyone wants to represent them. All players have some leverage because there are so many more potential agents than rookies. Negotiate for an hourly rate or a lesser percentage than is originally offered. The last time I discussed agent compensation with the NFLPA, I was told that there are a number of good agents who will work for 2-3%. Also, think about a sliding scale such as 3% for the first year, 2% for the second year, and 1% for the third year; or, a sliding scale tied to your draft status, such as 1% if you

are drafted in the first round, 2% if you go in the second round, and 3% for third round or lower.

Section 5 – Payment of Contract Advisor Fees

Contract Advisor shall not be entitled to receive any fee for the performance of his/her services pursuant to this Agreement until Player receives the compensation upon which the fee is based. However, Player may enter into an agreement with Contract Advisor to pay any fee attributable to deferred compensation due and payable to Player in advance of when the deferred compensation is paid to Player, provided that Player has performed the services necessary under his contract to entitle him to the deferred compensation. Such fee shall be reduced to its present value as specified in the NFLPA Regulations (see Section 4(B)). Such an agreement must also be in writing, with a copy sent to the NFLPA.

In no case shall Contract Advisor accept, directly or indirectly, payment of any fees hereunder from Players club. Further, Contract Advisor is prohibited from discussing any aspect of his/her fee arrangement hereunder with any club.

The language of § 5 is very important because the agent will get his commission if and when you collect your compensation.[116] In the era before NFLPA Standard Representation Agreements, many agents took their entire fee upon the signing of the NFL contract even if not guaranteed. For example, suppose the contract provided for a one million dollars signing bonus and four annual salaries of $1 million each, totaling five million dollars. The agent (assuming 3% commission) would take all $150,000 up front. However, few contracts are guaranteed. Suppose the player competes two years. He will collect $3 million but will have paid

[116] A fee on deferred compensation may be collected early if the player has performed the services triggering the compensation and the fee is reduced to present value. *See NFLPA Regulations Governing Contract Advisors* § 4(B)*, supra* note 3.

a commission on $5 million. That's not fair and is a relic of the past. So, this provision cannot be deleted. It would not favor you!

Section 6A – Expenses

> A. Player shall reimburse Contract Advisor for all reasonable and necessary communication expenses (i.e., telephone and postage) actually incurred by Contract Advisor in connection with the negotiation of Player's NFL contract. Player also shall reimburse Contract Advisor for all reasonable and necessary travel expenses actually incurred by Contract Advisor during the term hereof in the negotiation of Player's NFL contract, but only if such expenses and approximate amounts thereof are approved in advance by Player. Player shall promptly pay all such expenses upon receipt of an itemized, written statement from Contract Advisor.

This allows the agent to collect certain expenses of his representation from you. As a young person, you may not realize that long distance telephone calls formerly were billed by the minute and could get expensive. So the need for this category of reimbursement (due to unlimited data plans) has pretty much vanished. I have long suggested that this sentence be deleted by mutual agreement. In fact, this paragraph is the only one that the NFLPA allows to be stricken, and most agents will agree to do so. As to the travel expense reimbursement sentence, consider deleting it as well. Even if it remains, you have control due to the advance approval language.

Section 6B – Expenses

B. After each NFL season and prior to the first day of May following each season for which Contract Advisor has received fees and expenses, Contract Advisor must send to Player (with a copy of the NFLPA) an itemized statement covering the period beginning March 1 of the prior year through February 28th or 29th of that year. Such statement shall set forth both the fees charged to Player for, and any expenses incurred in connection with, the performance of the following services: (a) individual player salary negotiations, (b) management of player's assets, (c) financial, investment, legal, tax and/or other advice, and (d) any other miscellaneous services.

However, do not strike through 6B! That itemized statement is required by the CBA in order to keep you informed.

Section 8 - Disputes

Any and all disputes between Player and Contract Advisor involving the meaning, interpretation,
application, or enforcement of this Agreement or the obligations of the parties under this Agreement shall be resolved exclusively through the arbitration procedures set forth in Section
5 of the NFLPA Regulations Governing Contract Advisors.

This section is a future disputes clause wherein you and your agent choose to submit any and all disputes relating to this Standard Representation Agreement to arbitration pursuant to the arbitration rules of the NFLPA. So, any litigation relating to the SRA occurs in arbitration, not at the courthouse. Fair? I think so.

Section 13 – Governing law

This Agreement shall be construed, interpreted and enforced according to the laws of the State of _____.

Contract Advisor and Player recognize that certain state statutes regulating sports agents require specified language in the player/agent contract. The parties therefore agree to the following additional language as required by state statute:

We always advise our student-athletes to choose the laws of Texas rather than the agent's home state. The Texas Secretary of State's attorney may be the most diligent Uniform Athlete Agents Act watchdog in the country. Also, the Texas Act continues to protect the prospective professional until he signs his NFL Standard Player Agreement. The original version of the Uniform Act (in place in most states) fails to protect the exhausted eligibility athlete.[117] It is tied to NCAA eligibility. Furthermore, one of the most significant protections is afforded by § 5(f) of the Uniform Athlete Agents Act, which provides that you may cancel your contract (without cause) before the expiration of the 15th day after the date the contract is signed by notifying the agent in writing.[118] This means you can change your mind without giving any reason! The Act requires that the language in Appendix A be included in your contract (add this to §13 the NFLPA form).

B. Commentary by Kelli Masters

Quite honestly, I agree with this article on all points. Paragraph 6a should be crossed through and initialed by both the agent and the player. One note as to a change that is coming: if you sign

[117] R. Michael Rogers, *The Uniform Athlete Agent Act Fails to Fully Protect the College Athlete Who Exhausts His Eligibility Before Turning Professional*, 2 VA. SPORTS & ENT. L.J. 63 (2002); Lloyd Z. Remick, *Keeping Out the Little Guy: An Older Contract Advisor's Concern, a Younger Contract Advisor's Lament*, 1 VILL. SPORTS & ENT. L.J. 12 (2005).
[118] *See* UNIF. ATHLETE AGENTS ACT § 5(f)*, supra* note 3.

an SRA with two or more agents (whether they are in the same agency or working in a partnership or joint venture), one agent will be the designated payee. This agent will be paid your commission fees, and then will be responsible for disbursing the proper percentage to the other agent(s) on the agreement. This is to protect you from issues and disputes that may arise if agents discontinue doing business together.

I also agree that the arbitration provision is in the best interests of the player. The arbitration process, in my experience, is fair, reasonable, and can be significantly less expensive than going to court. Moreover, the NFLPA advocates on behalf of its members (the players). So even if you face a grievance from a former agent, the NFLPA will provide support and defend you throughout the process. For example, I represented a player who had fired his agent after the draft and signed with me shortly thereafter (at least five days later, of course). His agent had provided pre-draft training but did not have him sign a written agreement regarding repayment and did not file anything with the NFLPA that would indicate the player was responsible for repayment. The former agent filed a grievance against the player, seeking repayment of training expenses and quantum meruit (payment for time spent representing him). I worked with the NFLPA to try to resolve the matter, but the former agent refused to settle. The matter went before an arbitrator in Washington D.C., where the player was allowed to attend by phone. The arbitrator took testimony, which was damaging to the former agent, and the former agent agreed to settle prior to the entry of a binding decision. The same type of dispute could have taken months, if not years, and thousands of dollars to resolve via the court system.

CONCLUSION

Overall, a collegiate football star has many factors to take into account when considering the pursuit of a professional football career. As this career path may be extremely rewarding, athletes need to take caution before interacting with agents in a way

that could jeopardize that opportunity. Both athletes and agents must understand how NCAA Bylaw 12, the NFLPA rules and regulations, and the Uniform Athlete Agents Act all work together to protect the professional prospects throughout the agent selection process. As a talented college football athlete, you need to seriously consider all options and factors discussed in this article before leaving behind a year of collegiate eligibility to enter the NFL draft. Exercising the advice offered in this article, as well as the resources available to you through your university's compliance staff, you should make educated decisions to set yourself up for a successful professional career. So, when the Caller I.D. reveals that a famous football agent is calling you to recruit you to hire him, use the tools provided in this article to equip you in paving the road between NCAA stardom and the NFL.

Appendix

Section 7 – Disclaimer of Liability

Player and Contract Advisor agree that they are not subject to the control or direction of any
other person with respect to the timing, place, manner or fashion in which individual negotiations are to be conducted pursuant to this Agreement (except to the extent that Contract Advisor shall comply with NFLPA Regulations) and that they will save and hold harmless the NFLPA, its officers, employees and representatives from any liability whatsoever with respect to their conduct or activities relating to or in connection with this Agreement or such individual negotiations.

Section 9 – Notices

All notices hereunder shall be effective if sent by confirmed facsimile or overnight delivery to the appropriate address contained in this Agreement.
If to the Contract Advisor:
_____
If to the Player:
_____

Section 10 – Entire Agreement

This Agreement, along with the NFLPA Regulations, sets forth the entire agreement between the parties hereto and cannot be amended, modified or changed orally. Any written amendments or changes shall be effective only to the extent that they are consistent

with the Standard Representation Agreement as approved by the NFLPA.

Section 11 – Filing

This contract is signed in quadruplicate. Contract Advisor agrees to deliver two (2) copies to the NFLPA within five (5) days of its execution; one (1) copy to the Player; and retain one (1) copy for his/her files. Contract Advisor further agrees to submit any other executed agreements between Player and Contract Advisor to NFLPA.

Section 12 – Term

The term of this Agreement shall begin on the date hereof and shall remain in effect until such time that it is terminated by either party in which case termination of this Agreement shall be effective five (5) days after written notice of termination is given to the other party. Notice shall be effective for purposes of this paragraph if sent by confirmed facsimile or overnight delivery to the appropriate address contained in this Agreement. Notwithstanding the above, if this Standard
Representation Agreement is being signed by a prospective rookie player (a "rookie" shall be defined as a person who has never signed an NFL Player Contract) prior to the date which is thirty (30) days before the NFL Draft, then this Agreement shall not be terminable by Player until at least 30 days after it has been signed by Player.

If termination pursuant to the above provision occurs prior to the completion of negotiations for an NFL player contract(s) accepta-

ble to Player and signed by Player, Contract Advisor shall be entitled to compensation for the reasonable value of the services performed in the attempted negotiation of such contract(s) provided such services and time spent thereon are adequately documented by Contract Advisor. If termination pursuant to the above provision occurs after
Player has signed an NFL player contract negotiated by Contract Advisor, Contract Advisor shall be entitled to the fee prescribed in Paragraph 4 above for negotiation of such contract(s).

In the event that Player is able to renegotiate any contract(s) previously negotiated by Contract
Advisor prior to expiration thereof, and such renegotiated contract(s) for a given year equals or exceeds the compensation in the original contract, the Contract Advisor who negotiated the original contract shall still be entitled to the fee he/she would have been paid pursuant to 4 above as if such original contract(s) had not been renegotiated. If Contract Advisor represents Player in the renegotiation of the original contract(s), and such renegotiated contract(s) for a given year equals or exceeds the compensation in the original contract, the fee for such renegotiation shall be based solely upon the amount by which the new compensation in the renegotiated contract(s) exceeds the compensation in the original contract(s), whether or not Contract Advisor negotiated the original contract(s).

In the event that the Player renegotiates any contract(s) and the renegotiated compensation for a given year is less than the compensation in the original contract, the fee to the Contract Advisor who negotiated the original contract shall be his/her fee percentage applied to the new compensation, but only after the new compensation is reduced by the percentage which the compensation was reduced from the original contract. The fee to the Contract Advisor who negotiated the new contract shall be his/her fee percentage applied to the new compensation, but only after the new compensation is reduced by the compensation applicable to the original Contract Advisor's fee as calculated pursuant to the immediately

preceding sentence.

If the Contract Advisor's Certification is suspended or revoked by the NFLPA or the Contract
Advisor is otherwise prohibited by the NFLPA from performing the services he/she has agreed to perform herein, this Agreement shall automatically terminate, effective as of the date of such suspension or termination.

EXAMINE THIS CONTRACT CAREFULLY BEFORE SIGNING IT

IN WITNESS WHEREOF, the parties hereto have hereunder signed their names as hereinafter set forth.

_____	_____
(CONTRACT ADVISOR)	(PLAYER)
_____	_____
(Street Address)	(Street or P. O. Box)
_____	_____
(City, State, Zip Code)	(City, State, Zip Code)
_____	_____
(Telephone)	(In-Season Telephone)
_____	_____
(Fax Number)	(Off-Season Telephone)

_____ _____
(Player's Birthdate) (College/University)

_____
Print Name and Signature of PARENT or GUARDIAN
(if Player is under 21 Years of Age)

_____
(Street Address)

_____
(City, State, Zip Code)

_____
(Telephone)

NOTICE TO CLIENT:

(1) THIS ATHLETE AGENT IS REGISTERED WITH THE SECRETARY OF STATE OF THE STATE OF TEXAS. REGISTRATION WITH THE SECRETARY OF STATE DOES NOT IMPLY APPROVAL OR ENDORSEMENT BY THE SECRETARY OF STATE OF THE COMPETENCE OF THE ATHLETE AGENT OR OF THE SPECIFIC TERMS AND CONDITIONS OF THIS CONTRACT.

(2) DO NOT SIGN THIS CONTRACT UNTIL YOU HAVE READ IT OR IF IT CONTAINS BLANK SPACES.

(3) IF YOU DECIDE THAT YOU DO NOT WISH TO PURCHASE THE SERVICES OF THE ATHLETE AGENT, YOU MAY CANCEL THIS CONTRACT BY NOTIFYING THE ATHLETE AGENT IN WRITING OF YOUR DESIRE TO CANCEL THE CONTRACT NOT LATER THAN THE 16TH DAY AFTER THE DATE ON WHICH YOU SIGN THIS CONTRACT.

EVOLUTIONS IN THE ENFORCEMENT OF U.S. PUNITIVE DAMAGES IN ENGLAND - THE CASE OF FOOTBALL INJURIES

Cedric Vanleenhove[1] & Jan De Bruyne[2]

ABSTRACT

This article discusses the situation in which an American judge awards punitive damages for a crushing tackle on a football (soccer) pitch but the judgment needs to be enforced in England because the tackling player transferred to that country. This contribution investigates whether this type of award can be executed in England against the tortfeasor's assets there. England's approach towards foreign punitive damages is peculiar. The enforcement of multiple damages, a form of punitive damages arrived at by multiplying the compensatory damages, is statutorily barred by the Protection of Trading Interests Act 1980. For foreign punitive damages other than multiple damages, the sole available authority, namely Lord Denning's *obiter dictum* in *S.A Consortium General Textiles v. Sun and Sand Agencies Ltd.*, seems to support a receptive attitude. The legal basis of the punitive award, therefore, dictates the outcome of the enforcement proceedings in England.

I. Introduction

Shocking or career-threatening tackles have been observed in various football competitions around the world. Every football league has its examples of crushing challenges which have left the victim with long-term suffering. The Major League Soccer in the United States is no exception. Remember Hristo Stoichkov's leg-

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shattering tackle in 2003 during a game between D.C. United and American University. The tackle caused severe physical and psychological injuries to his opponent Freddy Llerena-Aspiazu. When the victim of such an incident decides to file a law suit to recover damages from the wrongdoer, it is possible that punitive damages are available. Punitive damages are essentially a sum of money placed on top of the normal compensatory damages. They seek to punish the defendant for his outrageous misconduct and to deter him and others from similar misbehavior in the future.

This article analyses the situation in which a tackling player who is ordered to pay punitive damages transfers from a team in the U.S. to a club in England. In those circumstances, it will be difficult for the victim to enforce his judgment for punitive damages in the United States. Football players usually lead a nomadic existence during their career. When they leave their club for a new team overseas, they mostly start a new life in the country of their most recent employer, leaving no or very few assets behind. Although its position as the leading domestic football league can be disputed,[3] it cannot be denied that the English Premier League is one of the most reputable football leagues in the world. In addition to the quality of football it offers, England's top league also boasts the highest wages.[4] Football players from or playing in the United

[3] In a 2014 study, Bleacher Report ranked the Premier League as the top league worldwide based on four statistics: goals per game, red cards per game, wins against top clubs from other leagues and point differential between the top team and the bottom team in the league. Joe Tansey, *Statistically Ranking the World's Top 10 Football Leagues*, BLEACHER REPORT (Jan. 14, 2014), http://bleacherreport.com/articles/1922780-statistically-ranking-the-worlds-top-10-football-leagues.

[4] An exclusive study undertaken by Sportsmail in 2014 revealed that the average yearly salary in the Premier League amounts to GBP 2.3 million, far ahead of the figure in the Bundesliga (Germany) and the Serie A (Italy). *See in this regard*: Nick Harris, *Premier League Wages Dwarf Those Around Europe with Top-Flight Players in England Earning an Average of £2.3million a Year... Almost 60 Per Cent More Than in Germany*, DAILY MAIL (Nov. 14, 2014), http://www.dailymail.co.uk/sport/football/article-2833020/Premier-League-wages-dwarf-Europe-flight-players-England-earning-average-2-3million-year.html.

States are thus drawn to this attractive football competition. There are a number of examples of famous players who have made the move from the U.S. football competition to the English Premier League. In 1999 Colorado Rapids sold Marcus Stephen Hahnemann to Fulham. Goalkeeper Tim Howard left Metrostars for Manchester United in 2003. Fulham bought Clint Dempsey from New England Revolution in 2007. Brad Guzan transferred from Chivas USA to Aston Villa in 2008. Finally, DeAndre Yedlin very recently swapped Seattle Sounders FC for Tottenham Hotspur.

The aim of this contribution is to investigate whether the victim will be able to enforce the punitive damages award obtained in the U.S. against the tortfeasor in England. This article first sheds light on the application of general tort law principles in the context of sport liability in the United States. A brief outline of this matter is indispensable in order to set the stage for the question of the enforcement of punitive damages in England (part II). This contribution then discusses the notion of punitive damages and especially examines their application in the context of sport injuries and liabilities (part III). Finally, insight into the enforcement chances of an American award for punitive damages for sport injuries in England is provided (part IV). England's approach towards foreign punitive damages is peculiar. The enforcement of multiple damages, a form of punitive damages arrived at by multiplying the compensatory damages, is statutorily barred by the Protection of Trading Interests Act 1980. For foreign punitive damages other than multiple damages, Lord Denning's *obiter dictum* in *S.A Consortium General Textiles v. Sun and Sand Agencies Ltd*. seems to support a receptive attitude (part V).

II. Tort Law in the Context of Sport Injuries in the U.S.

Sports such as hockey or football necessarily involve a certain risk of violent physical contact. Such conduct is often part of the game in contact sports and sometimes even encouraged.[5] It is, therefore,

[5] Michael F. Taxin, *The Changing Evolution of Sports: Why Performance Enhancing Drug Use Should Be Considered in Determining Tort Liability of Pro-*

accepted that participants assume, to a certain extent, the risk of physical injury which is inherent in playing such (violent) sports.[6] Injuries incurred by professional football players due to an opponent's tackle will thus not often result in civil litigation.[7] If an injured football player, nevertheless, decides to file a law suit against the opponent-tortfeasor, he can base his claims on three grounds of recovery, namely negligence, intention, and recklessness.[8]

Most US courts have, however, rejected the negligence standard in the context of professional sports due to policy considerations (e.g. the risk of floodgate litigation) and the assumption of risks principles – *volenti non fit injuria* (e.g. the claim that the plaintiff consented to the very conduct that forms the basis of the claim).[9]

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fessional Athletes, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 819 (2004); Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition*, 7 U. MIAMI ENT. & SPORTS L. REV., 194 (1990). *See* Jaworski v. Kiernan, 696 A.2d 332, 337 (Conn. 1997) (where the court held that "players in their enthusiasm will commit inadvertent rules violations from which injuries may result. The normal expectations of participants in contact team sports include the potential for injuries resulting from conduct that violates the rules of the sport").

[6] *See* Nydegger v. Don Bosco Preparatory High School, 495 A.2d 485, 486 (N.J. Super. Ct. Law Div. 1985) (in which Judge Meehan concluded that those who participate in a sport such as football "expect that there will be physical contact as a result […] Those who participate are trained to play hard and aggressive"). *See also* Richard J. Hunter Jr., *An "Insider's" Guide to the Legal Liability of Sports Contest Officials*, 15 MARQ. SPORTS L. REV. 369, 373 (2005).

[7] Jeffrey A. Citron & Mark Abelman, *Civil Liability in the Arena of Professional Sports*, 36 U.B.C. L. REV. 193, 194-195 (2003); Matthew S. Walker & Chris J. Carlsen, *Note, The Sports Court: A Private System to Deter Violence in Professional Sports*, 55 S. CAL. L. REV. 399, 400-402 & 412-413 (1981-1982); Erica K. Rosenthal, *Inside the Lines: Basing Negligence Liability in Sports for Safety-Based Rule Violations on the Level of Play,* 72 FORDHAM L. REV. 2631, 2632 (2004) (internal quotations omitted). *See also* Donald T. Meier, *Primary Assumption of Risk and Duty in Football Indirect Injury Cases: A Legal Workout from the Tragedies on the Training Ground for American Values*, 2 VA. SPORTS & ENT. L.J. 80, 153 (2002).

[8] *See* Rosenthal, *supra* note 7, at 2647.

[9] Jaworski v. Kiernan, 696 A.2d 332, 335-338 (Conn. 1997); Thurmond v. Prince William Prof'l Baseball Club, Inc., 574 S.E.2d 246, 249 (Va. 2003); An-

There has been an evolution in U.S. case law towards a standard of recklessness in cases of professional sports liability.[10] Recklessness is a form of conduct which amounts to a greater degree of fault than negligence where the actor does not desire harmful consequence but foresees the possibility and consciously takes the risk or, alternatively, a state of mind in which a person does not care about the consequences of his or her actions.[11] Recklessness can occur when the defendant acted with "reckless disregard of [plaintiff's] safety."[12] This recklessness standard had been followed by many U.S. courts in both the amateur[13] and professional[14] sport context.[15]

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derson v. Ceccardi, 451 N.E.2d 780, 783 (Ohio 1983); *Karas v. Strevell,* 227 Ill. 2d 440, (2008). *See also* Citron & Abelman, *supra* note 7, at 202; Rosenthal, *supra* note 7, at 2648; Lazaroff, *supra* note 5, at 195. *But see* Babych v. McRae*,* 567 A.2d 1269 (Conn. Super. Ct. 1989); Lestina v. West Bend Mut. Ins. Co., 176 Wis.2d 901, 914 (Wis. 1993). *See* Ray Yasser*, In the Heat of Competition: Tort Liability of One Participant to Another: Why Can't Participants Be Required to be Reasonable*, 5 SETON HALL J. SPORTS L. 253, 264 (1995); Mark M. Rembish, *Liability for Personal Injuries Sustained in Sporting Events After Jaworski v. Kiernan*, 18 QUINNIPIAC L. REV. 307, 316 (1998).

[10] Taxin, *supra* note 5, at 823; Yasser, *supra* note 9, at 254-255.

[11] Section 500 of the Restatement Second of Torts stipulates that "the actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." BRYAN A. GARNER, BLACK'S LAW DICTIONARY 1277 (9th ed. 2009).

[12] Hackbart v. Cincinnati Bengals, Inc. & Charles Clark, 601 F.2d 516, 524 (1979).

[13] Nabozny v. Barnhill, 334 N.E.2d 258 (1975) (dealing with an amateur football match). *See* Matt Partin, *Tort Law: Nabozny v. Barnhill - Tort Liability for Players in Contact Sports*, 45 UMKC L. REV. 119 (1976). Other cases in which the plaintiff claimed recovery for physical injuries because of participating in an amateur sport game are: Bourque v. Duplechin, 331 So. 2d 40 (La. Ct. App. 1976) (in the context of an amateur softball game) and Oswald v. Twp High School Dist. No. 214, 406 N.E.2d 157 (1980) (in the context of an amateur basketball game).

[14] Hackbart v. Cincinnati Bengals, Inc. & Charles Clark, 601 F.2d 516, 524 (1979) (in which the plaintiff was a football player who was injured when an

Intention is another ground on which claims for recovery can be founded. Intentional wrongdoing (e.g. battery or assault) involves claims that are based on a deliberate interference with another person either through threats of physical contact or directly through the physical contact itself.[16] An intentional tort requires the actor to have intended to cause the harm which resulted from the act.[17] It is, however, clear that in professional sport events, where "violent conduct is expected, encouraged, and a vital part of the game, it is difficult to show an intent to injure on the part of a player who was

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opponent intentionally struck him in the back of the head. The United States Court of Appeals for the Tenth Circuit reversed the decision of the lower court and held that the defendant's behavior was outside the scope of the playing rules as well as the general customs of professional football). *See also* Robert J. Gauvin v. Richard Clark, 404 Mass. 450, 454 (Mass. 1989) (in which the defendant "butt-ended" the plaintiff by ramming the back end of his hockey stick into the latter's stomach causing severe injuries. The Supreme Judicial Court of Massachusetts concluded that participants in an athletic event owe a duty to other participants to refrain from reckless misconduct and that a player might incur liability if he breaches such duty causing physical injuries).

[15] *See* ADAM EPSTEIN, SPORTS LAW 118-119 (1st ed. 2012). Yasser, *supra* note 9, at 257-26; Lazaroff, *supra* note 5, at 198-205; Rosenthal, *supra* note 7, at 2648-2653; Taxin, *supra* note 5, at 823-826.

[16] Citron & Abelman, *supra* note 7, at 198-199; Yasser, *supra* note 9, at 255-256

[17] Michael K. Zitelli, *Unnecessary Roughness: When On-field Conduct Leads to Civil Liability in Professional Sports*, 8 WILLAMETTE SPORTS L.J. 1, 2-3 (2010). There is a general agreement that "an intentional act causing injury, which goes beyond what is ordinarily permissible, is an assault and battery for which recovery may be had." *See* Overall v. Kadella, 361 N.W.2d 352, 357 (Mich. Ct. App. 1984). *See also* Moser v. Ratinoff, 130 Cal. Rptr. 2d 198, 206 (Ct. App. 2003) (where the California Second District Court of Appeal held that there may be a cause of action if the defendant's behavior in a biking contest is intentional or reckless and outside the range of the expected behavior); Averill v. Luttrell, 311, S.W.2d 812 (Tenn. Ap. 1957) (where the court ruled that the defendant was liable because of an intentional act on a baseball field. A professional baseball batter broke his jaw and was knocked unconscious when the opponent catcher hit him in the back of his head. The injured batter subsequently sued the catcher for assault and battery. The court entered a judgment in favor of the plaintiff and held the catcher liable for assault). *See* Stephen J. Gulotta Jr., *Torts in Sports--Deterring Violence in Professional Athletics*, 48 FORDHAM L. REV. 764, 784-785 (1980).

merely doing what he is paid to do."[18] Moreover, a defendant can also (sometimes successfully) invoke the defense of consent and assumption of risk of participating in professional sport games.[19]

In sum, the football player who suffers shocking and career-threatening injuries might be able to recover damages when he establishes that the defendant either acted with reckless disregard of the former's safety or with the intention to cause him physical injuries. Professional football players are, however, "encouraged to toughen up, to be macho and forego their right to sue."[20] It can, nevertheless, be argued that so-called crushing or career-ending tackles in football meet the requirements of reckless or intentional conduct. This in turn influences the availability and the award of punitive damages, which is discussed in the next part.[21]

III. Punitive Damages in General and in the Context of Sport Injuries

In civil law systems the victim of a tort committed by another person, a legal entity, or the government is entitled to be placed in the situation he or she would have been in had the tort not taken place.[22] The tortfeasor has to pay damages to compensate for the harm suffered by the plaintiff as a result of the tort. These compensatory damages (also referred to as actual damages) are further categorized into patrimonial and non-patrimonial damages. The

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[18] Taxin, *supra* note 5, at 825-826; Linda S. Calvert Hanson & Craig Dernis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 SETON HALL J. SPORTS L. 127, 135 (1996).

[19] *See* People v. Freer, 86 Misc.2d 280, 282 (Dist. Ct. 1976). *See also* Diane A. Carpenter, *Decreasing Sports Violence Equals Increasing Officials' Liability*, 3 LOY. L.A. ENT. L. REV. 127, 129 (1983). Taxin, *supra* note 5, at 826-830 with further references.

[20] Rosenthal, *supra* note 7, at 2632 (internal quotations omitted). *See also* Meier, *supra* note 7, at 153; Walker & Carlsen, *supra* note 7, at 412-413.

[21] *See* for an extensive comparative study and further references Cedric Vanleenhove & Jan De Bruyne, *Liability for Football Injuries and Enforcement in the EU - Will US Punitive Damages be Shown the Red Card in Europe?*, 14 VA. SPORTS & ENT. L.J. 50 (2014).

[22] *See* CEES VAN DAM, EUROPEAN TORT LAW (1st ed. 2006).

former serve to reimburse the plaintiff's quantifiable monetary losses such as property damage and medical expenses. The latter compensate for non-monetary forms of damage, with physical or emotional pain and suffering and loss of reputation as most common examples.[23]

Punitive damages, on the other hand, are not (primarily) intended to compensate the plaintiff for harm done. In contrast to their acceptance within common law jurisdictions, they are said to be relatively non-existent in civil law countries. The remedy transcends the corrective objective of re-establishing an arithmetical equilibrium of gains and losses between the injurer and the injured.[24] Punitive damages provide plaintiffs with additional monetary relief beyond the value of the harm incurred.[25] They are awarded in excess of any compensatory or nominal damages.[26] The Second Restatement of Torts and the Black's Law Dictionary define punitive damages as: "damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."[27] The U.S. Supreme Court views punitive damages as "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."[28] Punitive damages thus

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[23] Madeleine Tolani, *U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public*, 17 ANNUAL SURVEY OF INT'L & COMP. LAW 185, 187 (2011); Thomas Rouhette, *The Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept?*, 74 DEF. COUNSEL J. 320, 325 (2007).

[24] Francesco Quarta, *Foreign Punitive Damages Decisions and Class Actions in Italy*, *in* DUNCAN FAIRGRIEVE & EVA LEIN, EXTRATERRITORIALITY AND COLLECTIVE REDRESS 280 (1st ed. 2012); Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981).

[25] BRYAN A. GARNER, BLACK'S LAW DICTIONARY 175 (3rd pocket ed. 2006).

[26] Gabrielle Nater-Bass, *U.S.-Style Punitive Damages Awards and their Recognition and Enforcement in Switzerland and Other Civil-Law Countries*, 4 DAJV NEWSLETTER 154 (2003), *available at* http://www.arbitralwomen.org/files/publication/0210141916206.pdf.

[27] RESTATEMENT (SECOND) OF TORTS § 908 (1979). Garner, *supra* note 25, at 175.

[28] Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

focus on the socio-legal significance of the wrongdoing and on the importance of discouraging its repetition.[29]

The foundational requirement for punitive damages is the infringement of a legally protected interest.[30] In order to be able to obtain punitive damages, the plaintiff must have suffered actual damage and must provide sufficient evidence thereof. There is thus no separate cause of action for punitive damages.[31] Important is that the fact that the defendant has acted in an unlawful manner does not suffice for punitive damages to be awarded. The conduct in question must involve a degree of aggravation.[32] The Restatement of Torts emphasizes that "punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."[33] Mere negligence can thus never form the basis for a punitive damages award.[34] Some states, however, allow punitive damages in cases where the tortfeasor's behavior amounts to gross negligence, but then the negligence must be so gross that there was a conscious indifference to the rights and safety of the plaintiff.[35]

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[29] Quarta, *supra* note 24, at 280; Vanleenhove & De Bruyne, *supra* note 21, 55-58.
[30] 22 AM. JUR. 2D *Damages* § 551 (1988).
[31] 25 C.J.S. *Damages* § 197; 22 AM. JUR. 2D *Damages* § 551, 553 (1988).
[32] 22 AM. JUR. 2D *Damages* § 569. Lotte Meurkens, *The Punitive Damages Debate in Continental Europe: Food for Thought*, in LOTTE MEURKENS & EMILY NORDIN, THE POWER OF PUNITIVE DAMAGES – IS EUROPE MISSING OUT? 10 (1st ed. 2012).
[33] Across the different U.S. States, various terminology is employed to express this required high standard of misconduct: "egregious", "reprehensible", "bad faith", "fraud", "malice", "oppression", "outrageous", "violent", "wanton", "wicked" and "reckless." RESTATEMENT OF TORTS § 908 (1979).
[34] 25 C.J.S. *Damages* § 205. LINDA L. SCHLUETER, PUNITIVE DAMAGES 162 (6th ed. 2005).
[35] Schlueter, *supra* note 34, at 161; Anthony J. Sebok, *Punitive Damages in the United States*, in: HELMUT KOZIOL & VANESSA WILCOX (EDS.), PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 155 (1st ed. 2009); Vanleenhove & De Bruyne, *supra* note 21, 55-58.

Punitive damages have already been claimed and awarded at several occasions in cases of professional sport liability.[36] In *Polonich v. A.P.A. Sports*, for instance, the U.S. District Court for the Eastern District of Michigan awarded an amount of $350,000 in punitive damages to the plaintiff who suffered physical injuries during a hockey game after the defendant hit him in the face with a hockey stick.[37] Another famous case in which punitive damages were awarded is *Tomjanovich v. California Sports*. Tomjanovich, a basketball player of the Houston Rockets, was punched in the face by Kermit Washington of the Los Angeles Lakers when the former tried to break up a fight between players of both teams. As a consequence, Tomjanovich suffered severe physical injuries that ultimately ended his career. He subsequently brought a claim against the L.A. Lakers alleging both vicarious liability and negligent supervision. The jury found the defendant liable for the physical injuries that were caused by Washington's battery. Tomjanovich was awarded approximately $3.25 million including $1.5 million in punitive damages.[38]

Within the framework of this article, the question arises whether and to which extent punitive damages can be awarded under U.S. law when a football player dangerously tackles an opponent, thereby causing shocking and career-threatening injuries. As previously mentioned, a plaintiff will have to prove that the defendant acted with reckless disregard of the plaintiff's safety or with the intent to cause physical injuries. It can be argued that "crushing" football tackles are often executed with reckless disregard of the opponent's safety or with the intention to cause physical injury and thus

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[36] *See* Gil B. Fried, *Punitive Damages and Corporate Liability Analysis in Sport Litigation*, 9 MARQ. SPORTS L. J. 45 (1998).

[37] Polonich v. A.P.A. Sports, No. 74635 (E.D. Mich. filed Nov. 10, 1982). *See* Wyatt M. Hicks, *Preventing and Punishing Player-to-Player Violence in Professional Sports: The Court System Versus League Self-Regulation*, 11 J. LEGAL ASPECTS SPORT 209, 222 (2001); John F. Carroll, *Torts in Sports – 'I'll See You in Court!'*, 16 AKRON L. REV.537, 539 (1983).

[38] Tomjanovich v. Cal. Sports, No. H-78–243, 1979 U.S. Dist. LEXIS 9282 (S.D. Tex. 1979). *See* Citron & Abelman, *supra* note 7, at 199; Zitelli, *supra* note 17, 6-7; Vanleenhove & De Bruyne, *supra* note 21, 55-58.

open the door for courts to award punitive damages. In most football leagues in the world a number of such horrifying tackles have happened. For instance, Alf-Inge Håland's career ended due to the deliberate knee-high tackle by Roy Keane during the Manchester Derby in 2001. Another example is Axel Witsel's leg-breaking horror tackle that put Anderlecht player Marcin Wasilewski out for almost an entire year.[39]

Such career-ending tackles have also occurred in the United States. For instance, Freddy Llerena-Aspiazu suffered multiple open fractures of his right leg and several other physical and psychological injuries during a football game. He filed a lawsuit in the U.S. District Court of the District of Columbia claiming damages from former Bulgarian international Hristo Stoichkov whose tackle caused the injury. Llerena-Aspiazu alleged that Stoitchkov's tackle was the direct and the proximate result of the defendant's recklessness. Llerena-Aspiazu further argued that Stoichkov's raised-cleats tackle constituted outrageous conduct that was malicious, wanton, reckless or in willful disregard of rights. Therefore, Llerena-Aspiazu sought $5 million in punitive damages from Stoichkov.[40] Although a financial settlement was reached between Llerena-Aspiazu and Stoichkov,[41] the case shows that it is conceivable that punitive damages can be awarded if the court accepts that the tortfeasor deliberately tried to injure the plaintiff or acted willfully or grossly negligent with a conscious disregard for the safety of others. Given the unpredictable nature of a football player's career and the structure of the global football market, it is possible that by the end of the suit the tortfeasor has transferred to another club in another country and that enforcement outside of the U.S. thus becomes necessary. The question which is addressed in the following part is whether and to what extent the judgment and the punitive

[39] Vanleenhove & De Bruyne, *supra* note 21, 55-58.
[40] Freddy Llerena-Aspiazu v. Major League Soccer, et al., No. 1:06-cv-00343-RWR (D.C. 2006).
[41] Notice of Settlement, Freddy Llerena-Aspiazu v. Major League Soccer, et al., No. 1:06-cv-00343-RWR (D.C. 2006); Vanleenhove & De Bruyne, *supra* note 21, 55-58.

damages award can be enforced against the assets of the defendant in England.

IV. Enforcement of Punitive Damages in England

A. General Rules on Enforcement

As is the case in all EU Member States, the enforcement of U.S. punitive damages awards in England is not regulated by supranational legislation.[42] The U.S. and the UK (and consequently England) are not parties to a bilateral or multilateral treaty on the recognition and enforcement of judgments. In 1976 the U.S. and the UK tried to conclude a bilateral agreement on the reciprocal recognition and enforcement of judgments in civil matters but failed.[43] The English private international law rules, therefore, apply to American judgments seeking recognition and enforcement in England and Wales.

Under English common law, the institution of a fresh legal action is required for the enforcement of a foreign judgment. The foreign decision imposes an obligation on the defendant. This obligation then becomes the subject matter of the new action for the amount of the debt in England. However, the plaintiff may apply for summary judgment under Part 24 of the Civil Procedure Rules on the basis that the judgment-debtor has no defence to the claim. In any event, the English court will verify whether the foreign court had jurisdiction to adjudicate the claim against the defendant.

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[42] American punitive damages are thus subjected to a patchwork of national rules. *See* CEDRIC VANLEENHOVE, PUNITIVE DAMAGES IN PRIVATE INTERNATIONAL LAW: LESSONS FOR THE EUROPEAN UNION (1st ed. 2016) (forthcoming) (providing an overview of the positions taken by Germany, France, Spain and Italy).

[43] Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, Oct. 26 1976, 16 *International Legal Materials* 1977, 71. *See* Hans Smit, *The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?,* 17 VA. J. INT'L L. 443, 443-468 (1977); Peter Hay & Robert J. Walker, *The Proposed U.S.-UK Recognition-of-Judgments Convention: Another Perspective*, 18 VA. J. INT'L L 753, 753-770 (1978).

Only when, in the view of English law, the foreign court was entitled to summon the defendant and subject him to judgment, enforcement in England will be possible.[44]

Under English common law, the defendant has nine defences to rely on in order to prevent the enforcement of the unfavourable judgment.[45] Three are particularly relevant in the context of a punitive damages award. First, the Protection of Trading Interests Act of 1980 ("PTIA") bars the enforcement of multiple damages in England. Second, English courts will not enforce foreign penal judgments. Lastly, the defendant could attempt to invoke the public policy exception to exclude the possibility of enforcement of a punitive award.[46]

For punitive damages specifically, a distinction needs to be made between multiple damages for which specific legislation exists (part B) and punitive damages other than multiple damages for which no such legislation is available (part C).

B. Multiple Damages

1. Section 5 of the Protection of Trading Interest Act – Unenforceability of Multiple Damages

Multiple damages are a form of punitive damages arrived at by multiplying the amount of compensatory damages. The Protection of Trading Interest Act ("PTIA") is a statute from 1980 which prohibits the enforcement of multiple damages in England. PTIA attempts to thwart the exercise of U.S. extraterritorial jurisdiction

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[44] JAMES FAWCETT & JANEEN M. CARRUTHERS, CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 516-517 (14th ed. 2008); Michael Polonsky, *Particular Issues Affecting the Recognition and Enforcement of U.S. Judgments*, 19 INT'L L. PRACTICUM 156, 158 (2006);

[45] FAWCETT, CARRUTHERS, NORTH, *supra* note 44, 551.

[46] Robert Merkin, *Enforceability of Awards of Punitive Damages in the United Kingdom,* I.J.I.L. 18, 19 (1994).

over foreign citizens.[47] Section 5 provides that a judgment of an overseas country cannot be registered and no court in the UK may entertain proceedings at common law for the recovery of any sum payable under such a judgment, where that judgment grants multiple damages.[48] The rule represents the British belief that the treble damages which are recoverable under U.S. antitrust law are penal in nature and should not be available to private plaintiffs acting as private attorneys general.[49] Section 5 aims to neutralize the treble damages incentive for private parties in U.S. legislation in that it forces private litigants to weigh the benefits and costs of such an action given the unenforceability in the UK.[50] Although intended to apply to multiple damages (treble damages) arising out of antitrust litigation, a literal reading of the Act prohibits the enforcement of any type of multiple damages irrespective of the underlying cause of action.[51] The Act only applies to multiple damages and does not cover other punitive damages.

It has to be noted that Section 5 of PTIA renders the compensatory element of a multiple damages award unenforceable as well. This follows from a textual interpretation of the Act and is supported by Dicey and Morris who state that "Judgments caught by [S]ection 5 are wholly unenforceable, and not merely as regards that part of the judgment which exceeds the damages actually suffered by the judgment creditor."[52] Judge Parker (and Lord Diplock later agreed on that point[53]) remarked in *British Airways v. Laker*

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[47] Tina J. Kahn, *The Protection of Trading Interests Act of 1980: Britain's Response to U.S. Extraterritorial Antitrust Enforcement*, 2 NW. J. INT'L L. & BUS. 476, 479 (1980).

[48] §§ 5.1 and 5.2. A judgment for multiple damages is defined in Section 5(3) as "a judgment for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favour the judgment was given."

[49] Kahn, *supra* note 47, at 489.

[50] Kahn, *supra* note 47, at 510, 513 & 515.

[51] Kahn, *supra* note 47, at 510.

[52] LAWRENCE COLLINS, DICEY & MORRIS ON THE CONFLICT OF LAWS 566 (13th ed. 2000).

[53] British Airways v. Lakers Airways, [1985] AC 58 (H.L.) 89.

Airways that Section 5 of PTIA is aimed at judgments in antitrust matters and affects the whole award, not just the multiple damages part of it.[54,55] This view has been confirmed in other cases such as *Lewis v. Eliades*, where Lewis did not raise this issue on appeal.[56]

2. The Decision of the Court of Appeal in *Lewis v. Eliades*

In *Lewis v. Eliades*, a part of a U.S. judgment provided for treble damages for violations under the United States Federal Racketeer Influenced and Corrupt Organisations Act ("RICO").[57] RICO permits litigants to recover civil damages based on a number of criminal violations and provides the opportunity for a claimant to obtain treble damages in addition to the costs of the law suit.[58] The English courts were faced with the question whether the presence of these treble damages would make the whole judgment unenforceable in England under PTIA.

The proceedings in this case started in the United States District Court for the Southern District of New York. Former managers and promoters of the famous English boxer Lennox Lewis brought a suit in federal court against him after the breakdown of their relationship. Lewis counterclaimed on the basis of *inter alia* breach of contract, fraud, and racketeering contrary to RICO. In its judgment of March 15, 2002, the U.S. District Court held each of the defendants on the counterclaim liable for an amount of $7,273.641 USD. The District Court awarded $6,821.159 USD for breach of fiduciary duty, $56.400 USD for fraud and $369.082 USD as damages under RICO. The latter sum, however, was the compensatory amount without the treble multiplication.[59]

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[54] British Airways v. Laker Airways, [1984] QB 142 (H.L.) 161.
[55] Elaine Kellman, *Enforcement of Judgments and Blocking Statutes: Lewis v Eliades*, 53 I.C.L.Q. 1025, 1028 (2004).
[56] Emma Malcolm, *Winning the Fight for the Enforcement of US damages*, ENT. L.R. 133 (2004).
[57] Lewis v. Eliades, [2004] 1 WLR 692.
[58] 18 USC 1964(c); Kellman, s*upra* note 55, at 1028.
[59] Kellman, s*upra* note 55, at 1025.

Lennox Lewis then sought to enforce the judgment in England. The defendants in the enforcement proceedings argued that the judgment could not be enforced because of Section 5 of PTIA. They asserted that Lewis was entitled to an automatic trebling of the compensatory damages under RICO and that this blocked the enforcement of the New York judgment in its entirety. On August 1, 2002, Master Whitaker declined to follow the defendants' argument and granted summary judgment for an amount of $6,273.641 USD, *i.e.* the original amount awarded minus $1 million USD as agreed set-off between parties.

In the High Court proceedings, Judge Nelson also rejected this argument. In a decision of February 28, 2003, he noted that the trebling of the basic compensatory award was clearly not automatic. The claimant can decide to waive his right to recover these damages, can withdraw his application for treble damages, or can decide not to enforce the multiple portion of the award.[60] In the case at hand, Judge Nelson made his decision to enforce the American judgment conditional on: (1) Lewis withdrawing two motions he had filed in the U.S. District Court for the Southern District of New York; or (2) on his undertaking not to enforce the multiple damages against the defendants. Lewis had requested the U.S. District Court to treble the amount of the compensatory damages under RICO and to issue these treble damages in a separate judgment (in order to prevent any problems under PTIA). Judge Nelson, however, made it clear that the latter technique would not hinder the application of Section 5 of PTIA.[61,62] The High Court's ruling thus depended on the factual circumstances surrounding the case. It can arguably be derived from the decision that an unmultiplied award is enforceable in England if the judgment creditor agrees not to request multiplication in the rendering court, withdraws a pend-

[60] Lewis v. Eliades, [2003] 1 All ER (Comm) 850, 862; Kellman, s*upra* note 55, at 1026, n. 4.
[61] Lewis v. Eliades, [2003] 1 All ER (Comm) 850, 863.
[62] Kellman, s*upra* note 55, at 1026.

ing application for multiplication, or undertakes not to enforce the award beyond its compensatory element.[63]

Lennox Lewis complied with the condition laid down by Judge Nelson. For an unknown reason, the clerk in the United States District Court, nevertheless, ordered the issuance of a separate judgment for treble RICO damages. Judge Baer of the United States District Court subsequently set this order aside and ordered a single judgment (bearing the date of the original judgment) to replace the original judgment for an amount of $8,065.805 USD. The new amount reflected the – unwanted as a result of Lewis' withdrawal – trebling of the RICO damages of $396.082 USD to $1,188.246 USD plus an additional $40 USD for an earlier miscalculation.[64]

On appeal before the Court of Appeal in England, the situation had thus significantly changed. With the RICO damages having been trebled, the question to be answered became how Section 5 of PTIA had to be interpreted. One interpretation was that the treble damages tainted the other heads of damages, resulting in the total rejection of the judgment for enforcement purposes. Another understanding of Section 5 of PTIA meant that the other heads of damages could be enforced despite the statutory rejection of a judgment for treble damages. It should be remarked that Lewis did not try to enforce the RICO damages themselves which indicates that his lawyers probably believed that this would not stand a chance given the clear language of the Act.[65]

On October 9, 2003, the Court of Appeal ruled that the presence of treble damages does not mean that other damages are not recoverable.[66] It found that the non-RICO damages could be severed and distinguished from the unenforceable treble damages.[67] The Court of Appeal dismissed arguments based on Judge Parker's

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[63] Kellman, s*upra* note 55, at 1029-1030.
[64] Kellman, s*upra* note 55, at 1026.
[65] Malcolm, *supra* note 56, at 133; Kellman, s*upra* note 55, at 1026.
[66] Lewis v. Eliades, [2004] 1 WLR 692; Polonsky, *supra* note 44, at 158; Rouhette, *supra* note 23, at 335.
[67] Polonsky, *supra* note 44, at 158.

observation in *British Airways v. Laker Airways* and the opinion of Dicey and Morris as these relate to the compensatory part of a treble damages award and not to the legal fate of the other heads of damages in a mixed judgment.[68] It, therefore, held that the whole judgment was enforceable, save the treble RICO damages in the amount of $1,188.246 USD and the sum of $1 million USD as set-off between the parties.[69]

Ironically, the American judge's action of awarding Lewis more money by trebling the damages under RICO resulted in a lower amount to be recovered from the defendants in England due to Section 5 of PTIA. Judgment creditors seeking to enforce RICO claims or other claims for multiple damages against the English assets of the defendant should thus make certain that these multiple damages are clearly separated from other heads of damage. Moreover, in order to ensure maximum return in the UK, the plaintiff should consider not requesting the multiplication of the basic compensatory award provided for by the applicable statute.[70]

C. Punitive Damages

Forms of punitive damages which do not involve the multiplication of the compensatory damages are outside the ambit of PTIA and, therefore, follow a different regime. It is well settled in England that an English court will not lend its aid to the enforcement of a foreign penal law.[71] By imposing a penalty, a state exercises its sovereign power. Such an act of sovereignty cannot have any effect in the territory of another nation.[72] English courts will, therefore, not enforce a foreign judgment when it is given in respect of a

[68] Kellman, *supra* note 55, at 1027-1028.
[69] Lewis v. Eliades, [2004] 1 WLR 692, 705.
[70] Polonsky, *supra* note 44, at 159.
[71] Folliott v. Ogden, [1790] 3 Term Rep 726; Huntington v. Attrill, [1893] AC 150.
[72] FAWCETT, CARRUTHERS, NORTH, *supra* note 44, at 126.

fine or penalty. However, a sum payable to a private individual is not a fine or penalty.[73]

This principle was applied in the early 20th century case of *Raulin v. Fisher*.[74] The matter involved an American lady who injured a French officer in the *Bois de Boulogne* (France) while riding her horse recklessly. She was prosecuted for criminal negligence and fined 100 francs. Under French law, a criminal court can rule on the civil claim for damages as well if the victim decides to intervene in the criminal proceedings. The victim opted to do so and was awarded 15.917 francs for damages and costs in the same judgment. When the victim tried to enforce the judgment in England, Judge Hamilton made a distinction between the fine and the compensation. He ruled that the civil damages were recoverable because they were payable to an individual and not to the state. These damages could be severed from the fine which was unenforceable due to its penal character.[75] The crucial criterion to determine whether a foreign measure is a penalty, therefore, appears to be the receiver of the sums. If the money goes to the foreign state, the sum has to be classified as penal.

This formalistic approach was confirmed in *S.A Consortium General Textiles v. Sun and Sand Agencies Ltd.*[76] This is the only case touching upon the issue of the enforceability of punitive damages.[77] A French company had sold clothing to English merchants but after delivery the buyers failed to pay the agreed price. The seller brought its payment claim before the Commercial Court of Lille. In addition, it sought a further 10.000 francs on the basis of "*résistance abusive,*"[78] a head of damages awardable in France

[73] Polonsky, *supra* note 44, at 156.
[74] Raulin v. Fisher, [1911] 2 KB 93.
[75] FAWCETT, CARRUTHERS, NORTH, *supra* note 44, at 561; Merkin, *supra* note 46, at 21.
[76] S.A Consortium Gen. Textiles v. Sun and Sand Agencies Ltd,. [1978] Q.B. 279.
[77] Although the damages for "résistance abusive" were not qualified as punitive by the Court of Appeal.
[78] CODE CIVIL [C. CIV.] art. 1153 (Fr.).

where a defendant has unjustifiably opposed the plaintiff's claim. The Lille court gave judgment in default of appearance for the plaintiffs for the amount claimed, interest, and costs. Enforcement of the judgment in England was governed by the 1933 Foreign Judgments Act which regulates enforcement for judgments originating in countries with which the UK has a mutual recognition treaty. The defendants resisted enforcement of the 10.000 francs (awarded as a result of the unreasonable refusal by the defendants to pay a plain claim) in England on the ground that the French judgment imposed a penalty. Under Section 1(2)(b) of the Act, sums payable in respect of a penalty are excluded from enforcement. The defendants further relied on Section 4(1)(a)(v), which states that enforcement should be denied when it would violate public policy of the requested state.[79]

As to the characterisation of the sum for the "*résistance abusive*," all three judges in the Court of Appeal agreed that the amount for the unreasonable withholding of sums under a valid claim was compensatory, not penal and, therefore, enforceable.[80] Lord Denning believed it to be compensation for losses not covered by an award of interest, such as loss of business caused by want of cash flow, or for costs of the proceedings not covered by the court's order for costs. He, however, expanded *obiter dictum* upon the issue and summarized the defendants' argument as sustaining that the 10.000 francs were punitive or exemplary damages which amounted to a penalty and were, therefore, unenforceable under Section 1(2)(b) of the 1933 Act.[81] He repeated the conventional idea that a fine or other penalty only refers to sums payable to the state by way of punishment and that a sum payable to a private individual is not a fine or penalty.[82]

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[79] This public policy exception is similar to the one at common law.
[80] Nicholas Edwards & Robert G. Lee, *Recognition and Enforcement in English Law of Money Judgments from Outside the UK*, 12 I.B.F.L. 1, 2 (1994).
[81] The other judges in the case, Lord Justice Goff and Lord Justice Shaw, did not refer to the notion "punitive damages."
[82] S.A Consortium Gen. Textiles v. Sun and Sand Agencies Ltd., [1978] Q.B. 279, 299-300.

Although given in *dicta*, Lord Denning's statements relating to punitive damages are interesting given the hybrid nature of punitive damages. They are awarded not to compensate (at least not always and not primarily) but to punish the wrongdoer for reprehensible conduct. However, they are not payable to the state. Lord Denning's remark seems to explicitly support the view that, despite their inherent criminal nature, for enforcement purposes in England punitive damages avoid the penal label because they are awarded to a private person instead of to the state.[83,84] Lord Denning further ruled that English public policy does not oppose the enforcement of a claim for exemplary damages because these are "still considered to be in conformity with the public policy in the United States and many of the great countries of the Commonwealth."[85] He thereby indicated that punitive damages do not pose a problem from a public policy perspective either.[86] However, the *obiter* character of his elaboration should be underlined, leading to the conclusion that, at the very least, the enforceability of (U.S) punitive damages in the UK has not yet been definitively settled.

In our view it is curious how, on the one hand, the enforcement of punitive damages seems to be accepted by Lord Denning and distinguished scholars such as Dicey and Morris. The reasoning behind this acceptance is that punitive damages cannot be qualified as penal since they are not awarded to the state but to the plaintiff. On the other hand, multiple damages, a subcategory of punitive damages, are not enforceable because they are barred by a statute

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[83] Collins, *supra* note 52, at 476.

[84] In some U.S. states split-recovery systems are in place. In Oregon, for instance, a statute allocates 70% of the punitive damages awarded to the state. OR. REV. STAT. § 31.735 (2003). California law provides that 75% of the award flows to a Public Benefit Trust Fund. CAL. CIV. CODE § 3294.5. Only the part going to the plaintiff would thus be eligible for enforcement in the UK.

[85] S.A Consortium Gen. Textiles v. Sun and Sand Agencies Ltd., [1978] Q.B. 279, 300.

[86] The same conclusion was reached by the Supreme Court of Australia (Full Court) and the British Columbia Court of Appeal in Benefit Strategies Group Inc. v. Prider, [2005] SASC 194 and Old North State Brewing Co. v. Newlands Services Inc., [1999] 4 WWR 573.

(PTIA). They are even deemed to be so unacceptable that the compensatory "basic award" (*i.e.* before multiplying) cannot be enforced either. Punitive damages can, however, in some instances reach much higher numbers as they are "plucked out of the air."[87]

Until the *ratio decidendi* of a judgment deals with the issue of enforcement of foreign punitive damages, Lord Denning's *obiter dictum* in *S.A Consortium General Textiles v. Sun and Sand Agencies Ltd.* remains the only authority to rely on in support of the enforcement of such damages. The risk of unenforceability in England is, therefore, real.[88] The compensatory damages in a judgment for punitive damages will in any case be enforceable because PTIA does not apply and the punitive damages thus do not "infect" the compensatory damages. The compensatory damages are another head of damages which can be severed from the punitive award. The severing of judgments in order to distinguish enforceable from unenforceable portions was demonstrated in, for example, *Raulin v. Fisher* and *Lewis v. Eliades*.

V. Concluding Remarks

The article examined the liability for football injuries in the U.S. and especially focused on the enforcement of a judgment containing punitive damages in England. We elaborated on the scenario of a football player who dangerously tackles an opponent and thereby causes shocking and career-threatening injuries. The player risks to be sued on two major grounds in the U.S., namely recklessness and intention. A claimant will be able to recover damages when he establishes that the defendant either acted with reckless disregard of the former's safety or with the intention to cause him physical injuries. So-called crushing or horrifying tackles in football can meet the requirements of reckless or intentional conduct. This in turn influences the availability and the award of punitive damages.

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[87] Merkin, *supra* note 46, at 23.

[88] Polonsky, *supra* note 44, at 158; Rouhette, *supra* note 23, at 335 (according to Rouhette, it is even likely that punitive damages will not be enforced).

The article subsequently discussed the English approach towards the enforcement of punitive damages. In England multiple damages are statutorily barred by PTIA. If the victim of a tackle has been awarded punitive damages in the U.S. on the basis of a multiplier statute, he will end up with nothing as both the basic compensatory damages and the punitive damages will be blocked (in contrast, other heads of damage will not be denied enforcement). Therefore, if the player suffering injury from a tackle already foresees the necessity of enforcement in England, he is advised to waive his right to recover multiple damages or to withdraw the application for such damages. If the need for enforcement in England only becomes apparent after the trial, the player should decide not to enforce the multiple portion of the award in order to safeguard the unmultiplied compensatory damages.

Whether other forms of punitive damages can survive the English courts' scrutiny is uncertain. Lord Denning's *obiter dictum* in *S.A Consortium General Textiles v. Sun and Sand Agencies Ltd.* appears to suggest a positive answer. This attitude seems logical given the fact that the English legal system itself provides for punitive damages in its substantive law. In *Rookes v. Barnard*, Lord Devlin laid down three categories in which punitive damages can be awarded: (1) oppressive, arbitrary or unconstitutional action by the servants of the government; (2) cases in which the defendant calculated his behavior in order to make a profit which may exceed the compensation payable to the victim; and (3) punitive damages expressly provided for by statute.[89] Making punitive damages available under domestic law while at the same time refusing to enforce punitive damages originating from abroad would amount to legal hypocrisy and would show a lack of internal legal coherence. As things stands, the legal basis of the American punitive damages award is thus of paramount significance as it might mean the difference between all or nothing.

[89] Rookes v. Barnard, [1964] U.K.H.L 1 (H.L.) 37-38.