VOLUME XXI

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EDITOR'S NOTE

The University of Denver's Sports and Entertainment Law Journal is proud to complete its thirteenth year of publication. Over the past thirteen years, the Journal has strived to contribute to the academic discourse surrounding legal issues in the sports and entertainment industry by publishing scholarly articles.

Volume XXI features three case comments discussing relevant case law in the sports industry.

The first case comment is a piece written by a staff editor on the Journal, Nicholas R. Kehr. This piece discusses an interesting case between Independent Sports & Entertainment, LLC, a sports, media, entertainment, and management company, and Daniel Fegan, an NBA agent, and explores preemption of claims under the Labor Management Relations Act.

The second case comment, written by Logan P. Desmond and Leeann M. Lower, discusses the intriguing case of Derek Boogaard, a former NHL player that passed away due to drug overdose. Despite the negative ruling in this case, Boogaard's family continues to fight this legal battle, having most recently appealed to the 7th Circuit when the Northern District of Illinois granted the NHL's motion to dismiss.

The final case comment, written by Sean M. Winebrenner and Leeann M. Lower, discusses a Nebraska District Court's public forum analysis for the areas surrounding a sports arena.

Volume XXI also features one note, written by Callie P. Borgmann, a managing editor for the Journal. In this note, Ms. Borgmann analyzes the recent developments in royalties paid to songwriters for streaming services.

Finally, Volume XXI has five featured articles discussing issues and proposing solutions for hot topics we face in the sports and entertainment industries.

The first article, written by Tamara L. Kuennen and Chelsea Augelli, undertakes a deep analysis into the domestic violence problems and policies in the four major men's professional sports (NFL, NBA, MLB, and NHL), and proposes a solution for how to "advance the ball."

Moving into a discussion on college athletics, David E. Missirian writes the second article, analyzing whether university sports are a benefit or a

detriment to society and whether universities have a legal and moral duty to protect their students.

The third article, written by Jonathan G. Finck, analyzes what may be the hottest topic in the NFL—players kneeling. In this article, Mr. Finck explores the different punishments the NFL uses and analyzes whether any can be applied to players that kneel, while simultaneously recommending a path forward.

Transitioning to the NBA, the fourth article, written by Uriah Tagle, explores the current NBA and WNBA eligibility rules, reconciling these rules with anti-trust law and discussing the current effects on prospective players.

The final article, by Chris Breton, discusses the treatment of fan injuries in the MLB, including reactions from courts, legislatures, and the MLB itself, and proposes the necessary next steps in order to adequately protect the fans.

We are truly pleased with Volume XXI's publication and would like to thank the authors for all of their hard work. We would also like to thank our wonderful faculty advisor, Professor Stacey Bowers, and our outstanding dean, Dean Bruce Smith. To the editorial board, non-editorial board, and staff editors, I appreciate the endless effort and hard work that has perfected Volume XXI of the Journal.

Lastly, I would like to thank my parents, William Taylor, Sr. and Lisa Garduno, as well as Toni Johnson, Heather Taylor, Billy Garduno, Morgan Taylor, Marissa Narde, Natalie Willis, and Jesus Marquez for their continuous support throughout law school. I truly could not have achieved my accomplishments without your help!

WILLIAM D. TAYLOR, JR.
EDITOR-IN-CHIEF (ACADEMIC YEAR 2017-2018)
DENVER, COLORADO
SPRING 2018

INDEPENDENT SPORTS & ENTERTAINMENT, LLC V. FEGAN

By: Nicholas R. Kehr[*]

ABSTRACT

Independent Sports & Entertainment, LLC ("ISE") brought a claim against Daniel Fegan ("Fegan") for violating a non-compete clause in an asset purchase agreement in California state court. Fegan removed this action to federal court on the basis that the claim was completely preempted by the Labor Management Relations Act. The United States District Court for the Central District of California (the "Court") correctly concluded that the claim was not preempted by the Labor Management Relations Act, because the claim did not exist solely as a result of the National Basketball Association's ("NBA") Collective Bargaining Agreement ("CBA") nor was the claim substantially dependent on analysis of the CBA.

FACTS OF THE CASE

In the case between ISE and Fegan, the Court correctly decided that Fegan's breach of a non-competition agreement was not pre-empted by section 301 of the Labor Management Relations Act ("LMRA"). ISE is a sports management company that represents athletes in several professional sports leagues, including the NBA.[1] Fegan is a well-known sports agent who represents NBA players.[2] ISE and Fegan entered into an Asset Purchase Agreement ("APA") whereby ISE agreed to purchase Fegan's basketball business assets in exchange for cash and stock in ISE.[3] Fegan also agreed to become an employee of ISE so he could continue to represent his clients.[4] The APA included a non-competition provision whereby Fegan promised to refrain from directly or indirectly owning, managing, operating, controlling, or working for any business or organization that engages in sports marketing, representation, recruiting, or otherwise would compete with ISE during the period between March 15, 2013 and February 15,

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[1] Independent Sports & Entertainment, LLC v. Fegan, 2017 WL 2598550, at *1 (C.D.Cal., 2017).

[2] *Id.*

[3] *Id.*

[4] *Id.*

2018.[5] ISE alleges that Fegan violated the APA by running a "side business" in violation of the noncompetition clause, undermining ISE employees' loyalty to ISE, repeatedly violating the non-solicitation clause and otherwise failing to perform satisfactorily.[6]

Pursuant to an arbitration clause in the APA, ISE brought two arbitration claims against Fegan for his breach of the APA and the employment agreement.[7] ISE also filed action in state court in California, stating only one cause of action: for a preliminary and permanent injunction pending the arbitrations.[8] Fegan removed this action to federal court on the ground that the claim was completely preempted by section 301 of the LMRA.[9] ISE argued that its claim was not completely preempted and sought an order remanding the action back to state court.[10]

COURT ANALYSIS

A defendant may remove any action from state to federal court if the federal district court would have had original jurisdiction.[11] Federal courts have original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States.[12] Under the "complete preemption" doctrine, a federal defense can give rise to a federal question.[13] This doctrine provides that when "pre-emptive force of a [federal] statute is so extraordinary," it completely preempts state law.[14] Section 301 of the LMRA is one of the three statutes that the Supreme Court has found to completely preempt state law.[15] As a result, the question becomes whether ISE's claim is in fact subject to the completely-preemptive force of section 301.

Section 301 of the LMRA states: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction over the parties."[16] Thus, section 301 mandates

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[5] *Id.*
[6] *Id.* at 2.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] 28 U.S.C. § 1441(a) (2011).
[12] 28 U.S.C. § 1331 (1980).
[13] Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).
[14] Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987).
[15] *See* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6-7 (2003).
[16] 29 U.S.C. §185(a) (1945).

that federal common law governs the enforcement and interpretation of CBAs, and that this federal common law preempts state contract law.[17]

The Court relied heavily on the Ninth Circuit's two-step inquiry to analyze section 301 preemption of state law claims.[18] Under this inquiry, a court must first determine whether the asserted cause of action involves a right conferred upon an employee by virtue of state law, not by a CBA.[19] If the right exists as a result of the CBA, the claim is preempted.[20] If a court determines that the right underlying the plaintiff's state law claim "exists independently of the CBA" it moves to a second step, asking whether the right is nevertheless substantially dependent on analysis of a CBA.[21] Where there is such substantial dependence, the state law claim is preempted, but, if there is no substantial dependence, the claim may proceed under state law.[22]

To determine whether a right is independent of a CBA, a court must focus its inquiry on the legal character of a claim, as independent of rights under the CBA and not whether a grievance arising from precisely the same set of facts could be pursued.[23] ISE brought action against Fegan for his failure to keep his promise not to compete with ISE, as specified in the APA.[24] This claim did not exist as a result of the CBA, but rather it existed due to the APA.[25] Without the APA, ISE would have no right to enforce and, therefore, have no claim against Fegan.[26]

The Court found no merit in Fegan's counterargument that enforcing the non-competition agreement would interfere with Fegan's right to act as a player agent under the CBA which would in turn interfere with the authority of the National Basketball Player's Association ("NBPA") to certify, decertify, and otherwise discipline agents to whom it had delegated its exclusive authority to represent players.[27] The Court indicated the fact that ISE's right to enforce its contract with Fegan under state law and its impact

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[17] Teamsters of Am. v. Lucas Flour Co., 369 U.S. 95, 103-104 (1962).
[18] Kobold v. Good Samaritan Reg'l Med. Ctr., 832 F.3d 1024, 1032-33 (9th Cir. 2016).
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] Livadas v. Bradshaw, 512 U.S. 107, 122 (1994) (citing Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 410 (1988); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985)).
[24] Fegan, 2017 WL 2598550, at *5.
[25] *Id.*
[26] *Id.*
[27] *Id.*

on Fegan's ability to perform consistently with the CBA was merely incidental and did not transform ISE's state law claim for breach of the APA into a claim based on the CBA.[28]

In summary, under the first step of the *Kobold* test,[29] a court considers the legal character of the plaintiff's claim to ascertain whether it is founded directly on rights created by the CBA.[30] The nature of ISE's claim is breach of contract, and the contract Fegan allegedly breached was the APA, not the CBA.[31] Therefore, ISE's claim is not preempted under the first step of the *Kobold* test.

In the second *Kobold* step, a court asks whether the right underlying the plaintiff's state law claim is nevertheless substantially dependent on a CBA.[32] A claim is substantially dependent on a CBA where it is "grounded in" a CBA or "requires interpretation of" a CBA.[33] Where the analysis of the claim is substantially dependent on analysis of a CBA, it is preempted.[34]

ISE's claim that Fegan breached the APA's noncompetition clause is not "grounded in" the CBA, nor does it "require interpretation of" the CBA.[35] Therefore, ISE's claim is not substantially dependent on analysis of the CBA and is not preempted under the second step of the *Kobold* test.[36]

Section 301 of the LMRA does not bar a court from issuing an order simply because it may interfere with a player agent's ability to perform under a CBA.[37] Rather, section 301 bars only state law claims that arise out of a CBA or are substantially dependent on the interpretation of a CBA.[38] ISE's claim for breach of the APA is neither grounded in the CBA nor does it require interpretation of the CBA, so the claim is not substantially dependent on an analysis of the CBA. As such, Fegan's preemption claim under section 301 of the LMRA properly failed. The Court subsequently remanded the case to state court.

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[28] *Id.*
[29] Kobold, 832 F.3d at 1032-33.
[30] *Id.* at 6.
[31] *Id.*
[32] Kobold, 832 F.3d at 1032-33.
[33] *Id.* at 1032.
[34] *Id.*
[35] Fegan, 2017 WL 2598550, at *6.
[36] *Id.* at 6-7.
[37] Allis-Chalmers, 471 U.S. at 211.
[38] *Id.*

CONCLUSION

The Court decided the case correctly because Fegan's alleged actions were violations of the APA and not the CBA. Fegan's argument that the noncompetition clause in the APA was grounds for preemption under section 301 of the LMRA had no merit, because there was no a violation of the CBA. The Court correctly applied the two-step test from *Kobold* and was correct in determining that the right ISE sued on did not exist solely as a result of the CBA and that ISE's claim was not substantially dependent on an analysis of the NBA's CBA.

BOOGAARD V. NATIONAL HOCKEY LEAGUE

By: Logan P. Desmond[*] and Leeann M. Lower[**]

ABSTRACT

Former National Hockey League ("NHL") player Derek Boogaard passed away on May 13, 2011 of a drug overdose. On Boogaard's behalf, his parents brought action against the NHL, its Board of Governors, and league Commissioner Gary Bettman, alleging the NHL acted negligently by allowing Boogaard to become addicted to pain killers, breached their voluntarily undertaken duty to monitor his addiction, negligently failed to protect him from brain trauma, and breached their voluntarily undertaken duty to protect his health. In response, the NHL moved to dismiss the case, which was later converted to a motion for summary judgment. Stating preemption by Section 301(a) of the Labor Management Relations Act ("LMRA")[1] and a need to interpret the Collective Bargaining Agreement, the district court granted summary judgement in favor of the NHL.[2]

FACTS OF THE CASE

Players in the NHL are represented by the National Hockey League Players' Association ("NHLPA"). The NHLPA negotiated a Collective Bargaining Agreement ("CBA") with the league in 1996 and again in 2005. The 1996 CBA established a Substance Abuse and Behavioral Health ("SABH") Program that was made available to all players in the league, including Derek Boogaard (the "Plaintiff"). Plaintiff played in the NHL from 2005 to 2011 where his primary job was as an "enforcer." A player assuming this role commonly engages in fights with opposing players during games, a characteristic unique to the sport of hockey. These fights often left Plaintiff with various injuries which team staff subsequently treated with painkillers

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[1] Labor Management Relations (Taft-Harley) Act § 301(a), 29 U.S.C. § 185(a) (2012) provides: Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[2] Boogaard v. Nat'l Hockey League, 126 F.Supp.3d 1010 (N.D. Ill. 2015).

and sleeping pills. Plaintiff eventually became addicted to opioids, a painkiller, and was placed into the SABH Program in 2009. He was subsequently admitted to a rehabilitation facility where he completed the treatment program and was released. Plaintiff then suffered a setback and was admitted to another rehab facility, Authentic Rehabilitation Center ("ARC"). While the therapists at ARC reported to the NHL that Plaintiff did not want to comply with his treatment program, the NHL allowed him to be temporarily released on two occasions. Upon his second release, Plaintiff took Percocet, a painkiller, and was found dead the next morning due to an accidental drug overdose. Posthumous tests revealed that Plaintiff suffered from Chronic Traumatic Encephalopathy ("CTE"), a degenerative brain disease, which most likely occurred from the injuries he sustained from fighting during his hockey career. The CTE caused Plaintiff's brain to deteriorate in areas that controlled behavior, inhibition, impulse control, judgment, and mood. After his death, Plaintiff's parents, on behalf of their son, filed a complaint against the NHL, its Board of Governors, and NHL Commissioner, Gary Bettman (the "Defendants").

COURT ANALYSIS

The complaint was initially filed at the Circuit Court of Cook County, Illinois. Defendants removed the suit to district court as they believed Plaintiff's allegations were preempted by LMRA Section 301. Removal to district court was upheld, as two of the claims were found to be completely preempted by Section 301, upon which Plaintiff filed an amended complaint. In the amended complaint, Plaintiff presented the following eight complaints: Counts I and II alleged negligence by Defendants for allowing Plaintiff to become addicted to opioids and sleeping pills; Counts III and IV claimed Defendants' breached their voluntarily undertaken duty to monitor Plaintiff's drug addiction while he was enrolled in the SABH Program; Counts V and VI alleged negligence by Defendants for breaching their duty to protect Plaintiff's health and protect him from brain injury; and Counts VII and VIII claimed Defendants violated their voluntarily undertaken duty to protect Plaintiff's health by not barring team doctors from injecting him with Toradol, an intramuscular analgesic that may make concussions more likely. Defendants subsequently moved to dismiss the case in its entirety, asserting that Plaintiff's amended complaint was fully preempted by Section 301 of the LMRA. This motion was converted into a request for summary judgement.

The main argument utilized by Defendants was that the LMRA preempted Plaintiff's claims. Section 301 of the LMRA preempts state law claims "founded directly on rights created by collective-bargaining agreements,

and also claims substantially dependent on analysis of a collective-bargaining agreement",[3] as well as those "masquerading as a state-law claim that nevertheless is deemed 'really' to be a claim under labor contract".[4] Therefore, courts must evaluate all claims based on their substance, for which Section 301 preempts any state law claim whose resolution would require interpretation of a CBA. A court has jurisdiction to read a CBA and use this material to justify a ruling only when there is no dispute as to the CBA's meaning.

Counts I and II stated Defendants owed Plaintiff a duty to keep him reasonably safe and to protect him from addiction. Defendants would owe this duty if a special relationship existed under the voluntary custodian-protectee classification. For this classification to exist, Defendants would need to be able to control Plaintiff's behavior and have power over their welfare.[5] Defendants disputed the amount of control they had over Plaintiff's welfare, claiming the CBA did not allow them to control medical treatments, control a player once they had entered rehabilitation under the SABH Program, or change rules to prevent fighting.

Counts III-VIII differed from Counts I and II as they discussed voluntarily assumed duties by Defendants. Specifically, Counts III and IV alleged Defendants voluntarily assumed the duty of monitoring Plaintiff's addiction within the terms of the SABH Program. Defendants claimed that once Plaintiff was checked into the rehabilitation clinic, they no longer bore this duty.

Counts V and VI alleged negligence by Defendants for failing to protect Plaintiff from brain injury and for breaching their duty to protect his health. Plaintiff noted that Defendants had taken steps to make the game safer, such as the establishment of rules banning tripping and high-sticking. However, Plaintiff claimed Defendants should have established a concussion protocol, to monitor players who had concussion-like symptoms, or banned fighting altogether. Conversely, the defendants argued the CBA gave them no power over the specific procedures team doctors used to diagnose concussions and prohibited them from changing the rules of play without first consulting the NHLPA.

Counts VII and VIII claimed the NHL violated their voluntarily undertaken duty to protect Boogaard's health by allowing team doctors to inject him

[3] Caterpillar Inc. v. Williams, 482 U.S. 386, 394 (1987).
[4] Crosby v. Cooper B-Line, 725 F.3d 795, 797 (7th Cir. 2013).
[5] *See* Donaldson v. Young Women's Christian Ass'n of Duluth, 539 N.W.2d 789, 792 (Minn. 1995).

with Toradol. Plaintiff looked to Illinois and Minnesota state tort law that imposed a duty to protect others from harm known as the voluntary undertaking doctrine[6]. Defendants argued the CBA barred them from interfering with medical decisions of players, thus there was no way they could have stopped a team doctor from injecting Plaintiff with Toradol and they had not breached a voluntarily assumed duty.

COURT DECISION

The district court granted summary judgement to Defendants on all counts (I-VIII) of Plaintiff's amended complaint. More specifically, Plaintiff's state law claims were found completely preempted by Section 301 of the LMRA. Regarding Counts I and II, the court would have needed to interpret the CBA to discover the extent of the duty Defendants owed Plaintiff to keep him reasonably safe and away from addiction. While Plaintiff cited similar cases as support that his claims were not preempted, those cases did not require the court to interpret the respective CBAs. Therefore, both counts were preempted by the LMRA. Similarly, counts III and IV were completely preempted by the LMRA, as determining if Defendants had voluntarily assumed the duty of monitoring Plaintiff's addiction would require an interpretation of the CBA. In regard to Counts V and VI, Defendant's interpretation of the CBA led them to believe they had no control over team medical staffs or changing the league rules to ban fighting. As an interpretation of the CBA would have been required to resolve these issues, Counts V and VI were completely preempted as well. Finally, Counts VII and VIII were also found preempted, as an interpretation of the CBA was required to determine if Defendants assumed the duty to protect Plaintiff's health. The district court permitted Plaintiff to file a second amended complaint in which the claims are not all completely preempted by Section 301 of the LMRA.

This particular case is unique as most CBA disagreements first go through an arbitration process rather than federal court. In fact, Article 17 of the 2005 NHL CBA[7] required all interpretation disputes to be decided through arbitration. However, Plaintiff argued throughout the case that Defendants had not presented any actual CBA interpretation disputes. The district court ruled that there was at least general disagreement on the CBA's meaning and, therefore, interpretation would be required. This follows precedent, as

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[6] *See* Walsh v. Pagra Air Taxi, 282 N.W.2d 567, 571 (Minn. 1979).

[7] COLLECTIVE BARGAINING AGREEMENT BETWEEN NAT'L HOCKEY LEAGUE & NAT'L HOCKEY LEAGUE PLAYERS' ASS'N art. 17 (July 22, 2005), *available at* http://www.letsgopens.com/NHL-2005-CBA.pdf.

Wisconsin Central, Ltd. v. Shannon found that only interpretative disagreement leads to preemption.[8]

[8] Wisconsin Central, Ltd. v. Shannon, 539 F.3d 751, 758-60 (7th Cir. 2008).

BALL V. CITY OF LINCOLN, NEBRASKA

By: Sean M. Winebrenner[*] *and Leeann M. Lower*[**]

ABSTRACT

On March 7, 2015, Larry Ball was cited for trespassing by the Lincoln Police Department when passing out religious leaflets outside the Pinnacle Bank Arena. Ball brought action against the City of Lincoln, Nebraska along with Pinnacle Bank/Spectator Management Group ("SMG"), alleging a violation of his First Amendment rights. More specifically, he claimed SMG violated his constitutional rights by denying his exercise of free speech based upon the premise that public property is a nonpublic forum. The District Court was tasked with evaluating Pinnacle Bank Arena's Exterior Access and Use Policy to determine whether Ball's First Amendment rights were violated.

Many questions came into play when evaluating the legal issues of this case. Were Larry Ball's First Amendment rights violated? How are the rights of the individual weighed against the needs of the public? What are considered public and nonpublic areas? What are traditional public forums? Upon consideration of the aforementioned legal issues and the evidence presented, the U.S. District Court for the District of Nebraska denied Ball's motion for injunctive relief.[1]

FACTS OF THE CASE

Pinnacle Bank Arena (the "Arena") is located in the city of Lincoln, Nebraska, hosting athletic, public, recreational, and entertainment events. In October of 2014, SMG (the "Defendants"), operator of the Arena, adopted the Exterior Access and Use Policy (the "Policy"), outlining certain exterior areas as *nonpublic* forum areas reserved for the use of tenants and the artists or productions they authorized. The Policy was created to protect the "Plaza Area" in front of the main doors for use by tenants, and to ensure safety and crowd management. With 12,000 to 15,000 people entering and exiting a facility during events, consistency and efficiency in relation to

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[1] Ball v. City of Lincoln, Nebraska, No. 8:15CV95, 2015 WL 1781817 (U.S. D. Neb. April 15, 2015).

accessibility to patrons was considered important to Defendants. To further reduce crowd management issues and ensure safety, the Policy banned certain types of public communication within defined areas of the Arena perimeters, such as leafleting, merchandise sales, picketing, signature gathering, and promotional material distribution. The Policy was posted on the Arena's website and copies were made available to the public. Therefore, the specific exterior areas designated as nonpublic forums were communicated to citizens, such as Larry Ball (the "Plaintiff").

Plaintiff is a citizen of Lincoln, Nebraska, who expresses his Christian faith by passing out pamphlets with Christian messages. On March 15, 2014, he handed out religious items, directly outside the Arena doors, to individuals attending the boys' state high school basketball tournament. The Arena's staff approached him multiple times, each time asking him to move outside the Plaza Area to the sidewalk. Plaintiff returned later that afternoon and, again, began leafleting in the Plaza Area, albeit in a different location, north of the bollards. SMG staff then contacted the Lincoln Police Department after he refused to move. Lincoln police officers asked Plaintiff to move to the sidewalk outside the Plaza Area, but he again refused to move and was subsequently arrested and ticketed for trespassing and refusing to comply with the officers' directives. Plaintiff challenged the arrest and ticket, claiming a violation of his First Amendment rights, upon which the charges were dismissed.

Approximately one year later, on March 5, 2015, Plaintiff returned to the Arena to hand out more pamphlets. He was aware of the Policy, having received a copy from the Arena's staff. Plaintiff stood in the Plaza Area north of the bollards, approximately 25 feet from an Arena door. The Lincoln Police Department were, again, called and he was, again, ticketed for trespassing, but was not arrested. Two days later, Plaintiff distributed leaflets again on a sidewalk allegedly designated as a public thoroughfare outside the Plaza Area. Once again, he was cited for trespassing, at which time he left the Arena property. He subsequently filed a legal complaint in the U.S. District Court for the District of Nebraska in an attempt to seek injunctive relief and monetary damages for alleged violations of his First Amendment rights.

COURT ANALYSIS

The Supreme Court has outlined three categories of forums regarding free speech: (1) the traditional public forum, (2) the designated public forum, and (3) the nonpublic forum. Traditional public forums are "places which by long tradition or by government fiat have been devoted to assembly and

debate and the rights of the state to limit expressive activity are sharply circumscribed."[2]

Traditional public forums are those that have "immemorially been held in trust for the use of public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." [3] The Supreme Court has recognized sidewalks, streets, and parks as traditional public forums. In these public forums, the government cannot prohibit communicative activity. Alternatively, designated public forums are public property which the State government has unfolded for use by the public as a place for articulating activity and individuals are afforded the same protection provided to traditional public forums. Lastly, nonpublic forums are not specifically designated as open to public expression and individuals possess no protection.

In his complaint, Plaintiff asserted that his First Amendment free speech rights were violated by the Policy enforced by Defendants. He argued that the Arena is a traditional public forum; and, therefore, he has the right to express his freedom of speech at the facility's perimeters. In support of his argument, Plaintiff claimed the Plaza Area has the physical characteristics of a traditional sidewalk. Appearance and location of a walkway are supportive factors in determining whether the walkway is a sidewalk, for purposes of the public forum analysis. For example, in *U.S. v. Grace*,[4] the Supreme Court found the restriction of speech on the public sidewalks surrounding the Supreme Court building unconstitutional, as the sidewalks around the building were indistinguishable from any other sidewalk in Washington D.C. and should not be treated differently.

In response, Defendants argued that the Policy is a reasonable restriction on speech because the Plaza Area is a nonpublic forum. In *Cornelius v. NAACP*,[5] the Supreme Court stated that "nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." Defendants claimed the Policy is designed to reduce disruption that might be caused by activities, such as Plaintiff's, in the Arena's perimeter. As Defendants are state actors, the First Amendment rights of private citizens must be balanced by the government's interest in

[2] Perry Edu. Ass'n. v. Perry Local Educators Ass'n., 460 U.S. 37 (1983).
[3] *Id.*
[4] United States v. Grace, 461 U.S. 171 (1983).
[5] Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985).

the needs of the public. In considering this balancing test, Defendants alleged that Plaintiff's activities within the Arena's perimeters caused safety concerns for the public using the Arena.

In response to Plaintiff's traditional public forum argument, Defendants claimed the markings of the Plaza Area's boundaries are nonpublic and reasonable (see Figure 1). Specifically, Defendants asserted that the sidewalks around the Arena's perimeter have distinctive colors and design and clearly do not match public sidewalks outside the perimeter. The boundary elements identified by Defendants, along the southern edge of the Plaza Area, are notably less distinctive than the landscaping and grassy area that separates the Plaza from the Arena.

COURT DECISION

The primary legal issue examined by the district court was whether or not the Arena's perimeters are considered a public or nonpublic forum and if the sidewalks look, act, and function like a public sidewalk. The court ultimately held that Plaintiff did not demonstrate a violation of his established constitutional rights. More specifically, he failed to demonstrate that the Policy's perimeters around the Pinnacle Bank Arena's entrance is a public forum. Plaintiff also failed to demonstrate that Defendants' Policy restricting certain expressive activity in the Plaza Area is unreasonable.

The district court found that the Arena's perimeters have several physical characteristics common to public forums and may function as a type of public thoroughfare; however, it noted that the use of the Plaza Area as a forum for unlimited public expression was inconsistent with the Plaza Area's traditional use and principle purpose. The city of Lincoln, Nebraska's purpose in establishing the Plaza Area, and the Policy implemented, suggested that the Plaza Area was not intended to be used as a public forum. Accordingly, the district court concluded that Plaintiff was not likely to prevail on his claim that the Plaza Area is a traditional public forum.

Furthermore, the district court found that enforcement of the Policy did not seriously impair Plaintiff's First Amendment rights, as he can equitably reach his target audience in the public sidewalk near his desired location, which preserves the government's interest in public safety. As a result, the district court denied Plaintiff's motions for preliminary injunction and temporary restraining order, instructing him to practice his activities in the future in public areas, across the street from the Arena's perimeters; otherwise, he will be subject to further arrest.

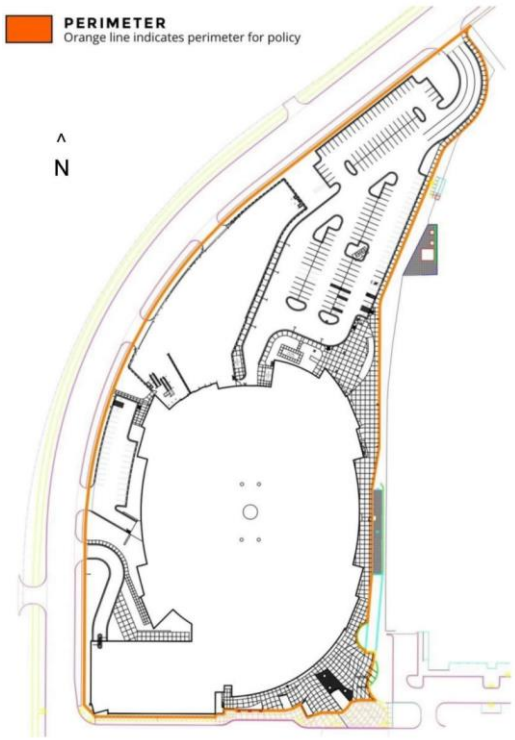

Figure 1. Pinnacle Bank Arena Policy Zone. Non-public forum exterior Arena areas depicted inside the orange line, defined as "areas that extend out to the public sidewalk perimeter and include walkways, steps, verandas, terraces, access ramps, parking lots, loading ramps, the Arena Festival Space/parking lot, and the Arena premium parking garage."

THE FUTURE OF STREAMING MUSIC: THE MUSIC MODERNIZATION ACT AND NEW COPYRIGHT ROYALTIES REGULATIONS

By: Callie P. Borgmann[*]

ABSTRACT

This note details how the Copyright Royalty Board and Congress are seeking to change the music industry. In January of 2018, the Copyright Royalty Board introduced new regulations that outline new procedures for paying songwriters and record labels royalties that derive from streaming services. These regulations will increase royalties from streaming by nearly fifty percent over the next five years and will help to eliminate the disparity between streaming and terrestrial royalty compensation. Additionally, Congress has proposed the Music Modernization Act, which would ultimately create an administrative agency that would handle copyright within the music industry. In the end, these new regulations will influence songwriters, streaming services, and users.

NEW ROYALTY REGULATIONS

On January 26, 2018, the Copyright Royalty Board ("CRB") introduced new regulations relating to royalties paid to songwriters for streaming services.[1] This decision came as a result of a 2017 trial between the National Music Publishers Association ("NMPA") and the Nashville Songwriters Association International ("NSAI") (NMPA and NSAI are collectively the "writers") against various streaming services such as Amazon, Apple, Spotify, and Pandora, as well as pressure from songwriters to increase streaming royalty rates.[2] Over the next five years, songwriter royalty rates for interactive streaming will increase by nearly fifty percent.[3] Prior to implementation of the new regulations, services were only required to pay

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[1] Press Release, Nashville Songwriters Association International, CRB Dramatically Increases Rates for Songwriters NMPA & NSAI Declare Victory (Feb. 12, 2018), https://www.nashvillesongwriters.com/crb-dramatically-increases-rates-songwriters-nmpa-nsai-declare-victory.

[2] *Id.*

[3] Paula Parisi, *Copyright Royalty Board Boosts Songwriters' Streaming Pay Nearly 50%*, VARIETY (Jan. 27, 2018, 11:23 AM) http://variety.com/2018/biz/news/copyright-royalty-board-boosts-songwriters-streaming-pay-nearly-50-1202679118/.

songwriters ten percent of revenue; this will now be raised to fifteen percent in coming years on a progressive scale.[4]

Royalty Year[5]	**2018**	**2019**	**2020**	**2021**	**2022**
% of Revenue	11.4%	12.3%	13.3%	14.2%	15.1%
Percent of Total Content Costs	22.0%	23.1%	24.1%	25.2%	26.2%

Though the streaming services sought to reduce the rates in the 2017 trial, the writers came out victorious despite not receiving a per-stream rate that they had initially hoped to receive.[6] In the past, streaming services had to utilize multiple calculations to determine the amount of royalties owed to songwriters. However, the regulations introduce new, more simplified rate terms.[7] Rates are now based on either total content costs or a percentage of revenue, whichever is greater.[8] Content costs are paid directly to record labels without harsh legal constraints, meaning the writers have some free-market impact. In addition to the new calculations, there are no longer caps and limitations on writer rates, giving more opportunity for benefits.[9] Rates that are paid directly to record labels from streaming services have improved as well.

Going forward, for every $3.82 earned by a streaming company, the songwriter or publisher will receive one dollar.[10] These regulations only include mechanical licenses, a term that originated from rolls cranked through player pianos, and includes albums, CDs, and downloads.[11] Anything that is broadcasted, either analog or digitally, is considered to be "public performance," which have different royalty rates.[12] This is where Pandora differs from Spotify and Apple Music. Pandora's rates are similar to traditional radio stations, because it is not an interactive listening platform, whereas Spotify and Apple Music are interactive by allowing

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[4] Mark Kaufman, *Musicians Must Now be Paid More for Their Streamed Songs – But is This a Big Blow to Spotify?*, MASHABLE (Jan. 31, 2018), https://mashable.com/2018/01/31/copyright-court-rules-streaming-companies-have-to-pay-artists-more/#UzLIpMgjbPq1.

[5] Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III), Docket No. 16-CRB-0003-PR (2018-2022), https://app.crb.gov/case/viewDocument/2288 [hereinafter Public Initial Determination].

[6] Parisi, *supra* note 3.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

listeners to play songs on demand. Non-interactive services are simply able to pay less royalties because they lack the on-demand nature that some streaming services provide.[13]

Subscription costs are likely to increase in the future, but not due to increased streaming royalty rates. Subscription costs may increase due to additional content; however, it is not likely subscription costs will increase immediately, but rather over the course of the next five years.[14] It is possible that streaming services such as Apple Music and Spotify may already be paying above the rates set forth in the regulations due to agreements with record labels.[15] Streaming services may already intend on increasing their subscription prices as they add additional content, such as podcasts and videos, regardless of the new regulations. Though the additional content could come at a higher price, it could provide users a more interactive listening process that is reminiscent of visiting record stores.[16]

IMPACT OF NEW REGULATIONS

While the new streaming royalties are considered a win for songwriters and singers alike, the new regulations may have a negative impact on some individual streaming services. Large streaming services, such as Apple, may feel less impact in their bottom line numbers by being required to pay out more to individual songwriters.[17] However, the implications of these new rates may have a greater impact on Spotify, a smaller streaming service, as it seeks to become profitable in its first year as a publicly traded corporation.[18] A large part of streaming income is driven by the number of people who subscribe to the streaming services. As of October 2017, Spotify had 18.2 million paid subscribers in the United States alone, while Apple Music had approximately fifteen million in the United States.[19]

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[13] Erin Jacobson, *How Spotify Has Waged War with the Music Industry*, FORBES (Sept. 22, 2017, 8:35 PM), https://www.forbes.com/sites/legalentertainment/2017/09/22/how-spotify-has-waged-war-with-the-music-industry/#470fe0c856d5.
[14] Kaufman, *supra* note 4.
[15] *Id.*
[16] *See generally id.*
[17] Parisi, *supra* note 3.
[18] *Id.*; *see generally* Zack O'Malley Greenburg, *Spotify Goes Public at $30 Billion; When Will Artists See Any of That?*, FORBES (Apr. 3, 2018, 2:01 PM), https://www.forbes.com/sites/zackomalleygreenburg/2018/04/03/spotify-ipo-goes-public-at-30-billion-when-will-artists-see-any-of-that/.
[19] Ed Christman, *Apple Music, Spotify Battle Heats Up Again as Race for US Subscribers Gets Closer*, BILLBOARD (Feb. 5, 2018), https://www.billboard.com/articles/business/8098161/apple-music-spotify-streaming-wars-subscribers-advantage.

Apple has continued to add subscribers in the United States at a faster rate than Spotify, which provides speculation about the strength of Spotify's earning power.[20] However, Spotify has more subscribers worldwide, and it seems likely Spotify will utilize their overall subscription growth to show their strength as a corporation.[21]

Currently, Spotify pays an average of $0.00397 per stream, or $3.97 per 1,000 streams.[22] This rate gives Spotify a competitive advantage over Apple, who pays $7.83 per 1,000 streams, or $0.00783 per stream.[23] This merely shows that Spotify users listen to more music than Apple subscribers, not that Spotify is necessarily more successful.[24]

An increase in streaming rates is incredibly important for songwriters and publishers alike. In 2013, Rodney Jerkins, producer of "As Long As You Love Me" by Justin Bieber, exposed the discrepancies between streaming rates and public performances.[25] Though the song earned songwriter Andre Lindall $146,000 in royalties, Jerkins revealed just how little streaming royalties contributed to that number; thirty-eight million streams on Pandora generated a mere $278 and thirty-four million YouTube streams generated only $218.[26] According to UC Irvine Media Studies Professor Peter Krapp, for a songwriter to make minimum wage in the state of California, their songs would need to receive four million streams per month.[27]

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[20] *See id.*

[21] Michelle Castillo, *Music Streaming Service Spotify Files to Go Public, Lost $1.5 Billion Last Year*, CNBC (last updated Mar. 5, 2018, 9:21 AM) https://www.cnbc.com/2018/02/28/spotify-files-for-ipo.html.

[22] Daniel Sanchez, *What Streaming Music Services Pay (Updated for 2018)*, DIGITAL MUSIC NEWS (Jan. 16, 2018), https://www.digitalmusicnews.com/2018/01/16/streaming-music-services-pay-2018/.

[23] *Id.*

[24] *See* Kabir Sehgal, *Spotify and Apple Music Should Become Record Labels So Musicians Can Make a Fair Living*, CNBC (last updated Jan. 26, 2018, 11:04 AM) https://www.cnbc.com/2018/01/26/how-spotify-apple-music-can-pay-musicians-more-commentary.html. (stating that Spotify is still losing money, despite growing forty percent a year).

[25] Kai Miller, *Rodney Jerkins Reveals the Ugly Truth About Royalties After Writing a Hit for Justin Bieber*, BET (Oct. 6, 2017) https://www.bet.com/music/2017/10/06/rodney-jerkins-justin-bieber-royalities.html.

[26] *Id.*

[27] Kaufman, *supra* note 4.

MUSIC MODERNIZATION ACT

In addition to changes through the CRB's new regulations, Congress has begun working on an act that could permanently change the face of the music industry and royalties. In late 2017, Congress introduced H.R. 4706, also known as the Music Modernization Act ("MMA"), with the intention to "amend title 17, United States Code, to provide clarity and modernize the licensing system for musical works under section 115 and to ensure fairness in the establishment of certain rates and fees under sections 114 and 115."[28] This act was passed unanimously by the House of Representatives on April 25, 2018, but still must past the Senate.[29] This act would provide for an administrative agency that would issue licenses to digital streaming services, and collect and distribute royalties to rights holders. This is different than current policies in place, where services are required to identify each rights holder and issue payment directly.[30] The MMA will help to regulate policies within the music industry and update copyright laws that have not been updated since 1976.

Another issue songwriters face frequently is that royalty payments are untimely. This act would seek to cure that problem with the new late fee provision of the CRB's regulations.[31] Currently, 17 U.S.C. § 115 does not outline any late fees regarding royalty payments;[32] however, the CRB's new regulations impose fines on streaming services that fail to compensate songwriters in a timely fashion. The new regulations outline the fines for streaming services that fail to compensate songwriters in a timely fashion as a late fee of 1.5% or the highest lawful rate, whichever is lower, for any payment that is received after the due date.[33]

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[28] Music Modernization Act of 2017, H.R. 4706, 115th Cong. (as passed by H.R., Apr. 25, 2018); *see also* Micah Singleton, *Congress May Actually Fix Music Royalties*, VERGE (Jan. 26, 2018 10:36 AM), https://www.theverge.com/2018/1/26/16931966/congress-music-modernization-act-licensing-royalties.

[29] Paula Parisi, *Music Modernization Act Unanimously Passes House of Representatives*, VARIETY (Apr. 25, 2018, 1:57 PM), http://variety.com/2018/biz/news/music-modernization-act-unanimously-passes-house-of-representatives-1202787045/.

[30] *See generally* Singleton, *supra* note 28.

[31] *Id.*

[32] 17 U.S.C. § 115 (2018).

[33] 37 C.F.R. § 385.4.

CONCLUSION

Ultimately, the new regulations set in place by the CRB change the face of streaming. For songwriters, these changes will impact their earning power. Increased penalty enforcement will also help to decrease the amount of late payments made by streaming companies. If the MMA is enacted, songwriters and streaming services will be regulated more closely. However, until Congress enacts the MMA, songwriters may need to continue to fight for higher compensation and more stringent regulation. Streaming services will have an uphill battle in maintaining their bottom line as well as preserving and improving their relationships with artists.

DOMESTIC VIOLENCE & MEN'S PROFESSIONAL SPORTS: ADVANCING THE BALL

By: Chelsea Augelli & Tamara L. Kuennen[*]

ABSTRACT

This article examines how men's professional sports leagues treat domestic violence committed by players. Over the past twenty years, but particularly over the last five, the public has criticized, and the media has shone a spotlight on, the big leagues' ignoring of the issue. Many call for parity between how the criminal justice system treats the issue of domestic violence and how the leagues should treat it, arguing for a zero-tolerance approach. This article applies lessons learned by feminist law and policy makers and legal scholars in the development of the larger justice system response to domestic violence to the nascent development of the same in men's professional sports. It uncovers the unintended consequences of a zero-tolerance approach that over-relies upon punitive sanctions. These consequences include the loss of victim voice and autonomy, the erosion of due process for alleged perpetrators, and the limiting of our understanding of the intersectionality of race, class, and gender identity that individually and institutionally contribute to the norm of domestic violence, to name but a few. Applying masculinities theory, the article argues for tempered measures to decrease players' perpetration of domestic violence and for resources deployed to a cultural shift in attitude about masculinity, women, and intimate relationships.

The article proceeds in five parts. After a brief introduction in Part I, Part II demonstrates why society generally and feminist law and policy makers particularly should care about how men's professional sport treats the issue of domestic violence, by documenting the ubiquity of men's professional sports and consequent viewing of athletes as role models, particularly by youth. Part III describes each of the four big league's historic treatment of domestic violence committed by players and traces the development of policies (or lack thereof) to address the issue. Part IV identifies the unintended consequences of the development of criminal and civil justice law and policy addressing domestic violence in the United States over the past fifty years and applies lessons learned, from a feminist legal perspective, to leagues' policies. It concludes that on balance, the Major League Baseball and National Basketball League are headed in the right

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direction. Its policies simultaneously have teeth while providing the most due process and individually tailored treatment of perpetrators. In Part V, however, the article argues that to address most meaningfully the issue of domestic violence the leagues should proactively take steps, even if baby steps, to foster a cultural downshift in hypermasculine norms that underlie the use of violence against women. Such significant change cannot happen overnight. Hence the title of this article. The goal is not the immediate slam dunk, but rather to advance the ball down the field, deliberately, incrementally and patiently.

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I. INTRODUCTION

Many legal and sports commentators writing about how to effectively address the problem of domestic violence in sports – particularly in the NFL, NBA, MLB and NHL[1] – argue that the arrest, prosecution and conviction rates of athletes should be on par with those in the general population.[2] They rightfully criticize the gross disparity. In the four leagues combined, between January 1, 2010 and December 31, 2014 (five years) only one of sixty-four reported allegations of domestic violence or sexual assault resulted in a conviction.[3] Interestingly, after 2014, when three of the four leagues significantly changed or added a domestic violence policy,[4] there is no single source of compiled data that documents these same statistics spanning across all four leagues.[5]

The criticism of this disparity is not a new one; on the contrary, it harkens back to the start of the Battered Women's Movement. In the 1970s, before

[1] Known as the "big four," these are the National Football League, National Basketball Association, Major League Baseball, and National Hockey League, respectively.

[2] Bethany P. Withers, *Without Consequence: When Professional Athletes Are Violent Off the Field*, 6 HARV. J. SPORTS & ENT. L. 373, 377 (2015); Nicole K. Repetto, *Domestic Violence, Sexual Assault, and Elite Athletes: Analyzing Arrest and Conviction Rates*, Senior Honors Theses 485, *available at* http://commons.emich.edu/cgi/viewcontent.cgi?article=1483&context=honors (arguing that elite athletes are not convicted at the same rate as the general population because of their elite status). *See, e.g.*, Joshua S.E. Lee & Jamie K. McFarlin, *Sports Scandals from the Top-Down: Comparative Analysis of Management, Owner and Athletic Discipline in the NFL & NBA*, 23 JEFFREY S. MOORAD SPORTS L.J. 69 (2016).

[3] JEFF BENEDICT, PUBLIC HEROES, PRIVATE FELONS: ATHLETES AND CRIMES AGAINST WOMEN 80 (1999) (describing how professional athletes "enjoy a significantly lower likelihood of being convicted" and noting that 85% of the athletes tried before a jury for felonious sexual assault between 1986 and 1995 were acquitted whereas nationally more than half of arrests for rape result in a conviction); Repetto, *supra* note 2; *see also* Withers, *supra* note 2, at 377 and note 22 (comparing rates of prosecution of athletes (25%) with those in the general population (63.8%)).

[4] Documenting changes in arrest and conviction rates is the subject of a future article.

[5] Due to the sensitive nature of domestic violence cases, accurate arrest and case disposition reporting is extremely difficult to track, aside from what is contained in the media. There are two databases, USA Today NFL Arrest Database and ArrestNation.com, that keep track of athlete arrests; however, these databases provide very basic and somewhat incomplete information spanning across all leagues.

"domestic violence"[6] as a legal or social concept existed, battered women's activists who sought to reform the government's disregard of violence against women when perpetrated by a spouse or partner (versus a stranger) urged the government to arrest, prosecute and convict domestic violence at the same rate as stranger violence.[7] By so doing, they argued, the government would show that it takes domestic violence seriously.

Viewed in hindsight from a feminist legal perspective, a number of unintended, negative consequences appear to have flowed from battered women's activists' early call for parity in the criminal justice system. As just one example,[8] pro-arrest policies resulted in not merely more arrests of perpetrators, but in significantly more "dual arrests" (both parties being arrested) at the scene of domestic disputes, causing a disproportionate increase in women's and victims' arrests when compared with perpetrators'.[9] As a result of counter-intuitive, unintended consequences such as this one, feminist legal scholars have argued that over-reliance on the criminal justice system has been a mistake, and to more effectively

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[6] Or "intimate partner violence" as it is often called and as we mean in this article, which discerns between violence amongst family members generally (and including intimate partners) versus between intimate partners only. We prefer the term "intimate partner violence" but because none of the leagues use this term, instead using "domestic violence," we follow suit here, and discuss this problem of definition in part IV *infra*. We acknowledge but do not explore in this article the rich scholarly debate over defining and labeling the problem of violence against women. For a recent example of this debate, *see* Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 165 (2016) (arguing that "violence against women" should be reframed as "gender violence"); Julie Goldscheid, *Gender Neutrality, the "Violence Against Women" Frame, and Transformative Reform*, 82 UMKC L. REV. 623 (2014). For a historical overview of the empirical problem of defining the problem, *see* EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 84-86 (Oxford University Press 2007).

[7] *See* LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 9-28 (2012) (a thorough discussion of the arguments made by activists in the 1970s).

[8] The article will explore a number of such unintended consequences, in addition to this example.

[9] *See* L. Kevin Hamberger, *Female Offenders in Domestic Violence: A Look at Actions in Their Contexts*, 1 J. OF AGGRESSION, MALTREATMENT & TRAUMA 117 (1997). In another criminal justice context – that of prosecution, rather than arrest – "no-drop prosecution of DV" policies have had the unintended consequence of diminishing women's calls to the police for help for fear that, if they change their minds about supporting the prosecution they will be held in contempt for not showing up at trial or if they do show up, being charged with perjury if they recant. *See* Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 FORDHAM L. REV. 837 (2013).

prevent and redress domestic violence, alternative remedies must be sought.[10]

Men's professional sports leagues are trying to do just this. While in the past "the sports industry has in effect embraced those men who demonstrate a disdain for women through repeated acts of criminal violence,"[11] three of the four big leagues now have adopted anti-domestic violence policies.[12] These employment policies are the kinds of alternative remedies legal feminists have urged. While the call for parity of prosecution rates is understandable, nuanced employment policies that provide significant procedural due process and individualized assessment, punishment and treatment of perpetrators would more effectively advance the ball in the right direction.

More importantly, this article asks: why replicate an ineffective response? Domestic violence has not decreased because of a tough-on-crime approach to the problem. One of the greatest lessons taught by feminist legal theorists is that the criminal justice system replicates the very norms it seeks to eradicate: male dominance and violence. Rather than focusing on punishment after the fact, men's professional sports would do better by meaningfully changing institutional culture to prevent domestic violence to begin with. Not only should men's professional sports care about what feminist legal scholars have to say, feminist legal scholars should care about how the sports industry acts. Many consider professional athletes to be role models, if not heroes. Given the worldwide platform on which these athletes perform, a cultural shift could have a ripple effect. Imagine a world in which men and boys watched their role models take gender equality in relationships seriously and saw an institutional culture that fostered this value with humanity and dignity rather than punishment and shame.

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[10] GOODMARK, *supra* note 7, at 21-22 (describing the history of the Violence Against Women Act and development of pro-arrest and prosecution policies in domestic violence and arguing that the "intense focus on the criminal justice system crossed out other potential strategies for addressing domestic violence. Invoking the power of the criminal justice system should have been one strategy, not the lone strategy, for combating abuse…").

[11] BENEDICT, *supra* note 3, at 26.

[12] Michael McCann, *Biggest Takeaways: The NBA's New CBA Deal*, SPORTS ILLUSTRATED, https://www.si.com/nba/2016/12/15/nba-cba-details-takeaways-adam-silver-michele-roberts (Dec. 15, 2016); Paul Hagen, *MLB, MLBPA Reveal Domestic Violence Policy*, MLB.COM (Aug. 21, 2015), http://m.mlb.com/news/article/144508842/mlb-mlbpa-agree-on-domestic-violence-policy; *NFL Owners Endorse New Personal Conduct Policy*, NFL (Dec. 10, 2014), http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy (Dec. 10, 2014). The NHL does not have a policy addressing domestic violence, which will be discussed *infra* section III.

The argument proceeds as follows. Part II documents why society, professional sports leagues, and legal feminists in particular, should care about how professional sports associations treat domestic violence. Part III carefully traces the leagues' treatment of domestic violence by providing an overview of its employment policies. Part IV applies the lessons learned in the broader development of anti-domestic violence law and policy in the U.S., focusing somewhat on MLB, which has taken many promising steps from which other leagues could learn. None of the leagues, however, have forged a path toward meaningfully changing players' or fans' perceptions of domestic violence. Part V argues that if the leagues took the problem of domestic violence seriously, they would be engaged in a cultural shift within their organizations to delegitimize domestic violence as a social norm.

II. WHY WE SHOULD CARE ABOUT HOW PROFESSIONAL SPORTS ASSOCIATIONS TREAT DOMESTIC VIOLENCE

Society, and legal feminists in particular, should care about domestic violence in professional sports given the ubiquity of live sports and the glorification of professional athletes. These men are considered heroes in the public eye and are seen as a "symbol of what so many boys desire to become."[13] Not only does their conduct matter, but how professional sports associations treat their conduct matters.

A. Ubiquity of Live Sports

Sixty-nine percent of Americans talk about, read about, or watch sports every day, and eighty-nine percent do so once per week.[14] A 2007 report concluded that "not only does a very significant portion of the population make a serious emotional commitment to sports (through participation and spectatorship), but that this unbridled enthusiasm cuts across age, race, gender, and income and education levels."[15] "A more recent study of over 1000 college students found similar results, with approximately seventy percent of participants reporting that they watched sports on television and discussed sports with others at least weekly."[16]

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[13] BENEDICT, *supra* note 3, at 3.
[14] Traci A. Guiliano et al., *Gender and the Selection of Public Athletic Role Models*, 30 J. SPORT BEHAVIOR 161, 162 (2007) (citations omitted) (citing Miller Brewing Company, The Miller Lite report on American attitudes toward sports (1983)).
[15] *Id.*
[16] *Id.* (citations omitted).

However, a 2015 survey conducted on behalf of the SportsBusiness Journal found one-third of people who responded stated that they are watching less sports than one year ago, and fifteen percent stated they have "cut the cord" and walked away from traditional cable service the past year.[17] Many millennials[18] have changed the viewership of sports and specifically on cable networks.[19] In a 2017 online survey by McKinsey&Company, forty-five percent of Generation Xers consider themselves committed sports fans, in comparison to thirty-eight percent of millennials.[20] Millennials are watching live games nearly as often as Generation Xers (3.2 games per week and 3.4 games per week, respectively); however, fifty-six percent of millennials are streaming sports in comparison to twenty-nine percent of Generation Xers.[21]

Sports teams, leagues and networks will need to maximize their audience through not only traditional television, but also through online and streaming.[22] What must be kept in mind though is the larger picture. Although viewership is down, it has gone from massive to slightly less than massive.

Although women have historically been less likely than men to be the most avid fans, evidence shows that the gender gap in sports viewership is beginning to narrow. Females comprise thirty-five percent of the "regular season TV audience" for the NFL, thirty-percent for the NBA, thirty-percent for the MLB, and thirty-two percent for the NHL.[23]

Due to the expansion of cable packages, competition from increased use of streaming devices and digital video recording, and the omnipresence of

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[17] Rick Maese, *Sports Viewership is Changing, but the Costs and Benefits to Fans Remain Murky*, WASH. POST (Dec. 14, 2016), https://www.washingtonpost.com/sports/sports-viewership-is-changing-but-the-costs-and-benefits-to-fans-remain-murky/2016/12/14/9b794fc6-c090-11e6-897f-918837dae0ae_story.html?utm_term=.05a8bc3e5ba3.

[18] Millennials are classified as people born between 1980 to 1996 and Generation Xers are classified as people born between 1965 and 1979, *see* note 16.

[19] Dan Singer, *We are Wrong About Millennial Sports Fans*, MCKINSEY&COMPANY (Oct. 2017), https://www.mckinsey.com/industries/media-and-entertainment/our-insights/we-are-wrong-about-millennial-sports-fans.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Kristi Dosh, *The Evolution in Marketing to Female Sports Fans*, FORBES, (Feb. 22, 2016), https://www.forbes.com/sites/kristidosh/2016/02/22/the-evolution-of-marketing-to-female-sports-fans/#2681f9587fc3 (citing "Ads & The Female Fan Base infographic" created by MBA@UNC).

smartphones, ratings across television have fallen in the past decade.[24] Until recently, live sports were immune to this trend, but some leagues have now suffered the same decline in ratings.[25] There are various theories, aside from the changing world of TV, for reduced ratings in live sports. The NFL, which has the highest viewership amongst professional sports leagues, experienced a 9.7% decline in viewership during the 2017 season alone.[26] Some speculate that the decline in NFL viewership is due to a number of issues such as players kneeling during the National Anthem in protest of police brutality, concerns about player concussions and brain damage, and how the NFL has handled incidents of domestic violence.[27]

In contrast, the NBA started the 2017-2018 season off with an eighteen percent increase in viewership from the prior season, which some commentators attribute to the NBA's focus on the game itself, rather than the league's drama.[28] The MLB's national viewership has maintained steady and increased by ten percent for Sunday Night Baseball, but viewership has decreased at the local level in certain areas based on how well the local team is doing.[29] The NHL's TV and digital viewership on NBC/NBCSN was up seven percent from the 2015-2016 season because of

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[24] Kevin Draper, *Reading Something in the NFL Ratings? You're Probably Wrong*, N.Y. TIMES (Sept. 25, 2017), https://www.nytimes.com/2017/09/25/sports/football/nfl-ratings-trump.html.

[25] Frank Pallotta, *Yes, the NFL's TV Ratings Are Down, but so is the Rest of Network Television*, CNN (Oct. 26, 2017), http://money.cnn.com/2017/10/26/media/nfl-ratings-tv-networks/index.html.

[26] Darren Rovell, *NFL Television Ratings Down 9.7 Percent During 2017 Regular Season*, ESPN (Jan. 4, 2018), http://www.espn.com/nfl/story/_/id/21960086/nfl-television-ratings-97-percent-2017-regular-season.

[27] James Doubek, *Knees, Domestic Violence and CTE: Why You Stopped Watching* Football, NPR (Feb. 4, 2018), https://www.npr.org/2018/02/04/583093472/knees-domestic-violence-and-cte-why-you-stopped-watching-football ([Listener Annie Callahan told NPR] "After it came out about abuse of their spouses or girlfriends, I actually refuse to watch the NFL anymore because I really don't think they take the safety of women seriously.").

[28] Richard Morgan, *NBA Enjoying Ratings Surge While NFL Flounders*, N.Y. POST (Dec. 21, 2017), https://nypost.com/2017/12/21/nba-enjoys-ratings-renaissance-as-nfl-flounders ("[The NFL's] story lines these days encompass a panoramic sweep of protest rights, brain-damage risks, squabbling owners, media oversaturation, even subpar play.").

[29] Ben Cafardo, *ESPN's Sunday Night Baseball Ratings Up Double-Digits in* 2017, ESPN (Sept. 27, 2017), https://espnmediazone.com/us/press-releases/2017/09/espns-sunday-night-baseball-ratings-double-digits-2017. *See also* Derek Helling, *MLB TV Ratings for National Broadcasts Up, But Local TV Uneven*, FANSIDED (June 2017), https://fansided.com/2017/06/01/mlb-tv-ratings-national-broadcasts-local-tv-uneven/.

a record increase in streaming; however, the NHL saw a significant drop in exclusive TV cable viewership.[30]

The NFL's decline in viewership must not be analyzed in a vacuum. In 2011, the NFL signed record-setting television broadcasting deals with three major networks who collectively paid twenty-eight billion to broadcast the games from post-season in 2013 through 2022.[31] Similarly:

> Major League Baseball's national television landscape is set through 2021. MLB [on October 2, 2012] announced an eight-year national media rights agreement [sic] with FOX and TBS, and combined with the recently announced ESPN deal, the three contracts will deliver a combined $12.4 billion – more than a 100-hundred percent increase in annual rights fees to MLB over the current arrangements.[32]

In the NBA, ESPN and Turner will together pay around two billion dollars – six-hundred thousand annually beginning in the 2016–17 season and lasting through the 2024-2025 season – representing "a one-hundred and eighty percent increase in the amount of money flowing into the league's coffers. By comparison, when the nine hundred and thirty million dollar deal was signed in 2007, it represented only a twenty-one percent increase from the previous one."[33] In 2011 the NHL reached a ten-year television and media rights deal with NBC Sports Group through the 2020-21 season for around two hundred million dollars annually, in addition to the existing exclusive network deal with NBC and Versus.[34]

Although there are no conclusive determinations for these trends, it is important to note that the media coverage surrounding off-the-court conduct by players may play some part in this, and the ubiquity of live sports may see varied trends based on each league's handling of these

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[30] Austin Karp, *NHL Regular-Season Viewership Sees Sharp Drop on TV, but Streaming Sets New Record*, SPORTS BUS. DAILY (Apr. 14, 2017), https://www.sportsbusinessdaily.com/Daily/Issues/2017/04/14/Media/NHL-audience.aspx.

[31] Joe Flint, *NFL Signs TV Rights Deals with Fox, NBC and CBS*, L.A. TIMES (Dec. 15, 2011), http://articles.latimes.com/2011/dec/15/business/la-fi-ct-nfl-deals-20111215.

[32] MANIACDESPORTS, http://maniacdesports.com/2017/12/22/le-nerf-de-la-guerre-pour-les-sports-majeurs-est-certainement-la-tele/ (last visited Apr. 24, 2018).

[33] Kevin Draper, *What the NBA's Insane New TV Deal Means for the League and For You*, DEADSPIN (Oct. 6, 2014), http://deadspin.com/what-the-nbas-insane-new-tv-deal-means-for-the-league-a-1642926274.

[34] Bob Condor, *NHL, NBC Sign Record-Setting 10-year TV Deal*, NHL (Apr. 19, 2011), https://www.nhl.com/news/nhl-nbc-sign-record-setting-10-year-tv-deal/c-560238.

issues. Many fans cite the importance of these issues in determining whether to watch because they, or their children, understand athletes to be role models.

B. Athletes as Role Models

For years, data has shown that athletes are role models. A large study in 1983 found seventy-five percent of Americans polled believe that athletes are good role models for children, and fifty-nine percent felt that athletes are often the *best* role models a child can have.[35] Children and adolescents (especially males) seem to agree, as numerous studies show that famous athletes are either at or near the top of lists of people that they most admire or want to be like.[36] For this reason, athletes find themselves subject to increased scrutiny because of their status and their visibility.[37]

Athletes are not merely role models, but "heroes" to some. This is at a time when the existence of heroes in society has, for decades, undergone considerable scholarly debate.

> Heroes provide active displays of prominent human characteristics and social relationships. Whether personal acquaintances or distant famous figures, they are socially constructed symbols . . . . They are thought to help define individual and collective identity, compensate for qualities perceived to be missing in individuals or society, display ideal behaviors that people strive to emulate, and provide avenues for temporary escape from the rigors of daily life.[38]

"Youths choose more athletes as heroes than adults do. If we are interested in conceptualizations of athletic heroes in American society, then it makes sense to focus on children and adolescents because of the relatively heavy emphasis they place on such individuals."[39] Many scholars refer to "sports heroes" when discussing well-known athletes that are admired by people; however, the "public athletic role model" is one who potentially influences the attitudes, behaviors and values of individuals who admire them from the

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[35] Guiliano, *supra* note 14, at 163-64.
[36] *Id.* at 164.
[37] Kenon A. Brown et al., *Tried in the Courts of Public Opinion: Effects of Involvement in Criminal Transgressions on Athlete Image*, COMMUNICATION & SPORT, published March 6, 2017, *available at* http://journals.sagepub.com/doi/pdf/10.1177/2167479517697426.
[38] JANET C. HARRIS, ATHLETES AND THE AMERICAN HERO DILEMMA 1 (Human Kinetics Publishers 1994).
[39] *Id.* at 24.

vision of a culturally agreed upon hero who is often held to a higher standard.[40] The dynamic between these two different classifications of athletes as role models has been the subject of debate for many years not only by academics, but by society as well. The "sports hero" takes on the role of admiration for his or her individualistic talent, unique abilities and embodiment of what it means to be a successful athlete.[41] The "public athletic role model" takes on the role that society historically has grown to give athletes by not only admiring their talent and success, but by using their platform as an athlete to influence others.[42]

Athletes in the 1960s and 1970s used their platform as an athlete and public figure to stand up for social injustice and advocate for social change.[43] Namely, athletes such as Jackie Robinson, Muhammad Ali, Billie Jean King, Tommie Smith, and John Carlos took this opportunity with grace, and surely had a substantial influence after using their platform in this way.[44] Now, with the ways in which technology has expanded viewership, athletes have the ability to send a worldwide message through a single gesture. Take for example former San Francisco 49ers quarterback Colin Kaepernick's silent gesture of kneeling for the national anthem before an NFL game as protest against social justice and police brutality.[45] This not only stirred controversy amongst NFL fans, but caught the immediate attention of President Donald Trump. President Trump condemned NFL players kneeling during the national anthem on Twitter, tweeting over twelve sports-related tweets in a thirty-six-hour period condemning both players for protesting and the NFL for allowing players to protest.[46]

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[40] Guiliano, *supra* note 14, at 161, 163-164.
[41] *Id.* at 163.
[42] *Id.*
[43] Travis Waldron, *Where Did All the Activist Athletes Go?*, THINKPROGRESS (Jan. 7, 2014), https://thinkprogress.org/where-did-all-the-activist-athletes-go-be6e62592e9e/ (stating that "…athletes are, obviously, human beings with opinions and causes and issues they care about, and unlike many "ordinary" people, they stand on a platform that gives them major influence in American culture.").
[44] *Id.*
[45] John Branch, *The Awakening of Colin Kaepernick*, N.Y. TIMES (Sept. 7, 2017), https://www.nytimes.com/2017/09/07/sports/colin-kaepernick-nfl-protests.html; *see also* Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 25, 2017 @ 5:39 AM), https://twitter.com/realdonaldtrump/status/912280282224525312?lang=en; (Nov. 28, 2017 @ 5:45 AM) https://twitter.com/realdonaldtrump/status/935489831005810688?lang=en.
[46] Hoffman, Mather & Fortin, *After Trump Blasts NFL, Players Kneel and Lock Arms in Solidarity*, N.Y. TIMES (Sept. 24, 2017), https://www.nytimes.com/2017/09/24/sports/nfl-trump-anthem-protests.html.

When viewership is considered along with the development of social media platforms such as Facebook, Instagram, and Twitter, athletes' capacity to influence can occur with one single post. For example, Lebron James posted a photograph of a sign on Instagram that says "I Am More Than an Athlete" with the caption "#wewillnotshutupanddribble" in response to Fox News host Laura Ingraham's criticism of athletes' comments on social issues.[47]

Athletes have come to share a specific role in our society, and whether that is of the "sports hero" or "public athletic role model," that role is an important piece to the way in which young children look toward professional athletes' off-the-court conduct, in comparison to just their athletic performance.

C. Should Professional Athletes be Role Models?

Although there is not much debate about whether professional athletes *are* role models, there is considerable debate about whether they *should be*. Today's athletes are in the public eye more than ever, and as they have continued to gain celebrity status through increased media attention, their status in the eyes of young children has increased substantially.[48] Athletes endorse many products and popular brands which consumers equate with celebrity image and the companies they represent.[49]

Not only are athletes subject to these expectations simply by becoming a professional athlete, but they are always in the spotlight, regardless of whether they want to be or not. The ways in which young children have access to their favorite athlete now, compared to the times of Billie Jean King or Muhammed Ali, is strikingly different. Their every move is subject to being posted on YouTube. Given this type of media exposure, their role cannot be reduced to simply playing sports and winning games.

The same exposure applies to every celebrity, but there is something unique about athletes compared to their celebrity counterparts. Society expects that

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[47] Greg Beacham, *LeBron James Says He 'Will Definitely Not Shut Up and Dribble,'* ASSOCIATED PRESS (Feb. 17, 2018), http://www.nba.com/article/2018/02/17/lebron-james-says-he-will-definitely-not-shut-and-dribble. *See also* LeBron James (@kingjames) INSTAGRAM, (Feb. 16, 2018), https://www.instagram.com/p/BfSIOu_BMHF/?taken-by=kingjames.

[48] Brown, *supra* note 37, at 3, 5; *see also* BARRY SMART, THE SPORT STAR: MODERN SPORT AND THE CULTURE ECONOMY OF SPORTING CELEBRITY (2005).

[49] Kenon Brown, *Is Apology the Best Policy? An Experimental Examination of the Effectiveness of Image Repair Strategies during Criminal and Non-Criminal Athlete Transgressions*, COMMUNICATION & SPORT 4, 23-42 (2016), *available at* http://journals.sagepub.com/doi/abs/10.1177/2167479514544950.

athletes will perform, win games, and also manage to never make mistakes; the same cannot be said for musicians or actors. In some ways society excuses, or understands, the behavior of a celebrity like Miley Cyrus or Justin Bieber, but society does not make the same excuses for professional athletes. Professional athletes have a different type of talent that society holds a closer personal connection to and investment with, given the nature of sports. As a result, sports ethicists see a troubling quagmire with the standards society continues to hold athletes to.[50] On one hand, they are expected to perform, win games and provide entertainment. On the other hand, athletes are human and are capable of making mistakes that society judges them much more harshly for, compared to other types of role models. The quagmire is that there is no middle ground between these two worlds and athletes are now subject to an inescapable role they must play in society. In some circumstances, certain actions and behaviors by athletes are more forgivable than others, such as losing their temper on the field or making a bad play, versus a news report that they were involved in a bar fight.[51]

Scholars have noted as much. As stated by philosopher Randolph Feezell:

> We should distinguish between being a role model in a descriptive sense and being a role model in a normative sense. A role model in a descriptive sense is one whose conduct (or life) is actually the object of imitation or is at least believed to be worthy of imitation. A role model in a normative sense is one whose conduct or life is worthy of being imitated or worthy of being some kind of exemplar.[52]

Feezell argues that professional athletes should be considered role models but only within the world of the sport that they play.[53] If one aspires to be an outstanding baseball player, for example, one should consider Barry Bonds to be a role model. What Barry Bonds did or did not do off the field should not affect his status as a role model on the field.[54] Great ball players can be role models regardless of whether they are racists, homophobes or "wife abusers."[55]

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[50] Shawn E. Klein, *An Argument against Athletes as Political Role Models*, 10 FAIR PLAY 25 (2017).
[51] Brown, *supra* note 37, at 9.
[52] Randolph Feezell, *Celebrated Athletes, Moral Exemplars, and Lusory Objects*, XXXII J. OF PHILOSOPHY OF SPORT 20, 22 (2005).
[53] *Id.* at 31 (discussing Barry Bonds's performance as having occasioned reflections on aging, struggle, fathers and sons and other non-baseball topics but arguing that this "real" Barry Bonds should be irrelevant and not tarnish his hero status in the world of baseball).
[54] *Id.*
[55] *Id.* at 33.

Others disagree. Philosopher Christopher Wellman argues that professional athletes, because of their fame and influence, have a moral obligation to behave well.[56] Some athletes agree with this position. Famous NBA player for the San Antonio Spurs, Tim Duncan, stated:

> I think automatically if you're a professional athlete that makes you a role model just because you're put into a situation where there are children that want to aspire to be like you. They want to get to where you are. And it doesn't matter if you're the [twelfth] buy on the bench or you're the number one star; you're in a spotlight, you're in a place that a kid wants to be in, and that's your responsibility to take that on.[57]

Danny Villanueva, the first Mexican-American player in the NFL, similarly stated that "since he grew up without a Latin role model in the NFL, he was very conscientious and very deliberate in his attempt to be successful so that other Latin children would not feel the same void."[58]

Other athletes disagree. Take Charles Barkley for example, who made an extremely bold statement in a Nike Air commercial, stating: "I'm not paid to be a role model. I'm paid to wreak havoc on the basketball court."[59] "Parents should be role models. Just because I dunk a basketball, doesn't mean I should raise your kids."[60]

Courts tend to disagree with Barkley's attitude:

> Professional athletes can hardly be permitted to hold themselves out as public figures, seeking a maximum

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[56] Christopher Wellman, *Do Celebrated Athletes Have Special Responsibilities to be Good Role Models? An imagined Dialog between Charles Barkley and Karl Malone*, SPORTS ETHICS: AN ANTHOLOGY 333-337 (Jan Boxill ed., 2002) (arguing that the mere fact that famous athletes have influence is the basis for the special responsibility).

[57] Holly M. Burch & Jennifer B. Murray, *An Essay on Athletes as Role Models, Their Involvement in Charities, and Considerations in Starting a Private Foundation*, 6 SPORTS LAWS. J. 249, 251 (1999) (citing *Meet the Press: NBA Commissioner David Stern and Players Kobe Bryant, Keith Van Horn, and Tim Duncan Discuss Various Issues Facing the NBA* (NBC television broadcast, Feb. 8, 1998), *available in* LEXIS, News Library, Script File).

[58] *Id.* at 252 (citing Christine Granados, *Setting the Pace: Top 10 Hispanic Trendsetters for 1998*, NEW AM. NEWS SERV. (Wash., D.D.), Dec. 31, 1998).

[59] Newsweek Staff, *I'm Not a Role Model,* NEWSWEEK (June 27, 1993), http://www.newsweek.com/im-not-role-model-193808.

[60] Nike Commercial, *Charles Barkley "I Am Not A Role Model,"* YOUTUBE (posted Mar. 9, 2007), https://www.youtube.com/watch?v=nMzdAZ3TjCA.

> amount of publicity for themselves and their teams with respect to their athletic achievements, while successfully claiming strictly private status when misconduct is charged or proved. Their professional careers and those of other entertainers who seek the public spotlight are so intimately tied to their personal conduct that such a distinction would be entirely unrealistic.[61]

Whether athletes should be role models (or not) may be up for debate for several years to come. What is empirically true is that athletes are, rightly or wrongly, considered role models. Appreciation of this status should be important to those who seek to reform the ways in which society thinks about and deals with the issue of domestic violence. Most critical to these groups, namely legal feminists, is that the audience for whom these athletes are role models is comprised primarily of men and boys. Because men (and those about to become men) are overwhelmingly the primary perpetrators of domestic violence, professional athletes, and particularly the leagues that promote and govern them, possess a unique capacity to create a cultural shift in the ways in which men treat women.

Of course, cultural shifts do not happen overnight. Rather, they are incremental. It is to the incremental steps that leagues are taking that this discussion now turns.

III. LEAGUES' POLICIES AND PRACTICES

In recent years most of the leagues have put in place, or modified, personnel policies addressing players' perpetration of domestic violence. This section examines these policies as well as the leagues' enforcement of them.

A. MLB

The MLB's history of developing and implementing player discipline has been a long one. The first Commissioner in American professional sports was appointed to serve the MLB in 1920, in response to a scandal involving players and gambling.[62] The MLB Commissioner's power has been rather broad since that time, including the authority to take disciplinary action to punish conduct that is detrimental to the best interests of the game. Under the MLB Collective Bargaining Agreement ("CBA") and the uniform

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[61] Bell v. Associated Press, 584 F.Supp. 128, 131-32 (D.D.C. 1984).
[62] Bethany Withers, *Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS & ENT. L.J. 145, 151 (2010).

player contract ("UPC"), a player may be subjected to disciplinary action for "just cause" by the Club, Chief Baseball Officer or the Commissioner for any conduct that is "materially detrimental or materially prejudicial to the best interests of Baseball."[63] The disciplinary action ranges from placing a player on administrative leave, suspension for a number of games or indefinite suspension from the league.[64] Under the MLB's grievance procedure, after a disciplinary action is implemented, the player then has the opportunity for arbitral review.[65]

Until 2015, the MLB had no policies in place and took no action whatsoever regarding domestic violence perpetrated by players. Before 2015, the MLB has had the opportunity to address issues with domestic violence, either through the Commissioner's power or the collective bargaining process. However, the MLB consistently deferred to the justice system for any punishment and refused to issue any suspensions for almost 100 years, unless the teams themselves issued punishment first.[66] Of the four sports organizations, the MLB has the second-lowest arrest rate and fewer instances of violent crime.[67] However, the MLB has encountered several notable domestic violence incidents with extremely popular players and has handled these much more leniently than other off-the-field misconduct. Popular players in the 1990s, such as Barry Bonds, Daryl Strawberry, Jose Canseco, Albert Bell and Dante Bichette, were all accused of domestic violence (some on multiple occasions) and not a single one of them received punishment from their respective Clubs or the League.[68]

It seems likely that the MLB's decision (like other leagues' decisions) to negotiate a policy with the players' union was incited by the harsh public criticism of the NFL's handling of Ray Rice's videotaped assault of his fiancé.[69] Several years prior to the Ray Rice incident, the MLB failed to take action to suspend or discipline a player that was caught on video

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[63] MAJOR LEAGUE BASEBALL COLLECTIVE BARGAINING AGREEMENT 51-52 (2017), *available at* http://www.mlbplayers.com/pdf9/5450407.pdf.
[64] *Id.* at 54.
[65] *Id.* at 41-51.
[66] *See* Withers, *supra* note 62, at 158.
[67] *See id.*
[68] Mike Bates, *MLB's Record on Domestic Violence Worse than NFL's,* SB NATION (July 28, 2014), http://www.sbnation.com/mlb/2014/7/28/5936835/ray-rice-chuck-knoblauch-minnesota-twins-mlb-domestic-abuse-violence?_ga=1.198265449.796088445.1470325899.
[69] *See* TMZ Sports, *Ray Rice Knocked Out Fiancée – Full Video*, YOUTUBE (Sept. 8, 2014), https://www.youtube.com/watch?v=VbwTMJroTbI.

assaulting his girlfriend.[70] In August 2006, Brian Giles, an outfielder for the San Diego Padres, knocked his girlfriend to the floor at a bar, and the incident was caught on surveillance cameras and witnessed by other bar patrons.[71] Giles pled no contest to a misdemeanor battery charge, but did not face a suspension or any type of fine from the league—he received no punishment at all besides an anger management class.[72] The victim did not release the video until two years later, allowing Giles to allude news coverage when the incident occurred.[73] Subsequent to the incident with Giles, Brett Meyers, a pitcher for the Philadelphia Phillies, was arrested and arraigned on charges for dragging his wife by the hair and slapping her across the face in front of various witnesses in Boston, MA outside of Fenway Park in 2006.[74] Meyers pitched the next day against the Boston Red Sox, and received boos from the stands from fans. Meyers' wife later chose not to proceed with charges, and Meyers continued to play without a single fine or suspension from the MLB or the Phillies.[75]

The MLB remained silent on the issue of domestic violence for another ten years until it implemented a mandatory domestic violence training during spring training in 2015.[76] The MLB contracted with *Futures Without Violence* to conduct the interactive sessions during spring training each year.[77] At the time, the players' union and the MLB were negotiating a full policy to be placed in the CBA and the Commissioner wanted to implement a program to address the issues in the interim. On August 21, 2015, MLB and the MLB Players' Association adopted a "Joint Domestic Violence,

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[70] Brent Schrontenboer, *Before Ray Rice, MLB Had Its Own Player Video Incident*, USA TODAY SPORTS (Sept. 12, 2014), https://www.usatoday.com/story/sports/nfl/2014/09/12/brian-giles-ray-rice-san-diego-padres-domestic-abuse-video/15500861/.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Lee Jenkins, *Start Yields Boos for Myers and Criticism for Phillies*, N.Y. TIMES (June 25, 2006), http://www.nytimes.com/2006/06/25/sports/baseball/25myers.html.

[75] Associated Press, *After Wife's Request, Charge Dropped vs. Philly's Myers,* ESPN (Oct. 5, 2006), http://www.espn.com/mlb/news/story?id=2614037.

[76] Associated Press, *MLB Players to Attend Mandatory Domestic Violence Education Program*, SI WIRE (Feb. 25, 2016), https://www.si.com/mlb/2015/02/25/mlb-domestic-violence-education-program.

[77] David Lennon, *MLB Learns from NFL's Mistake Implementing Domestic Violence Education Program*, NEWSDAY (*updated* Feb. 28, 2015), https://www.newsday.com/sports/columnists/david-lennon/mlb-learns-from-nfl-s-mistake-implementing-domestic-violence-education-program-1.9990592.

Sexual Assault and Child Abuse Policy."[78] The new policy created a Joint Policy Board of seven individuals, including three experts in the field of domestic violence, two members from the Players' Association and two members from the Commissioner's Office.[79] The Board is charged with, where necessary, creating a treatment plan for players. The plan requires, if the experts so conclude, that the player "submit to psychological evaluations, attend counseling sessions, comply with court orders (including child support orders), relocate from a home shared with his partner, limit his interactions with his partner, relinquish all weapons, and other reasonable directives designed to promote the safety of the player's partner, children or victims."[80]

While treatment is within the purview of the Joint Board, discipline is administered solely by the Commissioner's Office. When a player is accused of committing domestic violence, the Commissioner may place the player on administrative leave for up to seven days. This paid leave becomes unpaid leave if the Commissioner finds that the policy has been violated.[81] The Commissioner's investigation is independent of the filing or outcome of criminal charges, though the Commissioner may wait until legal proceedings have concluded before reaching a determination. The policy gives the Commissioner broad authority regarding the scope of disciplinary actions: "There is no minimum or maximum penalty prescribed under the policy, but rather the Commissioner can issue the discipline he believes is appropriate in light of the severity of the conduct."[82] The MLB created a player-friendly, confidential arbitration process that includes the opportunity for discovery and appeal options. The policy is treatment and intervention oriented, focusing on the individual player and individual context of each situation.

Shortly after the implementation of the new policy, Colorado Rockies shortstop Jose Reyes was arrested on October 31, 2015 and charged with abuse of a 'family and/or household member' in Maui, Hawaii for a physical altercation with his wife, Katherine Ramirez.[83] Ms. Ramirez told the police that Reyes grabbed her by the throat and shoved her into a sliding

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[78] Paul Hagen, *MLB, MLBPA Reveal Domestic Violence Policy*, MLB.COM (Aug. 21, 2015), http://m.mlb.com/news/article/144508842/mlb-mlbpa-agree-on-domestic-violence-policy.

[79] MLB Joint Policy, Section A ("Treatment and Intervention").

[80] *Id.*

[81] *Id.* at Section C ("Investigations").

[82] *Id.* at Section C ("Discipline").

[83] Jade Walker, *Rockies Shortstop Jose Reyes Arrested for Domestic Violence*, HUFF. POST (Nov. 10, 2015, 1:33 AM), https://www.huffingtonpost.com/entry/jose-reyes-arrest-domestic-violence_us_56418ac1e4b0307f2caecfd3.

glass door before security called the police, prior to which she sustained injuries to her side, neck and wrist and went to the hospital.[84] Criminal charges were filed, but dismissed, when Ms. Ramirez, did not support the prosecution. After the MLB conducted their investigation, the Commissioner, Rob Manfred, suspended Reyes for fifty-one games and he was required to contribute one-hundred thousand dollars to a charity focused on domestic violence.[85] This was the second longest of the three punishments the MLB had given out under the new domestic violence policy, and resulted in a nearly seven-million dollar loss to Reyes from his salary.[86] Reyes made a public apology to his wife, family, team, and fans and he was subsequently traded from the Rockies to the New York Mets.

On the same October weekend that Reyes assaulted his wife, Aroldis Chapman, then the closing pitcher for the Yankees, was accused by his girlfriend of pushing her, putting his hands around her neck and choking her.[87] At some point, while alone in his garage, Chapman fired eight bullets with a handgun, seven of which went into a concrete wall inside his garage and the other went through a window into an open field.[88] Although Chapman was arrested, prosecutors did not file criminal charges, citing insufficient evidence and conflicting accounts of what occurred.[89] The Commissioner suspended Chapman for thirty games and Chapman agreed to the punishment without filing any subsequent appeals, although he lost one million, seven hundred thousand dollars in salary.[90] When this decision was announced, Chapman denied hurting his girlfriend but admitted firing a gun. He apologized for firing the gun, calling this conduct "bad

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[84] *Id.*

[85] SI Wire, *Jose Reyes Suspended Through May 31 After Domestic Violence Incident*, SPORTS ILLUSTRATED (Apr. 12, 2016), https://www.si.com/mlb/2016/05/13/colorado-rockies-jose-reyes-suspended-domestic-violence.

[86] Mike Vorkunov, *As Jose Reyes Joins Mets, Domestic Violence Experts Hope Nuance Isn't Absent*, USA TODAY SPORTS (July 5, 2016), https://www.usatoday.com/story/sports/mlb/2016/07/05/jose-reyes-joins-mets-domestic-violence-advocates-ponder-punishment/86698770/.

[87] Tim Brown & Jeff Passan, *Police Report: Aroldis Chapman Allegedly Fired Gunshots, 'Choked' Girlfriend in Domestic Incident*, YAHOO SPORTS (Dec. 7, 2015, 7:36 PM), https://sports.yahoo.com/news/aroldis-chapman-s-girlfriend-alleged-he--choked--her--according-to-police-report-023629095.html.

[88] *Id.*

[89] *Prosecutors Decline to Charge Aroldis Chapman*, ESPN (Jan. 21, 2016), http://www.espn.com/mlb/story/_/id/14620135/aroldis-chapman-not-face-charges-domestic-dispute.

[90] Paul Hagen & Bryan Hoch, *Chapman Gets 30-game Suspension from MLB*, MLB NEWS (Mar. 1, 2016), http://m.mlb.com/news/article/165860226/yankees-aroldis-chapman-suspended-30-games/.

judgment."[91] After the suspension, Chapman was traded to the Chicago Cubs, which stirred up some controversy. A Cubs fan and journalist, Caitlin Swieca, decided that she would donate ten dollars for every Chapman save to a domestic-violence charity in Chicago called the Domestic Violence Legal Clinic.[92] Ms. Swieca announced her donation campaign on Twitter using #pitchin4DV in July 2016 and by November 2016, after only five months, the donations totaled thirty-five thousand dollars for the Domestic Violence Legal Clinic.[93] After the Cubs won the World Series in 2016, Chapman re-signed with the New York Yankees. During the 2017 season, the Yankees listed Chapman as "Mr. October" in the official team calendar, which is also Domestic Violence Awareness month in the United States.[94]

On April 13, 2016, Hector Olivera, then an Atlanta Brave, was arrested for assaulting his girlfriend in a hotel. She had visible bruises and was taken to the hospital and released later in the day.[95] The Commissioner suspended Olivera for eighty-two games, he was released by the Atlanta Braves and was subsequently sentenced in the criminal proceedings to ninety days in prison for misdemeanor domestic assault; however, he was released after ten days.[96] After serving his suspension Olivera was traded to the San

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[91] Wallace Matthews, *Aroldis Chapman Apologizes for 'Bad Judgment' in Using Gun*, ESPN (Mar. 2, 2016), http://www.espn.com/mlb/story/_/id/14884190/aroldis-chapman-accepts-suspension-apologizes-only-using-gun.

[92] Billy Witz, *Cubs Fans Root for Aroldis Chapman While Deploring His History*, N.Y. TIMES (Aug. 27, 2016), https://www.nytimes.com/2016/08/28/sports/baseball/chicago-cubs-fans-aroldis-chapman-domestic-violence.html.

[93] Caitlin Swieca, *Aroldis Chapman, Morality in Sports, and the Final Out of the World Series*, BASEBALL PROSPECTUS (Nov. 9, 2016), http://wrigleyville.locals.baseballprospectus.com/2016/11/09/aroldis-chapman-morality-in-sports-and-the-final-out-of-the-world-series/.

[94] Andy Clayton, *Tone-Deaf Yankees Make Chapman Mr. October in Giveaway Calendar*, N.Y. DAILY NEWS (Apr. 16, 2017), http://www.nydailynews.com/sports/baseball/yankees/tone-deaf-yankees-chapman-mr-october-giveaway-calendar-article-1.3059134.

[95] A.J. Perez, *Braves' Hector Olivera Arrested for Assault, Placed on Leave by MLB*, USA TODAY SPORTS (Apr. 13, 2016), http://www.usatoday.com/story/sports/mlb/braves/2016/04/13/hector-olivera-arrested-assault/82979822/.

[96] Mike Axisa, *Hector Olivera Sentenced to 90 days in Prison for Domestic Assault*, CBS SPORTS (Sep. 8, 2016), https://www.cbssports.com/mlb/news/hector-olivera-sentenced-to-90-days-in-prison-for-domestic-assault/.

Diego Padres on July 30, 2016, and released by the team on August 10, 2016.[97]

After Olivera's suspension, the MLB suspended two other players in 2017 for violation of the domestic violence policy. The MLB Commissioner concluded that Jeurys Familia, a relief pitcher for the Mets, did not physically assault his wife, but concluded his overall conduct was "inappropriate, violated the policy and warranted discipline."[98] Familia was suspended for fifteen games, lost roughly seven-hundred thousand dollars in pay, and was required to speak with other players about domestic violence issues and donate his time and money to domestic violence organizations.[99] Derek Norris, a catcher for the Tampa Bay Rays, was suspended September 1, 2017 for the rest of the 2017 season based on an Instagram post from his ex-fiancée that Norris verbally and physically abused her.[100] Norris forfeited one-hundred thousand dollars in pay, which he was required to donate to a domestic violence organization. In December 2017 Norris signed a minor-league contract with the Detroit Tigers, in which the General Manager justified signing Norris by stating that "he wasn't charged…the guy served his penalty… he should be able to sign, that's the way the process works."[101]

B. NFL

The NFL Commissioners historically have been given and exercised their disciplinary power under the NFL's Constitution and Bylaws, along with the CBA with the National Football League Players Association

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[97] David Hill, *Dodgers Bust Hector Olivera to Sign with Sugar Land Skeeters*, FOX SPORTS (Jun. 30, 2017), http://www.foxsports.com/mlb/story/dodgers-bust-hector-olivera-to-sign-with-sugar-land-skeeters-060117; *see also* MLB, *Hector Olivia Player Stats*, MLB (accessed on March 16, 2017), http://m.mlb.com/player/493343/hector-olivera.

[98] SI Wire, *Jeurys Familia Suspended 15 Games for Violating MLB Domestic Violence Policy*, SPORTS ILLUSTRATED (Mar. 29, 2017), https://www.si.com/mlb/2017/03/29/new-york-mets-jeurys-familia-suspended.

[99] *Id.*

[100] Billy Witz, *Catcher Derek Norris Suspended for Season Under Domestic Violence Policy*, N.Y. TIMES (Sept. 1, 2017), https://www.nytimes.com/2017/09/01/sports/baseball/catcher-derek-norris-suspended-for-season-under-domestic-violence-policy.html.

[101] Tony Paul, *Tigers GM Defends Signing Derek Norris*, DETROIT NEWS (Dec. 6, 2017), http://www.detroitnews.com/story/sports/mlb/tigers/2017/12/06/tigers-gm-defends-signing-derek-norris/108372530/.

("NFLPA").[102] Pursuant to all of these documents, the Commissioner has the authorization, and power, to take disciplinary action if a player's conduct is found to be "detrimental to the best interests of the League or professional football."[103] The Commissioner also has the power to establish policy and procedure in respect to the enforcement of the Constitution and Bylaws.[104]

Prior to 1997, the National Football League was reluctant to discipline NFL players involved in criminal acts and other off-the-field problems aside from violations of the drug policy. Between January 1989 and November 1994, fifty-six current and former NFL players were reported for violent behavior towards women, with not a single incident of discipline from an NFL Commissioner.[105] In fact, in the early 1990's the only criminal charge that would bar an athlete from playing in the NFL was murder.[106]

Until the O.J. Simpson murder trial in 1995, the conversation surrounding domestic violence, specifically in the NFL, was almost nonexistent. In July 1995, during the middle of Simpson's year-long trial, Sports Illustrated published "Sport's Dirty Secret, When Scarcely a Week Passes Without an Athlete Being Accused of Domestic Violence, It Is No Longer Possible to Look the Other Way."[107] The article exposed some of the most celebrated athletes arrested or convicted of domestic violence, and the ways in which the continued glorification of athletes has allowed society to turn a blind eye. The same week, one of the NFL's top quarterbacks, Warren Moon, was arrested and charged for misdemeanor assault against his wife, Felicia

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[102] Janine Young Kim & Matthew J. Parlow, *Sports and Criminal Law: Off-Court Misbehavior: Sports Leagues and Private Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 573, 591 (2009).

[103] Nat'l Football League, Constitution and Bylaws of the National Football League, 28-29 (rev. 2006) [hereinafter NFL Const.].

[104] *Id.* at 29.

[105] *See* Withers, *supra* note 2.

[106] JEFF BENEDICT & DON YAEGER, PROS AND CONS: THE CRIMINALS WHO PLAY IN THE NFL 40 (1998) ("[T]he authors asked player agent Leigh Steinberg if there were any criminal offenses that would altogether bar a player from playing in the NFL. 'Murder,' he replied . . ."); *see also* Robert Ambrose, Note, *The NFL Makes it Rain: Through Strict Enforcement of Its Conduct Policy, The NFL Protects Its Integrity, Wealth & Popularity*, 34 WM. MITCHELL L. REV. 1069, 1071 (2008).

[107] William Nack and Lester Munson, *Sports Dirty Secret When Scarcely A Week Passes Without An Athlete Being Accused of Domestic Violence, It is no Longer Possible to Look the Other Way*, SPORTS ILLUSTRATED (July 31, 1995), https://www.si.com/vault/1995/07/31/204992/sports-dirty-secret-when-scarcely-a-week-passes-without-an-athlete-being-accused-of-domestic-violence-it-is-no-longer-possible-to-look-the-other-way#.

Moon.[108] Warren Moon's domestic violence charge resulted from a call by his eight-year-old son to 911 asking for help because his parents were fighting.[109] When the police arrived, Felicia Moon claimed that she was at fault for the altercation that left scratches and bruises on her face, neck, back and legs, and insisted that she did not want to file a complaint against her husband; however, Warren was still charged but later acquitted.[110] Throughout the controversy and adjudication of Moon's case, the NFL and the Minnesota Vikings were silent, and Moon was never suspended nor mandated to counseling after his acquittal.[111]

In 1997, after increasing public concern about player conduct and specifically violence against women, the NFL Commissioner Paul Tagliabue adopted a "Violent Crime Policy" that covered any offense, misdemeanor or felony, involving a crime of violence, including hate crimes and domestic abuse.[112] This was the first "crime policy" of its kind in any arena of professional sports that specifically detailed offenses, such as domestic violence, that would be punishable if there was a conviction. The 1997 Violent Crime Policy gave the Commissioner a full array of disciplinary powers ranging from fines to indefinite suspension from the league. However, these punishments were only prescribed if there was a conviction or its equivalent, rather than based on arrest, allegations, or investigation by the police without formal charges.[113] Without a requirement for immediate action by the Commissioner, players could continue to play and be paid until a criminal proceeding was fully adjudicated.

In 2000, after collective demands from NFL club owners, Paul Tagliabue revised the Violent Crime Policy to encompass other non-violent crimes and off-the-field conduct.[114] After the revised 2000 Personal Conduct Policy went into effect, there were around forty arrests made between 2000 and 2006 for incidents involving domestic violence.[115] Of the forty arrested between 2000 and 2006, around eleven pled guilty or no contest, around thirteen were placed in a diversion program or anger management, and the

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[108] Jerri Kay-Phillips, *Unnecessary Roughness: The NFL's History of Domestic Violence and the Need for Immediate Change*, 5 BERKELEY J. ENT. & SPORTS L. 65, 71 (2016).
[109] *Id.*
[110] *Id.* at 71-72.
[111] *Id.*
[112] John Gibeaut, *When Pros Turn Cons*, ABA J., July 2000, at 38-42, 102-03, 106-09; *see also* NFL Violent Crime Policy, 2000.
[113] *Id.* at 108.
[114] Withers, *supra* at note 2, at 403.
[115] *NFL Arrest Database*, USA TODAY, https://www.usatoday.com/sports/nfl/arrests/all/all/all/ (last visited Mar. 16, 2018).

remaining players' charges were dropped due of lack of cooperation by the victim or lack of evidence, with only one player being cut from their team.[116] Out of the forty players arrested for domestic violence incidents from 2000-2006, the NFL fined approximately three players, and suspended at least three players for one to three games.[117]

In 2006, Roger Goodell was elected as the new NFL Commissioner and, by March 2007, he introduced an updated Personal Conduct Policy that strengthened the existing conduct guidelines.[118] Several major changes to the language required that those arrested for or charged with prohibited conduct undergo "an immediate, mandatory clinical evaluation and, if directed, appropriate counseling," and the policy would not only apply to players, but all League and team employees, and prospective players and employees.[119] The new Personal Conduct Policy did not apply exclusively to players, nor was it collectively bargained for with the National Football League Players Association (NFLPA). [120] This gave the NFL Commissioner an unprecedented expansion of power under the NFL by-laws and NFL Constitution to play 'the judge and jury' in handling conduct violations, because it was not collectively bargained for with the players.[121]

Yet, the NFL continued to ignore domestic violence. From 2006 to 2014, law enforcement authorities pursued at least fifty domestic violence cases against NFL players, including one for murder and at least five for assaulting or choking pregnant women.[122] Of these fifty cases, USA Today

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[116] *Id.*

[117] Withers, *supra* note 62, at 174.

[118] Brant Webb, *Unsportsmanlike Conduct: Curbing the Trend of Domestic Violence in the National Football League and Major League Baseball*, 20 AM. U. J. GENDER SOC. POL'Y & L. 741, 753 (2012).

[119] NFL PERSONAL CONDUCT POLICY (2007), http://www.espn.com/nfl/news/story?id=2798214.

[120] National Football League, *NFL Owners Endorse New Conduct Policy*, NFL (Dec. 10, 2014), http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy (Of note, the NFLPA was consulted and in support of the policy, but it was not collectively bargained for).

[121] Robert Ambrose, *The NFL Makes It Rain: Through Strict Enforcement of Its Conduct Policy, The NFL Protects Its Integrity, Wealth & Popularity*, 34 WM. MITCHELL L. REV. 1069, 1071 (2008).

[122] Brent Schrotenboer, *History of Leniency: NFL Domestic Cases under Goodell*, USA TODAY SPORTS (Oct. 1, 2014), https://www.usatoday.com/story/sports/nfl/2014/10/01/nfl-domestic-abuse-history-under-roger-goodell/16566615/.

Sports uncovered resolutions to forty-three:[123] eighteen players were able to avoid charges or prosecution after completion of rehabilitative programs or probation; nine players pled no contest, guilty, or were convicted by a judge; twelve players' charges were dropped, usually because of lack of cooperation by the victim; three players were acquitted; and one player fatally shot his girlfriend and then himself.[124] Of the players that technically violated the Personal Conduct Policy, a majority were suspended by the Commissioner for no more than two games, had no disruption in getting paid, and were able to finish out the rest of the NFL season.[125] Sports commentator Mike Bates pointed out in response to publicity criticizing NFL's failure to address its players' violent conduct: "At no time in the last quarter of a century has there been a commissioner-level sanctioning of any player for domestic violence, and most teams haven't bothered either."[126]

The NFL's response to domestic violence changed in September 2014, when TMZ[127] released a video that went viral. It showed Baltimore Ravens' player, Ray Rice, violently striking his fiancé Janay Rice unconscious and dragging her body out of an Atlantic City casino elevator.[128] Within hours of the video's release, the Ravens cut Rice and the NFL suspended him indefinitely.[129] This stark change in both a team's and the NFL's response to domestic violence is chalked up by many as a frantic and desperate cover up of their knowledge of the incident months prior to the release of the video. Not only was Rice cut and suspended, but the NFL immediately began drafting a new policy to further broaden its Personal Conduct Policy to encompass minimum suspensions in cases of domestic violence regardless of criminal conviction.

NFL Commissioner Roger Goodell created the December 2014 Personal Conduct Policy pursuant to the authority given to him under the NFL Constitution and Bylaws to address and sanction conduct detrimental to the

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[123] Unfortunately, as noted in footnote 3, we found that it was extremely difficult to find a complete and accurate database compiling arrests and prosecutions, aside from the USA Today Arrest Database. This database is presumed to be the largest compilation available of NFL arrests to date, but there is not a publicly available bank of this information otherwise found in any of our research. The USA Today Arrest Database also lacks complete information on the disposition of many of the arrests accounted for.

[124] *NFL Arrest Database*, *supra* note 115.

[125] *Id.*

[126] Bates, *supra* note 68.

[127] TMZ is an online magazine specializing in celebrity gossip. *See* http://www.tmz.com/.

[128] Jane McManus, *If Not the Player, Ray Rice Asks You to Forgive the Man*, ESPN-W (Apr. 28, 2017), http://www.espn.com/espnw/culture/feature/article/19248874/if-not-player-ray-rice-asks-forgive-man.

[129] *Id.*

league and professional football.[130] The NFL consulted with experts inside and outside of the league, including lawyers, domestic violence and sexual assault experts and advocates, law enforcement officials, academic experts and business leaders to ensure that this new policy would significantly build upon the previous policies.[131] This policy was not however collectively bargained for with the NFLPA.

The new policy included making threats of violence (not just actual violence) and acts of stalking, harassment and even intimidation. Of key importance was the addition that

> [V]iolations that involve assault, battery, domestic violence, dating violence, child abuse and other forms of family violence, or sexual assault involving physical force or committed against someone incapable of giving consent, a first offense will subject the offender to a baseline suspension **without pay** of **six** games, with consideration given to any aggravating or mitigating factors.[132]

In the eyes of domestic violence advocates "the NFL ha[d] taken some good first steps to build a meaningful strategy that deals effectively with violence against women."[133] Nonetheless, the NFL has continued to face public criticism about investigating accusations and handing down inconsistent punishments.[134]

In May 2015, Josh Brown, a former kicker for the New York Giants, was arrested for the fourth-degree assault of his wife, Molly Brown.[135] Not only did Josh Brown admit to a pattern of physical, verbal and emotional abuse of his then wife, but further documentation indicated that Brown had

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[130] NFL PERSONAL CONDUCT POLICY (Dec. 2014), http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf

[131] National Football League, *NFL Owners Endorse New Policy*, NFL (Dec. 10, 2014), http://www.nfl.com/news/story/0ap3000000441758/article/nfl-owners-endorse-new-personal-conduct-policy.

[132] NFL PERSONAL CONDUCT POLICY, *supra* note 130.

[133] Mark Maske, *NFL Toughens Punishment Guidelines for Domestic Violence*, WASH. POST (Aug. 28, 2014), https://www.washingtonpost.com/news/sports/wp/2014/08/28/nfl-toughens-punishment-guidelines-for-domestic-violence/?utm_term=.9771677b1b17.

[134] Mary Pilon, *Inside the NFL's Domestic Violence Punishment Problem*, BLEACHER REPORT (Jan. 31, 2017), http://mag.bleacherreport.com/nfl-domestic-violence-policy-suspensions/.

[135] *NFL Reopening Josh Brown Probe; He Won't Travel to London*, NFL NEWS (Oct. 20, 2016), http://www.nfl.com/news/story/0ap3000000724307/article/police-documents-say-josh-brown-admitted-to-domestic-violence.

violated a restraining order after his arrest.[136] Initially, the NFL did not follow the 2014 Personal Conduct Policy, but rather only placed Brown on a one-game suspension in August 2016 after a ten month investigation by the NFL.[137] During the investigation, the Giants re-signed Brown for a two-year four million dollar contract.[138] In the initial investigation, the NFL blamed the King County, Washington Sherriff's office with failing to provide any documents from the investigation and further blamed Molly Brown for failing to cooperate with the league in being non-responsive to investigator's inquiries. [139] In October 2016 once the King County (WA) Sherriff's Office closed their investigation and the NFL obtained documents that were previously unavailable, they re-opened the league investigation. [140] The documents contained information indicating documented assaults nearly two-dozen times, including at least once while Molly Brown was pregnant, e-mails and journal entries of Brown admitting to the abuse, and various 911 calls. [141]

After the NFL received the documents and re-opened the investigation, it put Brown on the Reserve/Commissioner Exempt List and then the New York Giants released him.[142] After the second investigation, the NFL suspended Brown for six-games, which he accepted, for violating the Personal Conduct Policy.[143] But because Brown had been released, this suspension would only be served if he were re-signed to another team. The NFL received a tremendous amount of criticism for the initial one-game suspension handed down to Brown, as the incident and allegations were a clear violation of the domestic violence section of the Personal Conduct

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[136] *Id.*

[137] Press Release, National Football League, *Josh Brown Suspended Six Games for Violation of NFL's Personal Conduct Policy* (Sept. 8, 2017), https://nflcommunications.com/Pages/JOSH-BROWN-SUSPENDED-SIX-GAMES-FOR-VIOLATION-OF-NFL%E2%80%99S-PERSONAL-CONDUCT-POLICY.aspx

[138] Adam Schefter, *NFL Suspends Former Giants Kicker Josh Brown for Six More Games*, ESPN (Sept. 8, 2017), http://www.espn.com/nfl/story/_/id/20629879/nfl-suspends-former-new-york-giants-kicker-josh-brown-six-more-games.

[139] *NFL Reopening Josh Brown Probe; He Won't Travel to London*, *supra* note 135.

[140] *Id.*

[141] Juliet Macur, *N.F.L. Shows It Doesn't Really Care About Domestic Violence*, N.Y. TIMES (Oct. 21, 2016), https://www.nytimes.com/2016/10/22/sports/football/nfl-domestic-violence-josh-brown-new-york-giants.html?mcubz=3.

[142] Around the NFL Staff, *Kicker Josh Brown Released by New York Giants*, NFL NEWS (Oct. 25, 2016), http://www.nfl.com/news/story/0ap3000000727860/article/kicker-josh-brown-released-by-new-york-giants.

[143] *NFL Reopening Josh Brown Probe; He Won't Travel to London*, *supra* note 135; Press Release, National Football League, *supra* note 137.

Policy.[144] This was the first opportunity the NFL had to demonstrate a serious commitment to implementing its policy. Instead, it blamed law enforcement and the victim.[145] Unlike many of the other players accused of domestic violence, Josh Brown admitted to the abuse, and well before the re-opening of the investigation; nonetheless the NFL took nearly two years to implement a six-game suspension.[146]

After Brown, the NFL got a chance to get implementation right. Ezekiel Elliott, a 2016 fourth-round draft pick running back for the Dallas Cowboys, was accused by his ex-girlfriend, Tiffany Thomson, of five separate allegations of domestic violence between July 17 and July 22, 2016, right after Elliott was drafted by the Dallas Cowboys.[147] Ms. Thompson's allegations ranged from Elliott grabbing her by the arm, throwing her against a door, choking, and smacking her.[148] By September 6, 2016, the Columbus District Attorney's office conducted a full investigation of the alleged incidents, including interviews of various witnesses, concluding that "due to conflicting and inconsistent information" no charges would be filed against Elliott.[149]

The NFL subsequently confirmed that it would continue its investigation into whether there was a violation of the personal conduct policy because "it is simply not enough to avoid being found guilty of a crime."[150] While it investigated, Elliott was caught on camera on March 11, 2017 pulling

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[144] Steve Almasy, *One Game? NFL Ban for Alleged Violence on Wife Draws Renewed Rage*, CNN (Oct. 25, 2016), http://www.cnn.com/2016/10/21/us/nfl-josh-brown-suspension/index.html.

[145] Around the NFL Staff, *NFL Details Probe Behind Josh Brown's Suspension*, NFL (Aug. 19, 2016), http://www.nfl.com/news/story/0ap3000000687596/article/nfl-details-probe-behind-josh-browns-suspension.

[146] Tyler Conway, *Josh Brown Admitted to Physical, Emotional Abuse of Wife, Per Police Documents*, BLEACHER REPORT (Oct. 2016), http://bleacherreport.com/articles/2670708-josh-brown-admits-to-physically-emotionally-abusing-wife-per-police-documents.

[147] Sarah Hardy, *A Comprehensive Timeline of Ezekiel Elliott's Domestic Violence Case*, SB NATION (Nov. 30, 2017), https://www.sbnation.com/2017/8/29/16151642/ezekiel-elliott-timeline-domestic-violence-police-report-nfl-suspension-appeal.

[148] *Id.*

[149] Press Release, Richard C. Pfeiffer, Jr., City Attorney, City Attorney's Office Columbus Ohio (Sept. 6, 2016), http://www.columbuscityattorney.org/pdf/press/EZEKIEL%20ELLIOTT%20PRESS%20RELEASE%209-6-16.pdf.

[150] NFL PERSONAL CONDUCT POLICY (2016), http://static.nfl.com/static/content/public/photo/2017/08/11/0ap3000000828506.pdf.

down a woman's top and exposing her breast in public.[151] Although charges were not filed, the NFL reviewed the incident and spoke to the woman but ultimately concluded that his behavior was "inappropriate and disturbing, and reflected a lack of respect for women," but did not discipline him for the incident.[152] The year-long investigation of the domestic violence was in the spotlight nearly the entire time. Much of the media focused on the credibility of Elliott's accuser, and the NFLPA engaged in various forms of victim shaming.[153] Throughout the investigation, there were documents leaked to the public or obtained through public record searches including police reports, witness statements, text messages and photos of the alleged injuries that also drew media attention regarding Ms. Thompson's credibility.[154]

On August 11, 2017, the NFL determined that there was substantial and persuasive evidence that Elliott physically abused his accuser and the Commissioner, Roger Goodell, handed down a six-game suspension for the 2017 season for the violation of the Personal Conduct Policy.[155] The NFLPA immediately appealed the decision to the NFL arbiter, and subsequently filed a Petition in U.S. District court arguing that he did not receive a fundamentally fair arbitration hearing, and that it was a "League-orchestrated conspiracy to withhold critical information," such that Elliott was not even able to face his accuser in order to cross-examine her credibility.[156] Ezekiel Elliott's case then went through an unprecedented series of multijurisdictional appeals, emergency stays, and injunctions during the span of four weeks that went up to both the 5th Circuit and then ultimately ended in the 2nd Circuit upholding his suspension.[157] During

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[151] Jeanna Thomas, *Ezekiel Elliott Pulled Down Woman's Top During a St. Patrick's Day Parade*, SB NATION (Mar. 13, 2017), https://www.sbnation.com/2017/3/13/14911080/ezekiel-elliott-st-patricks-day-parade-cowboys-dumb-bad-decision.

[152] *Id.*; *see also* Scott Davis, *The Cowboys Have Reportedly Grown 'Concerned' with Ezekiel Elliott's 'Lifestyle and Choices'*, BUS. INSIDER (Aug. 11, 2017), http://www.businessinsider.com/cowboys-reportedly-concerned-ezekiel-elliott-life-choices-2017-8.

[153] Darin Gantt, *NFL Accuses NFLPA of Shaming Ezekiel Elliott's Accuser*, NBC SPORTS (Aug. 16, 2017), http://profootballtalk.nbcsports.com/2017/08/16/nfl-accuses-nflpa-of-shaming-ezekiel-elliotts-accuser/.

[154] *Id.*

[155] Press Release, NFL Communications, *Ezekiel Elliott Suspended Without Pay for Six Games* (Nov. 15, 2017), https://nflcommunications.com/Pages/EZEKIEL-ELLIOTT-SUSPENDED-WITHOUT-PAY-FOR-SIX-GAMES.aspx.

[156] Petition to Vacate Arbitration Award, NFLPA v. NFL, No. 4:17-CV-00615, (E.D. Tex., 8/31/17).

[157] Hardy, *supra* note 147.

those four weeks, Elliott continued to play based on the complicated procedural posture of his case that changed day-by-day based on the court's rulings, appeals by both parties and oral arguments in front of the circuit courts.[158] Ultimately, on November 9, 2017, the 2nd Circuit denied Elliott's request for a preliminary injunction and reinstated the six-game suspension.[159] Elliott chose not to pursue any further appeal options and served his six game suspension, although he made clear in a statement from the NFLPA that "this is no way an admission of any wrongdoing."[160]

Elliott's case created a serious rift in the relationship between the NFLPA and the NFL, specifically with the NFL Commissioner. The NFLPA issued a statement riddled with criticism of the NFL's investigation and disciplinary process:

> [O]ur vigilant fight on behalf of Ezekiel once again exposed the NFL's disciplinary process as a sham and a lie… they brought in 'experts' and imposed a process with the stated goal of 'getting it right,' yet the management council refuses to step in and stop repeated manipulation of an already awful League-imposed system.[161]

Others share these criticisms. Commentators now criticize the NFL for swinging the pendulum too far in the other direction.[162] For example, NFL commentator Judy Battista stated that "The NFL should do all it can to make sure it knew everything and had the most complete picture of the events it could piece together before rendering a judgment…too often in the past, we've been left to wonder why that wasn't the case."[163] Others such as Stephanie Stradley, a Houston attorney who writes about legal issues in football stated "Roger Goodell says that NFL players are held to a higher

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[158] *Id.*

[159] Jeanna Thomas, *Ezekiel Elliott Suspension Back On Effective Immediately with 2nd Circuit's Latest Ruling*, SB NATION (Nov. 9, 2017), https://www.sbnation.com/2017/11/9/16603064/ezekiel-elliott-6-game-suspension-domestic-violence-appeal.

[160] Jeanne Thomas, *Ezekiel Elliott Drops his Appeal, Will Serve Full 6-game Suspension*, SB NATION (Nov. 15, 2017), https://www.sbnation.com/2017/11/15/16505302/ezekiel-elliott-suspension-appeal-drop-nfl-roger-goodell.

[161] Press Release, NFLPA, *NFLPA Statement on NFL Disciplinary Process* (Nov. 16, 2017), https://www.nflpa.com/news/ezekiel-elliott-disciplinary-process.

[162] Judy Battista, *Ezekiel Elliott Suspension suggests NFL Learned Critical Lesson*, NFL (Aug. 11, 2017), http://www.nfl.com/news/story/0ap3000000828687/article/ezekiel-elliott-suspension-suggests-nfl-learned-critical-lesson ("The league had in the past been inconsistent with its investigations and discipline which creates the impression this six-game ban is a bit harsh.").

[163] *Id.*

standard than [accused people who are not convicted of crimes are innocent], but his standard isn't by definition a standard… it is whatever Goodell says it is that day."[164] Dom Consentino, a Deadspin reporter, criticized the NFL's handling of Elliott's case stating "several years ago, the NFL pledged to get it right with domestic violence. But this case, in some ways, parallels instead what happened with the league's investigation of Tom Brady: cooperate with us, or we'll screw you."[165]

C. NBA

The National Basketball Association's (NBA) approach was similar to the NFL's (pre-1990's) regarding lax player discipline for off the court criminal conduct and domestic violence. Like the NFL, the NBA created a Personal Conduct Policy in 1999 through union negotiations with the National Basketball Player Association (NBPA). It required that any player convicted of a violent felony would receive a minimum 10-game suspension, or the league could order the player into counseling if there is reasonable cause to believe the player engaged in any type of off the court violent conduct. [166] On average, the NBA season consists of eighty-two games, so a ten-game suspension only amounts to twelve percent of a player's season. Unlike the NFL, the NBA maintained its policy without major revision until the most recent CBA of January 2017.[167]

In 2011 the NBPA updated the "Counseling for Violent Misconduct" section of the CBA,[168] but left untouched the "Unlawful Violence" section requiring a suspension only after a criminal conviction.[169] The update in 2011 provided that "if the NBA and the NBPA agree that there is reasonable cause to believe that a player has engaged in any type of off-court violent

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[164] Stephanie Stradley, *Ezekiel Elliott and the NFL Domestic Violence Policy*, STRADLEY LAW FIRM, http://www.stradleylaw.com/ezekiel-elliot-nfl-domestic-violence-policy/ (last visited Apr. 24, 2018).

[165] Dom Cosentino, *The NFL Seems to Have Punished Ezekiel Elliott for Not Cooperating with its Investigation*, DEADSPIN (Sept. 1, 2017), https://deadspin.com/the-nfl-seems-to-have-punished-ezekiel-elliott-for-not-1798704936.

[166] NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT art. VI §§ 4-5 (1999).

[167] National Basketball Players Association, *About & History*, NBPA.COM, https://nbpa.com/about/ (last visited Apr. 24, 2018) ("Since 1999, the NBPA has negotiated three new CBA's, in 2005, 2011, and 2017.").

[168] Larry Coon, *Breaking Down Changes in New CBA*, ESPN (Nov. 28, 2011), http://www.espn.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compares-last-one ("There were no changes to the 1999 Unlawful Violence section of the CBA in the re-negotiated CBA in 2005.").

[169] NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT art. VI § 7 (2011).

conduct . . . the player will be required to undergo a clinical evaluation by a neutral expert and if deemed necessary, appropriate counseling." [170] In the CBA "violent conduct" is defined as:

> any conduct involving the use or threat of physical violence, or the use of, or threat to use a deadly weapon, any conduct which could be categorized as a hate crime, sexual assault or any other sexual offense, acts of domestic violence, and any conduct involving dog fighting or animal cruelty.[171]

In addition, the 2011 CBA noted, "a Team shall not impose discipline on a player solely on the basis of the fact that the player has been arrested…unless the Team has an independent basis for doing so."[172]

Although the 2011 CBA indicated that NBA had the authority to investigate players who potentially engaged in off-the-court violent conduct, they continued to follow the NFL's footsteps by turning a blind eye and simply allow the criminal justice system to address the conduct before taking any action. Prior to the institution of the 2011 expanded policy, the NBA suspended four players for violation of the policy: Glenn Robinson in 2002, Jason Richardson in 2003, Eddie Griffin in 2004 and Ron Artest in 2007.[173] As with the other professional sports organizations (NFL, MLB, NHL), the NBA was heavily criticized for its policies on domestic violence after the Ray Rice scandal.[174] Within a couple of weeks of the release of the Ray Rice video, Jeffery Taylor, a Charlotte Hornets forward, was arrested and charged with domestic assault, and assault and malicious destruction of property, for conduct toward his girlfriend.[175] After Taylor's arrest, the Hornets banned him from all team-related activities while the NBA was continuing to conduct their investigation.[176] One month after the incident

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[170] *Id.* at 82.
[171] *Id.*
[172] *Id.*
[173] Withers, *supra* note 2, at 11.
[174] Howard Beck, *NBA Needs to Change Its Stance on Domestic Violence in Post-Ray Rice World*, BLEACHER REPORT (Sept. 26, 2014), http://bleacherreport.com/articles/2211257-nba-needs-to-change-its-stance-on-domestic-violence-in-post-ray-rice-world.
[175] Justin Hinkley, *Hornet's Jeffery Taylor Charged with Domestic Assault*, USA TODAY SPORTS (Sept. 25, 2014), https://www.usatoday.com/story/sports/nba/hornets/2014/09/25/jeffery-matthew-taylor-domestic-assault/16227257/.
[176] Associated Press, *Jeff Taylor Pleads Guilty to Abuse*, ESPN (Oct. 24, 2014), http://www.espn.com/nba/story/_/id/11787131/jeff-taylor-charlotte-hornets-pleads-guilty-domestic-violence.

Taylor pled guilty to misdemeanor domestic violence assault and malicious destruction of hotel property, and was sentenced to eighteen months of probation and required to complete twenty-six weeks in a domestic violence intervention program.[177]

But, in November 2014, after the NBA completed their independent investigation, NBA Commissioner Adam Silver suspended Taylor for twenty-four games.[178] Although the suspension was not in conformance with league standards, Silver indicated in a press release that the "suspension [was] necessary to protect the interests of the NBA and the public's confidence in it… Mr. Taylor's conduct violates applicable law and in my opinion, does not conform to standards of morality and is prejudicial and detrimental to the NBA."[179] While the NBA bylaws provide the Commissioner with a broad scope to issue punishments, the NPBA believed that this suspension was "excessive," "without precedent," and "inconsistent with the CBA;" however, Taylor decided not to proceed with an appeal and accepted the suspension.[180] This twenty-four game suspension, occurring just after the media spotlight on NFL's poor handling of the Ray Rice scandal, marked a turning point in the NBA's approach to domestic violence.

Prior to Jeffery Taylor's suspension, the most recent suspension for domestic violence was in 2007, over seven years earlier, to Sacramento Kings forward Ron Artest (now known as Metta World Peace).[181] Artest was arrested for misdemeanor corporal injury to a spouse, battery, false imprisonment and dissuading a witness from reporting a crime as a result of a domestic violence incident with his wife and his three-year-old daughter at home at the time.[182] Artest ultimately pled no contest to the charge of corporal injury to a spouse, and the remainder of the charges were

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[177] *Jeff Taylor Suspended 24 Games*, ESPN (Nov. 20, 2014), http://www.espn.com/nba/story/_/id/11904798/jeff-taylor-charlotte-hornets-suspended-total-24-games-pleading-guilty-domestic-violence-case.

[178] *Id.*

[179] *Id.*

[180] Michael McCann, *Jeff Taylor's Suspension for Domestic Violence Presents Compelling Debate*, SPORTS ILLUSTRATED (Nov. 21, 2014), https://www.si.com/nba/2014/11/21/jeff-taylor-domestic-violence-suspension-nba-adam-silver ("Michele Roberts signaled reluctance to negotiating a new domestic violence policy before the next round of CBA discussions… the NBA appears reluctant as well. The league has already seen problems for the NFL in adopting a bright-line six-game suspension for domestic violence.").

[181] *Kings Suspend Artest After Domestic Violence Arrest*, ESPN (Mar. 6, 2007), http://www.espn.com/nba/news/story?id=2788871.

[182] Associated Press, *Artest Sentenced to Community Service, Work Project*, ESPN (May 3, 2007), http://www.espn.com/nba/news/story?id=2859498.

dismissed pending his compliance with three-years of probation.[183] Artest was sentenced to a twenty-day work project with ten days suspended, a yearlong violence treatment program and a parenting class regarding the effects of domestic violence on young children.[184] During the pendency of his criminal case, Artest only sat out two games; the team did not suspend him, and the NBA only suspended him for seven games.[185] Of note, by 2013 the NBA and/or Artest's team suspended him on fourteen separate occasions for fighting or violent incidents with other players, and even fans, during games to which he received suspensions ranging from one to seventy-two games.[186]

Within the span of ten years, between 2004 and 2014, the NBA only suspended four players for domestic violence.[187] As with the other professional sports organizations, in the NBA's fan base, the Ray Rice incident sparked public outcry for a stronger stance on domestic violence causing the NBA to re-evaluate its policies.[188] Although the incident with Jeffery Taylor in 2014 was the NBA's first attempt to handle these issues with teeth, a subsequent player arrest in 2016 for domestic violence resulted in the NBA's incorporation of a negotiated policy in the next round of collective bargaining. In May 2016, Darren Collison of the Sacramento Kings was arrested and charged with felony domestic violence after his wife called 911 for assault. She had visible injuries when the police arrived.[189] Collison pleaded guilty to misdemeanor domestic violence and was sentenced to twenty days in jail, community service and a yearlong program to deter domestic violence as part of a three-year informal probation sentence.[190] After the NBA conducted its own investigation, Collision was suspended for eight games; the NBA took into account the conduct, result,

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[183] *Id.*
[184] *Id.*
[185] Chris Sheridan, *History of Metta World Peace Suspensions*, SHERIDAN HOOPS (Feb. 5, 2013), http://www.sheridanhoops.com/2013/02/05/history-of-metta-world-peace-suspensions/.
[186] *Id.*
[187] Phillips, *supra* note 108.
[188] Brian Mahoney, *Silver: NBA Will Review Domestic Violence Policies*, NBA (Sept. 22, 2014), http://www.nba.com/2014/news/09/22/adam-silver-nba-domestic-violence.ap/.
[189] Zach Harper, *Kings Guard Darren Collision Charged with Domestic Violence*, CBS SPORTS (June 18, 2016), https://www.cbssports.com/nba/news/kings-guard-darren-collison-charged-with-domestic-violence/.
[190] Associated Press, *Kings Guard Darren Collison Pleads Guilty to Domestic Battery*, ESPN (Sept. 2, 2016), http://www.espn.com/nba/story/_/id/17452571/darren-collison-sacramento-kings-pleads-guilty-domestic-battery.

his acceptance of responsibility, his cooperation with law enforcement and the NBA, and his voluntary participation in counseling.[191]

After these incidents, in January 2017, the NBPA and NBA came to an agreement in the CBA to include a joint policy prohibiting acts that constitute domestic violence, sexual assault, and child abuse.[192] The CBA includes an attachment detailing the definitions of "domestic violence," "sexual assault" and "child abuse," the creation of a policy committee of expert and party representatives "to provide education, support, treatment, referrals, counseling and other resources for players, their family members and others at risk."[193] The policy outlines the investigation procedures for the NBA, provides authority for the Commissioner to put a player on administrative leave while investigations are pending, and specifies that the Commissioner determine discipline on a case-by-case basis, including aggravating and mitigating factors.[194] The NBA also created a Policy Committee that operates outside of the disciplinary authority of the Commissioner, to essentially create and implement "Treatment and Accountability Plans" and any decision made by the committee is un-appealable.[195]

Although the NBA has now taken steps to remedy its past missteps in disciplining players for domestic violence, the future will determine whether it will follow and implement this new policy. The NBPA negotiated for more support, prevention and education rather than automatic player discipline when there is no conviction. Although there is no mandatory suspension based on a violation of the policy, the new CBA gives the Commissioner substantial power and discretion in choosing to suspend players for violating the policy. The NBA will have to depart from its past and demonstrate a commitment to implementing its new policy if it wants to be seen as taking seriously the issue of domestic violence.

D. NHL

The National Hockey League is arguably the least popular of the four major professional sports leagues in the United States. As such, the NHL has not

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[191] *Kings' Collision Suspended Eight Games for Domestic Violence*, NBA (Oct. 2, 2016), http://www.nba.com/article/2016/10/02/kings-collison-suspended-eight-games#/.
[192] NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT art. VI § 16 exhibit F (2017), *available at* http://nbpa.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf.
[193] *Id.*
[194] *Id.*
[195] *Id.*

been subjected to the same number of public relations nightmares that have plagued other leagues following high-profile domestic violence and sexual assault cases.[196] Yet despite the media attention to professional sports' handling of high-profile cases, the NHL has failed to move in the direction of creating a policy regarding domestic violence and sexual assault. Gary Bettman, the NHL Commissioner, has indicated that he "is not sure there is any need for any code of conduct for our players… who overwhelmingly conduct themselves magnificently off of the ice… our players know what's right and wrong."[197] However, several notable cases demonstrate that the NHL has failed, and continues to fail, handling off-the-ice conduct and domestic violence.[198]

Though the NHL does not have a domestic violence policy, it does have the ability to suspend players indefinitely for moral reasons according to broad clauses in Article 18-A of the NHL CBA, under the "Commissioner Discipline for Off-Ice Conduct."[199] Article 18-A.5 of the CBA states: "The League may suspend the Player pending the League's formal review and disposition of the matter where the failure to suspend the Player during this period would create a substantial risk of material harm to the legitimate interests and/or reputation of the League."[200] Furthermore, Article 18-A.5 indicates that under a criminal investigation "the League may suspend the Player pending the League's formal review and disposition of the matter where the failure to suspend the Player during this period of time would create a substantial risk of material harm to the legitimate interests and/or reputation of the league."[201] While it is unclear what comprises a violation of this policy, the policy provides the Commissioner with the authority to discipline players even in situations where a player has not been charged with a crime, and still provides the player with the opportunity to request a

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[196] Ben Harwich, *Domestic Violence in Professional Sports: An Analysis of Domestic Violence Through the Prism of Professional Sports League Collective Bargaining Agreements* (2016) (on file with author).

[197] Travis Hughes, *Gary Bettman Takes Shot at NFL That Totally Won't Backfire on Him*, SBNATION (Oct. 9, 2014), https://www.sbnation.com/nhl/2014/10/9/6952037/gary-bettman-quote-nhl-arrests-nfl-c.

[198] Joshua Kloke, *The NHL Is Making Up Its Domestic Violence Policy As It Goes*, VICE SPORTS (Dec. 3, 2014), https://sports.vice.com/en_us/article/aem97a/the-nhl-is-making-up-its-domestic-violence-policy-as-it-goes.

[199] NATIONAL HOCKEY LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 18-A (2013-2022), *available at* https://www.nhlpa.com/the-pa/cba.

[200] *NHL Fans Create Petition to Urge League to Take Clear Stance on Domestic Violence*, FOXSPORTS (Oct. 19, 2015), http://www.foxsports.com/nhl/story/nhl-chicago-blackhawks-patrick-kane-slava-voynov-domestic-violence-101915.

[201] NATIONAL HOCKEY LEAGUE COLLECTIVE BARGAINING AGREEMENT, *supra* note 199, at art. 18-A.3.

review by an independent arbitrator.[202] Like the league, the teams also have the option to invoke a "morals clause" in players' contracts in which the player "agrees to conduct on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interests of the Club, the League or professional hockey generally."[203]

Prior to 2013, many of the incidents surrounding domestic violence and sexual assault in the NHL went underreported, charges were dropped, or there was minimal media attention.[204] In October 2013, Colorado Avalanche goalie Semyon Varlamov was arrested for second-degree kidnapping and third-degree assault charges.[205] Varlamov's girlfriend, Evgeniya Vavrinyukat, alleged that he drunkenly knocked her down with a kick, stomped on her chest, and dragged her by her hair the night of the incident.[206] Varlamov posted bond, played in the next scheduled game, and continued to play despite the arrest and pending charges.[207] The NHL released a statement that they were "aware of the situation… and will not comment unless or until we have a fuller understanding of all the facts and circumstances related to the legal charges that have been filed," which was repeated in a statement by the Colorado Avalanche.[208] After Varlamov's

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[202] Cari Grieb, *Patrick Kane Case Hasn't Changed NHL's Attitude on Sexual Assault*, SPORTING NEWS (Aug. 28, 2015), http://www.sportingnews.com/nhl/news/patrick-kane-arrest-crime-charge-suspended-rape-sexual-assault-blackhawks-buffalo/zx67lhrucyry12bg03kudj20t.

[203] Matthew Heimlich, *The NHL Morality Clause: Can Athletes be Fired for "Immoral Behavior?"*, THE WHITE BRONCO BLOG (Dec. 15, 2015), http://thewhitebronco.com/2015/12/the-nhl-morality-clause-can-athletes-be-fired-for-immoral-behavior/.

[204] Greg Wynshynski, *NHL Fans Pressuring Teams on Assault, Domestic Violence*, YAHOO SPORTS (Apr. 28, 2017), https://sports.yahoo.com/news/nhl-fans-pressuring-teams-sexual-assault-domestic-violence-183350334.html ("In 2014, [Gary] Bettman said the NHL didn't have a domestic violence problem…but the NHL has had several recent high profile cases of sexual assault and domestic violence against women in recent years.").

[205] *Avs' Varlamov Arrested on Domestic Violence Charges*, NHL (Oct. 31, 2013), https://www.nhl.com/news/avs-varlamov-arrested-on-domestic-violence-charges/c-689289.

[206] Associated Press, *Semyon Varlamov Charges Dropped*, ESPN (Dec. 20, 2013), http://www.espn.com/nhl/story/_/id/10173198/semyon-varlamov-colorado-avalanche-charges-dropped.

[207] Rick Maese, *Semyon Varlamov, Colorado Avalanche Goalie, Plays Despite Accusations He Beat Girlfriend*, WASH. POST (Nov. 12, 2013), https://www.washingtonpost.com/sports/capitals/semyon-varlamov-colorado-avalanche-goalie-plays-despite-accusations-he-beat-girlfriend/2013/11/12/7741d72e-4b20-11e3-bf60-c1ca136ae14a_story.html?utm_term=.d3b61c44f5be.

[208] *Avs' Varlamov Arrested on Domestic Violence Charges*, *supra* note 205.

release, Colorado Avalanche's Coach Patrick Roy made a statement after starting Varlamov in the next game: "we're all aware of what happened, but we just feel that he's our guy, we have confidence in him and feel that it's good for him to play tonight."[209] Interestingly, almost exactly thirteen years prior in 2000, Patrick Roy was arrested on domestic violence and criminal mischief charges while playing for the Colorado Avalanche.[210] The NHL allowed Roy to play immediately; the criminal charges were dismissed three months later.[211]

Unfortunately the NHL never conducted an investigation into the allegations against Varlamov, and ultimately the district attorney dropped the charges based on information that led them to believe they could not prove the case beyond a reasonable doubt.[212] Varlamov's former girlfriend, Evgeniya Vavrinyukat, filed a civil suit against him seeking general, compensatory and punitive damages for reduction in past, present and future income, damage to reputation, humiliation and emotional distress.[213] The jury in the civil case sided with Varlamov, and the judge ordered Vavrinyukat to pay Varlamov $126,608 in damages for an abuse of process claim because the evidence did not support her claims of the abuse and attack.[214]

After criticism of its failure to even investigate Varlamov's conduct and amidst the media storm regarding the Ray Rice scandal, the NHL reconsidered its approach. In October 2014, Los Angeles Kings defenseman Slava Voynov was arrested on domestic violence charges.[215] The police report indicates that during a heated argument at a party, Voynov punched his wife, Marta Varlamova, in the jaw. They left the party and when home he choked her three times, pushed her to the floor several times,

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[209] Matt Brigidi, *Patrick Roy on Semyon Varlamov Start: 'Why Wait?'*, SBNATION (Nov. 1, 2013), https://www.sbnation.com/nhl/2013/11/1/5055628/semyon-varlamov-arrest-assault-kidnapping-starting.

[210] Aaron Lopez, *Roy Arrested on Domestic Violence Charges*, ABC News (Oct. 23, 2000), http://abcnews.go.com/Sports/story?id=100258&page=1.

[211] *Id.*

[212] Wynshynski, *supra* note 204.

[213] Katie Strang, *Semyon Varlamov Sued by Ex*, ESPN (Oct. 27, 2014), http://www.espn.com/nhl/story/_/id/11773836/semyon-varlamov-sued-civil-case-stemming-domestic-violence-incidents.

[214] *Avs' Varlamov Beats Domestic Violence Rap, Accuser Ordered to Pay*, FOXSPORTS (Feb. 3, 2016), http://www.foxsports.com/nhl/story/colorado-avalanche-goalie-semyon-varlamov-accused-of-domestic-violence-by-ex-girlfriend-wins-civil-case-judgment-020216.

[215] Billy Witz, *After Voynov's Arrest, the Kings Confront Domestic Violence*, N.Y. TIMES (Oct. 21, 2014), https://www.nytimes.com/2014/10/22/sports/hockey/after-voynovs-arrest-the-kings-confront-domestic-violence.html.

kicked her in several parts of her body and pushed her into the corner of a flat screen television causing a laceration to her face.[216] A neighbor called the police when she heard a female screaming next door.[217] Voynov was arrested in the hospital where his wife was being treated and charged with corporal injury to a spouse, and hours later was suspended indefinitely from the NHL pending a formal investigation based on the incident.[218]

The NHL did not allow Voynov to play or participate in any team practices during the pendency of the investigation, nor did it allow him to play in the World Cup for Russia, and it fined the Los Angeles Kings one-hundred thousand dollars for allowing Voynov to skate during a club practice.[219] Although Voynov's attorney initially indicated that Voynov would be pleading not guilty to the charges, he eventually pled no contest and was sentenced to ninety days in jail, three years' probation, a seven-hundred dollar fine, and to participate in a fifty-two-week domestic violence prevention program including eight hours of community service.[220] Because Voynov is a Russian citizen, prior to his release for serving his sentence, he was placed into the custody of U.S. Immigration and Customs Enforcement (ICE).[221] The Kings released Voynov and he decided to return to Russia rather than be deported.[222]

The NHL took a giant step forward in its handling of Voynov's case in comparison to Varlamov's just one year prior. The incident was a change

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[216] Nathan Fennon, *Kings Slava Voynov Pleads No Contest in Deal in Domestic Violence Case*, L.A. TIMES (July 2, 2015), http://www.latimes.com/sports/sportsnow/la-sp-sn-slava-voynov-pleads-no-contest-domestic-violence-case-20150702-story.html; *see also* Redondo Beach Police Dept. Records for Slava Voynov, (Jan. 27, 2015), http://www.trbas.com/media/media/acrobat/2015-02/82728341-04175255.pdf.

[217] Greg Beacham, *Voynov Suspended on Domestic Violence Suspicion*, SAN DIEGO UNION-TRIB. (Oct. 20, 2014, 8:29 AM), http://www.sandiegouniontribune.com/sdut-voynov-suspended-after-domestic-violence-charges-2014oct20-story.html.

[218] *LA Kings Issue Statement Regarding Slava Voynov*, L.A. KINGS (Oct. 20, 2014), https://www.nhl.com/kings/news/la-kings-issue-statement-regarding-slava-voynov/c-735338.

[219] Chris Peters, *NHL Fines Kings $100,00 for Violating Terms of Voynov Suspension*, CBS SPORTS (Dec. 2, 2014), https://www.cbssports.com/nhl/news/nhl-fines-kings-100000-for-violating-terms-of-voynov-suspension/.

[220] Chris Peters, *Kings' Slava Voynoc to Serve 90 Days in Jail Following Plea Deal*, CBS SPORTS (July 2, 2015), https://www.cbssports.com/nhl/news/kings-slava-voynov-to-serve-90-days-in-jail-following-plea-deal/.

[221] SI Wire, *Slava Voynov To Leave Kings, Voluntarily Departs U.S. for Russia*, SPORTS ILLUSTRATED (Sept. 16, 2015), https://www.si.com/nhl/2015/09/16/los-angeles-kings-slava-voynov-leaving-russia.

[222] Pierre LeBrun, *Slava Voynov Voluntarily Returning to Russia After Domestic Violence Case*, ESPN (Sept. 16, 2015), http://www.espn.com/los-angeles/nhl/story/_/id/13673270/slava-voynov-los-angeles-kings-returning-russia.

not only for other team owners and coaches, but the NHL as an organization.[223] However, the NHL still has a long way to go, specifically regarding sexual assault cases. In August 2015, Patrick Kane, an NHL All-Star and three-time Stanley Cup Champion for the Chicago Blackhawks, was accused of rape and sexual assault.[224] The accuser alleged that after going out to a nightclub, Kane invited her and a female friend back to his home for a private party and that he overpowered and raped her.[225] The woman then left Kane's home with her friend and went to a local hospital for examination. The police were subsequently called but no charges were filed.[226] The Erie County authorities conducted an investigation, and while the NHL conducted its own investigation it did not suspend Kane, and allowed him to attend training camp.[227] Kane's case took an interesting turn when the accuser's mother lied about a rape kit being placed on her doorstep, which the District Attorney referred to as a "bizarre hoax" and a "dog and pony show" regarding the allegations of tampered evidence.[228] Ultimately, the accuser declined to cooperate with the investigation and signed an affidavit declining to support prosecution. The Erie County DA believed that the case was "rife with reasonable doubt" and declined to press charges.[229] The NHL made a statement in March 2016 that "based on its review, including the determination made by the Erie County District Attorney not to pursue charges, the NHL has concluded the allegations against Kane were unfounded and the League considers the matter closed and will have no further comment."[230]

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[223] Chris Johnston, *NHL Passes First New Domestic Violence Test*, SPORTSNET (Oct. 20, 2014), http://www.sportsnet.ca/hockey/nhl/slava-voynov-los-angeles-kings-domestic-violence-charges-gary-bettman-nhl/.

[224] Jon Schuppe, *NHL Star Patrick Kane Facing Rape Investigation: Reports*, NBC NEWS (Aug. 7, 2015), https://www.nbcnews.com/news/sports/nhl-star-patrick-kane-facing-rape-allegations-reports-n405916.

[225] Lou Michael & Dan Herbeck, *New Details Emerge in Allegations Against NHL Star Patrick Kane*, BUFFALO NEWS (Aug. 9, 2015), http://buffalonews.com/2015/08/09/new-details-emerge-in-allegations-against-nhl-star-patrick-kane/.

[226] *Id.*

[227] Tanya Arezak, *The NHL Has a Responsibility to Suspend Patrick Kane*, SBNATION (Sept. 24, 2015), https://www.sbnation.com/2015/9/24/9372909/nhl-should-suspend-patrick-kane-pending-investigation.

[228] *District Attorney Says Accuser's Mom Lied About Bag*, ESPN (Sept. 27, 2015), http://www.espn.com/chicago/nhl/story/_/id/13737595/frank-sedita-prosecutor-patrick-kane-case-says-accuser-mom-lied-bag.

[229] Matt Higgins, *Patrick Kane Will Not Face Rape Charges*, N.Y. TIMES (Nov. 5, 2015), https://www.nytimes.com/2015/11/06/sports/hockey/chicago-blackhawks-patrick-kane-will-not-face-rape-charges.html.

[230] *NHL Statement Regarding Blackhawks' Kane*, NHL (Mar. 9, 2016), https://www.nhl.com/news/nhl-patrick-kane-statement/c-279495418.

In 2016, the NHL and the NHL Players' Association (NHLPA) developed a mandatory domestic violence, sexual assault and sexual harassment training for all players.[231] The program involves hour-long educational sessions with outside professionals that are in coordination with the behavioral health and wellness programs previously in place.[232] Although the NHL's education of players about domestic violence and sexual assault is a step in the right direction, it does not remedy the lack of a formal policy to hold players responsible for their off-the-ice conduct. The NHL fan base has voiced its concerns. A fan-created petition requesting that NHL implement a zero-tolerance policy for sexual assault and intimate partner violence is currently pending with over thirty-seven thousand signatures.[233] Given the public concern and recent media attention and the lack of action by the NHL, many teams have taken the creation of policy, advocacy and education into their own hands. For example, in 2015 the Nashville Predators partnered with the YWCA of Nashville and Middle Tennessee and its MEND program targeted at ending violence against women by engaging and educating men and boys.[234] The Nashville Predators and Bridgestone Arena President and CEO Sean Henry announced the NHL team and Allstate Foundation's commitment to donate five-hundred thousand dollars over a five-year period to support the MEND initiative.[235] Along with the five-hundred thousand dollar donation, the Predators also have a Public Service Announcement video titled "Unsilence the Violence"

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[231] John Wawrow, *NHL Begins Domestic Violence and Sexual Assault* Training, NHL (Jan. 15, 2016), https://www.nhl.com/news/nhl-begins-domestic-violence-and-sexual-assault-training/c-797688.

[232] *NHL Statement Regarding Blackhawks' Kane*, *supra* note 230 (The NHL indicates in its Press Release that there are "hour-long" sessions and players will complete this seminar over the span of "two months," but the NHL has not released any further statements or information regarding how many hour-long sessions the program includes.).

[233] Michelle Geschwind, *Petition to the NHL: Take Violence Against Women Seriously*, CHANGE.ORG, https://www.change.org/p/gary-bettman-bill-daly-demand-the-nhl-take-sexual-assault-and-domestic-violence-seriously?recruiter=401241624&utm_source=petitions_show_components_action_panel_wrapper&utm_medium=copylink (last visited Apr. 24, 2018).

[234] Brooks Bratten, *Preds, Mend Look to End Domestic Violence in Middle Tennessee*, NHL-PREDATORS (June 18, 2015), https://www.nhl.com/predators/news/preds-mend-look-to-end-domestic-violence-in-middle-tennessee/c-771401.

[235] *YWCA's MEND Program Scores Significant Support from Nashville Predators and* Allstate, YWCA (Jan. 25, 2017), https://ywcanashville.com/about/news-archives/ywcas-mend-program-scores-significant-support-from-nashville-predators-and.

"encouraging men and boys to speak up," because "the end of violence against women starts with men."[236]

IV. APPLYING LESSONS LEARNED IN THE DEVELOPMENT OF LAW IN THE UNITED STATES TO THE DEVELOPMENT OF POLICY IN SPORTS

Beginning in the 1970s and for two decades thereafter, law and policy in the U.S. redressing the problem of domestic violence exploded.[237] This section identifies the unintended consequences of this explosion and applies lessons learned to the development of domestic violence policy in the sports world. It argues that intuitive approaches to the problem of domestic violence, including harsh punishment, curtailed due process, and zero-tolerance have the potential to do more harm than good. If sports leagues truly want to say "no more" to domestic violence, as the NFL (for example) proclaims to do,[238] they should pay close attention to these lessons.

A. Thumbnail Sketch of Criminal and Civil Remedies

Fifty years ago, there was no criminal or civil justice system response to the problem of domestic violence. In fact, the concept of domestic violence, at least as far as the law was concerned, did not even exist. Today, sending a harassing email to an ex who lives across state lines is a federal crime (and potentially several state crimes or a civil contempt of court).

The seriousness with which the justice system now, theoretically at least, takes domestic violence is a response to the state's history of indifference. Police historically avoided responding to calls for help from victims of domestic violence; when they did respond, it was with reluctance to

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[236] *MEND: Unsilence the Violence*, NHL- NASHVILLE PREDATORS (Jan. 19, 2017), https://www.nhl.com/predators/video/mend-unsilence-the-violence/t-277437416/c-48538703.

[237] LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 10 (2012) ("Over the course of the last 40 years, the mushrooming response to domestic violence has transformed the legal landscape for women seeking relief from abuse."); *Id.* at 16-28 (providing a comprehensive overview of the development of the legal response to domestic violence in the United States from the 1970s to present day).

[238] *Roger Goodell Letter to NFL Owners*, ESPN (Aug. 29, 2014), http://www.espn.com/nfl/story/_/id/11425532/roger-goodell-letter-nfl-teams-domestic-violence-policy (publishing a letter written by NFL Commissioner Roger Goodell to all NFL team owners on Aug. 28, 2014 "Domestic violence and sexual assault are wrong. They are illegal. They are never acceptable and have no place in the NFL under any circumstances.").

interfere in a private, family matter and might end with (if the squabble was sufficiently serious) a walk around the block for a perpetrator but certainly not an arrest.[239] To address this problem, feminist activists and victim advocates reformed the law to require police to arrest alleged perpetrators at the scene of a domestic violence disturbance. Interestingly, these mandatory arrest laws proliferated around the time of the murder of O.J. Simpson's wife, Nicole Brown Simpson.[240]

Around the time of the trial, feminists began winning hard-fought policy battles to require district attorneys to prosecute aggressively domestic violence. "No drop" prosecution policies give prosecutors no or little wiggle room to dismiss criminal charges in cases of domestic violence.[241] By 1994, Congress passed the first federal law prohibiting domestic violence, the Violence Against Women Act, making it a federal crime to cross state lines to abuse or stalk an intimate partner, or to possess a gun if convicted of even a misdemeanor crime of domestic violence.[242]

On the civil side of the law, civil protection orders (or restraining orders) became available to victims in the late 1970s and throughout the 1980s. By 1989 every state provided for this emergency civil remedy that restrains the perpetrator from coming near or contacting the victim, amongst other forms of relief.[243] The Violence Against Women Act mentioned above provides an array of protections in the civil justice system as well. These range from new remedies for immigrant victims

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[239] Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1851-53 (2002).

[240] G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 238 (2005) ("Soon after [the murder of Nicole Brown Simpson], New York joined a majority of states in passing mandatory arrest laws in cases involving domestic violence. Most of the legislation passed that day had languished for years in state legislatures. With the death of Nicole Brown, politicians raced to the state house to invoke domestic violence laws, jumping on the "zero tolerance" bandwagon.").

[241] *See generally* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996) (describing, and supporting, aggressive prosecution policies in domestic violence cases). For a compilation of representative aggressive or "no-drop" prosecution policies, *see* Tamara L. Kuennen, *Private Relationships and Public Problems: Applying Principles of Relational Contract Theory to Domestic Violence*, 2010 B.Y.U. L. REV. 515, 592-95 (documenting policies in thirty-five states).

[242] GOODMARK, *supra* note 7, at 18-21 (describing the creation of the Violence Against Women Act and its reauthorizations against the backdrop of the many legal reforms occurring in the 1990s).

[243] *Id.* at 17.

to gain lawful immigrant status to prohibitions on landlords for discriminating against victims who apply for housing.[244]

In short, in the last half century, U.S. law and policy reforms have caused a change in how the civil and criminal justice systems respond to domestic violence.[245] While there have been tremendous benefits for victims who are able and who desire to use the justice systems for help, feminist activists who advocated these landmark reforms have questioned their effectiveness in ending domestic violence and meaningfully advancing the rights and safety of victims.[246] These questions flow from a number of unintended consequences of the reforms, to which this discussion now turns.

B. Over-Reliance on the Criminal Justice System and Consequent Erosion of Due Process

Despite the skepticism of some, the criminal justice response has, over time, became increasingly relied-upon as the primary solution to domestic violence. Women's advocates and activists played a major role in crafting the Violence Against Women Act ("VAWA") and in shaping federal funding priorities under that Act. "Their priority was using federal funds to reinvent the legal system to make police, prosecutors and judges more responsive."[247] The single largest pool of money under the VAWA when it initially passed was the STOP (Services for Training Officers and Prosecutors) grant, specifically intended to increase the apprehension, prosecution and adjudication of persons committing

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[244] Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA III), Publ. L. No. 109-121, 119 Stat. 2960 (2005).

[245] Kuennen, *supra* note 241, at 527.

[246] ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 52 (2000) ("The promise of 'legal liberalism is disconnected from the realities of women's lives. Legal intervention alone cannot do the job. Legal intervention may provide women certain protection from battering, but it does not provide women housing, support, child care, employment, community acceptance, or love…. The contradiction is profound."); *see also* GOODMARK, *supra* note 7, at 28 ("[T]he movement fought for and won legislative victories that allowed it to reconstruct the legal landscape, creating criminal and civil justice remedies and funding the development of those systems. But those victories came at a price. The movement went from being woman-centered to victim-centered, from self-help to saving, from working with women to generate the options that best met their needs to preferring one option, separation, facilitated by the intervention of the legal system, from being suspicious of and cautious about state intervention to mandating such intervention. The question is whether, for women subjected to abuse, that price has been worth paying.").

[247] GOODMARK, *supra* note 7, at 19.

violent crimes against women.[248] Arrest and prosecution of domestic violence has increased; so too has the reporting of domestic violence to the police. More importantly, rates of domestic violence are down, though this decline tracks the overall decrease in crime rates. "What has not declined is the rate at which women are killed by their male partners, which decreased less than the rates of other homicides between 1976 and 2004."[249]

Some argue that, even if the criminal justice system response worked perfectly, and every perpetrator of domestic violence was arrested, prosecuted and convicted, the reliance on the criminal justice response as a one-size-fits-all solution to domestic violence has posed problems.[250] It has "crowded out other strategies" to end domestic violence and "in the zero-sum game of funding, monies spent on law enforcement are not spent on other crucial services like housing, job training, education or economic development."[251]

In the world of sports, where professional athletes are charged but rarely convicted, it is especially critical that a criminal conviction is not a prerequisite to holding accountable perpetrators of domestic violence that the MLB, NFL and NBA have so recognized. The very existence of these leagues' employment policies that explicitly address domestic violence is proof.[252] The NHL is a half-century behind. Like the police and prosecutors in the 1960s, Commissioner Bettman has chosen to bury his head in the sand.[253]

The MLB, NFL and NBA policies make explicit a grant of authority to the leagues to discipline players regardless of the criminal justice system. This response is key. MLB's policy states that the "Commissioner's authority to discipline is not dependent on whether the player is convicted or pleads guilty to a crime."[254] The NFL's and NBA's policies are similar.

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[248] GARRINE P. LANEY, CONG. RESEARCH SERV., VIOLENCE AGAINST WOMEN ACT: HISTORY AND FEDERAL FUNDING 4 (2005).
[249] GOODMARK, *supra* note 7, at 21.
[250] For a summary of the one-size-fits-all critique of the criminal justice system respect to domestic violence, *see* Kuennen, *supra* note 9, at n. 239 and accompanying text.
[251] *Id.* at 22.
[252] *See generally* Deseriee A. Kennedy, *Using the NFL as a Model? Considering Zero Tolerance in the Workplace for Batterers*, 45 U. BALT. L. REV. 293 (2015).
[253] *See* note 239 *infra* and accompanying text.
[254] MLB Joint Policy, Section C ("Discipline").

Commissioner Manfred has put his money where his mouth is. In several of the cases he has presided over since MLB's policy went into effect, he doled out punishment where criminal charges were dismissed (Reyes, Chapman and Familia) and where they were not even filed (Norris). In the remaining case (Olivera), Manfred issued his decision while the criminal case was ongoing and before its resolution.

The MLB sends the message that even if a player's actions are not deemed criminal, they are deemed reprehensible and punishable by the League. That the punishments have teeth backs up that message. For players, being benched has been described as one of the most impactful punishments. In the words of one professional athlete:

> I don't think fines have all that much impact on very many players, even the lower-paid players. The real impact on players comes when it affects their playing time. You work so hard to get on the field and you become proud of what you do. When the league suspends players and takes away their playing time, it has more of an impact than taking the money away. You can always make more money, and money is kind of an abstract thing to some guys because at our age, some of us have made so much we don't even know what that money means. There are guys who are fined $10,000, it is only a tenth of what they are making that week. When the league affects play time is really when they have an impact.[255]

Commissioner Goodell has been less successful. He botched the first case to come before him only five months after implementing the 2014 Policy. Initially, Goodell suspended Josh Brown for only one game after a ten-month NFL investigation, despite the Policy's mandate that the minimum disciplinary action was suspension for six games. At first Goodell blamed the police for refusing to release evidence during its investigation, and then he blamed the victim herself for not cooperating. But Josh Brown admitted to a pattern of abuse.

In what appeared to be a response to public criticism, Goodell then overcompensated by shortchanging player Ezekiel Elliott of a full and fair procedure. The NFLPA made a convincing case that Elliott was

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[255] *See* BENEDICT, *supra* note 3, at 223-24 (quoting a NFL player).

never given the opportunity to confront his accuser in various phases of the proceedings. And because the policy itself was never collectively bargained for, their accusations that Goodell has swung the pendulum too far have merit.

When perpetrators feel that they are being treated unfairly, they are less likely to comply with court orders, treatment and other interventions.[256] Thus from the perspective of effectiveness of interventions, due process is extremely important. The MLB and the NBA got it right in their implementation of joint policies, collectively bargained for, between the leagues and the players' associations.

The NFL has mis-stepped here. By failing to get player buy in, in the form of collective bargaining, it has now put itself in a position that compromises the integrity of its investigations in order to make up for its past failure to properly address issues of domestic violence. It will likely be forced to face this issue head on with the NFLPA in the next round of collective bargaining negotiations in 2020.

While the NBA collectively bargained with the NBAPA, the NBAPA has filed a grievance against the NBA for what it believes to be excessive and inappropriate discipline in the first case of domestic violence following its most recent policy revisions. The NBA suspended Piston's center Willie Reed for six-games following an August 2017 domestic violence arrest.[257] The NBA stated that "the six-game suspension is based on all facts and circumstances of this matter and considers the conduct and its result, the outcome of the criminal matter, and Reed's voluntary participation in counseling as well as the court-mandated program, among other factors."[258]

Though NBAPA filed a grievance, it has not characterized the policy itself to be a sham. The joint policy is noteworthy for a couple of reasons. First, there is no mandatory minimum sentence when the league implements discipline. On one hand, this might allow the league to go light on accountability. On the other, mandates have appeared to backfire in the larger context of domestic violence criminal law reform, as seen in mandatory arrest and prosecution policies discussed above.

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[256] *See* Epstein, *supra* note 239, at 1870-71 (arguing that even when these perceptions are unrealistic, if accused perpetrators perceive they are being treated unfairly they are less likely to comply with court orders and/or the law).

[257] Dan Gartland, *Pistons Willie Reed Suspended Six Games for Domestic Violence*, SPORTS ILLUSTRATED (Feb. 6, 2018), https://www.si.com/nba/2018/02/06/piston-willie-reed-suspension-six-games-domestic-violence-arrest.

[258] *Id.*

Although the NBA investigation of Darrell Collison occurred prior to implementation of its most recent policy, his case is worthy of mention here. He pled guilty to domestic violence and was sentenced to twenty days in jail, a yearlong domestic violence intervention program, and three years of probation. The NBA took into account Collison's conduct of taking responsibility for the abuse, voluntarily participating in counseling, and cooperating readily with the investigation. It suspended him for eight games. This approach seems more balanced than the kneejerk reaction Commissioner Silver had taken two years before with Jeff Taylor, who he suspended for twenty-four games and which the NBPA proclaimed excessive.

Second, the NBA's 2017 policy as a whole focuses on remedies that are alternatives to harsh, discretion-less punishments typical of the criminal justice system. It eschews a one-size-fits-all approach to domestic violence, a critique deservedly and widely leveled at the criminal justice system.[259] Instead, the policy provides that discipline shall be determined on a case-by-case basis that includes consideration of both aggravating and mitigating factors.

The MLB's policy also incorporates individualized rather than one-size-fits-all strategies. For example, the policy emphasizes individualized treatment of the player, assigns experts in the field to evaluate the player's needs and take responsibility for monitoring compliance, and gives very broad discretion regarding the content of the treatment plan, including that the plan may provide (in addition to an enumerated list of directives) "other reasonable directives designed to promote . . . safety . . . ."[260] Reyes met with psychologists, was prescribed a counseling plan, and support groups working against domestic violence.[261] He also publicly apologized.

Significantly, Reyes has gotten a second chance with the Mets. The opportunity to continue to be employed is important for several reasons. First, unemployment amongst perpetrators is a significant risk factor for

[259] For a summary of the one-size-fits-all critique of the criminal justice system response to domestic violence, Kuennen, *supra* note 9, at n. 239 and accompanying text.
[260] MLB Joint Policy, Section A ("Treatment and Intervention").
[261] Billy Witz, *Jose Reyes Returns to the Mets, Baggage and All,* N.Y. TIMES (June 25, 2016), https://www.nytimes.com/2016/06/26/sports/baseball/jose-reyes-mets-domestic-violence.html.

lethality in domestic violence cases.[262] Second, as stated by Cindy Southworth, the executive director of the National Network to End Domestic Violence: "What we don't want is for someone, the moment the police are called, is for an athlete to lose his entire career . . . It would create huge, unfathomable pressure not to call 911 if they knew their loved one's career would be in jeopardy."[263]

But this position also requires balance. Compare Reyes to Chapman, who did a stint with the Cubs before signing with the Yankees the year following his suspension. Unlike Reyes, Chapman never publicly apologized; to the contrary, he publicly denied the allegations. The Yankees named him "Mr. October" in October 2017. October is Domestic Violence Awareness month.

C. The Challenge of Defining Domestic Violence

Over-reliance on the criminal justice system response had another unintended consequence in the broader social context. The definition of "domestic violence" changed from what activists in the early battered women's movement intended.[264] The criminal law definition focuses – as it does in cases of assaults perpetrated by a stranger – on a discrete, physical incident of violence.[265] But activists' and advocates' definition focuses on a pattern of behavior in which one party seeks to exert power and control over another. In this pattern, physical violence is but one of many control tactics a perpetrator uses. As a result, many advocates have argued that the law's myopic focus on physical violence alone has not adequately addressed the abuse many women suffer.

The MLB defines domestic violence just as activists would hope: it is "a pattern of abusive behavior in any intimate relationship that is used by one partner to gain or maintain power and control over another intimate partner."[266]

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[262] *See* Jacquelyn C. Campbell, *Risk Factors for Femicide in Abusive Relationships: Results from a Multistate Case Control Study*, 93 AM. J. PUB. HEALTH 1089 (2003) (identifying unemployment of perpetrator as most significant demographic in cases involving femicide).

[263] Witz, *supra* note 261 (quoting Cindy Southworth, executive vice president of the National Network to End Domestic Violence).

[264] For a concise summary of this topic, *see* STARK, *supra* note 6, at 84-92.

[265] *See generally* Deborah Teurkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 960 (2004) (arguing for an overhaul of the criminal law, which is "premised on a transactional model of crime that isolates and decontextualizes violence").

[266] MLB Joint Policy, Section A ("Treatment and Intervention").

The NBA policy is more detailed:

> "Domestic violence" includes, but is not limited to, any actual or attempted violent act that is committed by one party in an intimate or family relationship against another party in that relationship. Such an act may include physical assault or battery, sexual assault, stalking, harassment, or other forms of physical or psychological abuse. It may also include behavior that intimidates, manipulates, humiliates, isolates, frightens, terrorizes, coerces, threatens, injures, or places another person in fear of bodily harm. Domestic violence can be perpetrated by current or former spouses, current or former domestic or same sex partners, persons who are living together or have cohabitated, persons with children in common, persons who have or had an intimate or dating relationship, and family members. Domestic violence can be a single act or a pattern of behavior in a relationship.[267]

The NFL does not contain such clear or comprehensive language. It vaguely refers to:

> A crime of violence, meaning he is accused of having used physical force or a weapon to injure or threaten another person, of having engaged in a sexual assault by force or a sexual assault of a person who was incapable of giving consent, of having engaged in other conduct that poses a genuine danger to the safety or well-being of another person, or having engaged in animal abuse.[268]

It appears both from the text of the policy and based on the Commissioner's enforcement of the policy thus far to encompass incidents of physical violence against a person with whom the player has some sort of an intimate relationship.

The lack of specificity in the NFL definition is problematic. First, as sociologists have pointed out, there are many types of domestic violence.[269] These include singular, one-off sorts of incidents that occur

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[267] NBA/NBPA Joint Policy, Appendix F ("Joint NBA/NBPA Policy on Domestic Violence, Sexual Assault, and Child Abuse").
[268] NFL PERSONAL CONDUCT POLICY, *supra* note 150.
[269] *See* Stark, *supra* note 6, at 103-06 (describing sociologists' typologies of domestic violence).

in intimate relationships in which factors such as stressful circumstances or poor communication skills are apparent. The three leagues' policies may address this type of "common couple violence."[270]

But the kind of domestic violence that concerns feminist legal scholars and advocates for domestic violence victims is distinct in kind. It involves the perpetrator's systematic use of coercion and control and is done for the purpose and with the intent of diminishing the victim's autonomy. Sociologists call it "coercively controlling" violence. Physical acts of aggression may accompany coercively controlling violence, but they are not a prerequisite. It is coercion itself – the restraint of another from engaging in conduct in which she has a right to engage or abstaining from conduct in which she has the right to abstain – that comprises the act of domestic violence. The NBA alone captures these critical nuances.

The NFL, by failing to include coercively controlling domestic violence, misses what is widely considered the most dangerous type of domestic violence. In coercively controlling domestic violence, there is a heightened risk of lethality and, counter-intuitively, this risk is most prominent at the moment that the victim makes a decision to separate from the perpetrator.

D. Diminishment of Victim Autonomy

Perhaps the most prevalent feminist critique of the criminal justice system response is that, by mandating arrest and encouraging prosecution regardless of the victim's wishes, the current criminal regime erodes victim autonomy.

There are myriad reasons why victims do not cooperate with the prosecution. The victim may feel, for example, that she wants to salvage the intimate partnership because she still loves her partner; conversely, she may be desperate to escape him but feel that she will be in more danger, rather than less, by testifying for the prosecution and supporting conviction.

In all prosecutions of violence, whether they be in the context of intimate partners or in that of strangers, the state and the perpetrator are the only

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[270] *See* Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 479 (2008) (describing types of domestic violence and specifically describing situational, or "common couple" violence).

parties in the case and the victim is merely a witness who has little voice and no authority to decide when a given case should be prosecuted. Many victim witnesses feel fearful. But in the context of domestic violence, a number of factors exacerbate the victim's fear. First, no-drop prosecution policies provide victims with no choice about testifying. Prosecutors, under the gun to aggressively prosecute, have been known to charge victims who do not show up at trial with contempt of court. And they charge victims who recant with perjury. Second, as discussed above, if the type of domestic violence in the relationship is coercively controlling violence, the victim may be putting herself at heightened risk of homicide if the perpetrator perceives her to be supporting the prosecution as a means of ending the relationship. In addition, victims in domestic violence cases, unlike stranger assaults, may share children with the perpetrator, own a home with him, or be married to him. In short, when compared with stranger prosecutions, domestic violence prosecutions remove a victim's ability to order her private life across a broad spectrum of issues. This erosion of decision-making autonomy was not what early activists intended.

In the sports world, there is no question that many victims' voices are not heard.[271] Victims involved with professional athletes might be doubly worried about confidentiality, their partner losing their job, being in the media spotlight and subject to public criticism, and reliving the domestic violence every time a new story comes out. Janay Rice is one such example. She was panned by the public for sticking with Ray, and she knew it.[272] She talked publicly about how much she loved him, how worried she was about him losing his job, and how relieved she felt when

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[271] Ines Bebea & Simone Sebastian, *For Battered NFL Wives, a Message from the Cops and the League: Keep Quiet*, WASH. POST (Oct. 17, 2014), https://www.washingtonpost.com/posteverything/wp/2014/10/17/for-battered-nfl-wives-a-message-from-the-cops-and-the-league-keep-quiet/?utm_term=.11fc2ab18e5b ("The NFL is a unique universe with an overwhelmingly male workforce whose members are lionized in the press and in their communities; a we're all-in-this-together class, and incentives for the managers, coaches, and union reps to keep negative stories under wraps."); ("You get brainwashed. It's so ingrained that you protect the player, you just stay quiet. You learn your role is to be a supportive NFL Wife… otherwise, you'd cost him his job.").

[272] Jemele Hill, *Janay Rice, In Her Own Words*, ESPN (NOV. 28, 2014), http://www.espn.com/nfl/story/_/id/11913473/janay-rice-gives-own-account-night-atlantic-city ("I still find it hard to accept being called a 'victim.' I know there are so many different opinions out there about me – that I'm weak, that I'm making excusing and covering up abuse – and that some people question my motives for staying with Ray. However, I'm a strong woman and I come from a strong family. Never in my life have I seen abuse, nor have I seen any woman in my family physically abused.").

initially the NFL suspended him for only two games.[273] Then, when seven months after the incident, more footage of the assault was released, she had to relive it. She talked about "going into a shell" when this occurred, and about how angry she was when the Ravens cut Ray, and how worried she was about his future.[274]

Even in the investigatory process it is unclear whether victims' voices are meaningfully heard. Janay Rice, for example, stated that she was asked only one question during the NFL investigation: how she felt about everything.[275] She replied: "I broke down in tears. I could hardly get a word out. I just told him that I was ready for this to be over."[276]

E. The Absence of Intersectionality in the Legal Response

The justice system response, both criminal and civil, has been criticized for sensationalizing both victims and perpetrators. If a victim does not fit the mold of a weak, passive, helpless person who wants to leave the abusive relationship if only she could, she is viewed with incredulity and hostility.[277] This paradigmatic victim is both white and heterosexual, depriving women of color and lesbians of victim status and its associated protections.[278] "Reliance on these stereotypes and on the experiences of white, straight women to shape law and policy pushed the experiences of other women to the margins…. Race, sexual orientation, immigration status, class, disability status, and location all shape women's experiences with abuse, reinforcing their disempowerment and dictating their needs."[279]

Just as women are viewed stereotypically, so too are men. They are often seen as monsters and the explanation for their conduct lacks nuance: they all are asserting dominance over their partners to keep their partners in line.[280] Though psychologists and sociologists have well-documented

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[273] *Id.*

[274] *Id.* ("I was extremely surprised and angry that the Ravens released him, because they know him. They were our family, but I felt like the Ravens completely disregarded the past six years with him. Anytime the Ravens needed someone for a community event, Ray was their man. It seemed like a knee-jerk reaction for publicity reasons.").

[275] *Id.*

[276] *Id.*

[277] Tamara L. Kuennen, *Love Matters*, 56 ARIZ. L. REV. 977, 991 (2014)

[278] GOODMARK, *supra* note 7, at 70-71.

[279] *Id.* at 71.

[280] *Id.* at 148 (Dominance feminist explanation of why men abuse is one dimensional; maybe it's not about purposefully trying to control someone but rather about acting in ways that they were raised in a patriarchal society.).

various typologies of violence that occur in intimate partnerships, most advocates working in the field believe that perpetrators commit domestic violence to assert power and control over their partners, as discussed *supra*.[281] In addition:

> The feminist approach can be faulted for minimizing or denying the role of substance abuse, mental illness, childhood trauma, race, culture, and poverty in intimate-partner abuse…. Failure to take such factors into account perpetuates a one-dimensional image of the batterer as a controlling, heterosexual, male villain – a stereotype that impedes efforts to coordinate effective responses to domestic violence and entrenches gendered hierarchies that affect men, as well as women.[282]

To address men's violence against women, we must better understand the complexity of manhood and theories of masculinity. Masculinity theorists understand that masculinity is not innate but a social construct; like other gender identities, it is learned and performed.[283] Performance occurs along a continuum of conduct that differentiates itself by degrees from stereotypically feminine conduct. As put by Angela Harris, "[M]asculinities of all varieties share the requirement that men establish themselves on the ground of what they are not…. at best by being 'not a woman,' at worst by excluding, hurting, denigrating, exploiting, or otherwise abusing actual women."[284]

Sport is one of the primary sites at which masculinity is taught.[285] "The particular masculinity produced through participation in sports is shaped by

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[281] *See supra* section III.C.

[282] Carolyn B. Ramsey, *The Stereotyped Offender: Domestic Violence and the Failure of Intervention*, 120 PENN ST. L. REV. 337, 337-338 (2015).

[283] Ann C. McGinley & Frank Rudy Cooper, *Masculinities, Multidimensionality, and Law: Why They Need One Another, in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 3-4 (FRANK RUDY COOPER & ANN G. MCGINLEY, EDS., 2012) ("In contrast [to feminist theorists], masculinities theorists see masculinity as a social construct that encourages men to compete with one another in order to prove their masculinity to each other. Those behaviors, in turn, harm women because as men anxiously compete to prove their masculinity to one another, they often use women as pawns or props in the competition.") (citation omitted).

[284] Angela P. Harris, *Gender, Violence, Race and Criminal Justice*, 52 STANFORD L. REV. 777, 785 (2000).

[285] Deborah L. Brake, *Sport and Masculinity: The Promise and Limits of Title IX*, MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 207 (Frank Rudy Cooper & Ann G. McGinley, eds., 2012).

race, class, and the kind of sport played. The world of men's sports contains layers of privilege and hierarchies of masculinity within it."[286]

Masculinities theorists posit, for example, that the more physically violent and aggressive the sport, the greater status the sport and the athlete have in the masculinity hierarchy.[287] Men who excel at football, basketball and hockey therefore reap the greatest rewards of the hetero-masculinity that sports construct.[288] But this hierarchy is complicated by issues of race, class and sexual orientation.

> In contrast to other sites where masculinity is developed, men of color, and black men in particular, have succeeded in developing a celebrated masculinity through sports participation, especially in football and basketball. Through excelling in sports, black boys and men have been able to construct a higher-status masculinity and more varied life paths. And yet, their success is paradoxical because it does not challenge the institutions or structures that situate black men in a position of inequality, nor provide any but a very few with any real economic security through professional sport.[289]

Most of the sociological research on race and gender in sports has focused on black male athletes, some has focused on Latinos' inroads into baseball, and almost no research exists regarding Asian men in sports. [290]

Yet, the MLB, NFL and NBA players are racially diverse,[291] and NHL players are diverse in terms of nationality, with players from Russia,

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[286] *Id.* at 207-08.

[287] BRIAN PRONGER, THE ARENA OF MASCULINITY: SPORTS, HOMOSEXUALITY, AND THE MEANING OF SEX 19-20 (1990).

[288] Brake, *supra* note 285, at 210 (arguing that in high school and college sports, the most masculine sports, football and men's basketball, sit at the top of the athletic hierarch and that men who excel in these "reap the greatest rewards of the hetero-masculinity sport constructs.")

[289] *Id.* (citations omitted).

[290] *Id.* at 211.

[291] *See The Racial and Gender Report Card*, TIDES, http://www.tidesport.org/reports.html (last visited Apr. 24, 2018). NHL players are not racially or socio-econically diverse; they are largely white and middle class. *See* Evan F. Moore, *NHL Looks to Inner-Cities for New Generation of Diverse Players*, ROLLING STONE (Dec. 8, 2016), https://www.rollingstone.com/sports/nhl-looks-to-fix-diversity-issues-w454345.

Sweden and Canada.[292] While cultural background can never excuse domestic violence, interventions to address it must be culturally sensitive and individually tailored to the diverse cultural background and experiences of the player.[293]

More importantly, taking a player's race, class and cultural background into account helps us better understand why a one-size-fits-all policy in sport might be a kneejerk rather than deliberate response. Our society emasculates African-American and Latino men intellectually and financially,[294] and incarcerates them disproportionately. Simultaneously these groups have enjoyed some success in an institution (sport) that promotes violence and particularly violence against women as a demonstration of masculinity. Sport offers marginalized individuals a rare chance at the privileges associated with hegemonic masculinity. These paradoxes explain in greater depth how domestic violence committed by professional athletes deserves closer attention and more thoughtfulness than the standard criminalization strategy provides.

Other factors, such as players' dramatic increase in earnings, or move to the U.S. from another country, or language barrier, or overnight publicity if not fame, further complicate this inquiry.

F. The Unforeseen Stickiness of Norms

One issue that was not foreseen by activists was the fact that domestic violence convictions would be so difficult to obtain, and that these convictions would be overwhelmingly misdemeanors, rather than felonies, when compared with convictions of stranger violence.

Despite the reform of law and policy making domestic violence a crime, the average juror has been reluctant to view acts of violence between intimate partners as criminal. This problem, where the law is too disparate from a cultural norm, has been described as a problem of "sticky

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[292] Antonio De Loera-Brust, *The Problem with U.S. Hockey: Racial Diversity*, THE JESUIT REVIEW (Feb. 20, 2018), https://www.americamagazine.org/arts-culture/2018/02/20/problem-us-hockey-racial-diversity.

[293] MLB has paid attention to points of intersectionality in other contexts, but has it addressed intersectionality in its treatment of domestic violence? *See, e.g.*, *Latino Players Stress the Exact Spelling of Their Names*, N.Y. TIMES (Aug. 7, 2016), https://www.nytimes.com/2016/08/07/sports/baseball/eduardo-nunez-putting-accent-on-spanish-names.html (describing MLB campaign to both get spelling and pronunciations of Latino names right and also describing the 2015 Spanish-language outreach campaign).

[294] "African-American men have long argued that they are 'emasculated' by white supremacy, both materially and culturally." Harris, *supra* note 284, at 783.

norms." As Dan Kahan has written, sometimes law is capable of changing cultural norms, such as laws requiring the use of seat belts. Other laws, when too different from the majority of people's values and beliefs, are not capable of instigating cultural change. While both law and lawmakers profess "zero tolerance" for domestic violence, many people believe that some use of physical force is not only an acceptable, but legitimate, way to resolve conflict in an intimate relationship.[295]

The immediate firing of a player might be perceived to be a draconian response, and this would conflict with the sticky norms problem. If players, or fans, perceived the penalty to be too great for the crime, they might consider it to be outrageous and unfair. For example, commentator John Harper called for a penalty for MLB player Jose Reyes more in line with what Ray Rice got:

> Manfred needs to come down hard on Reyes with a punishment that gets players' attention and, in the best-case scenario, acts as a deterrent to such behavior in the future. How hard? Obviously, a major suspension is warranted. Something like 81 games, or half of the MLB 162-season, sounds right for a first-time offender, if the new policy is going to be taken seriously.[296]

If Reyes had been banned from MLB altogether for a "single mistake," as some have characterized it, perhaps there would be backlash. Indeed, player David Ortiz commented on February 23, 2016 (before the Commissioner's decision was rendered): "I know Jose well. Jose is not a troublemaker. He's a good guy . . . We're not perfect. . . . We all make mistakes. That's no excuse, but people are judging him without knowing everything."[297]

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[295] *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 609 (2000) (arguing that the average juror believes that some amount of violence within an intimate relationship is acceptable, and thus might be disinclined to convict in the case of domestic violence, and calling this a sticky norm that is not going to be easily changed by feminist law reforms reflecting values not yet adopted by society at large).

[296] John Harper, *Jose Reyes Should be Banned 81 Games if Baseball Wants Domestic Abuse Policy to be Taken Seriously*, N.Y. DAILY NEWS (Nov. 10, 2015), http://www.nydailynews.com/sports/baseball/harper-mlb-send-message-ban-jose-reyes-81-games-article-1.2429659.

[297] Bob Nightengale, *David Ortiz: 'I was Never Trying to be a Role Model'*, USA TODAY (Feb. 23, 2016), https://www.usatoday.com/story/sports/mlb/2016/02/23/red-sox-david-ortiz-domestic-abuse/80808174/.

In hockey, fans frustrated with the NHL's silence on the issue of domestic violence are calling for the league to do something. Understandably so, they seek "a clear, comprehensive policy of zero tolerance for players who commit acts of intimate partner violence or sexual assault" with "harsh, truly consequential punishment" for violation of the policy.[298]

But such cannot be the case if what the fans really want is for the NHL to effectively address domestic violence, which continues to be a sticky norm.

V. ADVANCING THE BALL: TOWARD A CHANGE IN SPORT'S CULTURAL NORMS

To address domestic violence meaningfully, the leagues must change the cultural norms that make it legitimate. Change must start from within or, as Commissioner Goodell put it: "We must get our own house in order first."[299] Goodell was referring to improving the disciplinary action taken against a player after he has committed domestic violence. These changes are critical. However, addressing domestic violence after-the-fact will never be enough to change the institutional norm of domestic violence.

One thing that all of the leagues – even the NHL – have done is educate themselves about domestic violence prevention. Some of the leagues have also partnered with domestic violence prevention agencies in the community to both educate and serve the public. Many of these partnerships have not been trivial.[300]

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[298] Geschwind, *supra* note 233.

[299] Everett Rosenfeld, *NFL's Goodell: We Will Get Our House in Order*, CNBC (Sept. 19, 2014), https://www.cnbc.com/2014/09/19/nfls-goodell-we-will-get-our-house-in-order.html.

[300] *See, e.g.*, *NFL Players Say No More to Domestic Violence & Sexual Assault in New PSA*, NO MORE CAMPAIGNS, https://nomore.org/campaigns/public-service-announcements/nflplayerspsa/ (last visited Apr. 24, 2018); Press Release, Phoenix Suns, *Suns to Host Domestic Violence Awareness Night* (Oct. 11, 2017), http://www.nba.com/suns/press-release/phoenix-suns-host-domestic-violence-awareness-night/#gref; Jane McManus, *New York Sports Figures, Teams Join Anti-Domestic Violence Campaign*, ESPNW (Oct. 6, 2016), http://www.espn.com/espnw/sports/article/17719313/many-new-york-pro-sports-teams-taking-part-national-campaign-domestic-violence-awareness-month; Christine Williamson, *Broncos Partnering with Project PAVE*, DENV. BRONCOS (Oct. 8, 2015), http://www.denverbroncos.com/news-and-blogs/article-1/Broncos-partnering-with-Project-PAVE/ee44dd87-5aee-47f6-8c75-58df58a13cce (discussing the Denver Broncos's partnership with Project PAVE for the "True Man" Project); Brooks Bratten, *Preds, MEND Look to End domestic Violence in Middle Tennessee*, NHL

Nonetheless, to truly change the norm of domestic violence, leagues must understand the culture of hypermasculinity from which domestic violence, and many forms of male violence, springs. Hypermasculinity, sometimes referred to as "hostile masculinity," is an exaggerated form of physical strength and personal aggression that is common in certain contexts,[301] such as in the military, among police, and in men's college and professional sports.[302] These are contexts connected by physical size requirements, the ability to brutalize, and an "us versus them" mentality.[303] Eruptions of force are glorified on a daily basis, leading to a culture in which physical dominance and even violence are always just below the surface.[304]

In addition, these contexts are known for hostile attitudes toward women.[305] Certainly violence against women occurs outside of these contexts. But, a large body of research demonstrates a significant correlation between violence against women and peer support of aggression against women.[306]

Hypermasculinity is also a way that gender is performed by men, and it allows men to establish themselves on the grounds of what they are not: feminine. The good news here is that something that is "performed" means that it is not innate. The bad news is that "something that is

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(June 18, 2018), https://www.nhl.com/predators/news/preds-mend-look-to-end-domestic-violence-in-middle-tennessee/c-771401 (discussing the Nashville Predators's partnership with the YMCA of Nashville and Middle Tennessee); Emma Cueto, *5 Athletes Who Fight Domestic Violence, Because They Are Just That Awesome*, Bustle (May 2, 2015), https://www.bustle.com/articles/80453-5-athletes-who-fight-domestic-violence-because-they-are-just-that-awesome (discussing specific athletes who have campaigns, most notably William Gay and Russell Wilson from the NFL); Ross Jones, *Why Russell Wilson's Stance Vs. Domestic Violence is Greater than Any On-Field Achievement*, FOX SPORTS (Oct. 4, 2014), http://www.foxsports.com/nfl/story/russell-wilson-why-not-you-seattle-seahawks-quarter-pass-the-peace-washington-redskins-100414.

[301] Coker, *supra* note 6, at 184.

[302] Harris, *supra* note 284; Leigh Goodmark, *Hands Up at Home: Militarized Masculinity and Police Officers Who Commit Intimate Partner Abuse*, 2015 B.Y.U. F. Rev. 1183, 1208 (2015) (making connection generally between military and police hypermasculinity); *see also* Coker, *supra* note 6, at 183 (making connection generally between men's sports and hypermasculinity).

[303] Harris, *supra* note 284, at 794.

[304] *Id.* at 796.

[305] *See* note 301 *infra* and accompanying text.

[306] Coker, *supra* note 6, at 180 (summarizing the empirical research and its three key findings: assaulters' peer support sexual aggression toward women; assaulters themselves hold hostile attitude toward women; and assaulters engage in problematic use of alcohol).

conventional and not innate does not necessarily make it easier to change."[307]

Former NFL player Derek McCoy has ideas about disrupting the connection between professional sports, masculinity, and domestic violence.[308] He urges that the root problem is "what we are all being taught about masculinity." In professional sports, a central focus is on the "importance of seeing yourself as above what is 'feminine,' such as expressing emotion as one example." The leagues institutionalize this type of thinking.

In the context of domestic violence, McCoy argues, players must be conditioned to think about women, and relationships with women, differently. Because players learn to alienate and feminize emotions, they in turn become aggressive towards females in order to see themselves above feminine, or feminine traits. McCoy notes that once players create a level of dominance towards others, they are more likely to bottle up these emotions until they build and finally blow up. These emotions become buried inside and eventually turn into anger, aggression, violence towards self and violence towards others.[309] In sports, success is predicated upon dominance, and players have likely been conditioned from a young age to exert dominance and masculinity, not only in their sport, but in day-to-day life. For a player to be conditioned to think about women and relationships with women differently, the leagues must provide rehabilitative resources for players to learn how to process emotions and learn equitable communication. McCoy wants to see leagues implement prevention-based measures, enforce positive social norms and to own, as an institute, that masculinity and violence are a result of this psychological conditioning.

McCoy works with Project PAVE, a non-profit in Denver, Colorado, that focuses on ways to end cycles of relationship violence. Project PAVE has created a partnership with the Denver Broncos called the "True Man" program that challenges boys and men to become allies in the prevention of gender-based violence through a team framework, and to address the psychological conditioning of masculinity in sports.[310] McCoy believes

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[307] Harris, *supra* note 284, at 803.
[308] Interview of Derek McCoy by authors, January 9, 2018 (notes on file with authors).
[309] Rachel Estabrook, *Former Buff, NFL Vet: Football Culture Can Be Manly, Not Violent, Off the Field*, NPR (Nov. 8, 2017), http://www.cpr.org/news/story/former-buffs-star-and-nfl-vet-wants-to-change-masculine-culture-in-football.
[310] PROJECT PAVE, https://www.projectpave.org/prevention.html (last visited Apr. 24, 2018).

that this prevention and intervention program in partnership with NFL teams is a large step towards addressing the inherent issues surrounding relationship violence. Rather than teams just "checking the box" by donating money to domestic violence organizations, they have a unique opportunity to address this institutional conditioning by engaging in programs like those offered by organizations like Project PAVE.

Changes like these do not occur overnight. There is no easy fix to a problem so deeply embedded in society as a whole, not just in the United States, but worldwide. Hence, the title of the article: Advancing the Ball. What is important here is the long game, requiring incremental, deliberate, strategic, patient movement forward.

VI. CONCLUSION

The temptation is strong to implement zero-tolerance, punitive sanctions for domestic violence perpetrated by professional athletes. This article has argued that lessons learned in the reform of the legal system's response to domestic violence in the United States over the past fifty years demonstrates that zero-tolerance, punitive sanctions have had a number of unintended, negative consequences, including over-reliance on the criminal justice system to solve the problem; diminishing victim autonomy; and seriously limiting our understanding of the intersectionality of race, class, and gender identity that individually and institutionally contribute to the norm of domestic violence. The most important of these unintended consequences is that zero-tolerance, punitive policies have not greatly diminished the occurrence of domestic violence. As a result, we have urged that fans and policy makers alike pay attention to these lessons as they consider the future of sport's treatment of domestic violence perpetrated by players, and that they take care to think strategically and proactively about the long game in the call for reform.

WHY ARE UNIVERSITIES PLAYING RUSSIAN ROULETTE WITH THEIR STUDENTS? THE IGNORED LEGAL AND ETHICAL DUTY

By: David E. Missirian[*]

This paper examines why colleges and universities sacrifice a group of gifted individuals, student athletes, all for the sake of money and prestige. These universities pay little or no attention to the horrific fate which they are bestowing on their sporting participants. These students are a group who have been promised an elite university education all in return for simply playing the sport that the students enjoy. Yet, despite the blessings the universities purportedly bestow on these athletes, there is a significant price to be paid. The sports they love and for which they are recruited subjects the student athletes to injuries which will not become apparent for many years after leaving college. The real cost of attending college and giving their university a winning season is traumatic brain injury brought about by multiple concussive and sub-concussive blows to the head and body.

We will look at the history of the university and its original purpose. Then, we will examine how the financial allure of sports has co-opted that once noble purpose to one of a money-making machine. We will ponder why schools turn a blind eye to the realities of concussive injury suffered by the student athlete and if there might be a way for these once honored institutions to regain their lost footing.

We will examine the new protections for athletes which could be employed if universities and colleges chose to alter their course. But, for this to be a reality, the schools must change their priorities and make the students and their education once again their focus. It means foregoing school adulation and the prospect of monetary gain for maintaining the original purpose of the institution. It is something which must be done now, or we, as a nation, face losing our most valuable resource—that of our students—who will be the future of our country.

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I. INTRODUCTION

Why are colleges and universities jeopardizing the lives of students? Are university sports a benefit to society or a detriment? And is there a legal and moral duty to protect students even if they are over the age of 18?

Now, before you dismiss these questions as apparent and self-evident, you might want to take the time to examine your answers against the realities of university life today. Many colleges and universities, either knowingly or unknowingly are destroying their students with little or no care for the student's future well-being. Colleges are causing students serious long-term injury in no less a lethal way than if they gave the student a loaded gun to play with. The gun which the universities allow the students to play with is college athletics, all done in the name of school prestige and financial opportunity. The bullet potentially loaded in that gun are concussive and sub-concussive blows suffered by the athletes which may lead them down the path of injury known as Chronic Traumatic Encephalopathy ("CTE"). Despite the overwhelming data which supports protecting these students from harm, most universities and colleges only take marginal precautions at best to save their charges from a life of potential misery and suffering. The universities' current actions are perpetuated by their unique status in today's society and the morass of our legal system.

II. IS RUNNING A UNIVERSITY A BUSINESS OR AN HONORED PROFESSION?

For some, the university's role has changed historically from one of nurturing and protection to one of a money-making machine where students are simply an expendable means to a lucrative end. There are benefits to being a teaching institution, but as with anything where money is involved nobility can sometimes give way to greed.

A. The History of the University

The exact beginning of the university is unknown.[1] However, there are records of the University of Cambridge in England dating back to the early thirteenth century.[2] Early universities sprang up as a result of people, called

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[1] Thomas E. Woods, Jr., *The Catholic Church and the Creation of the University*, CATH. EDUC. RES. CTR. (May 16, 2015), https://www.catholiceducation.org/en/education/catholic-contributions/the-catholic-church-and-the-creation-of-the-university.html.

[2] *Early Records*, UNIV. OF CAMBRIDGE, https://www.cam.ac.uk/about-the-university/history/early-records (last visited Mar. 15, 2018).

Masters, gathering together, who then took on students, educating them in a variety of areas.[3] The students courses of study were wide and varied, taught by Masters who themselves had been versed in the areas of arts, music, geometry, astronomy, civil law, and canon law.[4] Much as it is today, university students of the thirteenth century, who came from all over England, were viewed as a significant source of revenue for a town where the university was located.[5] As a result of the large influx of students attending the university local merchants and innkeepers overcharged students and masters for food and lodging.[6] This exploitation of students became so rampant that King Henry III took the scholars under his protection as early as 1231 and arranged for them to be sheltered from exploitation by their landlords.[7] At the same time he tried to ensure that they had a monopoly on teaching, by an order that only those enrolled under the tuition of a recognized master were to be allowed to remain in the town. Even in 1231 AD a university apparently was a place where learning could be acquired by a recognized master, but at a monetary cost.[8]

B. Universities Move Across the Pond

The first university established in the United States is one of speculation, though Harvard claims to be the "oldest institution of higher education in the United States, established in 1636 by vote of the Great and General Court of the Massachusetts Bay Colony."[9] The College of William and Mary was established in 1693.[10] Named for the British co-monarchs who were reigning at the time and who gave the university its royal charter (the first for any university in the United States) the College of William and Mary is the oldest university in the American South and was the first school of higher education in the United States to install an honor code of conduct for students.[11] Yale, the third oldest university, was established in 1701, and was originally founded as 'Collegiate School.'[12] It was renamed Yale in 1718 in recognition of a gift from Elihu Yale, a

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[3] *The Medieval University*, UNIV. OF CAMBRIDGE, https://www.cam.ac.uk/about-the-university/history/the-medieval-university (last visited Mar. 15, 2018).
[4] *Id.*
[5] *See Early Records*, *supra* note 2.
[6] *The Medieval University*, *supra* note 3.
[7] *Id.*
[8] *Id.*
[9] *History*, HARV. UNIV., https://www.harvard.edu/about-harvard/harvard-glance/history (last visited Mar. 15, 2018).
[10] *10 of the Oldest Universities in the US*, TOPUNIVERSITIES (Oct. 7, 2015, 10:00 AM), https://www.topuniversities.com/blog/10-oldest-universities-us.
[11] *Id.*
[12] *Id.*

governor of the British East India Company.[13] Fourth on the list of the oldest universities in the U.S., established in 1740, the University of Pennsylvania (commonly referred to as Penn) was founded by Benjamin Franklin and was the first U.S. university to offer both undergraduate and postgraduate studies.[14]

By 1740 one hundred years of formal university education became firmly entrenched in the United States, with there being four major institutions of learning, and with Penn having both graduate and undergraduate classes.

As can be true of things which years ago were more a luxury than a necessity, higher education enrollment in the colonies was largely limited to the well-to-do.[15] This situation prevailed through the late nineteenth and early twentieth century.[16] In 1869–70, only 63,000 students were attending higher education institutions throughout the country, which amounted to only about one percent of the eighteen to twenty-four year-old population.[17] This number of students was divided among 563 campuses, giving an average enrollment size of only 112 students.[18] Today, almost 200 years later there are over 14,000,000 students in the U.S. attending some 3,600 institutions, for an average enrollment of 3,931 students.[19] About thirty-three percent of all eighteen to twenty year-olds are enrolled in college today, half of which are women.[20]

Revenue sources for the operation of schools have remained relatively stable through the period of university development.[21] Universities' revenue come from endowments, Federal funds, State Funds, hospitals, Federal and State research grants, and auxiliary enterprises (included in this are sports tickets, merchandizing and media rights) and tuitions.[22] On average student tuitions account for twenty-eight percent of university revenue.[23]

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[13] *Id.*
[14] *Id.*
[15] U.S. DEP'T OF EDUC. OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 64 (Thomas D. Snyder ed. 1993), https://nces.ed.gov/pubs93/93442.pdf [hereinafter 120 YEARS OF AMERICAN EDUCATION].
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.* at 64.
[20] *Id.*
[21] *See id* at 71.
[22] *See id.* at 89.
[23] *See id.* at 72.

Overall, expenditures have increased with the increased number of schools.[24] From 1930-1990, the cost expenditure for universities has risen 250 percent.[25] Thus, the demand and necessity for alternative revenue streams have become vitally important to schools.

C. Schools Cling to a Golden Goose

The National Collegiate Athletics Association ("NCAA") and its affiliated members negotiated media contracts with various networks due to the advent of televised university sporting events.[26] The percentage of revenue generated by media contracts as a proportion of NCAA total revenue has increased steadily over the last thirty years.[27] The proportion of media revenue to total revenue is about eighty percent.[28] In 2010, the NCAA signed a fourteen-year, $10.8 billion contract with Turner Broadcasting.[29]

As a result of its sporting activities, the NCAA generates large sums of money which it distributes to its member universities.[30]

> The most recent estimate from the NCAA research staff is that college athletics programs annually generate about $6.1 billion from ticket sales, radio and television receipts, alumni contributions, guarantees, royalties and NCAA distributions. Another $5.3 billion is considered allocated revenue, which comes from student fees allocated to athletics, direct and indirect institutional support, and direct government support.[31]

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[24] *See id.* at 90.
[25] *See id.*
[26] Linda O'Brien, *Former College Athletes' Right of Publicity Claims Fail*, INTELL. PROP. L. DAILY (June 5, 2015), http://www.dailyreportingsuite.com/ip/news/former_college_athletes_right_of_publicity_claims_fail.
[27] *Revenue*, INTERNET ARCHIVE, http://web.archive.org/web/20180304184513/http://www.ncaa.org/about/resources/finances/revenue (last visited April 23, 2018).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*

Of the 231 NCAA Division 1 schools eighty-five percent operate at a positive cash flow as a result of their participation in the NCAA.[32] Many schools are making tens of millions of dollars based on their athletic participation.[33] As an example of the financial incentive to having an active division 1 athletic program, Connecticut University generated a $35 million surplus from its athletic program.[34] Rutgers University generated $28 million in revenue surplus from its sporting programs.[35] These monies come from ticket sales, student fees, and merchandizing and from NCAA distributions.[36] While it is true the larger schools receive the lion's share of the NCAA distributions, it is also true that all schools receive monies through their participation in the NCAA.[37] The fact that these distributions can be in the millions of dollars makes continuation of active winning sports programs a vital revenue stream.[38]

D. Universities and a Lapse of Memory?

As we enter the twenty-first century, what is the university's purpose and where in that purpose do athletics fit? In their early days, schools were purely places of learning with no athletic component at all.[39] As more places of learning developed and private schools emerged, where students would stay as residents of the school, the doctrine of *In loco parentis* became a reality.[40]

The doctrine of *In loco parentis* is an old English common law doctrine which was adopted in this country and states that the school is charged with the duties of the parent or to put it another way, "in the place of a parent".[41] In the case of *Gott v. Berea College* in 1913, the courts expanded what had previously been primarily a doctrine applicable only to boarding schools, to apply to colleges as well.[42]

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[32] *See* Steve Berkowitz et al., *2015-2016 Finances: Top School Revenue*, USA TODAY: SPORTS: NCAA, http://sports.usatoday.com/ncaa/finances/ (last visited Mar. 15, 2018).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Revenue*, *supra* note 27.
[37] *Id.*
[38] *See* Steve Berkowitz et al., *supra* note 32.
[39] *See Early Records*, *supra* note 2.
[40] *See* State v. Pendergrass, 19 N.C. 365, 365-66 (2 Dev. & Bat. 1837).
[41] *In loco parentis*, BLACK'S LAW DICTIONARY (2d. ed. 1910).
[42] Gott v. Berea Coll., 161 S.W. 204 (Ky. 1913); Theodore C. Stamatakos, Note, *The Doctrine of In loco parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471, 474 (1990).

In *Gott*, the court found that college authorities stood *In loco parentis* concerning the physical and moral welfare and mental training of their students.[43] The breadth of the rules and regulations promulgated by the school regarding their charges was equivalent to those which could be exercised by the parent and were only bounded by the law and that of public policy.[44] The court would give the school the same parental latitude that it would give a parent.[45]

In 1924, the sanctity of the authority of colleges over the welfare of their students was reiterated by the Supreme Court of Florida.[46]

> As to mental training, moral and *physical discipline*, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.[47]

As time passed, the parent-school relationship grew and with this growth emerged the schools' responsibility for the physical welfare of the child. "In its fullest form the doctrine of *In loco parentis* permits colleges to devise, implement and administer student discipline and to *foster the physical* and moral *welfare of students*."[48]

Given that school now had as part of its duty to protect the physical welfare of its students the full array of potential tort suits had to be considered. In 1941 the Supreme Court of Utah found a non-profit charitable university liable for a chemistry experiment gone awry.

> It is enough to say that in our opinion the Supreme Court of Utah, after much difficulty and contrariety of opinion has definitely and conclusively for the present repudiated the doctrine of immunity generally accorded charitable

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[43] Gott, 161 S.W. at 206.
[44] *Id.*
[45] *Id.* at 207.
[46] John B. Stetson Univ. v. Hunt, 102 So. 637 (Fla. 1924).
[47] *Id.* at 640.
[48] Stamatakos, Note, *supra* note 42, at 474 (emphasis added).

> institutions not operating for profit, especially if the tort be against a paid patient, or in this instance, a student.[49]

The door now swung wide open, the courts began to see that universities stood in a unique place where they served both as a substitute parent, with a parent's duties of protection, as well as one of a merchant who must protect a paying customer.[50]

E. Forget about In Loco Parentis it's the Sixties

Despite generations of students and a long history of teachers and universities acting as the caretakers of the next generation, the Sixties was a new age.[51] Democratic pollster Geoff Garin, who was born in 1953 and came of age in the Sixties, said that "everything changed" from the Fifties.[52] "He points to the movement for women's rights, civil rights for blacks, an increase in tolerance for differences and diversity, and technological breakthroughs among the most important trends of the decade."[53] Students no longer wanted the status quo, nor to be sheltered, herded and protected based on their dissatisfaction with society and its norms.[54] This dissatisfaction was exhibited through how they dressed, their hairstyles, their music, and their views on how they should be treated.[55]

With this movement of rebellion came a similar movement in the courts to reject *In loco parentis* and the protections which it afforded our university students. In a 1968 lawsuit against the actions of the University of Colorado, the court said: "We agree with the students that the doctrine of 'In loco parentis' is no longer tenable in a university community."[56] Similarly in California in 1967 the California Appeals Court stated: "For constitutional purposes, the better approach, as indicated

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[49] Brigham Young Univ. v. Lillywhite, 118 F.2d 836, 842 (10th Cir. 1941).
[50] *See id.*
[51] *See generally* Kenneth T. Walsh, *The 1960s: A Decade of Promise and Heartbreak*, U.S. NEWS & WORLD REPORT (Mar. 9, 2010, 4:00 PM), http://www.usnews.com/news/articles/2010/03/09/the-1960s-a-decade-of-promise-and-heartbreak?page=2.
[52] *Id.*
[53] *Id.*
[54] Linda Churney, *Student Protest in the 1960s*, YALE-NEW HAVEN TEACHERS INSTITUTE, http://www.yale.edu/ynhti/curriculum/units/1979/2/79.02.03.x.html (last visited Mar. 15, 2018).
[55] *Id.*
[56] Buttny v. Smiley, 281 F.Supp. 280, 286 (D. Colo. 1968).

in Dixon, recognizes that state universities should no longer stand in loco parentis in relation to their students."[57]

Thus, as a direct result of the demands for freedom made by college students in the Sixties, the courts gave them their freedom from *In loco parentis.* With each successive year the notions espoused by *In loco parentis*, that of building, nurturing and protecting students gave way to the more "enlightened view" of students as persons of majority and members of society who should be afforded the same freedoms.

A 1979 Federal Appeals court succinctly puts the tenor of the late Seventies:

> Our beginning point is recognition that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. There was a time when college administrators and faculties assumed a role In loco parentis . . . The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights.[58]

The rights of students and the new relationship of universities to their students was again trumpeted in a case where a student of the University of Utah was injured when she fell on a university-sponsored trip.[59] As a result of her fall she became a quadriplegic.[60] Despite her extreme injuries and the fact that the trip was sponsored by the university, the court reiterated the obligations of a university to its students.

> *Colleges and universities are educational institutions, not custodial*. Their purpose is to educate in a manner which will assist the graduate to perform well in the civic, community, family, and professional positions he or she may undertake in the future. It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its *adult students* . . . with

[57] Goldberg v. Regents of Univ. of Cal., 57 Cal. Rptr. 463, 470 (Cal. Ct. App. 1967) (citing Dixon v. Alabama State Bd. of Ed., 294 F.2d 150 (5th Cir. 1961)).
[58] Bradshaw v. Rawlings, 612 F.2d 135, 138-39 (3d Cir. 1979).
[59] Beach v. Univ. of Utah, 726 P.2d 413, 414-15 (Utah 1986).
[60] *Id.*

> responsibility for assuring their safety and the safety of others. Fulfilling this charge would require the institution to babysit each student, a task beyond the resources of any school.[61]

III. A SEED PLANTED AND A NEW BUSINESS AS USUAL

The Eighties and Nineties brought new revenue stream to universities. Television broadcasting has increased dramatically over the last fifty years. "By 1960, there were 52 million television sets in American homes, which is one in almost nine out of ten households. This figure soared to 219 million in 1997."[62] In 2015, there were approximately 106 million people who watched sports on television.[63]

A. Can We Have a Piece of the Pie?

The effect of television rights, and marketing of sports paraphernalia was such an important revenue stream for colleges that, in 1982, the NCAA was sued by the University of Oklahoma over the NCAA's requirement that college home games not be televised as that caused a reduction in game attendance.[64] The U.S. Supreme Court ruled against the NCAA and stated that its restrictions on televising the games was a restraint of trade.[65] It has been estimated that the amount of money potentially lost by the association of schools is as high as $73.6 million.[66] College revenue generated by sports media rights has climbed steadily every year.[67] In 1982, a three-year contract with CBS for media rights generated $49.9 million.[68] Six years later, that same media deal was worth $166 million, a 300 percent increase in revenue.[69] Another three years later the media rights paid for by CBS jumped another 300

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[61] *Id.* at 419 (emphasis added) (citations omitted).
[62] *Number of Televisions in the U.S.*, THE PHYSICS FACTBOOK, https://hypertextbook.com/facts/2007/TamaraTamazashvili.shtml (last visited Mar. 15, 2018).
[63] *Sports on TV in the U.S. – Statista Dossier*, STATISTA DOSSIER, https://comm3357spring17.files.wordpress.com/2017/01/study_id23358_sports-on-tv-in-the-us-statista-dossier.pdf (last visited Mar. 15, 2018).
[64] NCAA v. Board of Regents of Univ. Okla., 468 U.S. 85, 120 (1984).
[65] *See id.*
[66] *See* John Rohde, *NCAA lost TV Case in '84, Giving College Football an Open Market*, NEWSOK (Aug. 29, 2004, 12:00 AM), http://newsok.com/article/2864174.
[67] *See generally Revenue*, *supra* note 27.
[68] *Id.*
[69] *Id.*

percent.[70] As of today those media rights for a three-year contract are worth $2.3 billion.[71] These sums do not take into account monies paid by students for student activity fees, ticket fees or merchandizing. Given the cash cow sports have become for some schools, where is the incentive to reduce the cash flow? The cost to run a school has only gone up over the years, not down, which forces to schools to not only to keep but to promote those things which generate revenue.[72] Given the money to be made and the need for a winning team, having the best players is a necessity. And, in order to win games, you need to put those players on the field. As the saying goes, "If you are going to ride in the Kentucky derby don't leave your prize stallion in the stable."[73]

B. The Cost of Pie Can be Very High

So, what is the cost to the university for engaging in this high stakes sporting contest? Are there some potentially hidden costs that might take some of the luster off the golden goose, which is our athletes? The answer lies in two places: one in the expansion of old tort theory and the other in newly discovered medical science.

First as to torts. Under Restatement of Torts landowners, *i.e.*, universities, owe a reasonable duty of care to invitees.[74] An invitee is "a person who has express or implied invitation to enter or use another's premises, such as a business visitor or member of the public to whom the premises are held open. The occupier has a duty to inspect the premises and warn the invitee of dangerous conditions."[75] A university student is clearly on the premises at the behest of the institution and in fact, the school actively prohibits those non-matriculated students from attending class or participating in activities sponsored by the university, such as sporting activities.

> A possessor of land is subject to liability to his invitees [students] for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover

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[70] *Id.*
[71] *Id.*
[72] *See generally* 120 YEARS OF AMERICAN EDUCATION, *supra* note 15, at 90.
[73] *If You're Gonna Ride in the Kentucky Derby…*, ARCHIVE OF OUR OWN, http://archiveofourown.org/works/616887/chapters/1112753 (last visited Mar. 15, 2018).
[74] RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 51 (2012).
[75] *Invitee*, BLACK'S LAW DICTIONARY (9th ed. 2009).

> or realize the danger or will fail to protect themselves against it.[76]

Given that a university must protect a student from physical harm the question arises: what is the harm in playing sports? We all played sports and we are fine. Aren't we?

The answer is not what most people expect. College sports have not always been as beloved as they are today. "Early in the games' history in 1905 the sport of football was considered so dangerous, regularly killing participants, that President Theodore Roosevelt summoned the coaches of Harvard, Yale, and Princeton to Washington D.C. for a summit on how to make the game safer and threatened to take action in the absence of significant reform."[77] Public outcry also forced the creation of the NCAA in 1910 who added in a rule-making component to the game.[78]

The violence of the game has hardly decreased and the injuries sustained are in a form not easily recognized. That injury is concussive and sub-concussive blows taken by student athletes. The perception of most when they think of college sports is that they are safer than professional sports and that people are bound to get a bit banged up. A recent study by Harvard and Boston University found that the number of hits and resulting trauma is far higher than what we as a general populace suspected. Despite years of education and growing public awareness about head injuries, college football players report having six suspected concussions and twenty-one so-called "dings" for every diagnosed concussion, with offensive linemen being the least forthcoming to trainers and team personnel.[79]

The Harvard/Boston University report broke down the statistical analysis by position and found that offensive linemen reported significantly higher numbers of post impact symptoms than other positions.[80] These symptoms, which were reported as dings, included dizziness, headache, and seeing stars.[81] Despite these symptoms:

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[76] RESTATEMENT (SECOND) OF TORTS § 341A (1965).
[77] *The Impact of Concussions on High School Athletes: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. 24.1 (2010) (statement of George Miller, Chairman, Committee of Education and Labor).
[78] *Id.*
[79] Tom Farrey, *Study: 1 in 27 Head Injuries Reported*, ESPN (Oct. 3, 2014), http://espn.go.com/espn/otl/story/_/id/11631357/study-says-26-27-potential-concussions-unreported-college-football.
[80] Christina M. Baugh et al., *Frequency of Head-Impact-Related Outcomes by Position in NCAA Division I Collegiate Football Players*, 32 J. NEUROTRAUMA 314 (2015).
[81] *Id.* at 314.

> Offensive linemen reported having returned to play while experiencing symptoms more frequently and participating in more full-contact practices than other groups. These findings suggest that offensive linemen, a position group that experiences frequent, but low-magnitude, head impacts, develop more post-impact symptoms than other playing positions, but do not report these symptoms as a concussion.[82]

"An undiagnosed concussion is problematic because athletes who sustain additional brain trauma while recovering from a previous injury are at risk of more severe neurologic consequences."[83]

And what is this severe trauma? It is known as Chronic Traumatic Encephalopathy ("CTE").[84] CTE is a progressive degenerative brain disease found in people exposed to brain trauma over many years, including concussive and sub-concussive blows.[85] It is presently unknown exactly how many blows to the head it takes to induce CTE, but we do know that it currently can only be diagnosed conclusively after death with a brain dissection.[86] The illness itself may not manifest its symptoms outwardly for many years and is not one that only exhibits itself in old athletes; however, it can show up in young adults as well.[87]

The symptomology falls into four major categories: (1) somatic (headaches, nausea, vomiting, dizzy spells); (2) emotional (sadness to the point of depression even suicide, nervousness, irritability); (3) sleep disturbances (sleeping more of less than usual or trouble falling asleep); and (4) cognitive (difficulty concentrating, troubles with memory, feeling mentally slow or as if they are in a fog that will not lift).[88]

What most people do not realize is that concussive and sub-concussive blows do not require the athlete to have been rendered unconscious.[89] The vast majority of athletes who have suffered a significant brain impact are in

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[82] *Id.*
[83] *Id.* at 315.
[84] *See* ROBERT CANTU & MARK HYMAN, CONCUSSIONS AND OUR KIDS: AMERICA'S LEADING EXPERT ON HOW TO PROTECT YOUNG ATHLETES AND KEEP SPORTS SAFE 13 (Mariner Books ed. 2013).
[85] *Id.* at 90.
[86] *Id.* at 13.
[87] *Id.* at 90.
[88] *Id.* at 8.
[89] *Id.* at 106.

fact not rendered unconscious.[90] Concussive and sub-concussive injury does not necessarily occur due to a blow to the head but rather as a result of the head experiencing rotational forces which impact the brain inside the skull or via accelerational forces which whip the head around bruising the brain inside the skull.[91] The result of CTE can be loss of critical brain functions such as memory, impulse control, and a decline in their general ability to think and reason.[92]

While it is true that helmets can protect athletes from certain brain bleeds and skull fractures, they do not protect from rotational and accelerational concussive blows that cause bruising of the brain and therefore concussive injury.[93]

According to Dr. Cantu, a world renowned neurologist and specialist in the field of concussive therapy and research, most concussions resolve in seven to ten days and athletes return to their normal activities in two weeks.[94] Unfortunately, twenty percent of concussions are post-concussion syndrome cases.[95] These are cases where the injury can last at least one month and persists, with the patient experiencing unusually intense symptoms.[96] According to Dr. Cantu, rest is the only effective therapy and sports should stop completely until the patient is symptom free.[97]

Recent studies have found that the sideline observers be they coaches or athletic trainers miss six out of seven concussive impacts to their players during games and practices.[98] Couple this lack of observation by coaching staff with the fact that most athletes are hesitant to self-report due to parental pressure or a feeling that to be an athlete you needed to be tough and that playing hurt is just part of the game leaves us with a group of students which are extremely vulnerable.[99]

Are these student lives which may be ruined forever just a means to an end? Are they simply the cost of business of running an effective sports program? There is a lot of money at stake here.

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[90] *Id.*
[91] *Id.* at 106.
[92] *Id.* at 92.
[93] *Id.* at 96.
[94] *Id.* at 71.
[95] *Id.* at 71.
[96] CANTU & HYMAN, *supra* note 84, at 72.
[97] *Id.*
[98] *Id.* at 16.
[99] *Id.* at 132.

IV. POTENTIAL SOLUTIONS, THE GOOD, THE BAD, AND THE BLASPHEMOUS

A quote from a conference of Asian-European educators is appropriate: "Students are the future of our society. They need not only be trained for gainful employment, rather, they should be prepared to lead."[100] Given that our student populations are our future leaders and caretakers of society, it seems to go without saying that protecting them is in our collective best interest. So why then is it so hard to put practices in place to protect our student population? Like any discovery in its early stages, diagnosis, treatment and changing of our collective thought about normal behavior takes time. Concussive illness is very much like injury from smoking in that it can be easily ignored but the reality of engaging in the reckless behavior which promotes the injury cannot.

A. The Gold Standard of Care

The solutions to treating concussive illness come down to five steps, which need to be pursued with the same vigor with which we pursue a cure or treatment for any pandemic. These steps are detection, treatment, mitigation, reporting, and commitment to honesty.[101] There are several different methods for concussion detection, ranging from direct observation of concussive blows, to indirect observation using mechanical means or electronic modalities which track changes in acceleration and direction.[102]

Let's consider direct observation first. While constantly watching an athlete in play to determine whether they have suffered a concussive or sub-concussive blow may seem the most direct method of monitoring an athletes' condition, it has two significant criteria which are not easily satisfied. The first issue is who is qualified to do the observation of the athletes who may be suffering concussive injury? The second issue being what exactly are we looking for, visa vie a significant concussive event?

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[100] *Students: Our Future Leaders*, ASIA-EUROPE FOUNDATION, (Nov. 26, 2012), http://www.asef.org/projects/themes/education/2357-3rd-asem-rectors-conference/2816-students-our-future-leaders.

[101] World Health Organization [WHO], *Infection Prevention and Control of Epidemic-and-Pandemic-Prone Acute Respiratory Diseases in Health Care*, WHO Interim Guidelines, at 16 (June 2007), http://www.who.int/csr/resources/publications/WHO_CDS_EPR_2007_6c.pdf.

[102] Joseph Bien-Kahn, *Accelerometers Could Finally Fix the NFL's Concussion Crisis*, WIRED: SCIENCE (Feb. 3, 2017, 8:00 AM), https://www.wired.com/2017/02/nfl-concussions-accelerometer/.

A physician, such as a neurologist who specializes in the area of concussive illness or sports medicine, might be a good choice for someone to be observing athletic play.[103] "Neurologists are physicians who specialize in neurological functioning and are trained in the diagnosis and treatment of neurological disorders."[104] Thus after observing someone who has incurred a potential brain trauma or head injury during athletic play, the neurologist would immediately be in a position to perform a thorough neurological exam to test for any effects of that injury on the brain, spine, or nerves.[105] Thus instead of bringing the patient to the doctor for examination, we will bring the doctor to the patient. A simple elegant solution of observation, analysis, and testing then appropriate treatment modality.

Problematically, this immediate assessment and expertise does come at a significant cost. The yearly base salary for a physician who specializes in sports medicine ranges from a low of approximately $160,000 per year to a high of $337,000 per year, with the median salary approximately $221,000 per year.[106] It is not unreasonable to assume that at any given time there may be multiple sporting events being played which would necessitate hiring of multiple full time physicians whose sole job it would be to keep track of what is happening on the playing field. This brings up the question of how many physicians should we employ per sporting event? If we look at a football game or a practice, there will be a minimum of 22 athletes on the field practicing simultaneously. Any one of these athletes could suffer a concussive blow at any time. It seems unlikely that any one person could keep track of the actions of 22 people all at once. This potential for injury and the heightened need for observation would be moot if the incidence of injury were low, but the truth is far from that fact.

The number of reported concussions in athletics versus those actually suffered is staggering.[107] In collegiate football, among offensive linemen, the rate of diagnosed concussions to suspected concussions and dings was thirty-two to one.[108] In a 2010 study conducted of hockey players, the researchers found that the occurrence of concussions was seven times that as observed by coaches, reported by athletes or caught by physician

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[103] *Neurology*, WEILL CORNELL MEDICINE: CONCUSSION AND BRAIN INJURY CLINIC, https://concussion.weillcornell.org/our-services/neurology (last visited Mar. 15, 2018).
[104] *Id.*
[105] *Id.*
[106] *Physician – Sports Medicine Salaries*, SALARY.COM, https://www1.salary.com/sports-medicine-physician-salary.html (last visited Mar. 15, 2018) [https://perma.cc/WCB4-2652].
[107] Farrey, *supra* note 79.
[108] *Id.*

observers.[109] So the question arises: what is the appropriate number of people who should be watching the field of play/practice? The NCAA may be able to give us some guidance.

Based on NCAA rules, in a college football game there are at least seven referees who keep track of football rule violations.[110] In 2013, the NCAA granted the Big 12 a request to increase of the number of officials from seven to eight.[111]The Big 12 cited player safety, improved coverage of the action, and overall management of the game as the reasons for moving to eight officials.[112] Given that the NCAA has acknowledged that insuring player safety requires having multiple eyes on the field of play to detect potential rule violations and potential player injury, certainly that same numeric logic should be followed when attempting to detect injuries which might cause catastrophic brain trauma to the players.

Thus, from a viewpoint of parity, eight physician's specialists would be needed for each game and practice. The total cost per team would be approximately $1.68 million per year. Keep in mind this is for one sport. If there are other contact sporting events or practices occurring simultaneously more trained specialists would be needed. It is not unreasonable for there to be a soccer practice, a football practice, and a lacrosse practice to be happening simultaneously. This would then necessitate over five million dollars in physician observer costs per year.

Is this overkill, no pun intended, it depends on what you feel is the value of a student's life. I do not state this as an academic question but rather one which underpins a harsh reality. Engaging in athletic play which contributes to concussive brain injury can kill a student or worse leave them in a state of mental degradation which will burden them and their families for decades.[113]

So, what is the going rate to kill a person? In the wrongful death of a twenty-year-old college student, the court awarded the student's family 6 million

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[109] CANTU & HYMAN, *supra* note 84, at 16.
[110] *How Many Officials Does it Take for a College Game?*, NAT'L FOOTBALL FOUND., (July 7, 2014, 1:47 PM), http://www.footballfoundation.org/News/Blog/tabid/521/entryid/72/Default.aspx [https://perma.cc/8JET-X9NW].
[111] *Id.*
[112] *Id.*
[113] CANTU & HYMAN, *supra* note 84, at 90–92.

dollars in damages.[114] In another wrongful death suit against Massachusetts Institute of Technology ("MIT") the initial complaint asked for $26.7 million. [115] This case was ultimately confidentially settled.[116] Assuming the MIT settlement was 30 percent of what was asked for we arrive at $8.9 million. These two settlements alone make a yearly cost of $1.69 million seem almost reasonable.

These sums may be even higher for a student who did not die but rather has been rendered vegetative for the remainder of their life as the result of the concussive blows sustained during athletic play.[117] So what is a university to do? Even if we reduce the number of trained physicians to two, one to watch the ball in play and another to scan the field in general, that still would cost close to a $442,000 per year.[118] Given that number, it seems unlikely that universities would be inclined to do this based on sheer cost alone.[119] A 2013 USA Today article has some interesting statistics: "Division I schools with football spent $91,936 per athlete in 2010, seven times the spending per student of $13,628. Division I universities without football spent $39,201 per athlete, more than triple the average student spending."[120]

Quoting Rogers Redding, the National Coordinator of College Football Officiating: "Typically, money is an important issue whenever there is a proposal for increasing the number (of referees). The question always arises: given all the competing interests vying for the football dollar, how much should be invested in officiating."[121] Given the reluctance to spend money on a referee, how much enthusiasm can we image would be garnered for multiple physician salaries?

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[114] *$6 Million Settlement – Drunk Driving "Wrongful Death,"* MARTINEZ MANGLARDI ATTORNEYS: CASES, https://attorneystrialgroup.com/cases/drunk-driving-wrongful-death/ [https://perma.cc/3XWA-93FS].

[115] Rob Capriccioso, *Settlement in MIT Suicide Suit*, INSIDE HIGHER ED: NEWS (Apr. 4, 2006), https://www.insidehighered.com/news/2006/04/04/shin. [https://perma.cc/E7VH-DBVX].

[116] *Id.*

[117] CANTU & HYMAN, *supra* note 84, at 90–92.

[118] *Physician – Sports Medicine Salaries*, *supra* note 6.

[119] *See id.*

[120] Cliff Peale, *Athletics Cost Colleges, Students Millions*, USA TODAY (Sept. 15, 2013, 12:02 AM), https://www.usatoday.com/story/news/nation/2013/09/15/athletics-cost-colleges-students-millions/2814455/.

[121] *How Many Officials Does it Take for a College Game?*, *supra* note 110.

B. The Silver Standard of Care

If we assume that salary paid is indicative of value, then clearly a physician specializing in sports medicine would be the gold standard. Which begs the question: is there someone else who would be at least generally qualified to identify a potential concussive injury but not quite so expensive? Athletic trainers seem to be alternative whose qualifications set fit our need.

> As licensed medical professionals, athletic trainers ("ATs") receive comprehensive didactic and clinical training in concussion management. They are typically the first providers to identify and evaluate injured persons and are integral in the post injury management and return-to-play (RTP) decision-making process. Without exception, ATs should be present at all organized sporting events at all levels of play and should work closely with a physician or designate who has specific training and experience in concussion management to develop and implement a concussion-management plan. . .[122]

The average yearly salary of an athletic trainer is much less than not a physician.[123] Their average yearly salary is approximately $44,000.[124] Thus for that same $442,000 a university could hire ten athletic trainers as opposed to two physicians. If we stick to that same logic of two persons with eyes on the field of play at all times we now have a cost of $88,000 per year per sport. Roughly $264,000 per year to cover, football, soccer, and lacrosse. Not a small sum but an incremental increase to what is already being spent per student athlete and de minimus when compared to a $6 million wrongful death payout.[125]

As stated earlier, the athletic trainer may be the first medical professional on the scene of an injury.[126] "Athletic trainers (ATs) are highly qualified, multi-skilled health care professionals who collaborate with physicians to provide preventative services, emergency care, clinical diagnosis, therapeutic intervention and rehabilitation of injuries and medical

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[122] Steven P. Broglio et al., *National Athletic Trainers' Association Position Statement: Management of Sport Concussion*, 49 J. ATHLETIC TRAINING 245 (2014).
[123] *See Athletic Trainer Salaries*, SALARY.COM, https://www1.salary.com/Athletic-Trainer-Salary.html (last visited Mar. 15, 2018).
[124] *Id.*
[125] Peale, *supra* note 120; *$6 Million Settlement – Drunk Driving "Wrongful Death," supra* note 114.
[126] Broglio et al., *supra* note 122, at 245.

conditions. Athletic trainers work under the direction of a physician as prescribed by state licensure statutes."[127] They hold at least a bachelor's degree and must pass a state licensing examination in forty-nine states to call themselves athletic trainers. [128] They are not personal trainers.[129] Rightfully taken umbrage with whomever makes that mistake. In implementation of the Medicare system, the United States Government classifies athletic trainers as mid-level health care professionals. [130] Given their training and specialization it would seem that they would be a good fit for the role of concussion watchdog. In 2014, The National Athletic Trainers Association ("NATA") put out a position paper on proper concussion treatment protocols, entitled: National Athletic Trainers' Association Position Statement: Management of Sport Concussion.[131] The purpose of the associations' position paper was "to provide athletic trainers, physicians, and other health care professionals with best-practice guidelines for the management of sport-related concussions."[132] The guidelines and best-practices themselves were vetted by four persons with PhD's in the sports medicine field, two holders of master's degrees in sports medicine and a world known neurosurgeon who specializes in concussions, Dr. Robert Cantu.[133]

The report outlines procedures which can be followed at universities to enhance concussion detection as well as move in the direction of student athlete protection.[134] Best-practices include: disseminating appropriate education on concussive illness, prevention of concussive and sub-concussive blows, maintenance of documentation regarding injuries suffered by athletes, awareness of legal obligations as they are applicable from various governing bodies, appropriate evaluation of athletes and maintenance of records and reports of those evaluations, return to play decision making methodology and lastly equipment options for minimizing concussive blows.[135]

The listing of best practices on first blush seem quite comprehensive. But it should be remembered that these are merely suggested guidelines for athletic trainers to follow and are by no means legally required. Despite

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[127] *Athletic Training*, NAT'L ATHLETIC TRAINERS' ASS'N, https://www.nata.org/about/athletic-training (last visited Mar. 15, 2018).
[128] *Id.*
[129] *See id.*
[130] *See id.*
[131] *See generally,* Broglio et al., *supra* note 122, at 245.
[132] *Id.*
[133] *See generally id.*
[134] *See id.* at 246.
[135] *See id.*

the athletic trainers' medical expertise, the guidelines make it clear that a physician should be involved in making the ultimate decision to allow a return to play.[136] "Once an athlete has been diagnosed with a concussion, he or she should be removed from the sport and not allowed to return to physical activity *until cleared by a physician or designate*, no sooner than the next day"[137] Additionally, "after an athlete is diagnosed with a concussion, the RTP [Return-to-Play] progression should not start until he or she no longer reports concussion-related symptoms, has a normal clinical examination, and performs at or above preinjury levels of functioning on all objective concussion assessments."[138]

It is interesting to note that even in this best practice proposal, with detailed and intensive guidelines, there is verbiage used that may allow for a school to skirt their ethical and legal duty. The word designate is followed by the following: "who has specific training and experience in concussion management to develop and implement a concussion-management plan based on the recommendations outlined here".[139] A problematic word search for further fleshing out of the specific qualifications of the designate are limited to the verbiage quoted above. It is clear that a neurologist is qualified based on their medical training.[140] Athletic trainers are considered by the government to be mid-level medical personnel who, based on this best practice document, are appropriate to evaluate return to play criteria.[141] Yet if these are the only two qualified persons to make the decision one wonders why they did not simply state physicians and athletic trainers. This word choice was meant to include other medical professionals, and potentially other individuals. The Weill Cornell Spine and Brian Center, a center for research, detection and treatment of brain disease states, "coaches, athletic trainers and parents of athletes should also be trained to look for signs of concussion, so that they can make an immediate sideline assessment."[142] The observation and detection phase of concussion analysis seems to include and realize that at least preliminary detection might be done by persons other than physicians and athletic trainers. Yet with a lowering of the standard of observation by lowering the specific training of

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[136] *Id.* at 248.
[137] *Id.* (emphasis added).
[138] *Id.*
[139] *Id.*
[140] *Neurology*, *supra* note 103.
[141] *Athletic Training*, *supra* note 127.
[142] *Reviewed by* Kenneth Perrine, *Diagnosing and Treating Concussion*, WEILL CORNELL BRAIN & SPINE CTR., http://weillcornellbrainandspine.org/condition/concussion/diagnosing-and-treating-concussion (last visited Mar. 15, 2018).

the observer, are we opening up the door to improper diagnosis and, therefore, risk to the athlete?

C. The Bronze Standard of Care

Another possibility for detection is to substitute the human element for technology which does not require a yearly salary. This mode of detection and observation uses sensors on the athlete to detect a pre-determined level of G force or lateral acceleration. Current technology is either sport specific to football like the ones developed by the Riddell Sports Group (Riddell) best known for their manufacture of football helmets or that which can be adapted to be used in a slightly wider sports setting.

The Riddell Company has developed two system for concussive blow detection.[143] One system is called the SRS system and the other system is their Riddell InSite system.[144] Both systems detect concussive blows to the player as well as changes in spatial position.[145] The Riddell InSite system is based on a sensor system which is retrofitted into Riddell player helmets.[146] The cost of each helmet sensor setup is $125 per helmet with a yearly reconditioning fee of $25.[147] Riddell's InSite "is designed to alert team staff of high risk single and multiple head impacts, and enable improved identification and management of concussion[s]."[148] Riddell's SRS system uses the internal helmet sensing system in InSite coupled with a sideline computer system.[149] When the SRS system detects a suspect impact profile, it immediately notifies via wireless network the medical or training staff.[150] The use of the sideline computer gives a team athletic trainer or other professional the ability to have immediate access to a player's concussion history over time as well as multiple player information.[151] The cost of the SRS system, though, is more expensive that the InSite system.[152] It also requires someone to access the information gathered by the technology.[153]

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[143] RIDDELL, http://www.riddell.com/riddell-iq (last visited Mar. 15, 2018).
[144] *Id.*
[145] *Id.*
[146] Telephone Interview with K. Donoghue Riddell (Jan. 22, 2018) (on file with author).
[147] *Id.*
[148] RIDDELL, *supra* note 143.
[149] *Id.*
[150] *Id.*
[151] *See id.*
[152] Telephone Interview with K. Donoghue Riddell, *supra* note 146.
[153] RIDDELL, *supra* note 143.

D. Is There an Aluminum Standard of Care?

As with all things, there are some less expensive alternatives for concussion detection. What these systems have in common is that they rely on predetermined categories for concussion notification. One example is the GForceTracker, developed by GForceTracker Inc.[154]

> [GForceTracker Inc.'s] head impact monitoring system is now available in a football chin guard. Utilizing the same GFT athlete monitoring technology that is already proven and widely used in helmeted sports, the chin guard measures both linear acceleration and rotational velocity. It simply attaches to helmets using the same strap and clip features found on chin guards in the market place today.[155]

The sensor technology can also be used in sports like lacrosse, hockey and soccer. [156] The cost per sensing Unit is $150 each with a $96 per year maintenance fee, tracking software is free. The system monitors the athlete for physical activity which exceeds the notification threshold and then notifies the sideline personnel or athletic trainers that a significant impact has occurred.[157] The threshold settings are based on a study done by Virginia Tech and outlined in a paper which summarized those findings.[158]

There is also a product called FITGuard, produced by Force Impact Technologies, which is a mouth guard that lights up when the player wearing the guard has suffered a severe head impact.[159] The product is currently under development and close to market.[160] The initial projected cost of the guard, in 2016, was $129.99 per Unit.[161] This Unit also relies on the coach or sports professional on the sideline to notice the glowing

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[154] *See generally* GFORCE TRACKER, http://gforcetracker.com/ (last visited Mar. 15, 2018).
[155] *Football Chin Guards Go High Tech*, PRLOG (Mar. 23, 2015), https://www.prlog.org/12431747-football-chin-guards-go-high-tech.html.
[156] *Schutt Sports Introduces High Tech Sensors to Chin Straps*, CISION: PR NEWSWIRE (Mar. 2, 2016, 6:12 PM), https://www.prnewswire.com/news-releases/schutt-sports-introduces-high-tech-sensors-to-chin-straps-300230014.html (last visited Mar. 15, 2018).
[157] GFORCE TRACKER, *supra* note 154.
[158] *See generally* Ray W. Daniel et al., *Head Impact Exposure in Youth Football*, 40 ANNALS OF BIOMEDICAL ENGINEERING 976 (2012).
[159] FORCE IMPACT TECHNOLOGIES, https://www.fitguard.me/ (last visited Mar. 15, 2018).
[160] *See id.*
[161] Paul Szoldra, *This device is being touted as the 'check engine light for the brain'*, BUSINESS INSIDER (Jan. 15, 2016, 10:58 PM), http://www.businessinsider.com/fitguard-mouthguard-2016-1.

mouth guard and to remove the player from play.[162] The FITGuard technology records various levels of hits and displays either a green OK symbol, a blue, evaluate symbol or a red severe symbol.[163] To be effective the system still requires professional assessment of the athlete after the Unit triggers an alarm.[164] From a per player price point the FITGuard is significantly higher in price than the GForceTracker. The FITGuard has the benefit of being relatively simple to conduct an immediate assessment of the type of impact sustained, *i.e.*, minor (green), significant (blue), or severe (red).[165] The product literature available at present does not indicate what significance to change of color has to G force sustained be it lateral or axial or otherwise.[166] The product touts its efficacy but seems to rely at present on its visual appeal and simplicity of use as a selling point to parents of youth athletes to which it is marketed.

The difficulty with all of these systems which rely on technology as a substitute for a human is that each of these modalities, ultimately needs a physician or at least a medical professional such as an athletic trainer to evaluate the data and the incident which has occurred.[167] The final protection of the athlete is only as good as the person evaluating the data and making the player sit out. That means that the player's welfare must be put first, so that when injury or potential injury is detected the professional errs on protecting the player. Yet based on the way each of the aforementioned products is constructed and marketed each of them possesses the ability to customize the alarm setting so that each purchaser or school can set the desired trigger point or notification point wherever they choose.[168] One would hope that the purchasers, schools, colleges, and universities would err on the side of caution, making the Units more sensitive rather than less. It would seem from a standpoint of protecting our athletes that schools would rather have the Units report false positives for concussive injury, rather than false negatives, i.e. sitting out too many players than not enough. Unfortunately, that relies on the schools' motivation being the protection of the student's health and lifelong wellbeing as opposed to protecting the universities' pocketbooks from liability for student injury or from sacrificing a student in order to win a championship.

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[162] *See* Anthony Gonzales, *Force Impact Technologies presents the FITGuard*, YOUTUBE (Oct. 17, 2014), https://www.youtube.com/watch?v=2qGyg2teC_4.
[163] Telephone Interview with G-Force Technologies (Jan. 25, 2018 (on file with author).
[164] *Id.*
[165] *Id.*; *see* FORCE IMPACT TECHNOLOGIES, *supra* note 159.
[166] *See id.*
[167] *See generally* Broglio et al., *supra* note 122.
[168] Telephone Interview with K. Donoghue Riddell, *supra* note 146.

Thus, a decision needs to be made about a school's priorities as they apply to sports. Do we win at all costs even when that cost is to a student's life and future? Do we win with a later potential cost to a few students down the pike as long as we can reasonably protect the university from suit? Or do we protect our students from known risks and even potentially unknown risks given that it is only a game?

The answer to the following survey question given to the Top 100 Division I football coaches is illustrative. Out of one hundred surveyed, twenty responded to the following question: If your star player suffered a concussion during the final playoff game, would you bench him or put them in to play? The coaches questioned knew the survey was for developing a concussion policy for universities. Nineteen of the twenty coaches who responded said they would bench the student even though it was a playoff game. One coach said they would send them in to play. What is troubling about the one coach who would send the student in to play is that there is a possibility of the student suffering secondary impact syndrome once a concussion has occurred.[169]

> A controversial term first described by Saunders and Harbaugh in 1984, Second Impact Syndrome (SIS) consists of two events. Typically, it involves an athlete suffering post-concussive symptoms following a head injury. If, within several weeks, the athlete returns to play and sustains a second head injury, diffuse cerebral swelling, brain herniation, and death can occur.[170]

The above syndrome is well known thirty years after its proposal in 1984, yet we have an elite Top 100 Division I football coach who is willing to risk the life of one of his players for the sake of a win. And if this one coach admitted to be willing to act in this fashion, how many of the other nineteen who said they would bench him, would actually do so? To every person I have posed this last question, everyone answered that they believed at least one other would do the same if not more. That translates to at least ten percent of all coaches acting in a way which in any other circumstance would be considered grossly unethical if not illegal.

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[169] *See generally* Tareg Bey & Brian Ostick, *Second Impact Syndrome*, 10 WESTERN J. EMERGENCY MED. 6 (2009).
[170] *Id.*

E. Could the Simplest Solution be the Best or Blasphemy?

Thus far our solutions for protecting our student populations from potential concussive illness have ranged from spending several million dollars to spending several hundred thousand dollars. Some institutions "spent $91,936 per athlete in 2010, seven times the spending per student of $13,628. Division I universities without football spent $39,201 per athlete, more than triple the average student spending."[171]

Why is the amount universities spend on sports in Division I schools seven times the amount spent on the average student? Is the purpose of going to a university or college to play sports or to get an education? According to the American Association of Colleges and Universities:

> . . . getting a college education serves a purpose far beyond getting a job. What families and students themselves are paying for is much more than an accumulation of credits and a degree. It is more than knowledge of a particular field, training in a discipline, or even achievement of certain learning outcomes and critical skills . . . [it is] focusing not on the strictly defined goal of employment, but on the more humane and capacious goals of a better life, better communities, and a better society.[172]

Given the ferocity with which people cling to and revere athletics in colleges, one would think that the number of participants in sports would be a relatively high number, but the reality is actually very different. University of Pennsylvania has an undergraduate population of around 40,000 students, while the number of undergraduate student athletes was only 810 students as of 2014.[173] That amounts to the athletic population being a mere two percent of the total population. Purportedly fifteen out of the twenty-eight college sports at University of Pennsylvania pay for themselves, leaving thirteen of these sports as "lost leaders," *i.e.*, sports not making money but rather there as a student draw.[174] Calculating the exact

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[171] Peale, *supra* note 120.

[172] Bethany Zecher Sutton, *Higher Education's Public Purpose*, ASSOC. AM. COLLS. & UNIVS. (June 20, 2016), https://www.aacu.org/leap/liberal-education-nation-blog/higher-educations-public-purpose.

[173] Megan Fleming, *Perks of Being a Student Athlete at Penn State*, ONWARD STATE (Oct. 31, 2014, 4:15 AM), http://onwardstate.com/2014/10/31/perks-of-being-a-student-athlete-at-penn-state/.

[174] *See generally University of Pennsylvania Athletics Information*, COLL. FACTUAL, https://www.collegefactual.com/colleges/university-of-pennsylvania/student-life/sports/ (last visited Mar. 15, 2018).

amount spent on a university's sporting program is difficult given the various revenue streams and expenditures. According to one source though, University of Pennsylvania lists its sporting expenses at $37,669,540. It also lists its revenue from sports as $37,669,540.[175]

So where does much of the needed revenue come from? The answer for many of Americas largest public universities is "from surging television contracts, luxury suite sales and endorsements."[176] Unfortunately for other schools that do not have the benefits of television contracts and luxury suites, the burden falls onto the student population.[177] These student fees range from just a few tens of dollars to a few hundred.[178] At Rutgers University, the student fees that went to sports generated about $10.3 million.[179] At Florida State University, student fees of $237 per student generate about $8 million.[180]

The costs of sports and the small percentage of participation seem to call the question: Why are non-athletes footing the bill for student athletes? Could not Rutgers spend that $10 million per year on that which the American Association of Colleges and Universities suggested i.e. that of helping students attain the goals of a better life, better communities, and a better society.[181]

Additionally, given that leaving sports at the status quo, i.e. with no regard or concern for potential long term significant injury to players engaged in these sporting endeavors is untenable why engage in them at all? Does sports at the university level actually have a tangible benefit which outweighs the potential injury to its players? If on average less that 2 percent of the student players actually play in sports where is its value?

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[175] *Id.*
[176] Will Hobson & Steven Rich, *Why Students Foot the Bill for College Sports, and How Some are Fighting Back*, WASH. POST (Nov. 30, 2015), https://www.washingtonpost.com/sports/why-students-foot-the-bill-for-college-sports-and-how-some-are-fighting-back/2015/11/30/7ca47476-8d3e-11e5-ae1f-af46b7df8483_story.html?utm_term=.da67d92352dd.
[177] *See id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] Sutton, *supra* note 172.

V. EVERY COIN HAS TWO SIDES AND POTENTIALLY SOME VALUE

Despite its low number of participants and potentially skyrocketing costs, is it possible that sports do contribute something to the university experience that should not be lost? Is value determined by numbers of participants or by revenue generated? The Rosetta Stone is a single artifact of tremendous historical, and social relevance. The number of archeologists employed in the US is roughly 7600.[182] The number of accountants is 1.23 million.[183] Yet the value of those archeologists in deciphering the Rosetta Stone is invaluable. Maybe sports have a value beyond its professional monetary allure.

A. Is the Baby Being Thrown Out with the Bathwater?

Given the number of professional player law suits revolving around concussions and the possibility of significant injury being ever present, there is a tendency to simply abolish the activity as a whole without trying to mitigate the harm. There are many people who believe that sports have value beyond winning championships.[184]

> When managed with the right priorities in mind, collegiate athletics are good for student athletes . . . and for the student body as a whole. Our students come here first to learn, but intellectual growth is only part of what forms a well-rounded, contributing, mentally and physically healthy individual. Participation in athletics, from Division I to intramural, teaches students' critical life skills like leadership, teamwork, loyalty, commitment, perseverance, and time management. It fosters healthy habits and provides stress release. It forges friendships, inspires connections, and sparks school spirit that can last a lifetime.[185]

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[182] U.S. DEP'T LABOR: BUREAU OF LABOR STATISTICS, ANTHROPOLOGISTS AND ARCHEOLOGISTS, https://www.bls.gov/ooh/life-physical-and-social-science/anthropologists-and-archeologists.htm (last visited Mar. 15, 2018).
[183] *Number of Accountants and Auditors Employed in the United States from 2012 to 2022 (in Millions)*, STATISTA, https://www.statista.com/statistics/317587/number-of-accountants-and-auditors-employed-us/ (last visited Mar. 15, 2018).
[184] Ricardo Azziz, *The Value of Collegiate Athletics: Let's Not Throw the Baby Out with the Bathwater*, HUFFPOST: THE BLOG (Nov. 11, 2014, 11:23 AM), https://www.huffingtonpost.com/dr-ricardo-azziz/the-value-of-collegiate-a_b_6108674.html.
[185] *Id.*

> Well-run collegiate sports programs enhance faculty, student, alumni, and community engagement and alignment; they increase the value of the university brand; they drive enrollment and academic excellence; and they drive revenue for other auxiliaries (e.g., athletic paraphernalia sales). Multiple studies have shown alumni athletes donate more often and more dollars than non-athletes.[186]

Given the intangibles like leadership, teamwork, loyalty, and commitment, are these not the same types of activities and things which the American Academy of Colleges and Universities is striving for in order to make for a better society? Does a better life, community, and society not blossom from those who engage in charitable acts, teamwork, leadership, and perseverance?

Robert J. Sternberg, former Provost at Oklahoma State University, has some unique perspective on the topic given his various roles at institutions in his career. He started his career as a professor then as a Dean at Tufts University.[187] He has gone from academic to administrator to Provost and as such has viewed the interplay of sports and academic life from varying vantage points.[188] On the topic of the value of college sports he makes the following points:

> What leadership characteristics are important for an undergraduate education to develop? These might include traits and skills such as strategic and tactical planning, persistence, sensible risk-taking, resilience, self-discipline, time management, a sense of fairness, teamwork, an understanding of one's adversaries, and sportsmanship (being both a good winner and a good loser). If we now consider which characteristics competitive athletics help develop, the lists would track pretty well. That is, done right, participation in competitive athletics *is* leadership development.[189]

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[186] *Id.*

[187] Robert J. Sternberg, *Biography*, http://www.robertjsternberg.com/about-main-page/ (last visited Apr. 20, 2018).

[188] *See* Robert J. Sternberg, *College Athletics: Necessary, Not Just Nice to Have*, OVERBOARDER, http://www.overboarder.com/en/blog/college-athletics-necessary-not-just-nice-to-have/ (last visited Mar. 15, 2018).

[189] *Id.*

It would appear then that even academicians see a value in sports aside from the win-lose aspect of the game. Do some athletes feel privileged and on occasion behave as such by missing tests or not focusing on their studies? Of course, the numbers of athletes who are in fact doing well academically is more the rule than the exception.[190] Additionally, many employers and recruiters prefer that their employee candidates have some competitive experience because these individuals generally possess a certain drive and leadership skill.[191] That does not mean that sports is the only place to develop these abilities it simply shows that there is more than one type of classroom.[192]

If sports have an intrinsic value as a different type of classroom or learning venue, then how can we make use of both this unique setting and protect them at the same time?

B. How do we Save the Baby?

The answer is in reminding schools that protecting ones' most valuable asset, our students, requires changing our priorities as they apply to the sporting programs they offer. It means spending time and money first on protecting the athletes from concussive injury so prevalent in their field of play and by protecting our students from their own short-sighted views of their invincibility. It means changing the mindset of the universities from winning is everything to winning is important but not at the expense of the students.

What would some say about school tradition? Sports have been played at the university level for over one hundred years. Doesn't this traditions' longevity demonstrate its benefit? After all, traditions survive as a result of promoting a benefit not a negative outcome.[193] Yet, despite this long beneficial tradition, we now know that playing contact sports produces a very tangible, long-lasting injury that can have debilitating long term effects.[194]

Given the undeniability of the results, why are we so hesitant to change? There are many reasons why people resist change but here are a few from

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[190] *Benefits to College Student-Athletes*, NCAA, http://www.ncaa.org/student-athletes/benefits-college-student-athletes.
[191] Sternberg, *supra* note 188.
[192] *See id.*
[193] *Tradition*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/tradition.
[194] CANTU & HYMAN, *supra* note 84, at 92.

the perspective of business management which do relate to sporting programs and their use of people, in part, as a money-making enterprise. People resist change because of a feeling of loss of control, uncertainty, loss of face, concerns about competence, more work, and a potential ripple effect.[195] People associated with sports for many decades are likely to be defensive about admitting that they may have been doing something wrong, even harmful all these years, i.e. a loss of face.[196] No one wants to be associated with an activity that may have caused long term harm or damage to someone, thus denying that there is a potential risk or turning a blind eye to the risk allows people to avoid the potential problem. This lack of acknowledgement occurring even though the injury itself was only recently linked to sporting activities in general.[197] The desire to change may be perpetuated by a feeling of lack of competence because the injury sustained to the brain is hidden from view and not easily diagnosed, unless by a professional.[198] Coaching staff may feel ill equipped to make the call especially when the stakes of making a mistake are so high. There is also the ripple effect which may mean that if a comprehensive system is implemented, it will need to be done in all sports.[199] This is a type of flood gate argument popular with those who want to derail the corrective measure because of its magnitude.[200] This flood may be in terms of dollars, persons involved, complexity, or all three. In our situation, there are elements of all three but in no way is the cost, complexity, or outcome not worth the result. The result is no more and no less than the preservation of our society as a whole. The disease is real and not imaginary, the cure available and the cost within reach.

C. A Better Way to Bathe

The first step is to acknowledge that there is a potential problem is simultaneously educating our sporting staff and our athletes about the risks they face by competitive play. The next step is to understand and embrace the idea that it will take an initial investment of capital to adequately protect our students while they participate in sports and for universities to demonstrate that they are willing to make the commitment. We must be

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[195] Rosabeth Ross Canter, *Ten Reasons Why People Resist Change*, HARV. BUS. REV. (Sept. 25, 2012), https://hbr.org/2012/09/ten-reasons-people-resist-chang [https://perma.cc/T9BE-C7EQ].

[196] *Id.*

[197] CANTU & HYMAN, *supra* note 84, at 92.

[198] *Id.*

[199] Canter, *supra* note 195.

[200] *See* Truthfinder, *What is a Floodgates Argument in Tort Law*, QUORA, https://www.quora.com/What-is-a-floodgates-argument-in-Tort-Law (last visited Mar. 15, 2018).

proactive, rather than reactive, to the possibility of injury. We should not wait for the first multimillion dollar lawsuit to be filed, but rather implement protection ahead of that oncoming train.

Protecting athletes begins with detection and an appropriate remedial protocol. For football, that detection can be accomplished by utilizing Riddell's SRS and InSight detection systems. The sensor technology costs roughly $150 per player and can detect changes in lateral acceleration and G force. The threshold for detection and therefore removal from play being adjustable and should be set by a competent physician according to a written protocol which errs on the side of safety. Riddell's system is specifically setup for use in football helmets. For other sports, something like the GForceTracker might be utilized. GForce sensor technology can be used in sports like lacrosse, hockey, and soccer. [201] The cost per sensing Unit is $150 per Unit with a ninety-six dollar per year maintenance fee; tracking software is free. The system monitors the athlete for physical activity which exceeds the notification threshold and then notifies sideline personnel or athletic trainers that a significant impact has occurred.[202]

Both of these technologies require monitoring by qualified personnel. That personnel should be athletic trainers who have graduated with a degree in athletic training and are licensed by the state. The minimum number of athletic trainers at each practice or game should be at least three. This number, though less than the number of referees participating in most sports, would at least give three people watching the field of play at all times, not counting the coaching staff whose job it would be to pull players from play when concussive or sub-concussive blows are detected.

Baseline testing of each player should be done at the beginning of each season. The test would be an objective test, where an athlete cannot artificially lower their score to anticipate a concussive injury. Thereafter, monthly testing should occur. Eye-Sync is a product developed by Syncthink Inc. which detects eye movement as a way of quantifying an athletes' brain trauma.[203] The product has the ability to calculate a baseline reading for each student and therefore make it less possible for an athlete to artificially lower the baseline in preparation for a head injury.[204] These

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[201] *Schutt Sports Introduces High Tech Sensors to Chin Straps*, CISION: PR NEWSWIRE (Mar. 2, 2016, 6:12 PM), https://www.prnewswire.com/news-releases/schutt-sports-introduces-high-tech-sensors-to-chin-straps-300230014.html.
[202] GFORCE TRACKER, *supra* note 154.
[203] Telephone Interview with Jay Stevens, Vice President of Sales at Synvthink Inc. (on file with author).
[204] *Id.*

systems cost roughly $6,000. Each university would only need one or two Units.

For approximately $250,000 a school could equip 500 athletes with monitoring devices, purchase two Eye-Sync testing Units, and hire four athletic trainers. That cost is roughly five percent of the cost of one jury verdict against a school involving injury to a student athlete. From an income perspective, increasing enrollment in the institution by just five students would completely cover the cost of these programs.

Though these financial arguments are compelling, there is a more important reason why action needs to be taken regardless of the cost benefit analysis. Protecting our students must be done because it is the ethically right thing to do. Many ethical theorists point to the same conclusion. Jeremy Bentham and David Hume, proponents of Utilitarianism, say that societies' duty is to promote the most amount of good or benefit and to avoid activities which caused suffering.[205] Kant would say that people should act in a way which promotes good will.[206]

"A person acts from a good will when they do what they do because they think it is their duty: when they act from a sense of moral obligation."[207] Judeo Christian ethic would say do unto others as they would do unto you.

All these ethical theories point to doing the right thing that of protecting our students from harm. A thought reminiscent of *In loco parentis*, where institutions step into the shoes of parents. None of these theories concern themselves with the financial cost of doing the right thing. None of them require a cost benefit analysis to prove that the course of action proposed is good because it is cost effective. It is true that the numbers do bear out that in this case protecting our student athletes is both cost effective in the long run as well as socially beneficial; however, this is not why we should do it.

VI. CONCLUSION

We should act to protect our students because it is the right thing to do. A parent does not protect their child because of financial gain or fiscal balance.

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[205] Emrys Westacott, *Kantian Ethics in a Nutshell: The Moral Philosophy of Immanuel Kant*, THOUGHTCO. (Jan. 17, 2018), https://www.thoughtco.com/kantian-ethics-moral-philosophy-immanuel-kant-4045398.
[206] *Id.*
[207] *Id.*

They do so out of love. Are we our brother's keeper?[208] The answer historically has been yes we are.[209]

"Love your neighbor as yourself. There is no commandment greater than these."[210]

Throughout history from philosophers to the Bible to legal theories of *In loco parentis*, schools have been reminded to treat their students like parents. To do them no harm. To quote the court from 1837:

> One of the most sacred duties of parents is to train up and qualify their children, for becoming useful and virtuous members of society; . . . The teacher is the substitute of the parent; . . . and in the exercise of these delegated duties, is invested with his power.[211]

How can we effectively do our sacred duty if we fail to protect those with whom we are entrusted? The course we must take is clear. What is unclear is who will lead the path to virtuous action.

Jiminy Cricket had the following opinion of societies' moral conscience when asked what a conscience was by Pinocchio:

"What's a conscience! I'll tell ya! A conscience is that still small voice that people won't listen to. That's the trouble with the world."[212]

We can only hope that Jiminy's lack of faith in society is wrong and that universities and colleges will boldly go forward as leaders and protectors of our students and society as opposed to being ostriches with their heads buried in the sand.

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[208] Genesis 4.9 (King James).
[209] *See What is "My Brother's Keeper"?*, INNOVATEUS, http://www.innovateus.net/innopedia/what-my-brothers-keeper (last visited Mar. 15, 2018).
[210] Mark 12:30-31 (New Life Version).
[211] Morse v. Frederick, 551 U.S. 393, 414 (2007) (quoting State v. Pendergrass, 19 N.C. 365, 365–66 (1837).
[212] *Pinocchio*, IMDB, http://www.imdb.com/title/tt0032910/quotes (last visited Mar. 15, 2018).

CAN NFL PLAYERS BE PUNISHED FOR KNEELING? AN ANALYSIS OF THE BANTER SURROUNDING THE STAR-SPANGLED BANNER

By: Jonathan G. Finck[*]

ABSTRACT

This article explores the different punishments frequently used by the NFL to determine whether they can legally be applied to players who kneel during the anthem. Additionally, this article analyzes how the NFL's 2020 collective bargaining agreement can change to narrow its broad power while still allowing the league to punish reprehensible acts. Finally, this article recommends a way forward through the current anthem controversy.

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I. BY THE DAWN'S EARLY LIGHT – INTRODUCTION

> "Wouldn't you love to see one of these NFL owners, when somebody disrespects our flag, to say, 'Get that son of a bitch off the field right now, out. He's fired. He's fired!' You know, some owner is going to do that." – President Donald J. Trump[1]

In 2016, San Francisco 49ers quarterback Colin Kaepernick started a movement when he refused to stand for the National Anthem.[2] He did this to raise awareness of racial injustice in America.[3] Kaepernick's gesture gained momentum as many players around the league followed suit.[4] These protests created a fault line through our country, and many—including President Trump—are pressuring the National Football League ("NFL") to ban the protests.[5] The controversy raises questions about whether the league can punish players for peacefully protesting as they work for their private employer during nationally televised games. This article will explore the different punishments frequently used by the NFL and determine whether they can legally be applied to players who kneel during the anthem. Additionally, this article analyzes how the NFL's 2020 collective bargaining agreement can change to narrow its broad power while still allowing the league to punish reprehensible acts. Finally, this article recommends a way forward through this issue.

A. What So Proudly We Hailed

Colin Kaepernick made an immediate impact on the NFL. In just his second

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[1] President Donald Trump, Campaign Rally for Luther Strange in Huntsville, Al. (Sept. 22, 2017) (transcript available at https://factba.se/transcript/donald-trump-speech-luther-strange-rally-huntsville-alabama-september-22-2017).

[2] Josh Peter, *Colin Kaepernick Inspires a Movement with his Absence*, USA TODAY SPORTS (last updated Sept. 26, 2017, 9:16 AM), https://www.usatoday.com/story/sports/nfl/2017/09/25/colin-kaepernick-inspires-movement-his-absence/700808001/.

[3] Steve Wyche, *Colin Kaepernick Explains Why He Sat During National Anthem*, NFL.COM (last updated Aug. 28, 2016, 4:33 PM), http://www.nfl.com/news/story/0ap3000000691077/article/colin-kaepernick-explains-why-he-sat-during-national-anthem.

[4] Peter, *supra* note 2.

[5] Trump, *supra* note 1; Scott Davis, *NFL Players Are Reportedly Under Pressure from Owners and Management to Stop Protesting During the National Anthem*, BUS. INSIDER (last updated Oct. 9, 2017, 4:39 PM), http://www.businessinsider.com/nfl-players-national-anthem-protests-2017-10.

season, he led the San Francisco 49ers to a Super Bowl.[6] In 2014, he nearly repeated the previous season's success by reaching the NFC Championship Game.[7] Many thought he was going to permanently change the standard for quarterbacks and go down as one of the greatest to play the game.[8] Kaepernick became an idol. Embraced by the nation, he flooded the media and was featured on the cover of *GQ Magazine*[9] and displayed in the *ESPN Body Issue*.[10] The twenty-five-year-old Wisconsin native was loved across the country, becoming a football hero, sex symbol, and even Christian role model.[11]

After the 2014 NFC Championship Game, the 49ers suffered a steep decline.[12] Kaepernick began the 2015 season poorly and, after losing his starting position, decided to undergo season-ending surgery to mend a torn

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[6] Louis Bien, *Super Bowl XLVII: Colin Kaepernick Shines in Losing Effort*, SBNATION (Feb. 4, 2013, 12:45 PM), https://www.sbnation.com/nfl/2013/2/4/3949488/super-bowl-2013-colin-kaepernick-49ers.

[7] Al Saracevic, *NFC Championship Game Exceeded Expectations*, SFGATE (Jan. 20, 2014, 10:45 AM), http://www.sfgate.com/49ers/article/NFC-Championship-Game-exceeded-expectations-5158224.php.

[8] Associated Press, *Jaworski Praises Colin Kaepernick*, ESPN (Aug. 22, 2013), http://www.espn.com/nfl/trainingcamp13/story/_/id/9590058/ron-jaworski-says-colin-kaepernick-one-greatest-quarterbacks-ever (statement of ESPN analyst Ron Jaworski) ("I truly believe Colin Kaepernick could be one of the greatest quarterbacks ever. I love his skill set. I think the sky's the limit.").

[9] GQ MAG., Sept. 2013.

[10] Body Issue, ESPN, 2013

[11] *See* Melissa Steffan, *Tattooed 49ers QB Not the Only Controversial Christian in 2013 Super Bowl*, CHRISTIANITY TODAY (Jan. 31, 2013, 11:12 AM), http://www.christianitytoday.com/news/2013/january/tattooed-49ers-qb-not-only-controversial-christian-in-2013.html; Steve Politi, *Is Kaepernicking the New Tebowing?*, CNN (last updated Jan. 18, 2013, 3:21 PM), http://www.cnn.com/2013/01/18/us/colin-kaepernick-nfl/index.html?hpt=hp_abar.

[12] *See* Doug Williams, *Niners Still Haunted by Jim Harbaugh Mistake*, NBC BAY AREA (Jan. 2, 2017, 8:26 AM), http://www.nbcbayarea.com/news/local/Niners-Still-Haunted-by-Jim-Harbaugh-Mistake--409323835.html. Front office politics led to the firing of head coach Jim Harbaugh. *See id.* This was a shocking move as Harbaugh held a record of 44-19 and led the team to three straight NFC Championship games. *Id.* In the two years after Harbaugh was fired, the 49ers had a losing record of 7-25 and fired two different head coaches. *Id.*; *San Francisco 49ers 2015 Schedule*, NFL, http://www.nfl.com/schedules/2015/REG/49ERS; *San Francisco 49ers 2016 Schedule*, NFL, http://www.nfl.com/schedules/2016/REG/49ERS. Harbaugh is now the head coach of Michigan University, and has denied any interest in returning to the NFL. *See* Alex Kirshner, *Jim Harbaugh NFL Rumors are 'Lies Made Up By Our Enemies,' He Reportedly Told Players*, SBNATION (last updated Dec. 13, 2016, 8:50 PM), https://www.sbnation.com/college-football/2016/12/13/13942868/jim-harbaugh-rams-nfl-coach-search-rumors.

labrum in his left shoulder.[13] During the preseason of the following year, Kaepernick began to sit during the National Anthem. He later opted out of his contract with the 49ers in 2017 because of failed negotiations for a contract extension[14] and the team's refusal to trade him.[15] Although just four years earlier he led the team to the Super Bowl, the man who seemed destined for Canton, Ohio, walked away unwanted. There is no indication that he left the 49ers because of the anthem controversy, but he is claiming that other teams will not sign him because of it.

The NFL is a quarterback-centered league, and good quarterbacks are hard to come by. Many teams in the NFL are looking for a new quarterback, and the need only grows as players frequently get injured over the course of the season.[16] Despite the need, Kaepernick is still not signed. It is widely believed that Kaepernick's employment status is solely the result of his political actions and completely unrelated to his skill on the football field.[17] Indeed, Kaepernick himself believes this is the reason why he is not signed. In response to months of unemployment, he filed a claim against the league, alleging collusion among the team owners and general managers to silence Kaepernick and his influence.[18]

Kaepernick stunned the world back in 2016 when he first remained on the bench as everyone rose for the National Anthem.[19] He explained his actions

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[13] Paul Gutierrez, *Niners Place Colin Kaepernick on IR*, ESPN (Nov. 22, 2015), http://www.espn.com/nfl/story/_/id/14185127/colin-kaepernick-san-francisco-49ers-placed-season-ending-ir.

[14] Joe Fann, *Colin Kaepernick Opts Out of Contract, Becomes a Free Agent*, 49ERS (Mar. 3, 2017), http://www.49ers.com/news/article-2/Colin-Kaepernick-Opts-Out-of-Contract-Becomes-a-Free-Agent/55f3952d-1f83-4682-bf97-3c423ab26fa8.

[15] Wyche, *supra* note 3.

[16] *See* Will Brinson, *The Titans Are Signing Brandon Weeden and Colin Kaepernick Supporters Are Hot*, CBS SPORTS (Oct. 3, 2017), https://www.cbssports.com/nfl/news/the-titans-are-signing-brandon-weeden-and-colin-kaepernick-supporters-are-furious/.

[17] Jack Dickey, *There's No Credible Reason Why Colin Kaepernick Isn't on a Week 1 NFL Roster*, SPORTS ILLUSTRATED (Sept. 8, 2017), https://www.si.com/nfl/2017/09/08/colin-kaepernick-week-1-nfl-roster-not-signed; Michael Rosenberg, *Colin Kaepernick Can Be an Activist AND a Football Player*, SPORTS ILLUSTRATED (Aug. 15, 2017), https://www.si.com/nfl/2017/08/15/colin-kaepernick-national-anthem-protests-charlottesville. *But see* Will Brinson, *Anonymous NFL Exec on Colin Kaepernick: 'I Don't Think He Can Play*', CBS SPORTS (Aug. 31, 2017), https://www.cbssports.com/nfl/news/anonymous-nfl-exec-on-colin-kaepernick-i-dont-think-he-can-play/.

[18] ESPN, *QB Colin Kaepernick Files Grievance for Collusion Against NFL Owners*, ESPN (Oct. 16, 2017), http://www.espn.com/nfl/story/_/id/21035352/colin-kaepernick-files-grievance-nfl-owners-collusion.

[19] Wyche, *supra* note 3.

by stating, "I am not going to stand up to show pride in a flag for a country that oppresses black people and people of color. To me, this is bigger than football and it would be selfish on my part to look the other way."[20] Despite criticism, he has remained steadfast. He moved from sitting on the bench to kneeling by his teammates,[21] and others around the league slowly joined Kaepernick in support of fighting racial injustice.[22] Kaepernick quickly became the most polarizing player in the NFL. He received death threats,[23] yet led the league in jersey sales.[24] Some people refuse to watch football when players kneel:[25] others refuse to watch until Kaepernick is signed.[26] To some he is a traitor,[27] to others a patriot.[28]

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[20] *Id.*

[21] Mark Sandritter, *A Timeline of Colin Kaepernick's National Anthem Protest and the Athletes Who Joined Him*, SBNATION (last updated Sept. 25, 2017, 10:28 AM), https://www.sbnation.com/2016/9/11/12869726/colin-kaepernick-national-anthem-protest-seahawks-brandon-marshall-nfl (to open the 2016 NFL regular season, Kaepernick kneeled and was joined by teammate Eric Reid).

[22] John Breech, *Here Are the 11 Players Who Joined Colin Kaepernick's Protest in Week 1*, CBS SPORTS (Sept. 12, 2016), https://www.cbssports.com/nfl/news/here-are-the-11-players-who-joined-colin-kaepernicks-protest-in-week-1/.

[23] Eoghan Macguire, *Colin Kaepernick: Quarterback Says He Has Received Death Threats*, CNN (last updated Sept. 22, 2016, 8:30 AM), http://www.cnn.com/2016/09/21/sport/colin-kaepernick-death-threats/index.html.

[24] Darren Heitner, *Colin Kaepernick Tops Jersey Sales In NFL*, FORBES (Sept. 7, 2016, 7:54 AM), https://www.forbes.com/sites/darrenheitner/2016/09/07/colin-kaepernick-tops-jersey-sales-in-nfl/#45449eb37aad.

[25] Joe Flint, Amol Sharma & Andrew Beaton, *DirecTV Allows Some NFL Refunds After Anthem Controversy*, WALL ST. J. (last updated Sept. 26, 2017, 4:54 PM), https://www.wsj.com/articles/directv-allows-some-nfl-refunds-after-anthem-controversy-1506453159 (stating DirecTV offered full refunds to any Sunday Ticket package holders frustrated with kneeling during the anthem); *see also* Brad Tuttle, *5 Ways People Are Boycotting the NFL Because of the National Anthem Controversy*, TIME MONEY (Sept. 27, 2017), http://time.com/money/4958955/nfl-players-national-anthem-protest-trump-boycott/ (stating that fans have burned NFL jerseys and even game tickets in protest).

[26] David Dennis Jr., *Deciding to Skip the NFL Season*, ATLANTIC (Oct. 1, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/deciding-to-skip-the-nfl-season/541638/.

[27] Jesse Yomtov, *GOP Rep. Steve King on Kaepernick: 'This is Activism That's Sympathetic to ISIS'*, USA TODAY (last updated Sept. 15, 2016, 1:20 PM), https://www.usatoday.com/story/sports/nfl/2016/09/15/steve-king-colin-kaepernick-activism-sympathetic-to-isis/90399954/ (quoting GOP Rep. Steve King "When he steps out on the stage, the world stage, he's taking advantage of that and he's undermining patriotism . . . this is activism that's sympathetic to ISIS.").

[28] Kareem Abdul-Jabbar, *Abdul-Jabbar: Insulting Colin Kaepernick Says More About Our Patriotism than His*, WASH. POST (Aug. 30, 2016), https://www.washingtonpost.com/posteverything/wp/2016/08/30/insulting-colin-kaepernick-says-more-about-our-patriotism-than-his/?utm_term=.81e41cc7ad74 ("What makes an act truly patriotic and not just lip-service is when it involves personal risk or sacrifice.").

Kaepernick's protests occurred in the midst of a national spotlight on police actions of racial injustice. The technological development of police body cameras and video recording cell phones have led to an exposure of police behavior. Several incidents have overwhelmed the internet and news sources and have shocked our country's moral conscience.[29]

B. At the Twilight's Last Gleaming

Kaepernick's mission is outlasting his employment. Even though the 2017 NFL season started without the anthem protest's patriarch, athletes are still honoring what he represents. To open the season, a handful of players sat or raised their fists for the anthem. The Cleveland Browns linked arms with law enforcement as a sign of unity within the community between racial tensions and the police.[30] While not overwhelming, these displays of protest were enough to get the attention of President Trump.

While giving a campaign speech for Luther Strange in Alabama, President Trump went off script to rally the crowds. He spoke harshly of those "disrespecting our flag,"[31] and went so far as to encourage the NFL owners to fire the players who kneel.[32] This statement exacerbated an already divisive issue in the country.[33] The Sunday after President Trump's statement, the NFL had its largest display of protests, including more players kneeling during the anthem than ever before.[34] One team even stayed in the locker room until the anthem finished.[35]

The Trump Administration did not back down from the fight. On October

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[29] Al Baker, et al., *Beyond the Chokehold: The Path to Eric Garner's Death*, N.Y. TIMES (June 13, 2015), https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html.

[30] Ken Belson, *Anthem Demonstrations Include a Show of Unity in Cleveland*, N.Y. TIMES (Sept. 10, 2017), https://www.nytimes.com/2017/09/10/sports/football/national-anthem-nfl-protests.html.

[31] Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 24, 2017, 5:44 AM), https://twitter.com/realDonaldTrump/status/911904261553950720?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.cnn.com%2F2017%2F09%2F24%2Fpolitics%2Fdonald-trump-nfl-sunday-protest-response%2Findex.html.

[32] Trump, *supra* note 1.

[33] *See 'It's Disgusting': NFL Fans React to National Anthem Protests*, FOX NEWS INSIDER (Sept. 25, 2017, 7:22 AM), http://insider.foxnews.com/2017/09/25/nfl-fans-react-national-anthem-protests-players-not-respecting-american-flag.

[34] Adam Stites, *NFL Players Respond to Donald Trump with More Protests Than Ever*, SBNATION (last updated Sept. 26, 2017, 1:55 PM), https://www.sbnation.com/2017/9/24/16354916/nfl-protest-national-anthem-donald-trump.

[35] *Id.*

8, 2017, Vice President Mike Pence left an Indianapolis Colts game because players knelt during the National Anthem.[36] President Trump tweeted, "I asked @VP Pence to leave stadium if any players kneeled, disrespecting our country. I am proud of him and @SecondLady Karen."[37] Dallas Cowboys owner Jerry Jones made a statement following the Pence departure declaring that he will sit any players on his team that kneel during the anthem. Jones said, "We cannot in the NFL in any way give the implication that we tolerate disrespecting the flag."[38]

II. THROUGH THE PERILOUS FIGHT – THE HISTORY OF SPORTS PROTESTS

A. O'er the Ramparts We Watched – The History of Anthem Protests in Sports

This is not the first time in history that an athlete has used the anthem to raise awareness of their political cause. In the 1968 Mexico City Olympics, Tommie Smith and John Carlos stood on the podium, donning their gold and bronze medals for the 200-meter sprint. As the United States Anthem played, the athletes placed a black glove on their hand and raised a fist in a

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[36] Mike Pence (@VP), TWITTER (Oct. 8, 2017, 10:23 AM), https://twitter.com/VP/status/917078033491689472 ("While everyone is entitled to their own opinions, I don't think it's too much to ask NFL players to respect the Fag and our National Anthem."); Eli Watkins, *Pence Leaves Colts Game After Protest During Anthem*, CNN (last updated Oct. 9, 2017, 11:28 AM), http://www.cnn.com/2017/10/08/politics/vice-president-mike-pence-nfl-protest/index.html.

[37] Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 8, 2017, 11:16 AM), https://twitter.com/realDonaldTrump/status/917091286607433728.
Many commentators found this to be a cheap stunt that cost the taxpayers the money of sending the Vice President to Indiana when it was clear that members of the team were going to kneel during the anthem since many of them have before. Not to mention that it involved Kaepernick's former team. *See* Allan Smith, *Mike Pence's Early Exit from an NFL Game is Starting to Look More and More Like a Political Stunt*, BUS. INSIDER (Oct. 9, 2017, 6:34 PM), http://www.businessinsider.com/mike-pence-nfl-colts-49ers-game-political-stunt-2017-10; Jeanna Thomas, *Vice President Mike Pence Leaving the Colts Game Was a 'PR Stunt' Says 49ers Safety Eric Reid*, SBNATION (Oct. 8, 2017, 6:59 PM), https://www.sbnation.com/2017/10/8/16445178/vice-president-mike-pence-pr-stunt-colts-49ers-eric-reid-national-anthem-protest.

[38] Associated Press, *Jerry Jones: Cowboys 'Will Not Play' if They Disrespect Flag*, L.A. TIMES (Oct. 9, 2017, 7:10 AM), http://www.latimes.com/sports/nfl/la-sp-cowboys-jones-flag-20171009-story.html (statement of NFL owner Jerry Jones) ("If there's anything that is disrespectful to the flag, then we will not play . . . Understand? We will not play . . . If we are disrespecting the flag, then we will not play. Period.").

black power salute.[39] A clenched fist was the prominent symbol of the Black Panthers at the time, and it generally stood for solidarity and support in the fight for black equality.[40] The athletes also took off their shoes to protest poverty, and wore beads and a scarf to protest lynching.[41] As punishment, the athletes were kicked out of the Olympics, stripped of their medals, and suspended from the United States Track Team.[42]

The black power salute has also seeped into the current NFL protests. On September 17, 2017, then Seattle Seahawk and three-time Pro Bowler Michael Bennett celebrated a tackle by putting his fist in the air.[43] Bennet tweeted about his actions the next day, posting a picture of his gesture and stating, "The raised fist represents unity or solidarity with oppressed peoples."[44] This came roughly a month after Bennett claimed to have been profiled and held at gunpoint by the police.[45]

In 1996, the National Basketball Association ("NBA") suspended

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[39] DeNeen L. Brown, *They Didn't #TakeTheKnee: The Black Power Protest Salute That Shook the World in 1968*, WASH. POST (Sept. 24, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/09/24/they-didnt-takeaknee-the-black-power-protest-salute-that-shook-the-world-in-1968/?utm_term=.2219b8ec49f1.

[40] BBC, *Factbox: What is the Black Power Salute?*, SBS (last updated Aug. 26, 2013), http://www.sbs.com.au/news/article/2012/08/21/factbox-what-black-power-salute ("The clenched black fist, also known as the Black Power fist is a logo generally associated with black nationalism and sometimes socialism.").

[41] *Id.*

[42] *See id.* The athletes' punishment was given pursuant to the International Olympic Committee's 1968 Model Constitution. *See* INT'L OLYMPIC COMM., MODEL CONSTITUTION FOR A NATIONAL OLYMPIC COMMITTEE (1968).

[43] Anthony Barstow, *NFL Players Now Taking Their Protests onto the Field*, N.Y. POST (Sept. 17, 2017, 6:59 PM), http://nypost.com/2017/09/17/nfl-players-now-taking-their-protests-onto-the-field/.

[44] Michael Bennett (@mosesbread72), TWITTER (Sept. 18, 2017, 7:45 AM), https://twitter.com/mosesbread72/status/909790543869120514/photo/1?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.sbnation.com%2F2017%2F9%2F17%2F16323506%2Fmichael-bennett-celebrated-sack-vs-49ers-raised-fist.

[45] Michael Bennett (@mosesbread72), TWITTER (Sept. 6, 2017, 7:01 AM), https://twitter.com/mosesbread72/status/905430701595652096 ("Las Vegas police officers singled me out and pointed their guns at me for doing nothing more than simply being a black man in the wrong place at the wrong time."). Bennet claims that after the prize fight between UFC fighter Conor McGregor and boxer Floyd Mayweather Jr. in Las Vegas, that police singled him out for no reason other than being black. A gun was pointed towards his head while he was forced to the ground so that handcuffs could be placed on him. This was in response to gunshots heard in the area. *See id.*; Jill Martin, *Michael Bennett: Police Singled Me Out, Put a Gun Near My Head*, CNN (last updated Sept. 8, 2017, 5:05 AM), http://www.cnn.com/2017/09/06/sport/michael-bennett-las-vegas-police/index.html.

Mahmoud Abdul-Rauf one game for sitting during the National Anthem.[46] Abdul-Rauf sat because he could not reconcile his Muslim religion with the anthem's meaning. In an interview, Abdul-Rauf said, "You can't be for God and for oppression. It's clear in the Quran, Islam is the only way."[47] Abdul-Rauf was suspended for one game and fined $35,000 due to a league rule that required players to stand in a "dignified posture" during the anthem.[48] The NBA has a similar rule today. According to its official rules, "Players, coaches and trainers are to stand and line up in a dignified posture along the sidelines or on the foul line during the playing of the National Anthem."[49] NBA Commissioner Adam Silver reaffirmed this rule following President Trump's comments about the NFL.[50] Abdul-Rauf eventually compromised with the league and stood to pray with his head down during the anthem.[51]

However, Abdul-Rauf's career steadily declined after the incident. When his contract expired, no teams offered him a tryout, and he left to play in Europe.[52] Abdul-Rauf attributes this to the league's aversion to people who try to use their platform for a cause. He said, "They don't want these types of examples to spread, so they've got to make an example of individuals like this."[53] Six months before Kaepernick opted out of his contract with the 49ers, Abdul-Rauf foresaw Kaepernick's future. He said, "It's a process of just trying to weed you out. This is what I feel is going to happen to [Kaepernick]."[54]

Major League Baseball ("MLB") faced a similar issue, this time with the song "God Bless America." For the entire 2003 season, Hall of Fame first baseman Carlos Delgado decided to stay in the dugout during the seventh-

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[46] Jesse Washington, *Still No Anthem, Still No Regrets for Mahmoud Abdul-Rauf*, UNDEFEATED (Sept. 1, 2016), https://theundefeated.com/features/abdul-rauf-doesnt-regret-sitting-out-national-anthem/.
[47] *Id.*
[48] *Id.*
[49] NAT'L BASKETBALL ASS'N, OFFICIAL RULES OF THE NATIONAL BASKETBALL ASSOCIATION cmt. II(H)(2) (2017-2018 ed. 2017).
[50] Brian Mahoney, *Adam Silver Expects NBA Players to Stand During National Anthem*, NBA (Sept. 28, 2017, 8:09 PM), http://www.nba.com/article/2017/09/28/adam-silver-expects-nba-players-stand-during-national-anthem#/ (statement of NBA Commissioner Adam Silver) ("It's been a rule as long as I've been involved with the league, and my expectation is that our players will continue to stand for the anthem.").
[51] Washington, *supra* note 46.
[52] *Id.* In 2000, after two years overseas, he signed a short contract with the Vancouver Grizzlies. *Id.*
[53] *Id.*
[54] *Id.*

inning stretch playing of the patriotic song in protest of the Iraq war.[55] While the act was viewed negatively by some spectators, Delgado was never punished for his actions.[56] The MLB did not have a rule against sitting during the song, and Delgado's agent said that if Delgado were to play for a team that did have such a rule, Delgado would honor it.[57]

Despite many anthem protests across different sports, the issue of whether a player can be punished for these protests has not been thoroughly analyzed. This is in part because of the differences between the events. One key difference is that each sport is governed by its own CBA. The demonstration at the Olympics is even more unique because the International Olympic Committee (a non-profit international organization made up of volunteers) manages the governing rules and decides when to strip the athletes of their medals.[58]

B. Were So Gallantly Streaming – The NFL's History of Political Statements

Beyond the protests during the National Anthem, the NFL has dealt with other forms of players voicing their political beliefs. In 1986, quarterback Jim McMahon was annoyed when NFL Commissioner Pete Rozelle fined him $5,000 for wearing an Adidas headband.[59] The headband was in violation of a league rule that required all company logos to be covered.[60] In retaliation, the quarterback wrote "ROZELLE" across a plain white headband and wore it during the NFC Championship Game.[61] No fines were given for this action.

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[55] William C. Rhoden, *Sports of the Times; Delgado Makes a Stand by Taking a Seat*, N.Y. TIMES (July 21, 2004), http://www.nytimes.com/2004/07/21/sports/sports-of-the-times-delgado-makes-a-stand-by-taking-a-seat.html (statement of MLB Commissioner Bud Selig) ("I'm in the process of getting more information, but eventually I would like to sit down and discuss it with Carlos. I am very sensitive to this kind of issue, both as a matter of respect for our country and for one's right to express his opinion.").

[56] Sam Borden, *A MAN OF PRINCIPLE Delgado Makes Headlines Speaking His Mind*, N.Y. DAILY NEWS (Jan. 23, 2005, 12:00 AM), http://www.nydailynews.com/archives/sports/man-principle-delgado-headlines-speaking-mind-article-1.651402.

[57] *Id.*

[58] *The International Olympic Committee*, OLYMPIC, https://www.olympic.org/the-ioc (last visited Apr. 19, 2018).

[59] Associated Press, *Headband Isn't a Laughing Matter; $5,000 Fine Stands*, L.A. TIMES (Jan. 14, 1986), http://articles.latimes.com/1986-01-14/sports/sp-28009_1_adidas-headband.

[60] *Id.*

[61] *Id.*

McMahon continued his headband stunt in the Super Bowl, but channeled his creative energy towards a more positive cause. He had two hand-lettered headbands, the first had the words "JDF Cure" to support a juvenile diabetes foundation, and the second read "POW-MIA" to support U.S. servicemen imprisoned or missing in action from the Vietnam War.[62] Rozelle publicly supported the message of the headbands, but one NFL official said the league could keep McMahon out of a game until he conforms to the league's appearance standards.[63] McMahon did not test the league's sincerity.[64]

In 2014, the then St. Louis Rams made headlines when a group of players walked out of the tunnel with their hands held over their heads as a sign of surrender. The gesture was in support of the Black Lives Matter protest after the shooting of Michael Brown.[65] Brown was a black teenager shot by the police in Fergusson, Missouri.[66] This sparked "hands up, don't shoot" protests across the country after witness accounts said that Brown had his hands up in surrender when he was shot.[67] The Rams Executive Vice President of Football Operations, Kevin Demoff, supported the actions of his players. He said, "I do believe that supporting our players' First Amendment rights and supporting local law enforcement are not mutually exclusive."[68] The NFL decided not to punish the players for their demonstration. Brian McCarthy, Vice President of Communications for the NFL stated, "We respect and understand the concerns of all individuals who

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[62] Associated Press, *McMahon's Headbands: He's a Rebel with a Cause*, L.A. TIMES (Jan. 27, 1986), http://articles.latimes.com/1986-01-27/sports/sp-678_1_jim-mcmahon.
[63] Matt Schwerha, *1985 Bears Coverage: Rozelle Lays Down the Law*, CHI. SUN TIMES (June 24, 2016, 8:33 AM), https://chicago.suntimes.com/1985-chicago-bears/1985-bears-coverage-rozelle-lays-down-the-law/ (statement of NFL Commissioner Pete Rozelle) ("In New Orleans, I was concerned with him being able to walk this tightrope of being a colorful personality and maybe something else that'd be getting below the rope.").
[64] Bob Verdi, *From the Archives: Bears QB Jim McMahon Enjoys His Rebellious Image*, CHI. TRIB. (Jan. 13, 1986), http://www.chicagotribune.com/sports/football/bears/ct-jim-mcmahon-david-letterman-bears-20160114-story.html.
[65] Michael MacCambridge, *This Wasn't the First Time Football, Protest and Politics Have Mixed*, HISTORY (Sept. 25, 2017), http://www.history.com/news/how-football-protest-and-politics-have-always-mixed.
[66] *Ferguson Protests: What We know About Michael Brown's Last Minutes*, BBC, (Nov. 25, 2014), http://www.bbc.com/news/world-us-canada-28841715.
[67] Michelle Ye Hee Lee, *'Hands Up, Don't Shoot' Did Not Happen in Ferguson*, WASH. POST (March 19, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/03/19/hands-up-dont-shoot-did-not-happen-in-ferguson/?utm_term=.29a241d84b0c.
[68] MacCambridge, *supra* note 65.

have expressed views on this tragic situation."[69] The NFL has a history of demonstrating neutrality when players make political statements. So far, the NFL has continued their neutrality throughout the anthem protest.[70]

III. THE BOMBS BURSTING IN AIR – THE LEGALITY OF FIRING SOMEONE FOR KNEELING DURING THE ANTHEM

A. The First Amendment does not Protect a Player's Freedom of Speech from being Restricted by a Private Employer

It seems ironic to call the most watched sporting event in America private, but in terms of the First Amendment, it is. If the First Amendment did apply, it would be a straightforward analysis, and the players would undoubtedly hold the right to protest.[71] However, the First Amendment only protects individuals from governmental intrusion on the rights it establishes.[72] Because the First Amendment does not shield the NFL players from the employment repercussions of their speech, many analysts have concluded

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[69] SI Wire, *NFL Won't Discipline Rams Players for 'Hands Up, Don't Shoot' Gesture*, SPORTS ILLUSTRATED (Dec. 1, 2014), https://www.si.com/nfl/2014/12/01/nfl-discipline-st-louis-rams-players-hands-dont-shoot.

[70] Brian McCarthy (@NFLprguy), TWITTER (Oct. 17, 2017, 10:52 AM), https://twitter.com/NFLprguy/status/920346711335239681/photo/1?ref_src=twsrc%5Etfw&ref_url=https%3A%2F%2Fwww.cbssports.com%2Fnfl%2Fnews%2Fnfl-anthem-policy-unchanged-after-lengthy-meeting-between-players-owners%2F ("As we said last week, everyone who is part of our NFL community has a tremendous respect for our country, our flag, our anthem and our military. In the best American tradition, we are coming together to find common ground and commit to the hard work required for positive change."); *see also* Ken Belson, *After Anthem Protests, N.F.L. Plots a Careful Path Forward*, N.Y. TIMES (Sept. 28, 2017), https://www.nytimes.com/2017/09/28/sports/football/nfl-trump-anthem.html; Sean Wagner-McGough, *NFL Anthem Policy Unchanged After Meeting, Players Angry Kaepernick Wasn't Invited*, CBS SPORTS (Oct. 17, 2017), https://www.cbssports.com/nfl/news/nfl-anthem-policy-unchanged-after-lengthy-meeting-between-players-owners/ (stating that the Players Association and NFL Owners and players met to discuss the Anthem issue and that no rule change was put into place.).

[71] Texas v. Johnson, 491 U.S. 397, 414 (1989) (stating that "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[72] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

that the players have no recourse.[73] While they might not have Constitutional recourse, there are protections outlined in their employment contracts.[74]

B. NFL Players are not "At Will" Employees

The popular belief held by the media is that NFL players can be fired at any time at their employer's discretion because they are at-will employees.[75] This is not true. Black's Law Dictionary defines *employment at will* as: "Employment that is [usually] undertaken without a contract and that may be terminated at any time, by either the employer or the employee, without cause."[76] Employment for players in the NFL does not meet this definition because it is governed by a contract that has a set end date.

The confusion comes because teams frequently drop players from their roster. Every year teams start the preseason with large rosters that need to be trimmed to fifty-three players before the start of the regular season.[77] Players are also cut during the season or traded without their consent.

However, the team's prerogative to drop players is specifically related to the player's ability, the team's cap space, or the player's conduct if detrimental to the team. These termination rights are the result of a negotiated process between the NFL Players Association ("NFLPA") and the League. This agreement is recorded in the Collective Bargaining Agreement ("CBA"). The CBA is a contract that governs the player-league

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[73] *See generally* AP, *Legal Experts Split on if NFL Can Punish for Anthem Protests*, USA TODAY (last updated Oct. 11, 2017, 4:35 PM), https://www.usatoday.com/story/sports/nfl/2017/10/11/legal-experts-split-on-if-nfl-can-punish-for-anthem-protests/106530728/; Dylan Gwinn, *Dershowitz: NFL Players Don't Have a Constitutionally Protected Right to Kneel During the Anthem*, BREITBART (Oct. 22, 2017), http://www.breitbart.com/sports/2017/10/22/dershowitz-nfl-players-dont-have-constitutionally-protected-right-to-kneel-during-the-anthem/.

[74] NAT'L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS art. 42 (2011), *available at* https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf [hereinafter NAT'L FOOTBALL LEAGUE CBA]; Marc Edelman, *Can The NFL Really Fire Players For Kneeling During The National Anthem?*, FORBES (Sept. 28, 2017, 2:27 PM), https://www.forbes.com/sites/marcedelman/2017/09/28/nfl-trump-kneeling-national-anthem/#5f0a9c4e2976.

[75] AP, *supra* note 73.

[76] *Employment at Will*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[77] *See generally* Conor Orr, *What To Watch For On Roster Cutdown Deadline Day*, NFL (last updated Aug. 31, 2017, 11:52 PM), http://www.nfl.com/news/story/0ap3000000836009/article/what-to-watch-for-on-roster-cutdown-deadline-day.

relationship. The current CBA was signed in 2011 and is set to expire after the 2020 season.[78] The liberty teams have to drop players for the interest of the team is outlined in Appendix A, the NFL Player Contract. Section 11 states:

> If at any time, in the sole judgment of the Club, Player's skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club's roster, or if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract.[79]

Furthermore, teams can also cut a player based on the team's salary cap space.[80] Players who are cut for one of these three reasons may receive some financial compensation, depending on their contract.[81]

Based on the nature of their contracts, NFL players are best categorized as fixed-term employees. Fixed term means "work carried out under an employment contract that is due to end when a specified date is reached, a specified event does or does not occur, or a specified task has been completed."[82] Instead of their employment being at-will, it is governed by a contract agreed to by the parties before the employment. For a team to cut a player, it would have to terminate the contract. One of the reasons for the Player's Association is to protect against arbitrary termination.[83] While there are ways that a team can legally terminate the contract unilaterally, teams do not have the power to fire players for any reason whatsoever. Unions historically protect against this very concern, and the NFLPA is no

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[78] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 1 (defining "final league year" as "the league year which is scheduled prior to its commencement to be the final League Year of this Agreement. As of the date hereof, the Final League Year is the 2020 League Year").

[79] *Id.* at app. A, § 11.

[80] *Id.*

[81] *See id.* at art. 10, § 4(c) (outlining one form of guaranteed contract as "fully guaranteed if the player's contract is terminated because of lack of comparative skill; as a result of an injury sustained in the performance of his services under his Player Contract; and/or due to a Club's determination to create Room for Salary Cap purposes.").

[82] *Fixed-Term Work*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[83] NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, NFL PLAYERS ASSOCIATION CONSTITUTION art. 1, § 3 (2007), available at https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/League%20Constitutions%20&%20Bylaws/NFLPA%20Constitution%20-%20March%202007.pdf [hereinafter NFLPA CONST.] (stating the purpose of the union).

different.[84]

Because they are fixed-term employees and do have contracts, players can only be released before their contract expires based on the provisions set forth in the agreement. Therefore, the legality of firing players for protesting the National Anthem is a complicated issue and cannot be answered simply by explaining the limitations of the First Amendment and referencing the line in the Uniform Players Contract that teams have complete discretion.

C. The Commissioner has Absolute Authority to Punish Players

To fully analyze the CBA as it relates to a team's authority to punish players, the discussion must be split into the three categories of punishment that the league and teams have historically used. Those categories are (1) being fined, (2) being benched or suspended, and (3) being cut or released.

Authority for punishing a player for kneeling during the anthem needs to be justified under the CBA. There are two relevant clauses that give authority for punishing players for detrimental conduct: one giving authority to the Commissioner, the other to the teams.[85] These are also known as "morality clauses" or "morals clauses." Morality clauses exist in almost every contract related to talent that represents any sort of company.[86] One commentator explains why companies that hire talent prefer a broad morality clause by stating, "These companies are almost always looking to include a broad morals clause in contracts because that allows them to terminate talent for any potentially damaging conduct."[87] One prominent example of the application of a morality clause is an instance involving Denver Bronco linebacker Brandon Marshall.[88] When Marshall decided to join Kaepernick's movement and kneel during the anthem, he lost two endorsements: Air Academy Federal Credit Union and CenturyLink.[89] These companies terminated their agreements with Marshall through their

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[84] Darren A. Heitner & Richard Bogart, *Person Foul: Conduct Detrimental to the Team. Penalty Declined?* 5 HARV. J. OF SPORTS & ENT. L. 215, 238 (2014) ("[I]t is important to note that labor laws protect the rights of employees by allowing employee unions, such as the NFLPA, to collectively bargain with sports leagues, such as the NFL, to reach agreements that govern the terms of employment.").
[85] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42, 46.
[86] Heitner & Bogart, *supra* note 84, at 232.
[87] *Id.*
[88] Brad Tuttle, *This NFL Player Lost 2 Endorsement Deals for National Anthem Protests*, TIME MONEY (Sept. 13, 2006), http://time.com/money/4489790/colin-kaepernick-national-anthem-protests-brandon-marshall/.
[89] *Id.*

contracts' morals clauses.[90]

Specifically, Article 46 of the CBA gives the Commissioner the authority to take action against a player for any "conduct detrimental to the integrity of, or public confidence in, the game of professional football."[91] The only limit placed on this discretion is that the Commissioner "shall consult with the Executive Director of the NFLPA prior to issuing, for on-field conduct, any suspension or fine in excess of $50,000."[92] A Commissioner need only consult with the NFLPA.[93] There is no requirement that the NFLPA agree with the Commissioner's punishment. Therefore, the Commissioner's power to punish a player for conduct detrimental to the club is almost limitless.[94] The Commissioner's decision to punish a player also supersedes the team's authority.[95] However, the league's history shows that Commissioners usually leave punishment to the teams' discretion,[96] and Commissioner Goodell has indicated that he will let the players kneel for the anthem.[97]

D. Teams can Punish Players, but their Authority Rests on a Tentative Foundation

Even though the Commissioner is not threatening to punish the players for

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[90] *See generally id.*
[91] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 46, § (1)(a).
[92] *Id.* at art. 46, § (1)(c).
[93] *Id.*
[94] Heitner & Bogart, *supra* note 84, at 223-24. Public perception of the Commissioner's unlimited power has changed over the years and the Commissioner has proven to be ineffective in many aspects of the job, especially player discipline. *Compare* Robert Ambrose, *The NFL Makes It Rain: Through Strict Enforcement of Its Conduct Policy, the NFL Protects Its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL 1068, 1100-09 (2008), *with* Bethany P. Withers, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. OF SPORTS & ENT. L. 145, 174-75 (2010).
[95] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42(3)(b) ("Any disciplinary action imposed upon a player by the Commissioner pursuant to Article 46 will preclude or supersede disciplinary action by the Club for the same act or conduct.").
[96] Withers, *supra* note 94, at 168.
[97] Ahiza Garcia, *Goodell: NFL Players Aren't Trying to Be 'Disrespectful to the Flag*,' CNN MONEY (Oct. 18, 2017, 3:16 PM), http://money.cnn.com/2017/10/18/news/companies/nfl-national-anthem-protests-roger-goodell/index.html.

kneeling, certain team owners are.[98] Article 42 of the CBA gives teams the authority to punish players for conduct detrimental to their team.[99] The CBA does not provide a definition for detrimental conduct.[100] The broad language is only clarified by specific actions listed elsewhere in the contract.[101] For example, throwing a football into the stands has its own category and maximum fine in the CBA,[102] and therefore it does not fall under the category of detrimental conduct under the CBA.

1. A Team can Fine a Player for the Equivalent of One Week's Salary

According to Article 42 of the CBA, for "Conduct detrimental to Club," a team can impose a "maximum fine of an amount equal to one week's salary."[103] Riley Cooper, a wide receiver for the Philadelphia Eagles, was fined by his team in 2013 when he was recorded using a racial slur at a concert.[104] Cooper's fine was for an undisclosed amount. There is no dispute that an NFL team can punish a player by fining them the equivalent of one week's salary under the conduct detrimental to club clause.

2. It is Legal for a Team Owner to Suspend a Player for Four Games or Fewer, but not for a Longer Period, Unless the Player Continues the Detrimental Conduct

There are three varieties of punishment that involve keeping a player on the team but not letting them on the field. A player can be benched, suspended with pay, or suspended without pay. The CBA also makes a distinction in each of these categories based on duration: four games or fewer, or more than four games because of repeated offenses.

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[98] Ryan Grenoble, *Texans Owner on NFL Protests: 'We Can't Have Inmates Running the Prison'*, HUFF. POST (last updated Oct. 27, 2017, 12:52 PM), https://www.huffingtonpost.com/entry/texans-owner-bob-mcnair-inmates-runing-prison_us_59f3492ce4b03cd20b813041 (statement of Texans Owner Bob McNain) ("We can't have the inmates running the prison."). McNain's statement received immediate negative backlash for its race implications, and Texans wide receiver left practice out of protest. *Id.* McNain apologized later calling it a figure of speech. *Id.*

[99] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42, § (1)(xv).

[100] Heitner & Bogart, *supra* note 84, at 225.

[101] *Id.* at 225-26.

[102] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42, § (1)(a)(v).

[103] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42, § (1)(a)(xv).

[104] *Riley Cooper Sorry for Racial Slur*, ESPN (Aug. 1, 2013), http://www.espn.com/nfl/trainingcamp13/story/_/id/9526303/riley-cooper-philadelphia-eagles-issues-apology-uttering-racial-slur-video.

a. An NFL team has Complete Discretion Regarding When They Bench Players for Four Weeks or Fewer

Perhaps the most likely punishment that would be applied to an NFL player who kneels during the anthem is being benched. In fact, two weeks after President Trump's attacks on the NFL protestors, Dallas Cowboys owner Jerry Jones threatened to bench any player who refused to stand for the anthem.[105] Benching a player is one of the least severe forms of punishment a club can place on a player. Because the player is still paid pursuant to the terms of the contract, the only damage suffered is playing time and on-field exposure to viewers. Of course, this still can be considered a severe punishment since history has proven that athletes have a short window of productive years in the NFL, and playing time leads to future earning through endorsement deals and future contracts.[106]

Benching a player is a form of discipline that happens frequently in the NFL. Amid this anthem controversy, New York Giants cornerback Eli Apple was benched for one game. Reports speculate that this punishment was for arguing with the team owner's brother.[107] Pittsburgh Steelers wide receiver Martavis Bryant was also benched for one week after he took to social media to bash the teammate who was taking his playing time.[108]

While the CBA does not explicitly address the issue of benching players based on the team's discretionary discipline, the National Labor Relations Act ("NLRA") could prevent the teams from benching players for kneeling during the anthem. National labor law preempts the CBA and has been used

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[105] Brandon George, *Cowboys Owner Jerry Jones: Any Player Who Is 'Disrespectful to the Flag' Won't be Allowed to Play*, SPORTSDAY (Oct. 8, 2017), https://sportsday.dallasnews.com/dallas-cowboys/cowboys/2017/10/08/cowboys-owner-jerry-jones-player-disrespects-flag-allowed-play (statement of Cowboys Owner Jerry Jones) ("But if there is anything that is disrespectful to the flag then we will not play. You understand? If we are disrespecting the flag then we won't play. Period. . . . We know there is a serious debate in this country about those issues, but there is no question in my mind that the National Football League and the Dallas Cowboys are going to stand up for the flag. Just so we're clear.").

[106] Jackson v. Nat'l Football League, 802 F.Supp. 226, 231 (D. Minn. 1992) (stating that suspensions are irreparable damages to NFL players because of the short playing window).

[107] Will Brinson, *Another Giants CB Reportedly Benched for 'Discipline,' Might Have Yelled at Owner's Brother*, CBS SPORTS (Oct. 15, 2017), https://www.cbssports.com/nfl/news/another-giants-cb-reportedly-benched-for-discipline-might-have-yelled-at-owners-brother/.

[108] Jeremy Fowler, *Steelers Bench Disgruntled Martavis Bryant for Sunday*, ESPN (Oct. 25, 2017), http://www.espn.com/nfl/story/_/id/21156115/martavis-bryant-pittsburgh-steelers-benched-sunday-game.

before in appeals against the NFL.[109] In fact, a Texas labor union filed a complaint with the National Labor Relations Board ("NLRB"), arguing that Cowboys Owner Jerry Jones is violating Section 7 of the NLRA when he threatens to bench players who kneel during the anthem.[110] The NLRA states, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for mutual aid and protection*. "[111] "Concerted activity for mutual aid and protection" is the phrase that the labor union's complaint hinges on.[112] However, there must be a nexus between the political speech and the workplace for this law to apply.[113] For example, an employee speaking against the minimum wage law would likely establish a sufficient nexus between their workplace and the speech even if the speech was not directed at their specific work. The NFL players are kneeling to draw awareness to racial injustice, not to improve their treatment under their union contract, and not to address racial injustice in the NFL. Therefore, it is likely that the labor union in Texas will have little success in their claim.

If an NFL organization is determined to punish an NFL player for kneeling during the anthem, benching the player for four games or fewer is the safest method. There is nothing explicit in the CBA that forbids a coach from benching as punishment, and benching is commonly used as punishment across the NFL for other discipline. Owners who merely bench a player will also face less scrutiny than they would for issuing more severe punishment, since the players are still getting paid and the team is not profiting from their talent, as the team would be if they fined the player. Further, claims made by labor unions under the NLRA will likely fail because anthem protests are outside the scope of NLRA jurisprudence.[114]

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[109] *See generally* Nat'l Football League Players Ass'n v. Nat'l Football League, 598 F.Supp.2d 971, 977 (D. Minn. 2008) (referencing the League Management Relations Act and its relation to the CBA).

[110] Clarence E. Hill & Drew Davison, *Labor Union Files Complaint Against Jerry Jones Over Anthem Threat*, STAR TELEGRAM (last updated Oct. 10, 2017, 8:07 PM), http://www.star-telegram.com/sports/nfl/dallas-cowboys/article178148431.html.

[111] 29 U.S.C. § 157 (2012) (emphasis added).

[112] Hill & Davison, *supra* note 110.

[113] *See generally* Mohave Elec. Coop., Inc. v. NLRB, 206 F.3d 1183 (D.C. Cir. 2000).

[114] Lisa Nagele-Piazza, *Is 'Taking a Knee' a Protected Activity Under Labor Law?*, SOC'Y FOR HUMAN RES. MGMT., (Oct. 13, 2017), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/nfl-kneeling-anthem-protest-labor-law.aspx (stating that the NLRB board is currently conservative and thus might limit not limit the league's authority to bench players).

b. There is Limited Contractual Authority to Punish a Player More Than Four Games Based on their Behavior During the National Anthem

Suspensions can come from either the team or the league. However, serious disciplinary suspensions typically come from the league. The most serious form of deactivation is when players are placed on the Commissioner Exempt List. While the player is still paid, that player cannot participate in practices or attend games.[115] This form of league punishment can only be used when a player is accused of criminal violence by physical force or weapon, sexual assault, animal cruelty, or conduct that poses a genuine danger to another's safety.[116] A high-profile example is when former Viking's running back Adrian Peterson was placed on the list following a police investigation into allegations that he hit his four-year-old son with a switch.[117] Peterson eventually pled no contest to the child abuse charges, and finally had his suspension overturned on February 26, 2015, nearly five months and a whole football season after he was initially placed on the Commissioner Exempt List.[118] The NFL Commissioner is not able to place the athletes who kneel during the National Anthem on the Commissioner Exempt List because it is outside the criminal and violent scope for which the list is reserved.

Long-term deactivation was not always limited to the Commissioner Exempt List, and, before the 2011 CBA, teams could suspend players indefinitely. However, long-term deactivation transformed into the Commissioner's Exempt List because of abuse by team ownership. In 2005, former Eagles wide receiver Terrell Owens faced a four-game suspension when he criticized his quarterback and team. Owens gave the Eagles a lot to roll their eyes about, and this criticism proved to be the straw that snapped the ownership's back.[119] Owens appealed his suspension, but an arbitrator upheld the decision.[120] Emboldened by the decision and fed up with Owen's attitude, the Eagles decided to sustain the suspension beyond the original four games and even sought to regain part of his paid contract and half of

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[115] NAT'L FOOTBALL LEAGUE, 2016 PERSONAL CONDUCT POLICY at 5 (2016).
[116] *Id.* at 4.
[117] Gregg Rosenthal, *Vikings Deactivate Adrian Peterson Indefinitely*, NFL (last updated Sept. 17, 2014 9:42 PM), http://www.nfl.com/news/story/0ap3000000396097/article/vikings-deactivate-adrian-peterson-indefinitely.
[118] *Adrian Peterson Timeline*, NFL (last updated April 16, 2015 9:08 PM), http://www.nfl.com/news/story/0ap3000000485782/article/adrian-peterson-timeline.
[119] *Eagles Officially Deactivate T.O.*, ESPN (Dec. 5, 2005), http://www.espn.com/nfl/news/story?id=2249078.
[120] *Id.*

his signing bonus.[121] They were successful in recovering his $2.3 million signing bonus.[122] This unchecked power became a point of tension during the 2006 CBA negotiations, and eventually the Player's Association negotiated with the league to place limits on team suspensions.[123]

The current CBA references the *Owens* decision, and explicitly overrules it. It states, "[A]ny such deactivation, even with pay, shall be considered discipline subject to the limits set forth in this section. The Non-Injury Grievance Arbitrator's decision in *Terrell Owens* (Nov. 23, 2005) is thus expressly overruled as to any Club decision to deactivate a player in response to the player's conduct."[124] This language is key. Here, the CBA states that long-term suspensions "even with pay" are a violation of this agreement. While some people think this curtailed the power of the teams too much in disciplining their players,[125] it eliminated the possibility a team had to bury a player on their team simply to make an example and demonstrate authority.

Because of the changes made to the CBA after the Owens appeal, a long-term deactivation is off limits for the teams.[126] The Commissioner is also not allowed to exercise power by placing the athlete arbitrarily on the Commissioner's Exempt List. A long-term suspension is not a possible punishment that the league can impose on players who kneel during the National Anthem. This leads to the question, What happens when teams continually hand one-game suspensions to players who kneel?

c. NFL Teams Have the Contractual Authority to Punish Players who Repeatedly Kneel for as Many Games as they Choose

The 2011 CBA allows a team to punish a player through a suspension of four games or less, but limits the team's power for long-term suspensions. On its face, this creates a chasm that hinders effectiveness. A punishment that can only be enforced once has little deterrent effect. The CBA accounts for this, and allows teams to reinforce suspensions if the player recommits

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[121] *Terrell Owens Still Owes the Eagles*, BLEACHER REP. (Jan. 31, 2008), http://bleacherreport.com/articles/8140-terrell-owens-still-owes-the-eagles.
[122] *Id.*
[123] Heitner & Bogart, *supra* note 84, at 222.
[124] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42, § (1)(a)(xv).
[125] David C. Weiss, *How Terrell Owens, Collective Bargaining, and Forfeiture Restrictions Created a Moral Hazard that Caused the NFL Crime Wave and What it Meant for Michael Vick*, 15 SPORTS L. J. 279, 305–11 (2008).
[126] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 42, § (1)(a)(xv).

their actions. The contract states:

> Nor shall anything in this Section preclude a Club from imposing a fine and/or suspension without pay for conduct detrimental to the Club, as set forth in Section 1(a) above, in any case in which the same player has committed repeated offenses in the same League Year . . . [T]he NFLPA expressly reserves the right to challenge the imposition of such discipline for conduct detrimental to the Club based upon the absence of just cause and/or any other allowable bases for opposing discipline.[127]

The language of the contract clearly allows teams to reinforce their previous suspensions, with the operative language being "just cause." This language will likely be contested through the appeals process.[128] It is safe to say that if the club has the authority to punish players with a short-term suspension once, then they have that authority to punish them again when the player repeats the reprimanded conduct.

3. NFL Teams can Cut or Release Players from their Team for Any Reason, but they are Required to Pay the Price Associated with Dropping Players

The question of whether an NFL team can cut a player for kneeling during the anthem is best split up into two issues: (1) whether the team can remove the player from its roster, and (2) whether the team can avoid paying the player for the rest of their contract.

Cutting a player is terminating the contract. This is what President Trump is arguing for, and what many commentators feel the team can do because they believe the athletes have at-will status. However, as expressed earlier, NFL players are not at-will employees. McCann wrote, "An NFL player is in a different position. He has an employment contract. If he or his team ends the employment relationship before the contract expires, then the contract has been breached."[129] There is an exception if the termination is

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[127] *Id.* at art. 42, § (7).

[128] Michael David Smith, *Kedric Golston: Players Should Blame Ourselves for Giving Goodell Power*, NBC SPORTS (July 21, 2016, 11:56 AM), http://profootballtalk.nbcsports.com/2016/07/21/kedric-golston-players-should-blame-ourselves-for-giving-goodell-power/.

[129] Michael McCann, *Can An NFL Owner Legally 'Fire' A Player For Protesting?*, SPORTS ILLUSTRATED (Sept. 23, 2017), https://www.si.com/nfl/2017/09/23/donald-trump-fired-roger-goodell-player-protest.

done in a manner allowed by the contract.

The Uniform Player Contract's morality clause states that "if a Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract."[130] Some commentators believe that this option is only available to the team after they have suspended the player for four games,[131] but there is nothing in the contract to suggest this. NFL teams can terminate a player's contract if the player behaves in a manner the team believes reflects poorly on the club.[132] Firing an athlete for kneeling during the anthem would fall under this broad discretion.

If a contract is terminated based on the morality clause, a player forfeits the remainder of their salary. Section 6 of the Uniform Player Contract states that "if this contract is terminated . . . the yearly salary payable to Player will be reduced proportionately and Player will be paid the weekly or biweekly portions of his yearly salary having become due and payable up to the time of termination."[133] A player cannot lose money already earned.[134] If it is found that a player can be terminated for kneeling during the anthem under the morality clause, then a player is entitled to the rest of their contract *only* if portions are guaranteed.[135]

While a reading of the contract suggests a team may "fire" a player for kneeling during the anthem, there is still a lot of uncertainty. The NFLPA has already pledged support for players who kneel, and it is almost certain that they would appeal any contract termination. On top of that, increasing punishment also increases the likelihood of a reversal on appeal, and increases the amount of damages the player would be owed.

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[130] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, at app. A, § 11.
[131] Heitner & Bogart, *supra* note 84, at 233 ("NFL teams are limited to suspending a player (the talent) for up to four games before deciding whether to release the player.").
[132] Patricia Sanchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 WASH. & LEE L. REV. 3, 12 (2017) ("Based on the language, it is plausible to conclude that a team could terminate a player if in its sole discretion it believes his behavior could adversely affect or reflect on the team, regardless of actual damage.").
[133] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, at app. A, § 6.
[134] *Id.* at art. 4, § (9).
[135] McCann, *supra* note 129 ("The contract stipulates whether the player is still owed money. Although NFL contract generally do not 'guarantee' money, some players sign contracts with guarantees that require future payments. A 'fired' player would still receive those payments.").

E. If the NFL Chose to Punish Players for Protesting the National Anthem, the Agreed-Upon Appeals Process Would Allow the Players a Remedy

The appeals process laid out in the CBA is one of the main checks on the Commissioner's power. One analyst concluded that professional sports teams and the league offices have complete discretion in deciding who gets fired from the league.[136] In support of his argument, he referenced two large suspensions that were handed down by the Commissioner of the respected league: the suspension of pitcher John Rocker and the banishment of Los Angeles Clippers owner Donald Sterling.[137]

During the turn of the century, Atlanta Braves reliever John Rocker was suspended for seventy-three days after making racist and homophobic comments in a magazine article.[138] MLB Commissioner Bud Selig exercised his power in ordering the hefty penalty.[139] This exhibition of power is what was cited to support the assertion that leagues have complete control over their suspensions.[140] The irony of this example is that, instead of showing the power of the Commissioner, it shows the power of the players association and the appeals process. The MLB Players Association appealed the suspension and an arbitrator significantly reduced punishment, allowing Rocker to return after the first two weeks of the season and knocking $450 off his $500 fine.[141]

Sterling's story also offers little support for this claim. The NBA fined Sterling $2.5 million, banished him from the league, and threatened to seize and auction the team he owned after his girlfriend recorded and released

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[136] Jimmy Golen, *Trump Wants NFL Owners to Fire Protesting Players. Can They?*, DENV. POST (Sept. 26, 2017, 8:14 AM), http://www.denverpost.com/2017/09/26/can-nfl-owners-fire-protesting-players/.

[137] *Id.*

[138] Jeff Pearlman, *At Full Blast Shooting Outrageously From the Lip, Braves Closer John Rocker Bangs Away at His Favorite Targets; the Mets, Their Fans, Their City and Just About Everyone in it*, SPORTS ILLUSTRATED (Dec. 27, 1999), https://www.si.com/vault/1999/12/27/271860/at-full-blast-shooting-outrageously-from-the-lip-braves-closer-john-rocker-bangs-away-at-his-favorite-targets-the-mets-their-fans-their-city-and-just-about-everyone-in-it; *see generally* Golen, *supra* note 136; Murray Chass, *BASEBALL; Rocker States His Case at Appeal of Suspension*, N.Y. TIMES (Feb. 11, 2000), http://www.nytimes.com/2000/02/11/sports/baseball-rocker-states-his-case-at-appeal-of-suspension.html.

[139] Phil Rogers, *Arbitrator's Ruling Rocks Selig's Power*, CHI. TRIB. (March 2, 2000), http://articles.chicagotribune.com/2000-03-02/sports/0003020312_1_mr-rocker-and-disregards-john-rocker-atlanta-clubhouse.

[140] *See generally* Golen, *supra* note 136.

[141] *See generally* Rogers, *supra* note 139.

remarks Sterling made to her about how it bothered him when she hung out with black people.[142] Besides the fact that Commissioner Silver did not have the authority by himself to kick Sterling out of the league and needed the league owners to vote on it,[143] the example is also discredited because unusual circumstances deprived Sterling of the appeals process, and the team was sold independent of league action. After filing his appeal, Sterling's wife, Shelly Sterling, sold the team for $2 billion. The team had been placed in a public trust six years prior when Donald Sterling showed signs of Alzheimer's. The Second District Court of Appeals said that Shelly Sterling properly sold the team to avoid an extraordinary loss to the trust.[144] Donald Sterling did not get to exercise his appeal through the NBA CBA because his wife sold the team. Instead, he sued her and lost.

According to the Uniform Player Contract, any dispute between the player and team involving interpretation of the player's contract or CBA "will be submitted to final and binding arbitration in accordance with the procedure called for in any collective bargaining agreement in existence at the time the event giving rise to any such dispute occurs."[145] This arbitration process is laid out in Article 43 of the CBA.[146] This outlet is designed to allow players, either individually or through the NFLPA, to challenge rulings that are brought against them. The appeals take place in front of an impartial arbitrator, chosen by the league and NFLPA beforehand.[147] Impartial arbitrators are given exclusive jurisdiction over the appeal.[148] History has shown that close calls usually result in filing a temporary restraining order on the suspension.[149] This is because forcing a player to miss games is an irreparable harm.[150] However, if the appeal involves a suspended player,

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[142] Associated Press, *Appeals Court Upholds $2 Billion Sale of Clippers*, ESPN (Nov. 16, 2015), http://www.espn.com/nba/story/_/id/14147968/donald-sterling-loses-appeal-reverse-2-billion-sale-los-angeles-clippers; Kevin Trahan, *How NBA Owners Can Force Donald Sterling to Sell the Los Angeles Clippers*, SBNATION (April 29, 2014, 3:10 PM), https://www.sbnation.com/nba/2014/4/29/5665502/donald-sterling-suspension-la-clippers-sale-adam-silver.

[143] Trahan, *supra* note 142.

[144] Associated Press, *supra* 142.

[145] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, at app. A, § 19.

[146] *Id.* at art. 43, § 1 ("Any dispute . . . will be resolves exclusively in accordance with the procedure set forth in this Article, except wherever another method of dispute resolution is set forth elsewhere in this agreement.").

[147] *Id.* at art. 16, § 7.

[148] *Id.* at § 1.

[149] Nat'l Football League Players Ass'n v. Nat'l Football League, 874 F.3d 222, 231 (5th Cir. 2017).

[150] *See generally* Nat'l Football League Players Ass'n v. Nat'l Football League, No. 4:17-CV-00615, 2017 WL 4124105 at *6 (E.D. Tex. Sept. 18, 2017).

then there is an expedited appeals process.[151] Under this process, the hearing will take place seven days after the filing, and the decision will be produced no later than five days after the hearing.[152]

But appeals have also had a history of informal reviews. In 2010, Pittsburgh Steelers quarterback Ben Roethlisberger was suspended six games for violating the league's personal conduct policy.[153] This penalty came after the quarterback was accused of sexually assaulting a twenty-year-old girl.[154] After meeting with the Commissioner, Roethlisberger reduced his six-game suspension to four games.[155]

IV. GAVE PROOF THROUGH THE NIGHT – REWRITING THE NFL MORALITY CLAUSE

Despite its faults, the morality clause does serve a vital function. When reworked, it should remain a clause in the CBA. Morality clauses protect businesses from being attached to personalities who represent their business when that personality has behaved in a way that reflects badly on the business.[156] These clauses have grown in popularity.[157] Now, almost any individual who represents a company has a morality clause in their contract.[158] The morality clauses' rise in popularity is similar to the rise of the non-compete clause, but morality clauses have not been subject to the same level of judicial scrutiny.[159]

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[151] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 43, § 4 ("If the grievance involves a suspension of a player by a Club, the player or NFLPA will have the option to appeal it immediately upon filing to the Notice Arbitrator and a hearing will be held by an arbitrator designated by the Notice Arbitrator within seven (7) days of the filing of the grievance.")

[152] *Id.*

[153] Mike Reiss, *NFL Players Have Good Success Rate with Appeals*, ESPN: NFL NATION (Sept. 3, 2015), http://www.espn.com/blog/new-england-patriots/post/_/id/4782412/detailing-how-nfl-players-have-fared-in-recent-appeals.

[154] *Ben Roethlisberger's Ban at 4 Games*, ESPN (Sept. 4, 2010), http://www.espn.com/nfl/news/story?id=5527564.

[155] *Id.*

[156] Abril & Greene, *supra* note 132, at 5-7 (referencing Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and what Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L 347 (2009)).

[157] *Id.* at 18 ("While a 1997 survey found that less than half of all endorsement contracts included morals clauses, in 2003 that number had risen to at least 75%.").

[158] *Id.* at 7 ("[A]ny talented individual who is or may become associated with a company or organization in the minds of the public is likely to have a morals clause included in his or her contract." (quoting Pinguelo & Cedrone, *supra* note 156, at 366)).

[159] *Id.* at 35.

At their best, morality clauses encourage businesses and talent to portray a good image to society; at their worst, they stifle the freedoms of the talent at the discretion of the business. Morality clauses differ based on how broadly they can be interpreted.

A. The CBA Needs a Morality Clause, but the NFL and NFLPA Will Likely Want it to Read Differently

The league and teams will likely want to keep the morality clause as broad as possible.[160] A broad clause decreases liability.[161] They can use the athlete as the face of the league until that athlete steps out of bounds. When he does, the league or team can punish the player to dissociate themselves with that player's actions. The broader the clause, the greater discretion the league and teams have in when they choose to dissociate themselves.

There are also positive reasons why the league and team would want a broad morality clause. One is that the league and teams should have broad power in promoting behavior that makes the league look good[162] because it serves the interests of everyone involved.[163] It is also very difficult to list every action the league might want to deter.[164] Drafting a narrower morality clause would undoubtedly result in a list that fails to include some behavior that the league wishes it could punish, but no longer can.

The NFLPA will obviously try to negotiate for a narrower morality clause.[165] A narrower morality clause would provide clarity to the NFL players.[166] In the instance of kneeling for the anthem, a player could be fired from a team or suspended without pay for up to four weeks because of behavior that falls under this clause. It is only fair that they have sufficient warning before choosing to act.[167] The amount of speculation by sports and legal analysts is a sure indication that the broad language of the contract did not provide the athletes with sufficient warning.

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[160] Pinguelo & Cedrone, *supra* note 156, at 370 ("[C]ompanies are almost always going to seek to include a broad morals clause in their agreements. By including a broadly-worded morals cause, the company seeks to give itself extensive flexibility to terminate the talent agreement for any potentially damaging conduct of the talent.").
[161] *See id.*
[162] Heitner & Bogart, *supra* note 123, at 236.
[163] *Id.*
[164] *Id.*
[165] Pinguelo & Cedrone, *supra* note 156, at 370.
[166] Heitner & Bogart, *supra* note 123, at 238.
[167] *Id.* ("Additionally, players ought to know when they are breaking the rules if they are threatened with potentially facing severe penalties upwards of $1,000,000 in some cases.").

A broad morality clause also silences the voice of many people.[168] Athletes are on a unique platform with a large audience. Occasionally, as is the case with Kaepernick, that unique platform motivates them to challenge the status quo. Another prominent example is when Steelers running back Richard Mendenhall tweeted that people should not celebrate the death of Osama Bin Laden.[169] While neither the NFL or the Steelers punished Mendenhall for the tweets,[170] Champion terminated their endorsement contract with Mendenhall.[171] Currently NFL players are taking advantage of their platform by kneeling during the National Anthem to bring awareness to racial injustice committed by the police. To punish them would be to silence their voice.[172]

B. The NFLPA Should Consider Possible Alternatives to the Broad Morality Clause in the CBA

The current CBA is set to expire in 2020. The negotiations for the new CBA will likely be contentious, as the union's relationship with the league has been tested in recent years. The league will be looking for a win-win solution, keeping revenue and power while appeasing the talent. One way to do this would be through a narrower morality clause. There are two ways to limit the morality clause: scope and discretion.

The simplest way to limit the scope of the morality clause would be to list certain instances to which it applies. However, this sounds a lot easier than it is. There are some categories that can easily be included, like racist or homophobic speech and criminal accusations. Where it gets difficult is finding the balance between a team's desire to shape the environment of their team and a player's desire for free expression. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* wrestled with a similar balancing act when children wore black armbands to their school to protest the Vietnam War.[173] The Court in *Tinker* held that, "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere

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[168] Abril & Greene, *supra* note 132, at 43 ("Broad morality clauses chill speech and free expression.").
[169] Dashiell Bennett, *Rashard Mendenhall's Controversial Osama Bin Laden Tweets Cost Him a Sponsorship*, BUS. INSIDER (May 6, 2011, 4:19 PM), http://www.businessinsider.com/rashard-mendenhall-champion-sponsorship-2011-5.
[170] Heitner & Bogart, *supra* note 123, at 228.
[171] Bennet, *supra* note 169.
[172] Michael Starr Hopkins, *NFL Should Respect Players Rather than Punish Them for Protesting*, HILL (Oct. 12, 2017, 10:00 AM), http://thehill.com/opinion/civil-rights/355084-if-jerry-jones-is-a-real-cowboy-he-will-let-his-football-players-protest.
[173] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[174] The school had a legal obligation to strike this balance. The NFL is under no legal obligation since the First Amendment does not apply. Instead, they are only governed by the contract. Given the league's past and the player's heightened interest in using their platforms for political speech, it is possible that the Union applies enough pressure in the 2020 CBA negotiations to gain language like *Tinker* in the next CBA. That would eliminate the broad justification teams would likely use in claiming player conduct as a distraction, while still allowing teams to act against serious morality issues. In the case of kneeling during the National Anthem, the only distraction is the media and the efforts the teams take to avoid the issue.[175] Therefore, kneeling during the anthem would be allowed under a morals clause with this wording.

The new CBA could also have limits on how much a player can be fined under the conduct detrimental to league clause.[176] As it stands, there is no limit as to how much the Commissioner can fine a player for exhibiting conduct deemed detrimental to the league. This gives the Commissioner too much power. The conduct detrimental to league clause should have the same limits as the conduct detrimental to club clause: a fine not more than one week's salary.

The second way to change the morality clause would be to tailor its discretion. Changing discretion means changing who makes the determination to punish under the morality clause.[177] One option would be to require mutual assent between the league or team and the NFLPA when determining how to punish a player. This is unlikely because the league would almost surely never agree to it. Additionally, the NFLPA has shown a precedent of challenging almost any league punishment.[178] If this were to be the rule, then there would be very few suspensions.

Another option would be to reformat the arbitration portion of the CBA. When a player is disciplined for conduct detrimental to the league, the

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[174] *Id.* at 509.

[175] *See generally* Joseph Zucker, *Report: 'Tension Was Palpable' in Steelers Locker Room After Anthem Protest*, BLEACHER REP. (Sept. 27, 2017), http://bleacherreport.com/articles/2735527-report-tension-was-palpable-in-steelers-locker-room-after-anthem-protest.

[176] Heitner & Bogart, *supra* note 123, at 239

[177] Pinguelo & Cedrone, *supra* note 156, at 371.

[178] *See generally* Andrew Mahoney, *Tom Brady Joins List of Successful NFL Appeals*, BOS. GLOBE (May 15, 2015), https://www.bostonglobe.com/sports/2015/05/15/history-successful-nfl-suspension-appeals/ihViYTnTUt2cEwpTvOQKkN/story.html.

Commissioner can appoint himself as the "independent" arbitrator.[179] This has become one of the more controversial portions of the CBA[180] and will likely get changed during the next contract negotiation.[181] In fact, the NFLPA president, Eric Winston, stated that, "There has to be a neutral arbitrator. You can't tell me keeping Roger Goodell in the position he's in as arbitrator is going to win the confidence of the players. That's long gone. You can't go back and fix what's happened."[182]

Although the league and teams have not punished players for kneeling, the NFLPA should proactively narrow the broad morality clauses in the CBA. This can be done by changing the scope and discretion of the clause.

V. THAT OUR FLAG WAS STILL THERE – THE NFL SHOULD STAND FIRMLY BEHIND THE PLAYERS

While a strict legal analysis suggests that a player can be benched for kneeling during the anthem, the league and teams should avoid this political tar pit. The NFL has little to lose and almost everything to gain from standing behind the players. According to polling done on October 24, 2017, fifty-one percent of the country believes that sports leagues should not require their players to stand during the National Anthem.[183] This number has risen by a remarkable eight percent since Kaepernick began his crusade in September 2016.[184] The country is sympathetic towards the players' demonstrations and the racial equality movement in general.[185]

Most of the pressure against the league is that viewership has dropped at an alarming rate in recent years. Between the 2016 and 2017 season alone,

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[179] NAT'L FOOTBALL LEAGUE CBA, *supra* note 74, art. 46, § (2).
[180] Heitner & Bogart, *supra* note 123, at 231.
[181] Mark Maske, *NFLPA President: 'Hard to Imagine' a New CBA with No Changes to Roger Goodell's Role in Discipline*, WASH. POST (Aug. 5, 2015), https://www.washingtonpost.com/news/sports/wp/2015/08/05/nflpa-will-address-roger-goodells-power-to-hear-disciplinary-appeals-in-next-labor-deal-union-president-says/?utm_term=.ece2637ec55a (statement of Bengals lineman Eric Winston) ("I'm not against setting boundaries. [But] there has to be a neutral arbitrator. You can't tell me that keeping Roger Goodell in the position he's in as arbitrator is going to win the confidence of the players. That's long gone. You can't go back and fix what's happened.").
[182] *Id.*
[183] Marist Poll, *10/24: Growing Support for Anthem Protests*, MARIST POLL (Oct. 24, 2017), http://maristpoll.marist.edu/1024-growing-support-for-anthem-protests/.
[184] *Id.*
[185] *See generally id.*

viewership has dropped five percent.[186] Even though many view the numbers to be a direct result of the new wave of technology and the phenomena of cord cutting,[187] the nation's largest fingers are pointing at the anthem protests. President Donald Trump repeatedly blames the rule changes that protect players from brutal hits and the protests. Papa John's Pizza, one of the NFL's biggest sponsors, blames their loss in profits on the NFL anthem protests and threatens to pull their commercials because of it.[188] John Schnatter, Papa John's founder and CEO, who frequently appears on the company's commercials, is blaming Commissioner Goodell.[189] He said, "Leadership starts at the top, and this is an example of poor leadership. The NFL has hurt Papa John's shareholders."[190]

Although the NFL is facing this financial pressure, it should remember that this is not the first time in sports that change has brought a short period of doubt. In 1965, players protested the All-Star Game because they were receiving racist treatment when they arrived in New Orleans days before the game.[191] The league decided to stand behind their players, and the game was moved to Houston.[192] Not only did the league go to the trouble to tackle the logistics of moving the game, they also jeopardized the expansion of the NFL. Two years after the all-star game protest, New Orleans got the Saints in the 1967 expansion.[193]

Commissioner Goodell should stand behind the players kneeling to reshape his legacy. In 2014, Goodell botched the domestic violence investigation on Ray Rice in such a way that it permanently damaged Goodell's

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[186] Frank Pallotta, *Yes, the NFL's TV Ratings Are Down, But So is the Rest of Network Television*, CNN MEDIA (Oct. 26, 2017, 2:59 PM), http://money.cnn.com/2017/10/26/media/nfl-ratings-tv-networks/index.html.
[187] *Id.*
[188] Kate Taylor, *Papa John's Could Kill Its NFL Sponsorship Deal After National Anthem Protest Controversy*, BUS. INSIDER (Nov. 3, 2017, 5:29 PM), http://www.businessinsider.com/papa-johns-could-end-nfl-sponsorship-after-anthem-protests-2017-11.
[189] Nathaniel Meyersohn, *Papa John's Says NFL Protests Are Hurting Sales*, CNN MEDIA (Nov. 1, 2017, 4:59 PM), http://money.cnn.com/2017/11/01/media/nfl-papa-johns-protests/index.html.
[190] *Id.*
[191] Olivia B. Waxman, *This Football Player Fought for Civil Rights in the '60s. Here's What He Thinks About National Anthem Protests*, TIME (Sept. 8, 2017), http://time.com/4933400/nfl-anthem-protests-boycott-history/.
[192] *Id.*
[193] Peter Finney Jr., *The Story of New Orleans Being Awarded the Saints*, NEW ORLEANS SAINTS (Nov. 1, 2016), http://www.neworleanssaints.com/news-and-events/article-1/The-story-of-New-Orleans-being-awarded-the-Saints/85274ed6-fe34-4cdc-a463-85299df82b3f.

reputation.[194] This dropped Goodell's approval rating to twenty-eight percent.[195] The public's confidence in Goodell took a bigger hit when the league produced little evidence in their accusation of the Patriots organization and their hall-of-fame bound quarterback, Tom Brady.[196] Brady was suspended four games but his team still managed to win Super Bowl LI, and Goodell had to hand the Super Bowl MVP trophy to Brady.[197] Amidst all of this, national press was highlighting that the NFL tried to suppress evidence that concussions during football lead to loss of brain function and mental health problems as the players age. To top off his slew of negative press, Goodell asked for a contract extension of nearly fifty million and a private jet for life.[198]

Goodell needs to make a strong statement that will overshadow his mistakes—one that history will remember as proactive and good for the league. Supporting the players and their right to use their platform would at least help in correcting his negative reputation.

VI. DOES THE STAR-SPANGLED BANNER YET WAVE? – CONCLUSION

President Trump sparked a national debate when he attacked the players who kneel during the National Anthem. He called for the teams to fire those players who protest, and sports analysts and legal commentators across the country affirmed the teams' rights to terminate a player's contract under the morality clause. While a team probably can terminate a player's contract

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[194] Juliet Macur, *Ray Rice Ruling Highlights Roger Goodell's Missteps*, N.Y. TIMES (Nov. 28, 2014), https://www.nytimes.com/2014/11/29/sports/football/ray-rice-ruling-highlights-roger-goodells-missteps.html.

[195] Ray Frager, *Roger Goodell's Approval Rating Is Lower Than President Obama's*, FOX NEWS SPORTS (Feb. 10, 2016), http://www.foxnews.com/sports/2016/02/10/roger-goodell-approval-rating-is-lower-than-president-obama.html.

[196] Sally Jenkins, *Why Roger Goodell, Not Tom Brady, Is Deflategate's Real Loser*, WASH. POST (July 19, 2016), https://www.washingtonpost.com/sports/redskins/why-roger-goodell-not-tom-brady-is-deflategates-real-loser/2016/07/19/946c09b2-4dcc-11e6-a422-83ab49ed5e6a_story.html?utm_term=.9e11037d9db8.

[197] Lorenzo Reyes, *Super Bowl MVP Tom Brady, Roger Goodell End Season with One Last Awkward Moment*, USA TODAY (Feb. 6, 2017, 11:52 AM), https://www.usatoday.com/story/sports/nfl/patriots/2017/02/06/tom-brady-mvp-trophy-roger-goodell-deflategate-super-bowl-2017/97549474/ (describing the event by stating, "As Brady approached the podium, Goodell stopped to look up at him with some apparent confusion of what to do next, paused briefly, and then pulled closer to Brady — who had started to look around with uncertainty himself.").

[198] James Dator, *Roger Goodell is Asking for $50M Salary, Private Plane and Health Insurance for Life, Per Report*, SBNATION (Nov. 12, 2017, 12:17 PM), https://www.sbnation.com/lookit/2017/11/12/16639956/roger-goodell-50-million-salary-plane-insurance-nfl.

for participating in this historical process, the authority is not clearly established. The Commissioner has a clear right to punish however he feels necessary, subject to an appeal where he can appoint himself the arbitrator. Teams have a more limited right. They can suspend a player for four games, fine him for the equivalent of one week's salary, or terminate his contract and release him to free agency. These actions would be subject to the review of an independent arbitrator on appeal.

In order to protect the players' right in the future to use their platform, the current overly broad morality clause would need to be reworded at the 2020 CBA negotiations. This can be done by changing the scope or discretion of the clause. Regardless of the contract's language, the Commissioner should stand behind the league to redeem his legacy.

The CBA's morality clause it too broad, and the players should not stand for it.

DELAY OF GAME: ANALYZING THE LEGALITY OF THE NBA AND WNBA ELIGIBILITY RULES AND THEIR EFFECTS ON TOP AMATEUR BASKETBALL PLAYERS

By: Uriah Tagle[*]

ABSTRACT

Because of the NBA and WNBA eligibility rules, men are prevented from playing professional basketball in the United States until they are at least nineteen years old and women are prevented until they are at least twenty-two years old. Since these eligibility rules were established pursuant to collective bargaining between the leagues and their respective players unions, it is unlikely that they can be successfully challenged under antitrust law. Consequently, for the time between high school graduation and professional eligibility, men and women can either play NCAA basketball or play professionally internationally. Men can also play in the NBA G-League. Section II of this article reconciles antitrust law with the eligibility rules, while Sections III and IV analyze the effects of the rules on prospective players.

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I. INTRODUCTION

Imagine you are eighteen years old and have just graduated high school. You also happen to be the greatest eighteen-year-old actor the world has ever seen. You were a child actor in a few commercials and critically acclaimed independent movies, which you were not compensated for, and now every major studio in Hollywood is lining up to offer multi-million-dollar contracts to star in their movies. The major studios all agree you are the next big box office draw and industry insiders have begun speculating about your star on the Hollywood Walk of Fame. You are thrilled about your upcoming payday as you feel you will finally be justly compensated for your immense talent.

Just before your contract negotiations with the major movie studios are set to begin, you receive an email from the chairman of the Motion Picture Association of America (MPAA), a trade association that represents the six major movie studios.[1] The MPAA is not a multi-employer group that collectively bargains on behalf of its members, nor is it a party to a collective bargaining agreement with any actors' unions. The chairman's email outlines a newly instated rule that requires all actors employed by MPAA member studios be at least nineteen years old and one year removed from high school. The chairman explains that even though you are a talented actor, the MPAA member studios have all agreed that eighteen-year-olds are just too immature to work with. Because you do not meet the new MPAA eligibility requirements, your negotiations with the major studios will be delayed for another year. Even though some of the major studios still want to overlook any maturity concerns and offer you multi-million-dollar contracts, the MPAA's eligibility requirements prevent you from negotiating and accepting any of those contracts for at least a year.

Given that you are the best actor the world has ever seen, it might seem unjust and unfair that an arbitrary agreement between movie studios can prevent you from a multi-million-dollar payday. Federal courts would likely agree and would almost certainly strike down the agreement between the MPAA member studios that severely limited your earning potential as illegal under federal antitrust laws. Since restrictive arrangements between employers are illegal in this employment context, why are agreements which have the exact same effect legal in professional basketball?

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[1] As of 2018, the MPAA member companies are: Walt Disney Studios, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox, Universal Studios LLC, and Warner Bros Entertainment Inc. *Our Story*, MPAA, https://www.mpaa.org/our-story/ (last visited Mar. 28, 2018).

As a result of the restrictive National Basketball Association (NBA) and Women's National Basketball Association (WNBA) eligibility rules, top eighteen-year-old men's and women's basketball players are faced with a version of the eighteen-year-old movie star's dilemma every year. In the NBA, U.S. players must be nineteen and one year removed from high school during the calendar year of the draft,[2] and in the WNBA, U.S. players must be twenty-two or a college graduate during the calendar year of the draft (or be about to graduate within three months after the draft).[3] Since these eligibility rules were agreed to by the respective leagues and players unions as parties to collective bargaining relationships, they are protected from antitrust scrutiny by the judicially-created non-statutory labor exemption (NSLE). Because the NSLE would likely bar any potential challenges to the rules under antitrust or labor law, top amateur basketball players are left with limited options between their high school graduation and playing professional basketball.[4]

Section II of this paper will discuss: (1) federal antitrust law under the Sherman Act, (2) the creation of the NSLE, and (3) cases demonstrating that the NSLE would likely bar antitrust suits challenging sports leagues' age-based eligibility rules. Assuming the eligibility rules cannot be successfully challenged using antitrust law, Section III will explore the effects that that restrictive eligibility rules of the NBA and WNBA have on amateur basketball players.

A. The NBA Eligibility Rules

Before the NBA and NBA Players Association (NBPA) negotiated their first Collective Bargaining Agreement (CBA) in 1970, the NBA's eligibility rules required prospective players to be at least four years removed from high school.[5] At the time, there were two major professional basketball leagues in the United States: the NBA and the American

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[2] NAT'L BASKETBALL PLAYERS' ASS'N COLLECTIVE BARGAINING AGREEMENT art. X § 1(b) (2017), *available at* http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf [hereinafter NBA CBA, Article X].

[3] WOMEN'S NAT'L BASKETBALL PLAYERS' ASS'N COLLECTIVE BARGAINING AGREEMENT art. XIII (2014), *available at* https://wnbpa.com/wp-content/uploads/2017/07/WNBA-CBA-2014-2021Final.pdf [hereinafter WNBA CBA, Article XIII].

[4] *See* discussion *infra* Section III.

[5] Myron Medcalf, *Roots of One-and-Done Rule Run Deep*, ESPN (June 26, 2012), http://www.espn.com/mens-college-basketball/story/_/id/8097411/roots-nba-draft-one-done-rule-run-deep-men-college-basketball.

Basketball Association (ABA).[6] The first challenge to the NBA's eligibility rules came from a former ABA player, Spencer Haywood. Haywood had turned pro after his sophomore season at the University of Detroit and led the ABA in scoring and rebounding during the 1969-70 season with the Denver Rockets. Haywood then signed with the NBA's Seattle SuperSonics when he was only three years removed from high school, in direct violation of the NBA's eligibility rules.[7] When the NBA declared him ineligible, Haywood brought an antitrust suit against the league that he eventually won with the court declaring the NBA's four-year eligibility rule an illegal restraint on competition.[8] Following Haywood's successful challenge and the implementation of the NBA's first CBA, the eligibility rules were changed in 1971 to allow any player who could establish a "financial hardship" to enter the league straight from high school.[9]

Establishing a "financial hardship" with the NBA proved to be a mere formality as years passed, with Daryl Dawkins and Bill Willoughby becoming the first two to enter the league straight from high school under the new rules in 1975.[10] After Haywood, Dawkins, and Willoughby set the standard, no high school player tried to enter the NBA until the true "prep-to-pro" generation began in 1995 with Farragut Career Academy's Kevin Garnett.[11] Garnett was selected 5th overall by the Minnesota Timberwolves directly from high school in the 1995 Draft; he immediately had success, becoming an NBA All-Star in his second season.[12] After Garnett, the

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[6] The NBA would later merge with and absorb the ABA in 1976, resulting in the Denver Nuggets, San Antonio Spurs, Indiana Pacers, and New York Nets joining the NBA. *NBA Merges with ABA*, HISTORY, https://www.history.com/this-day-in-history/nba-merges-with-aba (last visited Mar. 28, 2018).

[7] Medcalf, *supra* note 5.

[8] *See* Denver Rockets v. All-Pro Mgmt., Inc., 325 F.Supp. 1049, 1055 (C.D. Cal. 1971); *see also* William C. Rhoden, *Early Entry? One and Done? Thank Spencer Haywood for the Privilege*, N.Y. TIMES (June 29, 2016), https://www.nytimes.com/2016/06/30/sports/basketball/spencer-haywood-rule-nba-draft-underclassmen.html.

[9] Rhoden, *supra* note 8.

[10] *See* Terry Pluto, *LeBron James Makes Good Points on NCAA, G-League*, CLEVELAND.COM (Mar. 1, 2018), http://www.cleveland.com/pluto/index.ssf/2018/03/lebron_james_ncaa_g_league.html?__vfz=rtw_top_pages%3D11000073723926. Moses Malone also entered professional basketball straight from high school, being selected by the ABA's Utah Stars in 1974. After the NBA-ABA merger, Malone had a 19-year NBA career, retiring after the 1994-95 season. *Moses Malone*, BASKETBALLREFERENCE, https://www.basketball-reference.com/players/m/malonmo01.html (last visited Mar. 28, 2018).

[11] Farragut Career Academy is a public 4-year high school in Chicago, Illinois. *See* Medcalf, *supra* note 5.

[12] *Kevin Garnett*, BASKETBALLREFERENCE, https://www.basketball-reference.com/players/g/garneke01.html (last visited Mar. 28, 2018).

floodgates opened with each subsequent draft featuring at least one, and often more, high schoolers making the leap directly to the NBA. Notable success stories included Kobe Bryant (1996), Jermaine O'Neal (1996), Tracy McGrady (1997), Amare Stoudemire (2002), LeBron James (2003), and Dwight Howard (2004).[13] However, for every successful prep-to-pro player there were also many who did not adjust well to the NBA or who went undrafted entirely, losing their National Collegiate Athletic Association ("NCAA") eligibility by declaring straight from high school, including Korleone Young (1998), Kwame Brown (2001), Eddy Curry (2001), Lenny Cooke (2002 – undrafted), Sebastian Telfair (2004), and Robert Swift (2004).[14] These cautionary tales of high school players who struggled in the professional ranks sparked team owners to push for a change to the eligibility rules, despite the success that many in the prep-to-pro generation had.[15]

During negotiations over the 2005 CBA, team owners pushed for a minimum age requirement.[16] Owners argued that a change to the eligibility rules would give prospects time to mature in college, allow teams more time to evaluate those prospects, and enable teams to stop spending valuable scouting resources in high school gyms.[17] The NBPA strongly opposed a change[18] to the eligibility rules because a minimum age requirement limited the career earning potential of prospects,[19] but it ultimately conceded the changes to the eligibility rules for other concessions in the 2005 CBA.[20] The rules, which first forced top high school prospects Greg Oden and Kevin Durant to attend a year of college before entering the 2007 NBA Draft, required U.S. prospects to be at least nineteen years old and one year

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[13] *See* JONATHAN ABRAMS, BOYS AMONG MEN: HOW THE PRE-TO-PRO GENERATION REDEFINED THE NBA AND SPARKED A BASKETBALL REVOLUTION (2016).
[14] *See* Medcalf, *supra* note 5.
[15] *Id.*
[16] *Id.*
[17] *Id.*; *see also* Tom Ziller, *How to End One-and-Done and Give the NBA a Real Minor League*, SBNATION (Mar. 2, 2015), https://www.sbnation.com/nba/2015/3/2/8106965/nba-draft-reform-one-and-done-dleague-ncaa.
[18] However, some veteran players were in favor of the change as it opened roster spots for veteran talent that would have been otherwise occupied by eighteen-year-olds.
[19] An eighteen-year-old prospect who becomes a free agent for the first time at twenty-two has potential to earn more maximum contracts over the course of their career than a nineteen-year old prospect hitting free agency for the first time at twenty-three.
[20] Ziller, *supra* note 17.

removed from high school during the calendar year of the draft.[21] Additionally, the rules required international prospects to be at least nineteen.[22] These eligibility rules are still in effect today.[23]

The changes to the NBA eligibility rules gave rise to the "one-and-done" phenomenon, as each draft since 2007 has featured several players who played NCAA basketball for only one season, most notably: Greg Oden and Kevin Durant (2007),[24] Derrick Rose (2008),[25] John Wall (2010),[26] Kyrie Irving (2011),[27] Anthony Davis (2012),[28] Andrew Wiggins (2014),[29] Karl-Anthony Towns (2015),[30] and Markelle Fultz (2017).[31] While NCAA basketball has been the most popular option for high school players, it is not the only option. Several prospects have elected to forego playing in the NCAA and have instead played professionally in a foreign country for one season after high school.[32] For those players, the results of this approach have been mixed, but playing overseas gave players like Brandon Jennings

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[21] NBA CBA, Article X, *supra* note 2 ("A player shall be eligible for selection [if]…[t]he player (A) is or will be at least nineteen 19 years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player (defined below), at least one (1) NBA Season has elapsed since the player's graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school.").

[22] *Id.*

[23] *Id.*

[24] *2007 NBA Draft Board*, NBA, http://www.nba.com/draft2007/board.html (last visited Mar. 28, 2018).

[25] *2008 NBA Draft Board*, NBA, http://www.nba.com/draft2008/board.html (last visited Mar. 28, 2018).

[26] *2010 NBA Draft Board*, NBA, http://www.nba.com/draft2010/ (last visited Mar. 28, 2018).

[27] *2011 NBA Draft Board*, NBA, http://www.nba.com/draft/2011/ (last visited Mar. 28, 2018).

[28] *2012 NBA Draft Board*, NBA, http://www.nba.com/draft/2012/ (last visited Mar. 28, 2018).

[29] *2014 NBA Draft Board*, NBA, http://www.nba.com/draft/2014/ (last visited Mar. 28, 2018).

[30] *2015 NBA Draft Board*, NBA, http://www.nba.com/draft/2015/ (last visited Mar. 28, 2018).

[31] *2017 NBA Draft*, NBA, http://www.nba.com/draft/board#/ (last visited Mar. 28, 2018). In 2017, ten years after the new eligibility rules took effect, the one-and-done phenomenon reached its peak with ten of the first eleven picks being nineteen-year-olds who attended college for one year (the 11th player was nineteen-year-old international prospect Frank Ntilikina). *Id.*

[32] *See* Eric Bossi, *Skipping College? Top High School Prospects Discuss Other Options*, RIVALS (July 20, 2016), https://basketballrecruiting.rivals.com/news/college-or-overseas-top-high-school-prospects-weigh-in.

(2009),[33] Jeremy Tyler (2011),[34] Emmanuel Mudiay (2015),[35] and Terrance Ferguson (2017)[36] the chance to earn multi-million dollar salaries and gain experience as professionals before entering the NBA.[37]

In the years since the NBA's current eligibility rules were enacted, they have drawn criticism from prospects, college coaches, commentators, fans, and most recently, NBA Commissioner Adam Silver. When asked about the age minimum during the 2017 Finals, Silver acknowledged the recent prevalence of one-and-done prospects and suggested that the league is considering a change to the eligibility rules.

> I think it's one of those issues that we need to come together and study. This year the projection is that we're going to have 20 one-and-done players coming, actually being drafted this year. When we first changed the minimum age from 18 to 19, the following year in 2006 we had two one-and-done players. So my sense is, it's not working for anyone. It's not working certainly from the college coaches and athletic directors I hear from. They're not happy with the current system. And I know our teams aren't happy, either, in part because they don't necessarily think that the players that are coming into the league are getting the kind of training they would expect to see among top draft picks in the league. So we're going to come together with everyone who is interested in the community, whether it be the colleges, [and] of course our union, agents, lots of points

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[33] *Brandon Jennings*, BASKETBALLREFERENCE, https://www.basketball-reference.com/players/j/jennibr01.html (last visited Mar. 28, 2018).
[34] *Jeremy Tyler*, BASKETBALLREFERENCE, https://www.basketball-reference.com/players/t/tylerje01.html (last visited Mar. 28, 2018).
[35] *Emmanuel Mudiay*, BASKETBALLREFERENCE, https://www.basketball-reference.com/players/m/mudiaem01.html (last visited Mar. 28, 2018).
[36] *Terrance Ferguson*, BASKETBALLREFERENCE, https://www.basketball-reference.com/players/f/fergute01.html (last visited Mar. 28, 2018).
[37] *See* Aaron Torres, *Former Arizona Hoops Commit Says Playing Overseas was 'Best Decision of My Life'*, FOX SPORTS (Dec. 9, 2016), http://www.foxsports.com/college-basketball/story/terrence-ferguson-2017-nba-mock-draft-playing-in-australia-stats-figures-112816.

> of view out there, and see if we can come up with a better system.[38]

If the team owners and the NBPA can agree to change the eligibility rules, they have three viable options: (1) revert back to the pre-2005 rules and lower the age minimum to eighteen; (2) increase the age minimum to twenty or older, forcing players to spend more time developing in college or elsewhere; or (3) adopt a hybrid system which allows prospects to either enter the NBA directly from high school at eighteen *or* wait until they are twenty or older.[39]

Until one of these changes is adopted, the only options available for eighteen-year-old prospects under the current eligibility rules are to: (1) play NCAA basketball for at least one year; (2) play professionally overseas for at least one year; or (3) play professionally in the G-League[40], the NBA's developmental league, for at least one year. Section III will explore each of these options, as well as the effects a change to the eligibility rules would have on them, in-depth.

B. The WNBA Eligibility Rules

Launched under the sponsorship of the NBA in 1996, the WNBA immediately became the most successful women's professional basketball

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[38] Adam Silver, Comm'r, Press Conference at 2017 NBA Finals (June 1, 2017) (transcript available at http://www.asapsports.com/show_interview.php?id=130413) [hereinafter Adam Silver, Press Conference at 2017 NBA Finals]. As discussed *infra* in Section III, a recent and ongoing Federal Bureau of Investigation ("FBI") investigation regarding corruption in NCAA basketball recruiting has shined the national spotlight on the NBA's eligibility rules. The probe has uncovered evidence that coaches and officials from prominent NCAA-member schools have provided impermissible benefits to top high school recruits who might have passed on playing NCAA basketball were it not for the NBA's eligibility rules. *See Report: FBI Probe into NCAA Corruption Identifies Possible Violations by Basketball Powers*, ESPN (Feb. 25, 2018), http://www.espn.com/mens-college-basketball/story/_/id/22553502/fbi-probe-corruption-reveals-basketball-powers-broken-ncaa-rules.

[39] Major League Baseball uses eligibility rules likes this; prospects must either sign with a team directly from high school at eighteen or wait three years until they are twenty-one (typically by playing in college). This system allows the top prospects to play professionally right away, while incentivizing other prospects to develop in college for two years and at least earn an associate's degree. *See First-Year Player Draft*, MLB.COM (Oct. 29, 2017, 2:27 PM), http://mlb.mlb.com/mlb/draftday/rules.jsp.

[40] Formerly named the "Developmental League" or "D-League", the name was changed to the "G-League" in 2017 following the NBA's partnership with Gatorade. *See* Michael Singer, *NBA Makes It Official: D-League is Now the G League*, USA TODAY (June 20, 2017, 10:48 AM), https://www.usatoday.com/story/sports/nba/2017/06/20/nba-official-d-league-now-gatorade-league/411841001/.

league in the United States, attracting top talent and causing the competing American Basketball League (ABL) to fold two years later in 1998.[41] Although the league did not establish a player's union (the WNBPA) or a CBA until 1998, the league's inaugural draft was held in 1997.[42] The eligibility rules applied to collegiate prospects in the 1997 draft were memorialized in the 1999 CBA and have remained unchanged and in effect since.[43] The rules require U.S. prospects to be at least twenty-two years old during the calendar year of the draft or to have graduated college (or be about to graduate within three months after the draft).[44] International prospects who are born and reside outside of the U.S. can enter the WNBA if they are at least twenty years old during the calendar year of the draft.[45]

The WNBA's eligibility rules have not been challenged under antitrust or labor law as the vast majority of prospects graduate college before entering the league. Some twenty-two-year-old prospects have left college for the WNBA before graduating,[46] but no eighteen-year-old prospect has attempted to enter the league directly from high school. While the lack of a formal challenge may seem odd given how much more restrictive the WNBA rules are than the NBA rules, the lack of a challenge is probably best explained by the WNBA's low salaries. Compared to the NBA's alluring *average* salary of about $6.4M per year,[47] the WNBA's *maximum* salary for veterans is only $113,500 per year,[48] and only $51,591 per year

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[41] Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW. J. L. & SOC. POL'Y. 1, 5-8 (2008).

[42] *Id.* at 9.

[43] *Id.* at 10.

[44] WNBA CBA, Article XIII, *supra* note 3 ("[An American] player is eligible to be selected in the WNBA Draft [only] if she: (i) will be at least twenty-two (22) years old during the calendar year in which such Draft is held; (ii) has graduated from a four-year college or university, or is to graduate from such college of university, during the calendar year in which such Draft is held; or (iii) attended a four-year college or university, her original class in such college or university has already been graduated or is to graduate during the calendar year in which such Draft is held, and she either has no remaining intercollegiate eligibility by written notice to the WNBA at least ten (10) days prior to such Draft.").

[45] *Id.*

[46] *See For 2nd Straight Year, Player Declares Early for WNBA Draft*, SPORTS ILLUSTRATED (Apr. 5, 2016), https://www.si.com/womens-college-basketball/2016/04/05/ap-bkw-ncaa-early-draft-entrants.

[47] *2017-18 NBA Player Contracts*, BASKETBALLREFERENCE, https://www.basketball-reference.com/contracts/players.html (last visited Mar. 28, 2018

[48] *See* WOMEN'S NAT'L BASKETBALL PLAYERS' ASS'N COLLECTIVE BARGAINING AGREEMENT art. V § 8 (2014), *available at* http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf.

for rookies.[49] Without the financial incentive of entering the league early that exists in the NBA, WNBA prospects have less reason to attempt a challenge to the eligibility rules.

Unless the WNBA's restrictive eligibility rules are changed, the only available options for eighteen year old prospects are: (1) play NCAA basketball for four years or until graduation; or (2) forgo college or leave college early to play professionally for a foreign team.[50] Section III will explore both of the options available to top prospects under the current eligibility rules in more depth.

II. THE NBA AND WNBA ELIGIBILITY RULES ARE PROTECTED BY THE NON-STATUTORY LABOR EXEMPTION AND THUS CANNOT BE CHALLENGED USING FEDERAL ANTITRUST LAW

Because both the NBA and WNBA eligibility rules restrict entrance of prospective players to professional basketball, the leagues would likely violate federal antitrust law if not for the NSLE. The NSLE protects the eligibility rules in both leagues from antitrust scrutiny since the rules were created during the collective bargaining process between team owners and the respective players unions.[51]

This section will give background on federal antitrust law under Section 1 of the Sherman Act, detail the creation of the NSLE, and examine the application of the NSLE to eligibility rules in professional basketball and football to explain why it is unlikely that the current eligibility rules in the NBA and WNBA can be successfully challenged with antitrust law.

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[49] *See* WOMEN'S NAT'L BASKETBALL PLAYERS' ASS'N COLLECTIVE BARGAINING AGREEMENT exhibit 5 (2014), *available at* http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf.

[50] As discussed in Section III *infra*, top WNBA players can make multi-million-dollar salaries playing for international teams during the WNBA offseason.

[51] It is also unlikely that prospects would be able to challenge the eligibility rules under a breach of the Duty of Fair Representation (DFR) claim. First, prospects would need to successfully argue that the NBPA and WNBPA represent prospective employees in addition to current employees under the National Labor Relations Act (NLRA). Assuming they can overcome this high bar, the prospects would then need to show that the union bargained adverse to their interests by acting arbitrarily, discriminatorily, or in bad faith when bargaining for the eligibility rules. No direct precedent exists for a successful DFR claim by a prospect who is not yet represented by a union. *See* Jessica L. Hendrick, *The Waiting Game: Examining Labor Law and Reasons Why the WNBA Needs to Change Its Age/Education Policy*, 27 MARQ. SPORTS L. REV. 521, 534-540 (2017); *see also* Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 165 (1971) (holding that union did not have duty to bargain for benefit of retired employees).

A. Federal Antitrust Law Under the Sherman Act

Section 1 of the Sherman Antitrust Act ("the Sherman Act") deems every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," illegal under federal antitrust law.[52] Generally, Section 1 violations fall into two categories: (1) "per se" violations; and (2) violations of the "Rule of Reason."[53]

A per se violation occurs when conduct violates Section 1 (by being a contract, combination, or conspiracy in restraint of trade) and has a "pernicious effect on competition and lack of any redeeming value."[54] Per se violations are "conclusively presumed to be unreasonable, and therefore illegal, without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[55] Examples of restraints that have been deemed to be per se violations are horizontal price fixing and output restrictions, horizontal territorial restrictions, and some group boycotts.[56]

For alleged violations of Section 1 that are not per se unreasonable, courts apply the Rule of Reason.[57] A restraint is unreasonable under the Rule of Reason if the plaintiff can show: (1) an actual agreement or conspiracy between competitors; (2) that the restraint has an adverse effect in the relevant market; and (3) that the anticompetitive effects of the restraint outweigh any procompetitive justifications offered by the defendants in support of the restraint.[58] Courts have also applied a "quick look" Rule of Reason analysis for restraints that are not per se illegal, but where "an observer with even a rudimentary understanding of economics could

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[52] 15 U.S.C. § 1 (2004).
[53] *See* WILLIAM HOLMES & MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK § 2:10 (2016).
[54] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).
[55] *Id.*
[56] *See* United States v. Trenton Potteries Co., 273 U.S. 392, 394-98 (1927) (holding that uniform price fixing by those controlling trade or business in interstate commerce was a per se violation); United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) (holding that territorial sales restraints on member supermarkets of cooperative buying association was per se violation); F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 412-13 (1990) (holding that group boycott by lawyers until compensation for representing indigent defendants was increased constituted per se violation).
[57] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 88 (1911) (announcing the Rule of Reason and holding that Section 1 of the Sherman Act only applies to contracts which unreasonably restrain trade).
[58] *See* WILLIAM C. HOLMES, INTELLECTUAL PROPERTY AND ANTITRUST LAW § 5:7 (2017).

conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[59]

When considering restraints imposed by professional sports leagues, such as the NBA and WNBA eligibility rules, courts rarely find per se violations and instead usually proceed with a Rule of Reason analysis under Section 1.[60] Thus, professional sports leagues are usually afforded the opportunity to avoid antitrust liability by offering valid procompetitive justifications for their imposed restraints.

B. Spencer Haywood's Revolutionary Challenge to Professional Basketball's Eligibility Rules

As noted *supra* in Section I, Spencer Haywood, a former ABA player, was the first to challenge the NBA's eligibility rules. At the time, the NBA did not have a CBA, and its eligibility rules required players to be at least four years removed from high school.[61] Haywood had turned pro after his sophomore season at the University of Detroit, and led the ABA in scoring and rebounding during the 1969-70 season with the Denver Rockets.[62] Haywood then signed with the NBA's Seattle SuperSonics when he was only three years removed from high school, in direct violation of the NBA's eligibility rule.[63] After being advised that the NBA's eligibility rule violated federal antitrust laws, Haywood brought an antitrust suit against the NBA, seeking summary judgment and an injunction prohibiting application of the eligibility rules.[64]

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[59] Even if a restraint is determined unreasonable under this "quick look" standard, defendants are still given the opportunity to present legitimate procompetitive justifications for the restraint. Plaintiffs are then given the chance to rebut by showing these legitimate procompetitive justifications can be accomplished by some significantly less restrictive alternative. Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 757 (1999); *see* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1063 (9th Cir. 2015).

[60] Spencer Haywood alleged a per se violation in his antitrust challenge to the NBA's eligibility rules and it is likely that the Supreme Court would have applied the per se framework if it had considered his antitrust claims on the merits. Instead, the Supreme Court simply reinstated a district court injunction against the NBA. In 1984, the Supreme Court decided *Board of Regents*, and held that a per se rule should only rarely be applied to the sports industry where agreements that might be characterized as "horizontal restraints on competition are essential if the product is to be available at all." Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984); *see* Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1205-07 (1971).

[61] Denver Rockets, 325 F.Supp. at 1055.

[62] The ABA had a four-year rule similar to the NBA, but found the rule imposed a hardship on Haywood and waived it. *Id.* at 1054.

[63] *Id.*

[64] *Id.*

The district court found for Haywood, enjoining application of the NBA's eligibility rules,[65] and granting partial summary judgment on the basis that the rules were per se illegal under Section 1 of the Sherman Act.[66] The court determined that application of the eligibility rules constituted a group boycott, conduct that was per se illegal at the time, so the Rule of Reason did not need to be applied.[67] In response to the *Haywood* decision, the NBA modified its eligibility rules, adding a rule that allowed players demonstrating "financial hardship" to enter the league.[68]

If *Haywood* were decided today, a court might still find that Haywood had a viable antitrust claim on the merits. However, before the viability of the antitrust claim could be considered, the court would need to decide whether the NSLE exempted the NBA from antitrust liability. Assuming that the four-year eligibility rule was bargained for by the NBA and NBPA and had been included in a CBA (which did not exist at the time *Haywood* was decided),[69] Haywood would have to fight an uphill battle to convince a court that his claims were not barred by the NSLE.

C. Creation and Application of the Non-Statutory Labor Exemption

Before creation of the NSLE, courts were faced with the difficult task of reconciling the conflicting principles of antitrust and labor law. While the Sherman Act generally discourages cooperation between parties who would otherwise be competitors, labor law encourages this cooperation to preserve industrial peace between employers and employees. Labor law encourages cooperation regarding wages, hours, and other terms and conditions of employment, such as the NBA and WNBA eligibility rules.

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[65] After the injunction was granted at the district court level, the NBA appealed to the Ninth Circuit, where the injunction was stayed. *Id.* at 1060. Haywood then applied to the Supreme Court for a stay of the Ninth Circuit order, where it was decided that the preliminary injunction of the district court should be reinstated. *Id.*; *see* Haywood, 401 U.S. at 1204.

[66] Denver Rockets, 325 F.Supp. at 1066-67.

[67] *Id.* ("[I]t is uncontested that the rules in question are absolute and prohibit the signing of not only college basketball players but also those who do not desire to attend college and even those who lack the mental and financial ability to do so.").

[68] As discussed in *supra* Section I, the hardship rule was not strictly enforced, allowing many players to enter the NBA directly from high school.

[69] Rules do not need to be included in a CBA for the NSLE to apply if the union implicitly agrees to the rule. For example, in *Clarett*, the Second Circuit applied the NSLE even though the eligibility rules in question were contained in the NFL bylaws rather than the text of the CBA. The court determined that the rules were implicitly agreed to as part of the bargaining process since the players union "agreed to waive any challenge to the Constitution and Bylaws" in the CBA. Clarett v. Nat'l Football League, 369 F.3d 124, 142 (2d Cir. 2004) [hereinafter Clarett II].

Federal statutes offered courts some guidance on how to apply federal antitrust law to labor disputes. The Norris-LaGuardia Act, enacted in 1932, forbids federal courts from issuing injunctions in any case "involving or growing out of a labor dispute" except in very narrow circumstances.[70] In 1941, the Norris-LaGuardia Act was broadly interpreted by the Supreme Court.[71] The Court determined that the Norris-LaGuardia Act, when read in conjunction with the Clayton Act, insulates most unilateral activities undertaken by unions (such as strikes) from antitrust scrutiny.[72] Although this protection, often referred to as the statutory labor exemption, insulated certain unilateral activities from antitrust scrutiny, courts were required to decide whether Congress intended to exempt terms agreed to by unions and employers via collective bargaining from antitrust scrutiny and, if so, how broad that exemption should be.

The Supreme Court tackled this issue in a series of cases and attempted to establish the parameters of the NSLE[73] to encourage cooperative and successful bargaining between employers and their employees.[74] The NSLE protects certain agreements between employers and unions reached pursuant to the collective bargaining process from antitrust scrutiny in order to encourage agreement between the parties without the threat of antitrust liability.[75] Unfortunately, even after the Supreme Court's series of

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[70] 29 U.S.C. § 101 (1932).

[71] United States v. Hutcheson, 312 U.S. 219, 235-36 (1941).

[72] *Id.* at 236 (holding that the Norris-LaGuardia Act, which was enacted "to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act," protects "immunized trade union activities" from being "violations of any law of the United States, including the Sherman Act"). The statutory exemption also protects some unilateral actions by employers. *See* Kennedy v. Long Island R. Co., 319 F.2d 366, 368 (2d Cir. 1963) (holding that unilateral action by group of employers in creating a strike insurance fund was protected by the labor exemption).

[73] *See* Allen Bradley Co. v. Elec. Workers, 325 U.S. 797 (1945) (holding that labor union's CBAs with manufacturers and contractors which had effect of establishing monopoly on electrical equipment in New York City, violated Section 1 of Sherman Act); Meat Cutters v. Jewel Tea, 381 U.S. 676 (1965) (holding that agreement between butchers' union and multi-employer bargaining group of meat markets to not sell meat at night violated Section 1 of the Sherman Act because it unreasonably restrained trade in the meat market); United Mine Workers v. Pennington, 381 U.S. 657 (1965) (holding that CBA between miner's union and large mine owners which provided that union would (1) receive higher wages, (2) not oppose mechanization of mines, and (3) not reach agreements with small owners unless they paid the same wages as large owners, violated Section 1 of the Sherman Act since it would force small owners out of business).

[74] *See* Christopher Smith, *A Necessary Game Changer: Resolving the Legal Quagmire Surrounding Expiration of the Nonstatutory Labor Exemption in Sports*, 14 U. PA. J. BUS. L. 1191, 1195 (2012).

[75] *See* Kieran M. Corcoran, *When Does the Buzzer Sound: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1053 (1994).

decisions noted *supra*, the scope of the NSLE was still unclear, especially as applied to terms agreed to by sports leagues and player's unions via collective bargaining.[76]

In 1976, the Eighth Circuit first applied the NSLE to sports, attempting to extract from the Supreme Court's decisions over the prior three decades, a clear test for applying the NSLE to terms agreed to by leagues and player's unions via collective bargaining. In *Mackey v. National Football League*, NFL players brought antitrust claims to challenge a free agency compensation rule unilaterally imposed in the league's constitution and bylaws.[77] Dubbed the "Rozelle Rule" after former NFL Commissioner Pete Rozelle, the rule provided that when a player signed with a different team in free agency, the free agent's new team and former team would attempt to reach an agreement compensating the former team for their loss.[78] If the two teams could not reach an agreement, the Commissioner had the authority to award a player or draft pick from the free agent's new team to his former team.[79] The players claimed that the "Rozelle Rule" unreasonably restrained player movement and lowered salaries because teams became hesitant to sign free agents.[80] The NFL and the team owners claimed that the NSLE should apply, and even if the NSLE did not apply, the rule was reasonable because it was implemented to maintain competitive balance and protect the investments of teams in scouting, selecting, and developing players.[81]

On the issue of the NSLE, the Eighth Circuit applied a three-prong test and decided that the NSLE did not exempt the "Rozelle Rule" from antitrust

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[76] *Id.*

[77] Mackey v. Nat'l Football League, 543 F.2d 606, 610 (8th Cir. 1976).

[78] *Id.* at 610-11.

[79] *Id.* The full rule, at that time embodied in Section 12(H) of the NFL Constitution was:

> Any player, whose contract with a League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signed a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.

[80] Mackey, 543 F.2d at 620.

[81] *Id.* at 611.

scrutiny.[82] Based on its reading of the Supreme Court's prior holdings on the NSLE, the Eighth Circuit reasoned that the NSLE should only apply when the restraint in question: (1) affects only the parties to the collective bargaining relationship; (2) concerns a mandatory subject of collective bargaining; [83] and (3) is the product of "bona fide arm's-length bargaining."[84] While the Eighth Circuit determined that the "Rozelle Rule" met the first two prongs of the test because of its effect on the wages of NFL players, the rule failed the third prong in the view of the court since it was unilaterally imposed by the league and its teams.[85] The Eighth Circuit rejected the NFL's argument that the players had agreed to the "Rozelle Rule" in exchange for other benefits, since there was no evidence of such a quid pro quo, and declined to apply the NSLE to bar the player's claims.[86] Without the protection of the NSLE, the "Rozelle Rule" was deemed illegal under Section 1 of the Sherman Act.[87]

D. Professional Basketball Withstands Antitrust Challenges in the Second Circuit

Although the Eighth Circuit refused to apply the NSLE in *Mackey*, professional basketball later successfully relied on the NLSE to withstand several antitrust challenges in the Second Circuit. In each of those cases, the Second Circuit rejected the framework proposed by the Eighth Circuit in *Mackey*. The Second Circuit, eschewing the balancing approach adopted by the Supreme Court that the Eighth Circuit had attempted to capture in its three-part test, instead focused primarily on whether applying the NSLE to restraints that allegedly restrained the market for the labor of NBA players would unduly interfere with the collective bargaining process and federal labor policy.

The first challenge came from Leon Wood, in response to an NBA salary cap provision that required teams that had exceeded the salary cap to sign their draft picks to one-year contracts worth $75,000.[88] Wood was drafted

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[82] *Id.* at 616.
[83] Under Section 8(d) of the National Labor Relations Act ("NLRA"), mandatory subjects of bargaining include "wages, hours, and other terms and conditions of employment…" 29 U.S.C. § 158(d) (1974).
[84] Mackey, 543 F.2d at 614.
[85] *Id.* at 615-16.
[86] *Id.*
[87] *Id.* at 622 (applying the Rule of Reason, the Eighth Circuit rejected the NFL's procompetitive justifications of preserving competitive balance, protecting team investments in scouting and player development, and preserving fan interest by limiting player movement).
[88] Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 957-58 (2d Cir. 1987).

in the first round by the Philadelphia 76ers, who had exceeded the salary cap, so he was offered such a one year contract for $75,000. Under the CBA, the offer allowed the 76ers to preserve their exclusive rights to sign Wood.[89] Believing he deserved to be paid significantly more, Wood rejected the 76ers offer and commenced an antitrust suit against the NBA, seeking a preliminary injunction to restrain enforcement of the CBA rule so that he could negotiate with teams other than the 76ers.[90] Wood contended that the salary cap provision was illegal under Section 1 of the Sherman Act because it prevented him from achieving his full market value. Moreover, he argued that, because he had not been part of the bargaining unit when the rule was adopted, the rule affected employees outside the bargaining unit.[91]

The Second Circuit rejected Wood's arguments and applied the NSLE to bar his antitrust claims,[92] noting that his contentions were "at odds with, and destructive of, federal labor policy."[93] Rejecting the Eighth Circuit's three-prong test from *Mackey*, the Second Circuit reasoned that it was inappropriate to balance antitrust and labor concerns in cases like Wood's, where the restraints are imposed in labor markets characterized by collective bargaining.[94] The court explained that once a group of employees elects an exclusive bargaining representative, individual employees are forbidden under federal labor law from seeking a better deal for themselves which is inconsistent with the terms of a CBA.[95]

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[89] *Id.* at 958.

[90] *Id.*

[91] Wood contended that since the salary cap provision was agreed to by the NBPA, a bargaining unit that only included current players and not prospective players, forcing prospective players to be bound by the provision was illegal. The court rejected this argument, noting that exclusive bargaining representatives like the NBPA are explicitly permitted to bargain on behalf of employees outside the bargaining unit under the NLRA. *Id.* at 959-60; *see* 29 U.S.C. § 152(3) (1978).

[92] Wood, 809 F.2d at 963.

[93] *Id.* at 959. Wood's case was decided in the Second Circuit by Judge Ralph Winter, formerly a law professor at Yale, who had earlier written a law review article advocating for an expansive view of the NSLE in the context of the sports industry. The article was cited by the district court in *Clarett I*. *See* Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 24 (1971); *see also* Clarett v. Nat'l Football League, 306 F.Supp.2d 379, 385-86 (S.D.N.Y. 2004) [hereinafter Clarett I].

[94] The three cases upon which the Eighth Circuit based its *Mackey* test (*Allen Bradley*, *Jewel Tea*, and *Pennington*) did not concern restraints occurring in labor markets characterized by collective bargaining, so the Second Circuit did not think they should be applied to Wood's case. Wood, 809 F.2d at 962-63.

[95] *Id.*; 29 U.S.C. § 159(a) ("Representatives…selected…by the majority of employees in a unit…shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining.").

The Second Circuit further noted that collective bargaining agreements in industries other than sports often disadvantage new and prospective employees compared to senior union employees.[96] Thus, the court held that Wood's antitrust claims could not proceed even though the salary cap provision limited the earning power of new players.[97] In the view of the Second Circuit, allowing Wood's antitrust claims to proceed would have caused federal labor policy to "essentially collapse unless a wholly unprincipled, judge-made exception were created for professional athletes."[98] Though the NSLE was applied to bar Wood's antitrust claims, players did score a minor victory from the Second Circuit's decision, as the court noted that in the absence of a collective bargaining relationship, the NBA's salary cap and draft provisions would be illegal under Section 1 of the Sherman Act.[99]

The NSLE was next applied to shield the NBA from antitrust scrutiny in 1995. In *Williams v. National Basketball Ass'n*, the NBA sought a declaration that it was legally permitted to continue applying the salary cap, right of first refusal, and draft provisions of the expired 1988 CBA until a new agreement was reached.[100] The NBA players counterclaimed, asserting that continued application of the provisions of the expired 1988 CBA was illegal under Section 1 of the Sherman Act.[101]

Even though the 1988 CBA had expired, the Second Circuit followed its decision in *Wood* by applying the NSLE to shield the NBA from antitrust claims.[102] The court reasoned that exposing the NBA to antitrust liability for continued application of the CBA after impasse was reached would effectively forbid multiemployer bargaining units from performing the "most routine practices of multiemployer bargaining."[103] Thus, regardless of whether a CBA is in effect, multi-employer bargaining units cannot be exposed to antitrust liability without subverting federal labor policy as long

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[96] Wood, 809 F.2d at 960.
[97] *Id.*
[98] *Id.* at 961.
[99] *Id.* at 959.
[100] Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 686 (2d Cir. 1995).
[101] *Id.*
[102] *Id.* at 692; *See also* Powell v. Nat'l Football League, 930 F.2d 1293 (8th Cir. 1989) (holding that the NSLE applied to bar antitrust challenge to various terms and conditions of employment implemented after impasse by NFL teams).
[103] Williams, 45 F.3d at 689 ("Appellants' claim is that employers may not agree upon common terms and conditions of employment to be negotiated in a new CBA, bargain hard over those terms, ultimately insist upon them, and even obtain them by resorting to economic force. Appellants thus claim that the most routine practices of multiemployer bargaining…are *per se* unlawful.").

as a collective bargaining relationship exists.[104] Since a collective bargaining relationship still existed between the NBA and NBPA even after expiration of the 1988 CBA, the Second Circuit held that the NSLE must be applied.[105]

The Second Circuit's application of the NSLE to shield the NBA from antitrust scrutiny in *Wood* and *Williams*[106] set the stage for the Supreme Court's first holding on the NSLE as it pertains to sports in *Brown v. Pro Football Inc.*

E. The Supreme Court Rules on the NSLE as Applied to Sports

Like *Mackey*, *Brown* concerned another restraint that was unilaterally imposed by the NFL.[107] During CBA negotiations, the NFL and NFLPA agreed to allow each team to establish a developmental squad of young players who had failed to make a regular NFL roster.[108] When the NFL presented the NFLPA with its plan of paying each developmental squad player a salary of $1,000 per week, the NFLPA disagreed, and the negotiations reached impasse two months later.[109] At impasse, the NFL elected to unilaterally impose the $1,000 weekly salary, prompting developmental squad players to challenge the restraint under antitrust law.[110]

Believing that the three-prong test from *Mackey* was inappropriate in a labor market case such as this, the Supreme Court held that the NSLE applied to bar the players' antitrust claims.[111] The Court noted five factors that supported its holding: (1) the restraint was imposed by a multi-employer bargaining unit after impasse; (2) the employer's conduct in imposing the terms took place during and immediately after a collective bargaining

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[104] *Id.* at 693.

[105] *Id.* at 686 ("Antitrust immunity exists as long as a collective bargaining relationship exists).

[106] *See also* Caldwell v. Am. Basketball Ass'n, 66 F.3d 523 (2d Cir. 1995) (holding that NSLE applied to bar antitrust suit from player who claimed he was "blacklisted" by ABA and NBA, since allowing antitrust liability would subvert federal labor policy which required such claims to be submitted to the NLRB as grievances).

[107] Brown v. Pro Football Inc., 518 U.S. 231, 234-35 (1996)

[108] *Id.*

[109] The NFLPA objected to the NFL's plan because it did not give developmental squad players benefits and protections similar to those provided regular players, and restricted individual squad players from negotiating their own salaries. *Id.* "Impasse" is a term used to describe the point at which the parties to a collective bargaining relationship have "exhausted the prospects of concluding an agreement and further discussions would be fruitless." Bridgeman v. Nat'l Basketball Ass'n, 675 F.Supp. 960, 966 (D.N.J. 1987).

[110] Brown, 518 U.S. at 235.

[111] *Id.* at 250.

negotiation; (3) the employer's conduct was directly related to the lawful operation of the bargaining process; (4) the restraint concerned a mandatory subject of bargaining; and (5) the restraint concerned only parties to the bargaining relationship.[112] While the Supreme Court's factors included the first and second prongs of the *Mackey* test, the Court declined to apply the third prong, whether the restraint was the product of "bona fide arm's-length bargaining."[113] Interestingly, this means that had the *Mackey* case arisen after *Brown* was decided, the Eighth Circuit likely would have applied the NSLE and barred the players' antitrust claims regarding the "Rozelle Rule."[114]

Since the NSLE applied, the Supreme Court did not consider the merits of the antitrust claims brought by the developmental squad players. The *Brown* decision set a new standard for application of the NSLE to terms imposed pursuant to a collective bargaining relationship and scored a huge victory for sports leagues on the judiciary's biggest stage. Following the Supreme Court's decision in *Brown*, the Second Circuit decided *Clarett v. National Football League*, which granted parties to a collective bargaining relationship seemingly limitless discretion in imposing restraints on the players' services market.[115]

F. Maurice Clarett's Challenge to the NFL Eligibility Rules Gives Parties to a Collective Bargaining Relationship Seemingly Limitless Discretion in Imposing Restraints on the Players' Services Market

Clarett v. National Football League represents the current standard for application of the NSLE to CBA's negotiated by sports leagues and players unions via collective bargaining. Frustrated by the NFL's eligibility rules, which require prospective players to be at least three years removed from

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[112] *Id.*

[113] *Id.* Had the Supreme Court chosen to apply the bona fide arms-length bargaining factor, the NSLE might not have been applied since the rule was clearly not the product of good faith bargaining. Nevertheless, the NFL's unilateral implementation of the rule after impasse was a legal tactic under labor law. *See* NLRB v. Katz, 369 U.S. 736, 744 (1962).

[114] The Court emphasized the importance of applying labor law principles in a case like *Brown* where the alleged anticompetitive impact of the restraint occurred in a labor market characterized by collective bargaining rather than in a product market or a labor market not characterized by collective bargaining. *Id.* at 738-44. Thus, had *Brown* been decided before *Mackey*, the Eighth Circuit likely would have applied labor law principles when deciding on the application of the NSLE to the "Rozelle Rule." Brown, 518 U.S. at 238-242.

[115] Clarett I, 306 F.Supp.2d at 379-411.

high school,[116] star Ohio State running back Maurice Clarett, who wished to enter the NFL when he was only two years removed from high school, brought an antitrust suit against the NFL in New York district court seeking to have the rules declared illegal under the Sherman Act.[117] On the issue of the NSLE, the district court declined to follow the Second Circuit's previous decisions. Using the Eighth Circuit's three-prong test from *Mackey* instead, the district court reasoned that the NSLE applies when the restraint in question: (1) affects only the parties to the collective bargaining relationship; (2) concerns a mandatory subject of collective bargaining; and (3) is the product of "bona fide arm's-length bargaining.[118]

On the first prong, the district court determined that the NFL's eligibility rules only affected prospective players like Clarett "who are complete strangers to the bargaining relationship."[119] Since "Clarett's eligibility was not the union's to trade away," the district court held that the eligibility rule affected parties outside the bargaining relationship and failed the first prong.[120] Second, after considering the Second Circuit's previous opinions in *Wood*, *Williams*, and *Caldwell v. American Basketball Ass'n*, the district court determined that the eligibility rules did not concern a mandatory subject of bargaining and thereby failed the second prong of the *Mackey* test.[121] Unlike the Second Circuit's previous opinions which governed "the terms by which those who are *drafted* are employed," the district court held

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[116] Quoting the Bylaws, the court stated:

> The Bylaws provided that a player became eligible if he exhausted his eligibility to play college football or graduated from college. A player was also eligible if he was five years removed from his first enrollment in college (or four years removed, if he never played college football), regardless of whether he had any remaining college eligibility. Finally, a player not otherwise eligible could be granted "Special Eligibility."
>
> Such a player has been granted eligibility through special permission of the Commissioner. In order to receive consideration for the League's principal college draft in any year, any application for special eligibility must be in the Commissioner's office no later than January 6 of that year. For college football players seeking special eligibility, *at least three NFL seasons must have elapsed since the player was graduated from high school.*

Clarett I, 306 F.Supp.2d at 385-386 (citing CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE art. XII, §§ 12.1 (A)-(E) (1993)) (emphasis added).

[117] *Id.* at 382.

[118] *Id.* at 393-397.

[119] *Id.* at 395.

[120] *Id.*

[121] *Id.*

that the NFL's eligibility rules "preclude[d] players from entering the labor market altogether, and thus affect[ed] wages only in the sense that a player subject to the [eligibility rules] will earn none."[122] Finally, the district court held that the eligibility rules failed the third prong of the *Mackey* test as well, since the NFL failed to meet its burden of proving that the eligibility rules "evolved from [the collective bargaining] process."[123]

Since the eligibility rules failed the *Mackey* test, the district court found that the NSLE did not bar Clarett's suit, allowing his antitrust claims to proceed.[124] Applying the Rule of Reason, the district court rejected the NFL's offered procompetitive justifications[125] and declared the NFL's eligibility rules illegal under Section 1 of the Sherman Act.[126]

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[122] *Id.*

[123] *Id.* at 396. The eligibility rules were not included in the text of the CBA but rather in the NFL bylaws. *Id.* The NFL argued that the rules met the third prong of the Mackey test even though the eligibility rules were not contained in the CBA because the NFLPA agreed to waive its rights to bargain over or challenge the NFL Constitution and Bylaws in the CBA. *Id.* The district court rejected this argument, reasoning that while the NFLPA waived its rights to bargain over or challenge the eligibility rules, the NFL did not meet its burden of showing that the NFLPA agreed to the rules. *Id.* On appeal, the Second Circuit accepted the NFL's argument on this point. *See* discussion *infra* notes 126-141.

[124] Clarett I, 306 F.Supp.2d at 397.

[125] *Id.* at 405-10. The NFL's procompetitive justifications included: (1) protecting younger/less experienced players from heightened risk of injury; (2) protecting the NFL's entertainment product from the adverse consequences associated with such injuries; (3) protecting NFL teams from the costs and liability resulting from such injuries; and (4) protecting other adolescents from over-training in the hopes of prematurely developing the traits required to play in the NFL, and the injuries/self-abuse resulting from this over-training. *Id.* at 408. The district court rejected the NFL's first and fourth justifications stating that concern for the health of younger players "has nothing to do with promoting competition." *Id.* The district rejected the NFL's second justification because it concerned the sports entertainment market rather than the player personnel market and the NFL "may not justify the anticompetitive effects of a policy by arguing that it has procompetitive effects *in a different market*." *Id.* (emphasis added). Finally, the district court rejected the NFL's third justification because "[t]he fact that the [NFL] and its teams will save money by excluding players does not justify that exclusion." *Id.* at 409. Even if the district court had accepted the NFL's procompetitive justifications, the court still would have granted summary judgment for Clarett because a less restrictive alternative existed: basing a player's NFL-readiness on medical examinations and tests rather than age. *Id.* at 410.

[126] *Id.* at 408. Applying the "quick look" Rule of Reason, the district court determined that the NFL's age-based eligibility rules were a naked restraint of trade that limited "competition in the player personnel market by excluding sellers." *Id.* at 406. The court rejected the NFL's argument that Clarett failed to define the relevant market, noting that the NFL had exclusive market power in the market for NFL players and the eligibility rules had anticompetitive effects. *Id.* 407-08. Thus, the court determined that Clarett had properly established the market for NFL players as the relevant market. *Id.*

The NFL immediately appealed the district court's ruling and Clarett's case was heard by the Second Circuit.[127] The Second Circuit reversed the ruling of the district court, holding that the NSLE applied to protect the NFL's eligibility rules from antitrust scrutiny.[128] Declining to apply the three-prong *Mackey* test in light of the Supreme Court's *Brown* decision,[129] the Second Circuit instead applied its decisions in *Caldwell*,[130] *Williams*, and *Wood* to reject Clarett's claims.[131]

First, the court determined that the eligibility rules concerned a mandatory subject of bargaining, since they represented a "quite literal condition for initial employment,"[132] and had "tangible effects on the wages and working conditions of current NFL players."[133] Clarett had argued that the eligibility rules did not concern mandatory subjects since they directly affected the wages, hours, and other terms and conditions of employment of current employees,[134] but the Second Circuit did not accept his argument.[135] Next, the court rejected Clarett's argument that the eligibility rules were an impermissible bargaining subject since he was not a member of the players union when the they were negotiated.[136] Comparing Clarett to a "typical worker who is confident that he or she has the skill to fill a job vacancy but does not possess the qualifications or meet the requisite criteria that have been set,"[137] the Second Circuit held that the NFL and players association had the right pursuant to their collective bargaining relationship to bar prospective employees from entry "for nearly an reason whatsoever so long as they do not violate federal [labor] laws."[138] Finally, the Second Circuit

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[127] Clarett II, 369 F.3d at 124.

[128] *Id*. at 125.

[129] *Id.* at 134 ("[T]he suggestion that the *Mackey* factors provide the proper guideposts in this case simply does not comport with the Supreme Court's most recent treatment of the non-statutory labor exemption in *Brown v. Pro Football, Inc*.").

[130] Caldwell v. American Basketball Ass'n, 66 F.3d 523, 95 (2d Cir. 1995).

[131] Clarett II, 369 F.3d at 138, 143.

[132] *Id.* at 139.

[133] *Id.* at 140; *see* Allied Chem. & Alkali Workers, 404 U.S. at 180 (holding that benefits of retirees are not mandatory subjects of bargaining because they do not vitally affect the terms and conditions of employment of active employees).

[134] Clarett II, 369 F.3d at 140; *see* Petition for Writ of Certiorari at 18-20, Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004) (No. 04-910). *Compare* Star Tribune, 295 N.L.R.B. 543 (1989) (holding that drug testing for prospective employees was not a mandatory subject of bargaining); *with* Johnson-Bateman Co., 295 N.L.R.B. 180 (1989) (holding that drug testing for current employees was a mandatory subject of bargaining).

[135] Clarett II, 369 F.3d at 139.

[136] *Id*. at 140.

[137] *Id.* at 141.

[138] *Id.* A different Circuit considering this issue might accept Clarett's argument and hold that parties to a CBA must have at least some rational basis for such a strict exclusionary rule on prospective employees.

held that even though the eligibility rules were contained in the NFL bylaws rather than the text of the CBA, the rules were still agreed to as part of the bargaining process, because the players union "agreed to waive any challenge to the Constitution and Bylaws" in the CBA.[139] Determining that allowing antitrust liability would "subvert principles that have been familiar to, and accepted by, the nation's workers for all of the NLRA's sixty years in every industry except professional sports,"[140] the Second Circuit reversed the district court and applied the NSLE to shield the NFL eligibility rules from antitrust scrutiny.[141]

Currently, the Second Circuit's *Clarett* holding is the most relevant precedent for courts to consider when ruling on the application of the NSLE to shield the eligibility rules of professional sports leagues from antitrust challenges. While it is possible that another Circuit could disagree with the Second Circuit's holding and choose to accept some of the arguments offered by Clarett, it is much more likely that the NSLE will continue to be applied to protect sports leagues and their eligibility rules from antitrust scrutiny.[142] Thus, assuming that the NSLE bars the NBA and WNBA eligibility rules from being successfully challenged under Section 1 of the Sherman Act, top amateur basketball players are left with limited options in the time between graduating from high school and playing professional basketball.

III. ASSUMING THE ELIGIBILITY RULES CANNOT BE SUCCESSFULLY CHALLENGED WITH ANTITRUST LAW, HOW DOES THEIR APPLICATION AFFECT TOP AMATEUR BASKETBALL PLAYERS?

As discussed *supra* in Section I, the NBA and WNBA eligibility rules restrain top U.S. amateur basketball players from playing professionally. The NBA's rule prevents men from playing professionally until they are 19 years old and one year removed from high school graduation. The WNBA's rule prevents women from playing professionally until they are 22 years old or four years removed from high school graduation. This

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[139] *Id.* at 142.

[140] *Id.* at 143 (quoting Caldwell v. American Basketball Ass'n, 66 F.3d 523, 530 (2d Cir. 1995) (internal quotations and brackets omitted).

[141] *Id.*

[142] *See* Daniel A. Applegate, Student Author, Comment, *The NBA Gets A College Education: An Antitrust and Labor Analysis of the NBA's Minimum Age Limit*, 56 CASE W. RES. L. REV. 825 (2006); *but see* Joseph A. Litman, Student Author, Note, *Tremendous Upside Potential: How A High-School Basketball Player Might Challenge the National Basketball Association's Eligibility Requirements*, 88 WASH. U. L. REV. 261 (2010).

Section will explore the available options for both men and women in the period between high school and professional eligibility.

A. Men's Basketball

The NBA's eligibility rules require U.S. prospects to be at least 19 and one year removed from high school during the calendar year of the draft, and international prospects to be at least 19 during the calendar year of the draft.[143] This leaves top 18-year old prospects with three options for their gap year: (1) play NCAA basketball for at least one year; (2) play professionally for a foreign team for at least one year; or (3) play professionally in the G-League, the NBA's developmental league, for at least one year.[144] Outside of these options, top amateur players can only hope that the NBA and the NBPA bargain to loosen the eligibility rules, since they likely cannot be successfully challenged under federal antitrust law, as discussed *supra* in Section II. This section will explore the benefits and detriments of each available option and discuss the effects of possible changes to the eligibility rules.

1. Playing NCAA Basketball

As mentioned in *supra* Section I, playing NCAA basketball for at least one season has been by far the most popular option among top high school prospects. Since the change to the NBA's eligibility rules in the 2005 CBA, NCAA basketball has experienced a "one and done" phenomenon, with top high school prospects spending one year in college before declaring for the NBA Draft after their freshman season.[145] Since 2007, when Greg Oden

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[143] NBA CBA, Article 10, *supra* note 2.

[144] A fourth approach is currently being explored by 5-star Western Kentucky recruit Mitchell Robinson. Jeff Goodman, *Mitchell Robinson leaves Western Kentucky will focus on NBA draft*, ESPN (Sept. 18, 2017), http://www.espn.com/mens-college-basketball/story/_/id/20743631/five-star-recruit-mitchell-robinson-leaves-western-kentucky-hilltoppers-focus-nba-draft. Robinson dropped out of Western Kentucky shortly after enrolling and considered transferring, but instead took the year off to focus on preparing for the 2018 NBA Draft. *Id.* Time will tell whether Robinson's gamble will pay off, with one NBA executive remarking, "[h]e's a huge red flag…and I'm not sure he's even that good." *Id.* Robinson was unable to play in the G-League during the 2017-18 season because of a rule that barred entry by players who attended a college or university during the same academic year. Tim Cato, *G-League Bars Top NCAA Prospects Due to Obscure Rule, Per Report*, SBNATION (Jan. 11, 2018, 6:45 PM), https://www.sbnation.com/2018/1/11/16880980/g-league-ncaa-prospects-mitchell-robinson-nba-rule. The rule provides an exception for players who have exhausted their NCAA eligibility or been declared ineligible by the NCAA, but Robinson did not meet either exception due to the circumstances of his departure from Western Kentucky. *Id.*

[145] Medcalf, *supra* note 5.

and Kevin Durant were drafted first and second after their freshman seasons at Ohio State and Texas respectively, 25 of 33 total players selected in the Top-3 have been one-and-done players.[146] The one-and-done phenomenon reached its peak in the 2017 Draft, with 10 one-and-done players among the first 11 selections.[147] With the vast majority of top high school players since 2007 electing to play NCAA basketball during their gap year between high school and the NBA, it is by far the most utilized option available to top amateur prospects.

Playing NCAA basketball for at least one year provides several benefits for top amateur players. Players who choose NCAA basketball receive a free college education (assuming they are on scholarship)[148] as well as access to state-of-the-art facilities,[149] high-quality equipment, and expansive alumni networks.[150] Going to college, even for only one year, is also viewed as a good way for players to mature and develop professionally, as the rigors

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[146] *2007 NBA Draft Board*, *supra* note 24; *2008 NBA Draft Board*, *supra* note 25; *2009 NBA Draft*, NBA, http://www.nba.com/draft2009/ (last visited Mar. 28, 2018); *2010 NBA Draft Board*, *supra* note 26; *2011 NBA Draft Board*, *supra* note 27; *2012 NBA Draft Board*, *supra* note 28; *2013 NBA Draft Board*, NBA, http://www.nba.com/draft/2013/ (last visited Mar. 28, 2018); *2014 NBA Draft Board*, *supra* note 29; *2015 NBA Draft Board*, *supra* note 30; *2016 NBA Draft Board*, NBA, http://www.nba.com/draft/2016/ (last visited Mar. 28, 2018); *2017 NBA Draft*, *supra* note 31. Further, from 2014-2017 all 12 players selected in the Top-3 of their respective drafts were one-and-done college players. Colt, Kesselring, *2017 Update: NBA One-and-Done Era, Visualized*, HERO SPORTS (Feb. 20, 2017, 5:28 PM), https://herosports.com/news/one-and-done-rule-list-college-basketball-nba-visualized.

[147] *2017 NBA Draft Board*, *supra* note 31. Interestingly, the only player in the Top-11 who did not attend college for a year was 19-year-old French point guard Frank Ntilikina, who was selected 8th by the New York Knicks. *Id.*

[148] Division 1 men's basketball teams have 13 scholarships to allocate and can award financial aid up to the equivalent "cost of attendance that normally is incurred by students enrolled in a comparable program at the institution." NAT'L COLLEGIATE ATHLETIC ASS'N BYLAWS [hereinafter NCAA Bylaws] art. 15.06 & 15.5.5.1 (2017), *available at* https://www.ncaapublications.com/p-4511-2017-2018-ncaa-division-i-manual-august-version-available-august-2017.aspx.

[149] Will Hobson & Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, CHI. TRIB. (Dec. 23, 2015), http://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html; *see also* Steve Politi, *10 College Basketball Practice Facilities that Will Blow Rutgers Fans Away*, NJ.COM (Feb. 26, 2015), http://www.nj.com/rutgersbasketball/index.ssf/2015/02/10_basketball_practice_facilities_that_will_blow_r.html.

[150] Top basketball programs often have several well-connected alumni working in the NBA as players, coaches, agents, advisors, and executives. Joe Boozell, *College Basketball Players in the NBA: Kentucky, Kansas Top the List*, NCAA (June 22, 2016), http://www.ncaa.com/news/basketball-men/article/2016-06-22/college-basketball-players-nba-kentucky-kansas-top-list.

and challenges of being truly independent for the first time cause most to mature.[151]

Further, playing NCAA basketball is the best way for top amateur players to grow their brand, secure future marketing opportunities, and become a household name before playing a single NBA game. Regular season games are televised on major networks like ESPN, CBS, and Fox Sports, as well as on conference television networks, and the annual NCAA Tournament thrusts players into a bright national spotlight.[152] Additionally, since this exposure makes it easy and relatively cheap to scout NCAA players, NBA teams appear to be more inclined to spend a high draft pick on NCAA players competing against a known level of competition rather than players who spend their gap year competing internationally or in the G-League.[153] Finally, for players who are not sure if they are ready to enter the NBA after their freshman season (or any other season), a new rule provides players the

[151] Brian Shaffer, *The NBA's Age Requirement Shoots and Misses: How the Non-Statutory Exemption Produces Inequitable Results for High School Basketball Stars*, 48 SANTA CLARA L. REV. 681, 686 (2008).

[152] Patrick Hipes, *NCAA Tournament Ratings at 24-Year High Through First Weekend*, DEADLINE (Mar. 20, 2017), http://deadline.com/2017/03/ncaa-tournament-ratings-record-2017-1202047200/.

[153] *See* Jordan Ritter Conn, *Is the NBA Done Drafting International Players?*, GRANTLAND (June 28, 2012), http://grantland.com/features/evan-fournier-not-necessarily-surprising-dearth-foreign-prospects-2012-nba-draft/ (Pete Philo, an international scout with the Timberwolves, stated, "When you're scouting college kids, you can watch your team play one night, and then go watch North Carolina and Duke play the next night." "The comparison is right there. If you stay over in Europe too long, you're not used to the athleticism of our league. You're watching slow on slow. Anybody with any kind of quickness all of a sudden looks like he's Tony Parker").

opportunity to test their NBA draft stock without losing their NCAA eligibility, provided they do not hire an agent.[154]

For all the benefits that playing NCAA basketball provides, the major problems with choosing this option all seem to stem from the NCAA's strict eligibility rules.[155] Most relevant to players being restrained from earning a multi-million dollar NBA salary, players who choose NCAA basketball cannot receive a salary or be paid in any way for their play.[156] While players receive scholarships which usually cover the full cost of college attendance,[157] they often feel exploited by this rule, since their play drives multi-million dollar revenues for their schools in the form of ticket and jersey sales, and enormous television contracts.[158] These revenues are not shared with the players in any way, and are instead shared between the schools, conferences, and NCAA.[159] Further, the NCAA's bylaws prevent

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[154] Sam Vecenie, *NBA Draft Prospects Big Fans of Rule Giving Them More Time to Test Waters*, CBS SPORTS (May 13, 2016), https://www.cbssports.com/college-basketball/news/nba-draft-prospects-big-fans-of-new-rule-giving-them-more-time-to-test-waters/; *see also* Memorandum from Nat'l Collegiate Athletic Ass'n to Div. I Athletic Dirs., Senior Compliance Adm'rs, and Men's Basketball Head Coaches (May 23, 2017), *available at* https://www.ncaa.org/sites/default/files/2017DIENF_NBAEducational_Memov2_20170523.pdf. The NCAA's "no agent" rules have themselves been challenged by players under antitrust law and otherwise. *See* Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992) (holding that the NCAA's no-agent rules were not illegal under antitrust law because the plaintiff failed to allege anticompetitive effects of the rules in his complaint); *see also* Oliver v. Nat'l Collegiate Athletic Ass'n, 155 Ohio Misc.2d 17 (Ohio Ct. Com. Pl. 2009), vacated pursuant to settlement (Sept. 30, 2009) (granting injunction against NCAA's rules prohibiting lawyers from being present during contract discussions with a professional team since rules were arbitrary and capricious, illogical, and violated NCAA's contractual obligation of good faith and fair dealing to plaintiff college baseball player).

[155] *See* NCAA Bylaws, *supra* note 148.

[156] *Id.* at art. 12.1.2.

[157] *Id.* at art. 15.01.06.

[158] *See* David Berri, *Exploitation is Everywhere in Men's College Basketball*, TIME (Nov. 14, 2014), http://time.com/3586037/exploitation-is-everywhere-in-mens-college-basketball/.

[159] *See Distributions*, NCAA.COM http://www.ncaa.org/about/resources/finances/distributions (last visited Mar. 28, 2018); *see also* Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/?utm_term=.fc3a6acbc2a8.

players from profiting off their name, image, or likeness in any way,[160] so players are unable to receive endorsements, sell autographs, hire agents, receive promises of future pay, or "use [their] athletics skill (directly or indirectly) for pay in any form"[161] without losing their NCAA eligibility.

In the fall of 2017, news of an FBI investigation regarding corruption in NCAA basketball recruiting sent shockwaves through the basketball world.[162] The ongoing probe has shed light on the recruiting "black market" and named NCAA coaches and players, both active and former, associated with many prominent institutions, such as the University of Louisville, the University of Arizona, and the University of Southern California.[163] The FBI investigation has thrust NCAA basketball into the national spotlight and fueled many conversations about alternatives to NCAA basketball for top high school players, the future of the current NCAA model, and changes to the NBA's eligibility rules.[164]

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[160] *See* NCAA Bylaws, *supra* note 148, at art. 12.1.2. These rules have been under fire recently and were the subject of a very prominent antitrust suit brought by former college athletes against the NCAA. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015), cert. denied, 137 S.Ct. 277 (2016); *see also* Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621 (Colo. App. 2004) (holding that plaintiff, who was an Olympic and World Cup skier before being recruited to play football at Colorado University, could not profit from his notoriety as a skier and maintain his eligibility to play football).

[161] NCAA Bylaws, *supra* note 148, at art. 12.1.2(a).

[162] *See Report: FBI Probe into NCAA Corruption Identifies Possible Violations by Basketball Powers*, *supra* note 38.

[163] *Id.*; *see* Daniel Rapaport, *What We Know About Each School Implicated in the FBI's College Basketball Investigation*, SPORTS ILLUSTRATED (Nov. 17, 2017), https://www.si.com/college-basketball/2017/09/29/what-we-know-about-each-school-fbi-investigation.

[164] *See* Andy Staples, *The NCAA Must Change the Rules in Order to Solve College Basketball's Existential Crisis*, SPORTS ILLUSTRATED (Feb. 23, 2018), https://www.si.com/college-basketball/2018/02/23/fbi-probe-investigation-ncaa-recruiting-rules-andy-miller. On the heels of the FBI investigation, Adam Silver reportedly met with the NBPA to discuss changes to the NBA's eligibility rules. Khadrice Rollins, *Report: Adam Silver Wants to Improve NBA's Relationship With Elite High School Players*, SPORTS ILLUSTRATED (Mar. 5, 2018), https://www.si.com/nba/2018/03/05/adam-silver-elite-high-school-player-one-and-done-change-g-league ("We're not by any means rushing through this. I think this is a case where, actually, outside of the cycle of collective bargaining, we can spend more time on it with the players' association, talking to the individual players, talking to the executive board and really trying to understand the pros and cons of potentially moving the age limit."). Per the report, Silver is also considering enticing top high school players to play in the G-League by offering higher salaries for players on both standard G-League contracts and two-way contracts. *Id.*

Aside from the problems players face when attempting to preserve their NCAA eligibility, especially when considering the ongoing FBI investigation, choosing NCAA basketball might result in additional issues for top high school players. One-and-done players who know they are declaring for the NBA Draft after their freshman season do not really receive the benefits of a free college education. Some of these players do not attend classes since they know they will not be finishing their degree, and will sometimes disenroll from classes at the conclusion of basketball season to begin preparing for the NBA Draft.[165] For those that do attend class and finish at least one year of college, becoming an on-campus celebrity and one of the most famous students at the school might not be the best environment for certain players to learn to act like a professional and to mature.[166] Additionally, while NCAA training programs are very high-quality, some NBA teams would rather have college-aged players developing in the NBA or G-League, where the player can be under the organization's control and treat basketball like a full-time job.[167]

Since the NBA's current eligibility rules were incorporated in the 2005 CBA, top amateur prospects have overwhelmingly decided that the benefits of playing NCAA basketball in their gap year outweigh the detriments –

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[165] *See* Gary Parrish, *76ers Rookie Ben Simmons' Year at LSU Exposed in Showtime's 'One & Done'*, CBS SPORTS (Nov. 4, 2016), https://www.cbssports.com/college-basketball/news/76ers-rookie-ben-simmons-year-at-lsu-exposed-in-showtimes-one-done/; Adam Silver, Press Conference at 2017 NBA Finals, *supra* note 38 (Students "enroll in these universities…and they attend those universities until either they don't make the tournament, and the last game therefore of their freshman season, or to whenever they lose or win in the NCAA Tournament, that becomes their last day. So in essence it's a half-and-done, in a way"); *see also* Matt Norlander, *Adam Silver Changes Stance on Age-Limit Rule and That's Bad News for College Hoops*, CBS SPORTS (June 1, 2017), https://www.cbssports.com/college-basketball/news/adam-silver-changes-stance-on-age-limit-rule-and-thats-bad-news-for-college-hoops/.

[166] *See generally* Pete Thamel & Thayer Evans, *College Stars Run for Cover From Fans' Cameras*, N.Y. TIMES (Sept. 16, 2009), http://www.nytimes.com/2009/09/17/sports/ncaafootball/17colleges.html?_r=1&hpw.

[167] Adam Silver, Press Conference at 2017 NBA Finals, *supra* note 38 ("[O]ur teams aren't happy either, in part because they don't necessarily think that the players…are getting the kind of training they would expect to see among top draft picks…[I]ncreasingly the veteran players…feel that the young players are not coming in game-ready…[like] when they were coming out of college"); *see* Kevin O'Connor, *The Future of the NBA Could be the G-League*, THE RINGER (June 6, 2017), https://www.theringer.com/nba/2017/6/6/16077542/nba-draft-adam-silver-age-limit-ben-simmons-51cc9cfbc034; *see also* Tim MacMahon, *Cuban: D-League Better for Prospects*, ESPN (Mar. 6, 2014), https://espn.go.com/dallas/nba/story/_/id/10538276/mark-cuban-says-nba-d-league-better-option-ncaa.

especially when considering the alternatives. However, if the eligibility rules were changed, players might choose differently.

The NCAA has the most to gain if the NBA's age minimum is increased, as top players would spend more time in college, generating revenue for schools, conferences, and the NCAA itself. Television viewership might increase as well since some consumers feel that the one-and-done phenomenon has diluted the quality of NCAA basketball by encouraging constant roster turnover from year to year.[168] Further, an increase to the age minimum would give players a chance to earn an associate's degree during their time in college, and also likely convince some players to stay the final two years to finish a bachelor's degree.[169] Such an increase would cause the NBA's eligibility rules to become even more restrictive however,[170] and might draw an antitrust challenge, exposing the NBA to the risk that a different Circuit would disagree with the Second Circuit's reasoning in *Clarett* and refuse to apply the NSLE.

The NCAA also has arguably the most to lose if the NBA's age minimum is decreased to 18 and players are allowed to enter the NBA straight from high school again. It is unclear what effect this would have on the quality of NCAA basketball – on one hand, top high school players would forego college for the NBA, but on the other, fewer players would leave school early resulting in less roster turnover.[171] Even with a few top high school players declaring for the NBA Draft each year, many more top high schoolers would still attend college, and the quality of NCAA basketball

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[168] *See* Andrew Lynch, *The NBA's One-and-Done Rule has Ruined the NCAA Tournament*, FOX SPORTS (Mar. 20, 2017), http://www.foxsports.com/college-basketball/story/ncaa-tournament-march-madness-overrated-bad-buzzer-beaters-031717; *see also* Sam Drexler, *Is One and Done Ruining College Basketball?*, ODYSSEY (Mar. 28, 2016), https://www.theodysseyonline.com/is-one-and-done-ruining-college-basketball.

[169] *See generally* Steve Kerr, *The Case for the 20-Year-Old Age Limit in the NBA*, GRANTLAND (May 8, 2012), http://grantland.com/features/steve-kerr-problems-age-limit-nba/.

[170] *See* Matt Ellentuck, *Raising the NBA Draft Age Limit to 20 Would Cost New Players Millions*, SBNATION (May 12, 2016), https://www.sbnation.com/nba/2016/5/12/11510186/nba-draft-age-limit-20-adam-silver-cost-millions.

[171] *See* David Ubben, *Can College Basketball be Saved?*, SPORTS ON EARTH (Sept. 28, 2017), http://www.sportsonearth.com/article/256500732/how-to-repair-college-basketball-after-scandal; Tom Ziller, *Kill the NBA Age Minimum. The G League is Ready to Replace College*, SBNATION (June 2, 2017), https://www.sbnation.com/2017/6/2/15728454/nba-draft-age-minimum-gleague-adam-silver.

would likely be just fine as it was pre-2005.[172] The players would benefit the most under this system by regaining the freedom of choice they possessed before the current eligibility rules were enacted.

Perhaps the best solution, one that appears acceptable to the NCAA, NBA, and top high school players is to adopt a version of MLB's eligibility rules.[173] As mentioned *supra* in Section 1, MLB's eligibility rules allow players to either sign with a professional team at 18 or wait three years until they are 21, typically by playing NCAA baseball for three years. If such a system were adopted by the NBA, top high school players could enter the NBA straight from high school and players who choose college would be more likely to reap the benefits of a free college education with enough time to finish at least an associate's degree. Unfortunately, a hybrid system like this would leave players who are not ready for the NBA until after their freshman season of NCAA basketball hung out to dry.[174] Even though these players might be ready for the NBA after their freshman season, such a hybrid system would require them to stay in school until the end of their junior season, forcing them to sacrifice two extra years of NBA salary.

Regardless of which alternative to the NBA's current eligibility rules makes the most sense, one thing is for certain: until some change is adopted, playing NCAA basketball will continue to be the most popular option available to top high school players.

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[172] From 1995, when Kevin Garnett sparked the prep-to-pro generation, through 2005, when the eligibility rules were changed, 39 of the 582 players drafted were drafted directly from high school (only 6.7%). If the NBA returned the age minimum to 18, a handful of top players would forego college every year, but the vast majority would still play NCAA basketball for at least one year. *See* JONATHAN ABRAMS, *supra* note 13.

[173] *See* Matt Norlander, *College Coaches Like 'Baseball Rule' for NBA Draft, but it May Not Solve the Big Issues*, CBS SPORTS (June 19, 2017), https://www.cbssports.com/college-basketball/news/college-coaches-like-baseball-rule-for-nba-draft-but-it-may-not-solve-the-big-issues/.

[174] For example, Trae Young, who averaged twenty-eight points per game for the University of Oklahoma during the 2017-18 season and is projected to be a top-10 pick in the 2018 NBA draft, was ranked 23rd in the 2017 ESPN Top 100. *Trae Young*, ESPN, http://www.espn.com/college-sports/basketball/recruiting/player/_/id/203210/trae-young (last visited Apr. 2, 2018); Jeremy Woo, *2018 NBA Mock Draft 5.0: Who Will Leave a Strong Impression in the NCAA Tournament?*, Sports Illustrated (Mar. 14, 2018), https://www.si.com/nba/2018/03/14/nba-mock-draft-2018-march-madness-deandre-ayton-trae-young-luka-doncic. Had Young been allowed to enter the 2017 NBA draft, it is highly unlikely he would have been drafted within the top-10.

2. Playing Professionally Internationally

Following enactment of the NBA's new eligibility rules, a handful of top high school players have elected to forego playing in the NCAA and instead spend their gap year playing professionally in a foreign country. Notable examples of players who chose this option are Brandon Jennings (drafted 10th in 2009), Jeremy Tyler (drafted 39th in 2011), Emmanuel Mudiay (drafted 7th in 2015), and Terrance Ferguson (drafted 21st in 2017).[175] Jennings, who was the test case for this approach in 2009, has been the most successful of this group with the 2017-18 season being the 9th of his solid career,[176] while Tyler, who spent two years overseas after famously foregoing his senior year of high school, played in only 104 NBA games over three seasons[177] before becoming a cautionary tale.[178] It is too soon to tell how Emmanuel Mudiay and Terrance Ferguson's NBA careers will proceed, but after Mudiay's rough rookie season,[179] abysmal sophomore

[175] In addition, a notable international experiment is ongoing in Lithuania, where LiAngelo Ball and LaMelo Ball, the younger brothers of Los Angeles Lakers point guard Lonzo Ball, signed professional contracts with Prienai-Birstonas Vytautas. Benjamin Hoffman, *LiAngelo and LaMelo Ball Are Headed to Lithuania*, N.Y. TIMES (Dec. 11, 2017), https://www.nytimes.com/2017/12/11/sports/liangelo-lamelo-lavar-ball-lithuania.html. LiAngelo Ball, who is eligible (and declared) for the 2018 NBA draft, intended to play NCAA basketball for the University of California Los Angeles during the 2017-18 season, but withdrew his enrollment after being suspended indefinitely following an arrest for shoplifting on the team's international trip to China. Eduardo Gonzalez, *LiAngelo Ball Declares for the NBA Draft*, L.A. TIMES (Mar. 27, 2018), http://www.latimes.com/sports/nba/la-sp-liangelo-ball-nba-draft-20180327-story.html; Eric Sondheimer & Ben Bolch, *LaVar Ball Says He is Withdrawing Son LiAngelo from UCLA*, L.A. TIMES (Dec. 4, 2017), http://www.latimes.com/sports/nba/la-sp-ucla-lavar-ball-20171204-story.html. LaMelo Ball, who is eligible for the 2020 NBA draft under the current eligibility rules, withdrew from his junior year of high school after becoming the first high school athlete to debut a signature shoe. Eric Sondheimer, *LaVar Ball to Pull Son LaMelo from Chino Hills and Train Him Personally*, L.A. TIMES (Oct. 2, 2017, 3:36 PM), http://www.latimes.com/sports/highschool/la-sp-high-school-sports-updates-lavar-ball-to-pull-lamelo-from-chino-1506983851-htmlstory.html; A.J. Perez, *High school Athlete LaMelo Ball Gets Signature Shoe, Sparking Eligibility Questions*, USA TODAY (Aug. 31, 2017, 5:00 PM), https://www.usatoday.com/story/sports/2017/08/31/high-school-athlete-lamelo-ball-gets-signature-shoe-sparking-eligibility-questions/621469001/.

[176] *Brandon Jennings*, *supra* note 33.

[177] *Jeremy Tyler*, *supra* note 34.

[178] *See* Chris Mannix, *A Sorry Semester Abroad*, SPORTS ILLUSTRATED (Mar. 29, 2010), https://www.si.com/vault/2010/03/29/105917331/a-sorry-semester-abroad; *see also* Josh Fu, *NBA Draft 2011: In Jeremy Tyler, Golden State Warriors Take a Smart Risk*, BLEACHER REPORT (July 3, 2011), http://bleacherreport.com/articles/749047-golden-state-warriors-take-a-smart-risk-with-jeremy-tyler-acquisition.

[179] Tom Ley, *There's Still Hope For Last Season's Worst NBA Rookie*, FIVETHIRTYEIGHT (Oct. 24, 2016), https://fivethirtyeight.com/features/theres-still-hope-for-last-seasons-worst-nba-rookie/.

campaign,[180] and recent trade to the New York Knicks,[181] it is safe to assume his career might resemble Tyler's more than Jennings'. Since none of the players who have chosen the international option have been Top-5 draft selections, made NBA All-Star appearances, or signed maximum NBA contracts, top high school players are still very wary of the risks of spending their gap year overseas.[182] However, those that can look past these risks have the chance to earn multi-million dollar salaries, receive endorsements, and be free of the NCAA's restrictive eligibility rules.

Freedom from the NCAA's amateurism rules is the main benefit of choosing the international option. Without needing to worry about losing their amateurism, players can receive a salary and endorsements, and can profit off their name, image, and likeness directly or indirectly. Elite high schoolers who choose the international option often make an annual salary of more than $1M: Jennings signed with Italy's Lottomatica Virtus Roma for $1.2 million,[183] Mudiay with China's Guangdong Dongguan Bank for

[180] *See* Daniel C. Lewis, *Emmanuel Mudiay Moved to Bench Role*, DENV. STIFFS (Feb. 22, 2017), https://www.denverstiffs.com/2017/2/22/14701694/emmanuel-mudiay-benched-for-jameer-nelson.

[181] *Knicks Acquire Emmanual Mudiay in 3-Team Trade*, NBA (Feb. 8, 2018, 9:27 PM), http://www.nba.com/article/2018/02/08/new-york-knicks-acquire-emmanual-mudiay-three-team-deal-official-release. In return, the Denver Nuggets received a second-round pick from the New York Knicks and thirteen-year veteran point guard Devin Harris from the Dallas Mavericks. *Id.*; *Devin Harris*, BASKETBALLREFERENCE, https://www.basketball-reference.com/players/h/harride01.html (last visited Mar. 28, 2018).

[182] For example, 5-star recruit Kevin Knox turned down a $1.4M offer from a Chinese team to instead attend the University of Kentucky for the 2017-18 season. *High School Basketball Star Turns Down $1.4 Million Offer to Play Overseas*, FOX SPORTS (Apr. 15, 2017), http://www.foxnews.com/sports/2017/04/15/high-school-basketball-star-turns-down-14-million-offer-to-play-overseas.html.

[183] This salary figure included endorsements. Ray Glier, *Brandon Jennings Sends Home a Warning from Europe*, N.Y. TIMES (Jan. 23, 2009), http://www.nytimes.com/2009/01/24/sports/basketball/24recruit.html.

$1.2 million,[184] and Ferguson with Australia's Adelaide 36ers for at least $1 million.[185]

Playing internationally also offers players the opportunity to experience being a professional basketball player for the first time, possibly giving them a leg up on their peers who choose college. In the NBA, players are expected to treat basketball like a full-time job, without the academic distractions they would have in the NCAA, and play against fully grown and developed men, rather than nineteen to twenty-two-year-olds. By spending their gap year playing for an international team, prospects can adjust to the life of a professional basketball player and the physical challenge of playing against older, more developed players, before stepping into their first NBA locker room.[186]

Despite the benefits of receiving remuneration for their talents before their NCAA peers, the risks of playing internationally cause most players to stay away. First, players are not afforded the national exposure of playing NCAA basketball, so endorsement opportunities might be harder to come

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[184] Matt Norlander, *Reports: Emmanuel Mudiay Signs 1-year, $1.2 Million Deal in China*, CBS SPORTS (July 22, 2014), https://www.cbssports.com/collegebasketball/eye-on-college-basketball/24632524/reports-emmanuel-mudiay-signs-1-year-12-million-deal-with-chinese-team.

[185] *See* Terrance Ferguson, *Why I'm Going Pro in Australia*, PLAYER'S TRIB. (June 30, 2016), https://www.theplayerstribune.com/2016-6-30-terrance-ferguson-arizona-australia-basketball/; *see also* Matt Ellentuck, *NBA Draft Prospect Who Skipped College to Play Overseas Want Others to do the Same*, SBNATION (June 12, 2017, 8:35 PM), https://www.sbnation.com/nba/2017/6/12/15788188/terrance-ferguson-nba-draft-college-overseas-alabama-arizona; Olgun Uluc, *Why More Young NBA Hopefuls May Skip College to Play in NBL Instead*, FOX SPORTS (June 30, 2016), https://www.foxsports.com.au/basketball/why-more-young-nba-hopefuls-may-skip-college-to-play-in-nbl-instead/news-story/d8ed8d92befea7820c59670f948b4e2b. The Australian National Basketball League ("NBL"), the league in which Ferguson played during the 2016-17 season, has launched a new program to attract top U.S. high school players during their gap year. Jonathan Givony, *How Australian Basketball is Targeting One-and-Dones*, ESPN (Mar. 1, 2018), http://www.espn.com/nba/story/_/id/22594625/how-australian-basketball-targeting-one-dones-nba-draft. The program adds an extra roster spot to each NBL team intended strictly for top high school players like Ferguson. *Id.* Top high school players filling the roster spot will reportedly be paid the Australian equivalent of $78,000 funded directly by the NBL. *Id.*

[186] *See* Max Blau, *Brandon Jennings, Kyle Singler, and Others Talk About Playing Basketball Overseas*, GRANTLAND (Dec. 7, 2012), http://grantland.com/the-triangle/brandon-jennings-kyle-singler-and-others-talk-about-playing-basketball-overseas/; *see also* Ethan Skolnick, *NBA's 'International' Presence on the Rise as Basketball Keeps Growing Globally*, CBS SPORTS (Aug. 31, 2016), https://www.cbssports.com/nba/news/nbas-international-presence-on-the-rise-as-basketball-continues-to-grow-globally/.

by. Due to higher costs than domestic scouting and difficulty evaluating quality of competition,[187] international scouting is also much tougher for NBA teams. For some players, less scouting might be beneficial as their flaws may be exposed less than if they were playing under the NCAA's national spotlight.[188] For the vast majority of others, less scouting means that a poor statistical performance could completely crash their draft stock,[189] and that it is much easier to fall off the radar of NBA teams completely.[190] The risk of having their draft stock crash is the main reasons why players are wary of the international route.[191]

Further, players choosing to play internationally during their gap year are much more isolated from their friends and family than those who attend college. Players might be able to use their salary to bring a few family members overseas to live with them,[192] but living in a foreign country can

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[187] *See* Ritter Conn, *supra* note 153.

[188] *See* Uluc, *supra* note 185.

[189] This was the case with Jeremy Tyler, who experienced two poor seasons overseas before entering the NBA Draft. A star at San Diego High School, Tyler skipped his senior season to sign with Israel's Maccabi Haifa. In ten games, Tyler averaged only 2.1 points and 1.9 rebounds in 7.6 minutes per game, before quitting the team and returning to San Diego. Tyler then spent the following season with Japan's Tokyo Apache, bouncing back a bit by averaging 9.9 points and 6.4 rebounds in 15.4 minutes per game. Had Tyler stayed in high school and attended the University of Louisville, as he originally planned during his gap year, it is safe to assume he would have been drafted higher than 39th in 2011. *See* Brent Schrotenboer, *After Everything, Jeremy Tyler Still Bound for NBA*, SAN DIEGO UNION-TRIB. (June 21, 2011), http://www.sandiegouniontribune.com/sports/nba/sdut-after-everything-jeremy-tyler-still-bound-nba-2011jun21-htmlstory.html; *Tyler Quits Maccabi with 5 weeks Left*, ESPN (Mar. 20, 2010), http://www.espn.com/nba/news/story?id=5008825.

[190] Despite a solid statistical season in China, Emmanuel Mudiay, ranked 5th in the 2014 ESPN 100, dropped out of the top five and was drafted 7th by the Denver Nuggets. Likewise, Terrance Ferguson was ranked the 11th best high school player in the 2016 ESPN 100, had an above average season in Australia, and still fell to the Oklahoma City Thunder at 21. *See* Kurt Streeter, *Emmanuel Mudiay Is Not Scared*, ESPN (June 24, 2015), http://www.espn.com/espn/feature/story/_/id/13135005/top-guard-emmanuel-mudiay-quietly-climbed-draft-charts-playing-china; *see Emmanuel Mudiay*, ESPN, http://www.espn.com/college-sports/basketball/recruiting/player/_/id/117574/emmanuel-mudiay (last visited Mar. 28, 2018Neil Johnson, *What to Make of 2017 NBA Draft Mystery Man Terrance Ferguson*, ESPN (Feb. 17, 2017), http://www.espn.com/nba/story/_/id/18701018/what-make-2017-nba-draft-mystery-man-terrance-ferguson; *Terrance Ferguson*, ESPN, http://www.espn.com/college-sports/basketball/recruiting/player/_/id/180838/terrance-ferguson (last visited Mar. 28, 2018

[191] *See generally* Bossi, *supra* note 32.

[192] Brandon Jennings was able to bring his mother and half-brother to live with him in Italy. Glier, *supra* note 183.

often be a culture shock.[193] Additionally, eighteen-year-olds might be treated with less respect than they are used to in the locker room and forced to play a diminished role on the court.[194] As noted above, these challenges might help some players to prepare themselves for the NBA, but might cause others to crumble under the pressure.[195]

Any changes to the NBA's eligibility rules would have drastic effects on the international market for high school talent. If the age minimum is increased, more players would likely choose the international route instead of the NCAA as the financial incentive would become much more attractive. Conversely, if the age minimum is decreased and the eligibility rules are returned to their pre-2005 state, the international market for top high school players would crash as they would stop choosing the international route before college completely.[196] The attractiveness of this option is completely based on its status as a lucrative alternative to the strict amateurism rules of the NCAA, so if players can go directly to the NBA from high school, the benefits of playing overseas will be eliminated, and the international experiment will likely end for top high school players.

3. Playing in the G-League

To be eligible to play in the G-League, the NBA's developmental league, players only need to be eighteen.[197] Naturally, this means that a third option for top high school players is to enter the G-League directly from high school. Under the current structure, players can sign with a G-League team directly from high school, play for a season, and then declare for the NBA Draft the following year. Playing in the G-League instead of playing in the NCAA or internationally is being explored by a top high school player, Darius Bazley, for the first time during the 2018-19 season.[198] When considering Bazley's choice in conjunction with the introduction of two-

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[193] *See* Blau, *supra* note 186.
[194] *See* Glier, *supra* note 183.
[195] *Id.*; *see also* Blau, *supra* note 186.
[196] However, 18-year-olds who declared for the draft straight from high school and went undrafted might sign with international teams or G-League teams. While the international market might crash for the top high school players, it would not crash completely as undrafted players from high school and college would still choose the international route.
[197] *Frequently Asked Questions: NBA G League*, NBA, http://gleague.nba.com/faq/ (last visited Mar. 28, 2018).
[198] Bazley, a five-star recruit and McDonald's All-American, was originally committed to play at Syracuse University. Jeremy Woo, *Breaking Down Darius Bazley's Decision: Syracuse's Loss Is the G League's Gain*, SPORTS ILLUSTRATED (Mar. 29, 2018), https://www.si.com/nba/2018/03/29/breaking-down-implications-darius-bazleys-g-league-decision-syracuse.

way contracts and the FBI investigation into NCAA basketball, it seems that the NBA's long-term goal might be to transform the G-League into a true minor league.[199]

The 2017 NBA CBA provides for two roster slots per G-League team to be used for players on two-way contracts.[200] These two-way contracts allow players, who meet the NBA's eligibility requirements by being at least nineteen-years-old and one year removed from high school, to spend up to forty-five days with their affiliated NBA team and the rest of the season with their G-League team.[201] Players on two-way contracts are paid $75,000 per season during their time in the G-League[202] (players on normal G-League contracts are paid between $19,000 and $26,000 per season)[203] and a six-figure rookie minimum scale salary[204] during their time in the NBA. Two-way contracts provide an alternative to playing internationally for players who want to be paid during their gap year and are much more lucrative than typical G-League contracts. The value of these contracts still pales in comparison to multi-million-dollar international contracts however, so until G-League salaries are increased, top high school players will still choose to play in the NCAA or for a foreign team instead.

NBA teams feel that the G-League provides a better development environment for players than they would have in college or internationally,

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[199] *See* O'Connor, *supra* note 167; Marc J. Spears, *Elite High School Hoops Prospects Should Stop Playing the NCAA Game and Consider the G League*, THE UNDEFEATED (Feb. 26, 2018), https://theundefeated.com/features/elite-high-school-hoops-prospects-should-stop-playing-the-ncaa-game-and-consider-the-g-league/.

[200] The concept of two-way contracts was borrowed from the National Hockey League (NHL). Two-way contracts in the NHL allow players to play for both an NHL team and its minor league affiliate in the American Hockey League (AHL) in the same season. Tim Cato, *How the NBA's New 2-Way Contracts Work and Why Some Agents are Worried about Them*, SBNATION (July 18, 2017), https://www.sbnation.com/nba/2017/7/18/15985262/nba-two-way-contract-2017-summer-league-agents-worried-about-them; *see generally* BoltsGuy04, *Waivers & Entry-Level Contracts for Dummies*, SBNATION (July 17, 2017), https://www.rawcharge.com/2017/7/17/15973228/waivers-entry-level-contracts-for-dummies-national-hockey-league-american-hockey-league.

[201] Cato, *supra* note 200.

[202] *Id.*

[203] Michael McCann, *The G-League: 12 Takeaways on NBA's New Deal*, SPORTS ILLUSTRATED (Feb. 14, 2017), https://www.si.com/nba/2017/02/14/nba-gatorade-g-league-deal-adam-silver-takeaways.

[204] For the 2017-18 season, the minimum contract for players with zero NBA experience will pay $815,615 per season. Players on two-way contracts will receive a prorated portion of this salary during their time on the NBA roster. *2017 CBA Minimum Annual Salary Scale*, REALGM, https://basketball.realgm.com/nba/info/minimum_scale/2017 (last visited Mar. 28, 2018).

and two-way contracts allow teams to give players who meet the NBA's eligibility requirements a brief NBA audition while maintaining control[205] after the players are sent back to the G-League.[206] The team-friendly nature of two-way contracts has caused many NBA agents to caution their clients about signing them.[207] Players signed to two-way contracts are limited to signing with one NBA team, are not guaranteed a call-up to the NBA, and can be sent down to the G-League at any time, essentially leaving their fate in the hands of one organization.[208] Conversely, for a slightly lower salary, players signed to normal G-League contracts who meet the NBA's eligibility requirements can negotiate with *any* NBA team for a spot on an NBA roster after their first call-up.[209] Thus, while two-way contracts might appear to incentivize top high school players to sign with G-League teams straight from high school if the NBA's eligibility rules were changed, it is not a viable option until the salary is increased.

Aside from the unimpressive salaries, another reason players are wary to jump to the G-League directly from high school is the quality of competition. G-League players are only one step away from the NBA and NBA teams have great access to G-League scouting, especially for players on their affiliated teams.[210] If a player who entered the G-League straight from high school struggled against G-League competition, NBA teams would be quick to assume that player could not handle NBA competition and the player's draft stock would likely crash. Thus, players like Darius Bazley, who choose to sign with a G-League team directly from high school are betting on themselves to excel against high-quality competition in order to preserve their draft stock.

A change to the NBA's eligibility rules is essential for the role of the G-League to expand. If the age minimum is increased, more players might think about testing the G-League, but without a higher salary, most top high school players would still choose the much more lucrative international option. On the other hand, lowering the age minimum could revolutionize

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[205] Players who are signed to regular G-League contracts are free to sign with any NBA team, whereas players with two-way contracts can only sign a fully guaranteed deal with the NBA team that signed them. *See* Mika Honkasalo, *HoopsHype Explains: How do Two-Way Contracts Work?*, HOOPSHYPE (July 19, 2017), http://hoopshype.com/2017/07/19/hoopshype-explains-how-do-two-way-contracts-work/.

[206] *See id.*; *see generally* O'Connor, *supra* note 167.

[207] Cato, *supra* note 200.

[208] *See* Honkasalo, *supra* note 205.

[209] *Id.*

[210] *See generally* Tom Ziller, *Can the D-League Really Take Over the NCAA?*, SBNATION (Mar. 5, 2014), https://www.sbnation.com/2014/3/5/5469282/nba-draft-age-minimum-dleague-ncaa-mark-cuban.

the structure of professional basketball and transform the G-League into a true minor league. As was the case before the 2005 CBA, top high school players drafted in the first or second round would receive normal rookie scale contracts, which would not count against a team's salary cap if the player was sent to the G-League.[211] The rest of the high school players who chose to enter the Draft could then either: (1) be drafted and signed to a two-way contract; or (2) go undrafted, sign with the G-League team of their choosing, and attempt to get signed by an NBA team.[212] A system like this would allow players to enter the NBA straight from high school, and allow teams to use the G-League for developing younger players without giving them playing time in the NBA or having their salaries count against the salary cap.

Many of the biggest problems with the NBA's current eligibility rules would be eliminated if the NBA had a true minor league. While salaries are currently too low to adequately incentivize top amateurs to sign in the G-League, an increase to salaries or a decrease to the age minimum could establish the G-League as the true minor league the NBA needs.

4. Hope the NBPA and Owners Bargain to Loosen Eligibility Rules

For players who do not wish to play NCAA basketball, play for a foreign team, play in the G-League, or prepare and train for the draft during their gap year, the only other option is to hope that the NBA owners and NBPA can reach an agreement to loosen the eligibility rules and reduce the age minimum back to eighteen. Due to the national spotlight on NCAA basketball and the NBA's eligibility rules in the wake of the FBI investigation, changes to the eligibility rules might be coming very soon. With the introduction of two-way contracts and the establishment of more G-League affiliates, the NBA can ensure that fewer roster spots are taken away from veteran players if the age minimum is returned to eighteen, and that teams can better use their G-League affiliates for player development. Despite the reservations that many NBA teams have about scouting and drafting high school players,[213] the league's increased focus on expanding the G-League makes it seems that a reduction to the age minimum is more likely than an increase.[214]

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[211] *See* O'Connor, *supra* note 167.
[212] *Id.*
[213] *See* Norlander, *supra* note 173; *see also* Kerr, *supra* note 169.
[214] *See* Ziller, *supra* note 171.

B. Women's Basketball

The WNBA's eligibility rules require U.S. prospects to be at least twenty-two years old during the calendar year of the draft or to have graduated college (or be about to graduate within three months after the draft), while international prospects who are born and reside outside of the U.S. must be at least twenty years old during the calendar year of the draft.[215] The detrimental economic effects of these eligibility rules are less than the effects of the NBA rules, since the WNBA's lower revenue produces less lucrative and desirable salaries. Further, unlike the NBA rules which seem to have no legitimate procompetitive justifications, the WNBA can argue that its eligibility rules encourage players to finish their college degrees before turning pro,[216] even though it is unlikely a court would accept this justification.[217] Nonetheless, the WNBA eligibility rules are still very restrictive since they prevent adult women from entering their chosen profession.[218]

Since the eligibility rules likely cannot be challenged with antitrust or labor law,[219] top eighteen-year-old prospects are left with two options after high school: (1) play NCAA basketball for four years or until graduation; or (2) forgo college or leave college early to play professionally for a foreign team. This section will explore the benefits and detriments of both options and discuss the effects of possible changes to the WNBA eligibility rules.

1. Playing NCAA Basketball for Four years or Graduating College

Since the WNBA's eligibility rules create a four-year gap between high school and playing professionally, which is substantially longer than the

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[215] WNBA CBA, Article XIII, *supra* note 3.

[216] In 1998, Tennessee Volunteers star Chamique Holdsclaw considered challenging the eligibility rules after her junior season but chose to return for her senior season to set a positive example for young women. "I really want to see these young women set goals," Holdsclaw said, "and I want one of those goals to be to get that degree." Edelman & Harrison, *supra* note 41; *see* Elizabethe Holland, *Holdsclaw will Stay in College Basketball*, ST. LOUIS POST-DISPATCH (Mar. 30, 1988) at C6.

[217] For example, a court like the district court in *Clarett* might find this justification merely paternalistic and irrelevant to an antitrust defense; *see* Clarett I, 306 F.Supp.2d at 379-411.

[218] Since the WNBA has a monopoly on women's professional basketball in the United States, the strict eligibility rules deny women the opportunity to play professional basketball in any capacity in the U.S. *See generally* N. Jeremy Duru, *Hoop Dreams Deferred: The WNBA, the NBA, and the Long-Standing Gender Inequity at the Game's Highest Level*, 2015 UTAH L. REV. 559 (2015).

[219] *See* discussion *supra* note 51.

one-year gap which NBA prospects must fill, playing NCAA basketball is the status quo for top amateur women. The vast majority of these players graduate from college before declaring for the WNBA.[220] Players who turn twenty-two during their junior year or receive medical hardship waivers[221] have the option of leaving college for the WNBA before graduation; however, many players presented with this option choose to finish school instead of pursuing a professional career because of the WNBA's low salaries.[222] As is the case with NBA prospects, playing NCAA basketball before declaring for the WNBA Draft has benefits and drawbacks.

Unlike the NBA's eligibility rules, the WNBA's eligibility rules push players to finish their college education before becoming professional.[223] Since the WNBA has much lower salaries than the NBA, top amateurs have less of an incentive to turn professional and are much more likely to attend class, study, and earn a bachelor's degree to get the most out of their free college education.[224] Earning a degree sets players up for a future beyond basketball, by ensuring they are prepared for a career switch if their WNBA career does not work out.[225] Further, the WNBA's strict eligibility rules allow it to market its players as both scholars and athletes, who will act as positive role models for younger women.[226]

Playing NCAA basketball also has some of the same benefits for women as it has for men. Aside from the free college education, players are given a full four years to mature and develop before becoming professionals.[227] Since women are older when they turn pro than men, WNBA prospects naturally enter the league more seasoned and mature. Playing NCAA basketball also allows players to be in the national spotlight, albeit a bit less than men. In fact, women's NCAA basketball is more popular than the

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[220] *See* Doug Feinberg, *Women's Basketball: Top Players Choose School Over WNBA*, NCAA (Apr. 2, 2017), http://www.ncaa.com/news/basketball-women/article/2017-04-02/womens-basketball-top-players-choose-school-over-wnba; *see also* Nick Forrester, *NCAA Women's Basketball Graduation Rates Tie for Highest Ever*, EXCELLE SPORTS (Nov. 15, 2016), http://www.excellesports.com/news/ncaa-graduation-rates-women-men/.
[221] Players with injuries or illnesses which cost them a season of competition can be granted medical hardship waivers that provide an extra year of eligibility to make up for the season that was lost. NCAA Bylaws, *supra* note 148, at art. 12.8.4.
[222] *See* Feinberg, *supra* note 220; *see* Edelman & Harrison, *supra* note 41.
[223] *See* Edelman & Harrison, *supra* note 41, at 24.
[224] *Id.* at 24, 25.
[225] *Id.* at 25.
[226] *Id.*
[227] *Id.* at 26.

WNBA;[228] therefore, players have a better chance to grow their profile in college before entering the professional ranks. Finally, like men, women who choose to play NCAA basketball are afforded the opportunity to stay closer to family and friends than if they chose to play overseas.

The drawbacks of playing NCAA basketball are much the same for women as they are for men. As a result of the NCAA's restrictive amateurism rules, players cannot receive a salary, profit off their name, image, or likeness, sell autographs, hire agents, receive a promise of future pay, or "use [their] athletics skill (directly or indirectly) for pay in any form" without losing their NCAA eligibility.[229] Since WNBA salaries pale in comparison to NBA salaries,[230] and women's college basketball typically generates substantially less revenue than men's college basketball,[231] these amateurism rules have less of a detrimental economic effect on women than men.[232] With that said, the WNBA's eligibility rules force women to be subjected to the NCAA's amateurism rules three years longer than men, substantially limiting their earning capacity.

Another drawback of playing NCAA basketball is that players who get injured or have academic problems might not be able to make it through the four years of college required to play in the WNBA. The four-year eligibility rule pushes top high school players towards playing NCAA basketball, where players must then excel for four years to increase their chances of being drafted to the WNBA.[233] As a result, players who experience devastating injuries in college or struggle with the rigors of

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[228] Lyndsey D'Arcangelo, *Why Aren't Women's Basketball Fans Following Their Players To The Pros?*, DEADSPIN (May 10, 2017), https://deadspin.com/why-arent-womens-basketball-fans-following-their-player-1795024988.

[229] NCAA Bylaws *supra* note 148, at art. 12.1.2(a).

[230] *See* David Berri, *Basketball's Growing Gender Wage Gap: The Evidence the WNBA is Underpaying Players*, FORBES (Sept. 20, 2017), https://www.forbes.com/sites/davidberri/2017/09/20/there-is-a-growing-gender-wage-gap-in-professional-basketball/#41edeb6036e0.

[231] *See* Jason McIntyre, *Women's College Basketball Loses $14 Million a Year, Says Mark Emmert*, THE BIG LEAD (Apr. 20, 2016), http://thebiglead.com/2016/04/20/womens-college-basketball-loses-14-million-a-year-says-mark-emmert/.

[232] Men generate more revenue for their colleges and forfeit multi-million-dollar NBA salaries, whereas women generate less revenue and forfeit substantially lower WNBA salaries. *See* Berri, *supra* note 230.

[233] 0.9% of women who play NCAA basketball make it to the WNBA. *Estimated Probability of Competing in Professional Athletics*, NCAA, http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics (last visited Mar. 28, 2018).

being a student-athlete[234] and cannot make it through four years at the NCAA level are prevented from playing professionally, even if they otherwise have the basketball talent.[235]

Despite the drawbacks of playing NCAA basketball, the WNBA's four-year eligibility rules push the vast majority of high school players towards attending college. Until WNBA salaries are increased to a level where top high school players are incentivized to enter the professional ranks at eighteen, it is unlikely that the eligibility rules will be challenged under antitrust law. Such a challenge might cause the WNBA to loosen its eligibility rules and allow younger players to enter the league. Regardless of any changes to the eligibility rules, the lack of a lucrative WNBA salary to entice players into leaving college early means the vast majority of amateurs would continue to stay in college for four years to complete their degrees. Thus, WNBA salaries must be increased before any changes to the WNBA eligibility rules will make a meaningful difference in the NCAA.

2. Playing Professionally Internationally

For top amateurs who do not want to play NCAA basketball for four years, the other option is to sign with a foreign team in Europe or Asia directly from high school or after playing a few years of NCAA basketball. Unlike men's basketball where earning potential is highest in the NBA, elite women can often earn double their WNBA salaries playing for international teams.[236] As a result, many players supplement their WNBA salaries by playing for international teams during the WNBA's offseason.[237] Given the quality of talent competing for roster spots on international teams and the inherent difficulties for these teams of scouting U.S. high school players, there has yet to be a notable test case of a top high school player forgoing

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[234] A 2011 NCAA survey estimated that women's basketball players spent an average of 37.6 hours per week on athletic activities in 2010. *See* Peter Jacobs, *Here's the Insane Amount of Time Student-Athletes Spend on Practice*, BUSINESS INSIDER (Jan. 27, 2015), http://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1.

[235] *See* Edelman & Harrison, *supra* note 41, at 26-27.

[236] Barbara Barker, *For WNBA players, the Real Money is Overseas*, NEWSDAY (Nov. 19, 2016), http://www.newsday.com/sports/columnists/barbara-barker/wnba-players-are-underpaid-shouldn-t-have-to-play-overseas-1.12639553; *see* Seth Berkman, *Overseas, Lost in Transition*, N.Y. TIMES (Nov. 10, 2014), https://www.nytimes.com/2014/11/11/sports/basketball/transition-game-wnba-players-battle-the-blues-in-first-season-abroad.html?mcubz=3.

[237] Berkman, *supra* note 236.

college to sign with an international team.[238] Nevertheless, for players who wish to earn a salary for playing basketball in the four years following high school graduation, signing with a professional international team is the only option.

The benefits of playing internationally all stem from the lucrative salaries. International teams are often financed by local governments, private sponsors, or funds shared with profitable soccer club partners and are not subject to the WNBA's salary restrictions, allowing them to offer much higher salaries.[239] For example, star player Diana Taurasi famously skipped playing in the 2015 WNBA season with the Phoenix Mercury at the request of her Russian team UMMC Ekaterinburg which paid her $1.5 million per year.[240] Lucrative salaries like this have caused 89 of the WNBA's 144 players (almost 62%) to play for foreign teams in the offseason.[241]

Given the high volume of established WNBA players as well as four-year college graduates competing internationally, it stands to reason that it would be very difficult for an eighteen-year-old American to find a roster spot on a foreign team. Even if a high school player could find an international team willing to sign them, it would still make more sense for most players to play NCAA basketball on scholarship and take advantage of a free

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[238] However, in 2009, Rutgers star Epiphanny Prince skipped her senior season to sign with Spartak Moscow in Russia, and later Botas Spor in Turkey. Prince was drafted 4th overall in the 2010 WNBA Draft by the Chicago Sky. Prince completed her 8th WNBA season in 2017. Past attempts by Schuye LaRue (who left the University of Virginia after her sophomore season) and Britany Miller (who left Florida State after her sophomore season to play in the Czech Republic) were unsuccessful, as both flamed out of the WNBA very quickly. *See* Greg Bishop, *Rutgers Basketball Star to Turn Pro in Europe*, N.Y. TIMES (June 16, 2009), http://www.nytimes.com/2009/06/17/sports/ncaabasketball/17ncaa.html?mcubz=3; *see* Greg Bishop, *Ex-Rutgers Guard Seeks Overseas Path to W.N.B.A.*, N.Y. TIMES (Dec. 1, 2009), http://www.nytimes.com/2009/12/02/sports/ncaabasketball/02prince.html?mcubz=3; *see Epiphanny Prince*, BASKETBALLREFERENCE, https://www.basketball-reference.com/wnba/players/p/princep01w.html (last visited Mar. 28, 2018).

[239] Berkman, *supra* note 236; *see* Ceyda Mumcu, *Overseas Opportunities Could be a Boon for WNBA, Players*, SPORTS BUSINESS DAILY (Aug. 31, 2015), http://www.sportsbusinessdaily.com/Journal/Issues/2015/08/31/Opinion/Ceyda-Mumcu.aspx.

[240] Barker, *supra* note 236.

[241] Current as of April 2018. Each of the twelve WNBA teams has twelve roster spots, meaning the league employs 144 players. *WNBA Players Playing Overseas*, WNBA, http://www.wnba.com/wnba-players-playing-overseas/ (last visited April 1, 2018).

college education before attempting to play professionally overseas.[242] Further, players who sign with international teams are isolated from their families and are often the only Americans or English-speakers on their teams.[243] While high school players might be attracted to lucrative international salaries and relatively short seasons,[244] the difficulties of finding a roster spot as an eighteen-year-old are likely the reason why a test case for this approach does not yet exist.

Any changes to the WNBA's eligibility rules would likely have no effect on the international player market. The WNBA's eligibility rules currently restrict players from earning a salary in the U.S. for four years after high school graduation and players still have not started signing with international teams directly from high school. If having to play four years without getting paid is not enough to incentivize players to attempt playing professionally for a foreign team after high school, reducing the age minimum would have no effect on the international market and high school players would continue to choose college knowing they can sign with an international team after completing their degree. If anything, a reduction to the WNBA's age minimum would cause the average age of U.S. players playing for international teams to decrease, as players would reach the WNBA at a younger age and thus have an earlier opportunity to earn roster spots on top international teams.

IV. CONCLUSION

A. Current State and Future of Men's Basketball

Under the NBA's current eligibility rules, there are three options available for top high school players during their gap year: (1) play NCAA basketball; (2) play professionally for a foreign team; or (3) play professionally in the G-League. As discussed *supra*, since the current eligibility rules were enacted, the vast majority of players have chosen to play NCAA basketball, giving rise to the one-and-done phenomenon. However, as Adam Silver noted when reflecting on ten years of the current eligibility rules during his interview at the 2017 NBA Finals, the current system does not seem to be

[242] If a player is talented enough to play professionally for an international team after high school, they would certainly be talented enough to find an international team after college. However, if a high school player chose to go to college with an international offer on the table, they'd be running the risk that they get injured or struggle academically, possibly spoiling a professional career entirely.
[243] Berkman, *supra* note 236.
[244] *See* Hendrick, *supra* note 51, at 541.

working for anyone involved, and, in the wake of the FBI investigation into NCAA basketball, a change to the eligibility rules appears inevitable.[245]

Unless team owners are able to strong-arm players during negotiations (which seems unlikely given victories the NBPA has scored in recent negotiations),[246] it seems unlikely that the eligibility rules will become more restrictive through an increase to the age minimum. However, if an increase were to happen at the expense of prospective players, the NCAA and international teams would be the biggest beneficiaries as top prospects would be forced to find longer-lasting alternatives to the NBA.

Given the NBA's recent efforts to expand the G-League with the introduction of two-way contracts which allow teams to maintain control of younger prospects without keeping them on an NBA roster, it seems much more likely that the age minimum will be reduced to eighteen and the eligibility rules are returned to their pre-2005 state. For the age minimum to be reduced, the NBA must first take steps to establish the G-League as a true minor league. Depending on how two-way contracts are received, the NBA could give each team more two-way roster slots. Under this system, top prospects currently planning to leave college after their freshman season could get drafted into the NBA straight from high school, while other eighteen-year-olds would have the options of attending college, getting drafted and signed to a two-way contract, or signing with a G-League team directly from high school and declaring for the Draft the following year.

While such a change might discourage some top high school players from playing NCAA basketball, plenty of players would continue to attend college and the NCAA's on-court product might actually improve with more roster continuity from season to season. In fact, as was the case pre-2005, players who chose to attend college would be more likely to stay in school long enough to finish a degree before declaring for the NBA. Returning the age minimum to eighteen would have its most detrimental effect on the international market, as top prospects would no longer have an incentive to play overseas, and the experiment of top high school players turning pro overseas would likely end. Nonetheless, under such a system,

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[245] Adam Silver, Press Conference at 2017 NBA Finals, *supra* note 38.

[246] *See* Jeff Zillgitt, *Chris Paul Trade, Phil Jackson Saga Reinforce Power of NBA Players*, USA TODAY (June 28, 2017), https://www.usatoday.com/story/sports/nba/2017/06/28/chris-paul-trade-phil-jackson-saga-reinforce-power-nba-players/437496001/#; *see also* David Aldridge, *Young Players, Rising Stars Could Benefit Most from New CBA Deal*, NBA.COM (Dec. 19, 2016), http://www.nba.com/article/2016/12/19/morning-tip-who-benefits-most-new-cba-players-owners-tv-revenue#/.

players who cannot make it to the NBA and who do not want to fight for a roster spot in the G-League would still sign with international teams, as is the case currently.[247]

Regardless, until some change is made to the NBA eligibility rules, top high school players are left with the three options noted above. Until there are more international success stories, successful examples of players like Darius Bazley entering the G-League directly from high school, or G-League salaries are increased, the vast majority of players will continue to choose to play NCAA basketball during their gap year, and the one-and-done phenomenon will continue.

B. Current State and Future of Women's Basketball

Under the current version of the WNBA's eligibility rules, the only options available for top amateurs after high school are to either play NCAA basketball for four years or until graduation or play professionally with an international team. Even though these rules are very restrictive, in the sense that they prevent adult women from playing professional basketball in the United States until four years after their high school graduation, there likely will not be a challenge to the eligibility rules under either antitrust or labor law until playing in the WNBA becomes more desirable. Transforming the WNBA into a more desirable destination starts with increasing average salaries.

The WNBA needs to find a way to generate more revenue so that they can afford to pay higher salaries to its players. While it is hard to imagine a future where the WNBA drives as much revenue as the NBA, the league should at least be able to afford to pay its players as much as top international leagues are offering. When players can make a lucrative payday by playing in the WNBA, it is more likely that top eighteen to twenty-one-year-olds will attempt to enter the league early and challenge the restrictive eligibility rules, as was the case with Spencer Haywood and Maurice Clarett. As discussed *supra* in Section II, an antitrust or labor law challenge to the WNBA's eligibility rules may not be successful in court, but the pressure of a lawsuit might cause the league to be more willing to make concessions and loosen the eligibility rules during the collective bargaining process.

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[247] *Ex US Colleges Players Overseas by Team*, US BASKET, http://www.usbasket.com/ncaa1/Ex-NCAA-D1-Basketball-Players.asp (last visited Mar. 28, 2018).

If the eligibility rules were loosened, it is unclear how much the WNBA's age minimum would be decreased. It seems unrealistic for the WNBA to eliminate their age minimum entirely, especially since they do not have a history of allowing eighteen-year-olds into the league. Further, such a change would diminish the importance of attending college to prepare for a career after basketball, something that is very important when there are only 144 roster spots available in the twelve-team WNBA. Perhaps the WNBA should reduce the age minimum for U.S. players to twenty, so that it mirrors the rule for international prospects. This change would provide an early out for college players who feel they are ready to play professionally, while still encouraging players to go to college and get an education. Two years is enough time to earn an associate's degree for top players, and the vast majority of other players would still play NCAA basketball for four years, even with higher WNBA salaries.

Regardless of which change to the WNBA's eligibility rules would work best, the future of women's professional basketball in the U.S. depends on higher WNBA salaries. If salaries remain stagnant, it is highly unlikely that the eligibility rules will be formally challenged, and more players might follow Diana Taurasi's example and skip the WNBA season entirely to earn a much higher salary with an international team. Exactly how the WNBA can increase revenue and interest in the league remains to be seen, but until then, top amateurs will continue to play NCAA basketball for four years before turning pro.

THE SEVENTH-INNING STRETCH[ER]?: ANALYZING THE ANTIQUATED "BASEBALL RULE" AND HOW IT GOVERNS FAN INJURIES AT MAJOR LEAGUE BASEBALL GAMES

By: Chris Breton[*]

ABSTRACT

Fan injuries at Major League Baseball games have been an issue for more than a century. Courts have heavily relied on stare decisis in deciding cases involving fans injured by foul balls but have largely ignored the ever-changing realities of the game. Players are bigger, faster, stronger, and bats shatter with an increasing risk of harm. Through the prevalence of cell phone use—and stadiums maximizing the technological and theatrical aspects of attending a baseball game—fans are routinely and deliberately distracted during play. Despite this, fans that are injured have little to no recourse through the judicial system because of the assumption of the risk doctrine and the accompanying "baseball rule." Some states have enacted legislation giving even greater protection to stadium operators. Historically, Major League Baseball has been reluctant to alter its approach on fan protection as the game is rooted in a tradition that is difficult to change. However, with several high-profile incidents in past seasons, Major League Baseball revised its stance and the Commissioner introduced increased netting protection recommendations. Although the policy was not a league-wide mandate, the introduced guidelines have since been instituted by team owners. However, this has not sufficiently stopped injuries from occurring and consequently, alternative remedies—such as further expansion of the netting, reworking the legal standard for recourse, or a baseball arbitration system for fans—are necessary to lessen or eradicate the impact of the archaic baseball rule that governs fan injury litigation today.

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I. INTRODUCTION

"About 1,750 spectators get hurt each year by errant balls, mostly fouls, at major-league games. This means that it happens at least twice every three games. That's more often than a batter is hit by a pitch."[1] Baseball stadiums have evolved substantially over the past 100 years. For instance, original baseball stadiums did not incorporate netting, leading to the area behind home plate being labeled as the slaughter-pen as fans would routinely be injured by foul balls and broken bats.[2] As the game has evolved, courts have recognized the necessity in protecting fans, albeit in a very limited fashion. Most courts, but not all, adhere to a limited duty of care frequently called the "baseball rule."[3] Although the baseball rule differs slightly between state laws, the general rule offers a two-prong requirement for stadium owners: (1) the owner must screen the most dangerous section of the field (the area the judiciary believes to be behind home plate); and (2) the screening must be sufficient for spectators who may be reasonably anticipated to want protected seats.[4] This duty of care owed to fans is generally lower than the reasonable duty of care most owners are held to in a business-invitee tort standard.[5] A fan attending a baseball game is more vulnerable to an injury by a batted ball than a player is, yet the archaic baseball rule will severely limit the ability for that fan to recover for injuries sustained.

There is no governing body that currently has total authority to regulate fan injuries in Major League Baseball. Major League Baseball Commissioner Rob Manfred has maintained that baseball teams are free to regulate as they see fit in their own stadiums.[6] However, the judiciary, state and federal legislatures, and Major League Baseball all have the ability to establish sufficient fan safety regulations. Part II of this article focuses on the crippling effects an injured fan may incur, with examples of such injuries. Part III examines the development of the baseball rule and different approaches taken by the judiciary and state legislatures. Part

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[1] Complaint at 2, Payne v. Office of the Com'r of Baseball, No. 4:15-cv-03229-SC (N.D. Cal. July 13, 2015) (citing David Glovin, *Baseball Caught Looking as Fouls Injure 1,750 Fans a Year*, BLOOMBERG BUSINESS (Sept. 9, 2014, 3:05 PM), http://www.bloomberg.com/news/articles/2014-09-09/baseball-caught-looking-as-fouls-injure-1-750-fans-a-year [hereinafter Complaint].

[2] *Id.* at 7-8.

[3] Matthew J. Ludden, *Take Me Out to the Ballgame ... but Bring a Helmet: Reforming the "Baseball Rule" in Light of Recent Fan Injuries at Baseball Stadiums*, 24 MARQ. SPORTS L. REV. 123, 124 (2013).

[4] Akins v. Glens Falls City Sch. Dist., 424 N.E.2d 531, 533 (N.Y. 1981).

[5] Ludden, *supra* note 3, at 124.

[6] *See generally id.*

IV analyzes Major League Baseball's approach to fan injuries and the new recommendations that have been made and instituted by teams. Part V explores injuries that have occurred after the recommendations had been made by Major League Baseball. And Part VI looks at possible solutions in shifting away from the baseball rule and towards increased protection and recovery for fans.

II. PREVIEWING THE DEVASTATING EFFECTS OF FAN INJURIES

Although Major League Baseball has instituted new recommendations for protective screening at stadiums—extending the protective screening to the side of the dugout closest to home plate—the recommendations were not mandated and have not sufficiently prevented fan injuries from occurring.[7] From a purely financial standpoint, there is little motivation for Major League Baseball to require expanded screening beyond the recommendations because of the near immunity permitted by the baseball rule. The baseball rule, developed in *Akins v. Glens Falls City School District*, only requires stadium owners to screen the area behind home plate and ensure there are enough protected seats for fans that could be reasonably anticipated to want them.[8] Fans in all other areas assume the risk. The baseball rule originates from the notion of *volenti non fit injuria* or "to a willing person, injury is not done."[9] Historically, the judiciary's view is that the dangers of being struck by a foul ball are obvious, as Justice Cardozo explained, "One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious . . . just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball."[10] While Major League Baseball's new recommendations offer slightly more protection to fans, the recommendations do nothing to disrupt the judiciary's position. Consequently, if stadium owners have the section behind home plate adequately screened off then both the owner and Major League Baseball are protected from liability. As a result, injured fans are forced to seek recovery for damages through a judicial system that has been historically unsympathetic.[11]

The devastating effects of fan injuries are apparent from the wealth of examples that exist—examples that are not exclusive to Major League Baseball games. For example, on March 16, 2002, 13-year-old Brittanie

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[7] *See infra* Section IV(B).
[8] *See* Akins, 424 N.E.2d at 531.
[9] Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929).
[10] *Id.*
[11] *See infra* Section III(A).

Cecil was attending a National Hockey League game at the Nationwide Arena in Columbus, Ohio when she was struck by an errant puck.[12] The force of the impact snapped her head back, causing severe damage to an artery in her neck.[13] Cecil eventually succumbed to her injuries, dying two days later.[14] In June of that year, NHL Commissioner Gary Bettman quickly reacted to Cecil's death and instituted increased protective screening behind each goal.[15] In response to fan complaints about the obstructed view he simply said, "after three minutes, people don't know it's there."[16] The NHL later settled a lawsuit with Cecil's parents for $1.2 million.[17]

An example of a fatal injury at a Major League Baseball game occurred on May 16, 1970, when 14-year-old Alan Fish was struck above the left ear by a line drive foul ball at a Los Angeles Dodgers game.[18] The adult he was with stated that Fish "remained slumped forward with his chin on his chest, 'out like a light,' for approximately one minute."[19] The boy then "stretched and groaned and commenced speaking in an unintelligible fashion … followed by a period during which he stuttered and was unable to speak without long pauses between words."[20] After ballpark emergency first aid determined that he was okay to go back to his seat, his body language seemingly returned to normal and he watched the remainder of the game.[21] After the game, his condition worsened considerably and he was taken to the hospital where he ultimately died four days later.[22] An autopsy confirmed that the impact of the baseball caused a hairline skull fracture, which led to Fish's brain tissue being contused and lacerated by the displaced portions of his fractured skull.[23] The impact induced intracerebral

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[12] John Esterbrook, *Girl Killed by Stray Hockey Puck*, CBS NEWS (Mar. 19, 2002, 4:09 PM), http://www.cbsnews.com/news/girl-killed-by-stray-hockey-puck/.
[13] *Id.*
[14] *Id.*
[15] *See* Bob Nightengale, *Nightengale: MLB Must Increase Netting at All Ballparks*, USA TODAY SPORTS (June 7, 2015, 11:49 PM), http://www.usatoday.com/story/sports/mlb/2015/06/06/broken-baseball-bat-fan-feway-park-netting-maple-bats/28611829/.
[16] Chris Hine, *Fan's Death Led to NHL's Protective Netting Policy*, CHI. TRIBUNE (Aug. 1, 2015, 8:24 AM), http://www.chicagotribune.com/sports/hockey/blackhawks/ct-nhl-fan-safety-spt-0802-20150801-story.html.
[17] Associated Press, *Settlement from NHL and Others Released*, ESPN (Apr. 14, 2004), http://sports.espn.go.com/nhl/news/story?id=1782097.
[18] Fish v. L.A. Dodgers Baseball Club, 128 Cal. Rptr. 807, 811 (1976).
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 811-12.
[23] *Id.*

hemorrhage, killing him.[24] Major League Baseball did nothing to increase screening protection following this incident. The family sued the Dodgers for "failure to provide the decedent 'with a safe place to witness the ball game'" and for wrongful death as a result of the attending doctor's negligence.[25] The lower court granted the defendant's motion for nonsuit on the cause of action for failure to provide a safe place to witness the baseball game.[26] In the end, there was little discussion about the safety of the ballpark in the *Fish* case. But primarily, both the Cecil and the Fish incidents show the perilous dangers fans face when stadiums lack adequate safety netting.

There have been so many fan injuries at Major League Baseball games both before and after the death of Alan Fish that it would be a futile exercise to attempt to list them all.[27] A recent injury that may have provided the impetus for Major League Baseball's new policy recommendations happened in the 2015 season at a Boston Red Sox game. The injury occurred when 44-year-old Tonya Carpenter was struck in the face by a shattered bat after Oakland Athletics third basemen Brett Lawrie's wooden bat splintered and flew into the stands.[28] Carpenter was with her young son and sitting in an area of the stadium not protected by screening.[29] Carpenter's injuries were so excruciating that her screams could be heard throughout the ballpark.[30] And the blood from her face was so severe that Red Sox centerfielder Mookie Betts had to turn away.[31] Carpenter had surgery and recovered, but the severity of the damage was considered life-threatening at the time.[32] Prior to the incident, there had been much discussion about the hazards of maple bats, and this occurrence served to

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[24] *Id.*

[25] *Id.* at 810 (the doctor directed the emergency medical facility at the stadium and the Dodgers were included under this theory as being the principal responsible for the negligence of its agent).

[26] *Id.*

[27] However, for an attempted detailed account see Exhibit B of Complaint, *supra* note 1, at 2-20.

[28] ESPN News Services, *Woman Injured by Broken Bat at Fenway Park Remains in Serious Condition*, ESPN (June 8, 2015), http://espn.go.com/mlb/story/_/id/13024139/woman-injured-boston-red-sox-game-serious-condition [hereinafter *Woman Injured by Broken Bat*]; *see also* Ludden, *supra* note 3, at 125 (A fan was struck by shards of a baseball bat at a Los Angeles Dodgers baseball game, causing a concussion and two jaw fractures. The injury resulted in over $7000 of medical bills that the Dodgers refused to pay, relying on the baseball rule and the assumption of the risk doctrine).

[29] *See Woman Injured by Broken Bat*, *supra* note 28.

[30] Nightengale, *supra* note 15.

[31] *Id.*

[32] *Woman Injured by Broken Bat*, *supra* note 28.

elevate the scrutiny on that particular kind of bat.[33] But more importantly, this incident has led to discussions on increased netting and fan protection.

After the incident, Commissioner Manfred stated he would "react strongly" to the event and went on to say, "when you have an issue like this, an incident like this, you have to go back and re-evaluate where you are on all of your safety issues, and trust me, we will do that …."[34] Commissioner Manfred also stated, "fan safety is our foremost goal for all those who choose to support our game by visiting our ballparks, and we will always strive for that experience to be safe and fan-friendly."[35] It should be noted that Carpenter's friends set up a "GoFundMe" page—a crowdfunding platform that allows people to raise money for others—to help pay for the costs of her recovery; further evidencing the inability of injured fans to recover damages from stadium operators, team owners, or Major League Baseball.[36]

III. ANALYZING THE JUDICIARY AND STATE LEGISLATURE'S POSITIONS

The issue of fan injuries at baseball games has been fiercely litigated for over a century.[37] Because Major League Baseball has failed to institute a strict policy relating to fans injured by foul balls and broken bats, most of the issues have fallen to the judiciary. Although some courts have delegated that job to state legislatures, the majority of courts still follow the baseball rule. This rule has failed to adapt with the changing nature of the game.

A. The Development of the Baseball Rule

One of the earliest cases addressing fan injuries at a baseball park was the 1908 Supreme Court of Michigan case, *Blakeley v. White Star Line*.[38] In *Blakeley*, the court held that a spectator's voluntary position in the stands, and their common knowledge of the game relating to balls and bats reaching them in that position, was an assumption of the risk.[39] In 1913,

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[33] Billy Baker, *Fenway Incident Puts Scrutiny Back on Maple Bats*, BOSTON GLOBE (June 9, 2015), https://www.bostonglobe.com/sports/2015/06/08/fenway-incident-puts-scrutiny-back-maple-bats/DTSOKWj3kR6621Fevq9wnN/story.html.

[34] Jeffri Chadiha, *Scary Fenway Incident Puts Fan Safety in Spotlight,* ABC NEWS (June 9, 2015), http://espn.go.com/mlb/story/_/id/13044333/scary-incident-fenway-park-puts-baseball-fan-safety-spotlight.

[35] Complaint, *supra* note 1, at 29.

[36] *Woman Injured by Broken Bat*, *supra* note 28.

[37] *See infra* Section III(A).

[38] Blakeley v. White Star Line, 118 N.W. 483 (Mich. 1908).

[39] *Id.*; *see also* Gil Fried & Robin Ammon Jr., *Baseball Spectators' Assumption of*

the Missouri Court of Appeals in *Crane v. Kansas City Baseball and Exhibition Co.*, held that a fan who voluntarily sits in a seat to avoid the obstruction of vision from protective netting assumes the risk and should not be allowed to recover "since his own contributory negligence is apparent and indisputable."[40] In 1935 and keeping with the decision of *Crane*, the Supreme Court of California in *Quinn v. Recreation Park Ass'n*, cited *Edling v. Kansas City Baseball & Exhibition Co.*, holding that only ordinary care must be exercised to protect fans from injuries—management does not have to screen all sections—and owners are not required to provide screened seats for every patron, but only to provide screened seats for as many fans as may be reasonably expected to ask for them.[41] If a patron cannot find a screened seat and instead chooses to sit in an unprotected seat, he assumes the risk and is precluded from recovering damages for any injuries sustained.[42]

Fan injury litigation continued in this thread for several years, which saw the development of the baseball rule. In 1981, the Court of Appeals of New York developed a two-prong requirement in *Akins v. Glens Falls City School District*, holding that "the owner must screen the most dangerous section of the field—the area behind home plate—and the screening that is provided must be sufficient for those spectators who may be reasonably anticipated to desire protected seats on an ordinary occasion."[43] Although there is some difference among state courts in relation to the baseball rule, this two-prong requirement is generally held as the standard in determining liability for stadium owners.[44]

It should be noted that despite the baseball rule's focus on the area behind home plate, most incidents occur down the first and third base lines. One case, *Costa v. Boston Red Sox Baseball Club*, shows the difficulties fans face when trying to avoid line drive foul balls that are hit towards that area. In *Costa*, Jane Costa was seated in an unscreened section down the first base line and was struck in the face by a foul ball, causing severe and

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Risk: Is It "Fair" or "Foul"?, 13 MARQ. SPORTS L. REV. 39, 40 (2002); Mohit Khare, *Foul Ball! The Need to Alter Current Liability Standards for Spectator Injuries at Sporting Events*, 12 TEX. REV. ENT. & SPORTS L. 91, 92 (2010).

[40] Crane v. Kan. City Baseball & Exhibition Co., 153 S.W. 1076, 1078 (Mo. Ct. App. 1913); Fried & Ammon Jr., *supra* note 39, at 40-41.

[41] Quinn v. Recreation Park Ass'n, 46 P.2d 144, 146 (Cal. 1935); Fried & Ammon Jr., *supra* note 39, at 40-41.

[42] Fried & Ammon Jr., *supra* note 39, at 40-41.

[43] Akins, 424 N.E.2d at 533.

[44] Khare, *supra* note 39, at 93-94.

permanent injuries.[45] Costa retained the services of a professional engineer to testify to the virtual impossibility of evading a foul ball when sitting in that area.[46] The engineer, using a range finder, determined the distance from her seat to home plate was forty-seven yards, or 141 feet.[47] He then studied videotape of the game and concluded that the minimum speed of the baseball when it struck Costa was ninety miles per hour, or 132 feet per second.[48] He concluded that Costa had a mere 1.07 seconds to react and take evasive actions after the ball was hit, making it effectively impossible to avoid the ball.[49]

In *Davidoff v. Metropolitan Baseball Club, Inc.*, a 14-year-old girl, sitting down the first base line was struck in the eye by a foul ball at a game at Shea Stadium.[50] She suffered serious injuries and lost the vision in one eye.[51] Her seat was protected by a mere three foot high fence.[52] The same Court of Appeals of New York that developed the two-prong baseball rule requirement in *Akins* held that she could not recover because there were screened sections available behind home plate and that fans choose to sit in unscreened sections of the field to satisfy their desire to see the game unobstructed.[53] A sharply written dissent by Chief Judge Cook—which perfectly sums up the absurdity of the baseball rule—highlighted the irrational logic of it, arguing "it cannot be said as a matter of law that plaintiff here was exposed to any less of a risk than that experienced by a spectator sitting 20 rows behind home plate, where protective screening is required."[54]

Similarly, in *Friedman v. Houston Sports Ass'n*, an 11-year-old girl, again sitting down the first base line, was struck near her right eye by a foul ball.[55] The jury found that the stadium operator was negligent for failing to warn of the dangers of being struck by a baseball when sitting down the first base line.[56] The jury awarded Karen Freidman and her father

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[45] Costa v. Bos. Red Sox Baseball Club, 809 N.E.2d 1090, 1091 (Mass. App. Ct. 2004).
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Davidoff v. Metro. Baseball Club, Inc., 463 N.E.2d 1219, 1220 (N.Y. 1984).
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at 1221.
[55] Friedman v. Hous. Sports Ass'n, 731 S.W.2d 572, 573 (Tex. App. 1987).
[56] *Id.*

$55,000 in actual damages and $125,000 in punitive damages.[57] However, the trial judge awarded the defendant's motion for judgment notwithstanding the verdict, invoking the baseball rule and emphasizing the fact that Freidman chose to sit in an unscreened portion of the stadium.[58]

B. A Minority Rejection of the Baseball Rule

The United States Supreme Court has never addressed the baseball rule. But while the majority of state courts follow the rule, there is a minority that have rejected it. This rejection has mainly been limited to courts in Idaho, Indiana, and New Mexico.[59] For example, in *Rountree v. Boise Baseball, LLC*, the Supreme Court of Idaho, citing a district court opinion, stated that baseball stadium owners will be held to the same standard that all business owners are held to, "the duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others."[60] Consequently, the court refused to adopt the baseball rule, instead agreeing with the district court that it is up to the legislature to adopt that kind of rule as the legislature is much more in tune with the public policy considerations involved in the issue.[61] The court then cited several state laws that had been enacted in various jurisdictions to address the issue.[62]

In *South Shore Baseball, LLC v. DeJesus*, the Supreme Court of Indiana rejected the baseball rule, asking, "But are stadiums and franchises, by virtue of baseball's status as our national pastime, governed not by our standard principles of premises liability but rather entitled to a special limited-duty rule? We think not."[63] The court rejected the notion that any sport, even baseball, should be given special treatment and subject to a special rule of liability.[64] Similar to the decision in *Rountree*, the court also held that fan injuries are a public policy issue best resolved by the

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[57] *Id.*
[58] *Id.* at 573-75.
[59] Ed Edmonds, *Baseball Needs to Reduce the Risk of Fan Injury*, CHI. TRIBUNE (Aug. 24, 2015, 4:18 PM), http://www.chicagotribune.com/news/opinion/commentary/ct-baseball-fans-injuries-mlb-bat-line-drive-ball-perspec-0825-jm-20150824-story.html.
[60] Rountree v. Boise Baseball, LLC, 296 P.3d 373, 377 (Idaho 2013).
[61] *Id.* at 379 (citing Anstine v. Hawkins, 447 P.2d 677, 679 (Idaho 1968)).
[62] *Id.* (citing ARIZ. REV. STAT. ANN. § 12-554 (West 1999); COLO. REV. STAT. ANN. § 13-21-120 (West 1994); 745 ILL. COMP. STAT. ANN. 38/10 (West 1992); N.J. STAT. ANN. §§ 2A:53A-43—48 (West 2006)).
[63] S. Shore Baseball, LLC v. DeJesus, 11 N.E.3d 903, 904 (Ind. 2014).
[64] *Id.* at 909.

legislature.[65]

In *Crespin v. Albuquerque Baseball Club, LLC*, the Court of Appeals of New Mexico also declined to adopt the baseball rule.[66] The court relied on New Mexico law, supporting legal commentary, and the Restatement (Third) of Torts: Apportionment of Liability.[67] The court pointed to the direction of New Mexico law moving away from "judicially declared immunity or protectionism" and toward a universal standard of ordinary care.[68] The court was also persuaded by legal commentary criticizing the baseball rule as a "throw-back to the days when assumption of the risk was a sub-category of contributory negligence" and also claiming that the rule has failed to adapt to baseball's evolution.[69] In analyzing the Restatement (Third) of Torts: Apportionment of Liability, the court found a shift toward modern tort standards and a rejection of per se rules like the baseball rule.[70] Ultimately, recourse for fans injured at games continues to be limited by the majority baseball rule as most courts have proved to be very reluctant to go against over a century of precedent despite reasonable alternatives.

C. Legislative Responses and Responsibilities

A small number of state legislatures have already began adopting statutes for regulating baseball fan injuries.[71] Because there is no national standard, and because the Supreme Court has not spoken on the issue, every state has the power to institute regulations. The current statutes that have been enacted are much more favorable to stadium operators than the fans that are injured, and, thus, are on par with the majority baseball rule. Furthermore, the statutes are usually comprehensive and much more specific than judicial opinions. For example, an Arizona statute specifies that owners—defined as a "person, city, town, county, special district, limited liability company . . . or university that is in possession and control

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[65] *Id.*
[66] Crespin v. Albuquerque Baseball Club, LLC, 216 P.3d 827, 834 (N.M. Ct. App. 2009).
[67] *Id.*
[68] *Id.*
[69] *Id.* at 833-34 (citing Fried & Ammon Jr., *Baseball Spectators' Assumption of Risk: Is It 'Fair' or 'Foul'?*, 13 MARQ. SPORTS L. REV. 39, 54-59 (2002) (emphasizing the increased level of spectators' distraction and the high price of seats behind home plate rendering those protected seats unavailable to the casual fan)).
[70] *Id.* at 834.
[71] *See* ARIZ. REV. STAT. ANN. § 12-554 (West 1999); COLO. REV. STAT. ANN. § 13-21-120 (West 1994); 745 ILL. COMP. STAT. ANN. 38/10 (West 1992); N.J. STAT. ANN. §§ 2A:53A-43-48 (West 2006).

of a baseball team or facility in which baseball games are played"—are not liable to spectators that are injured by baseballs or other equipment used by players during a game unless the owner "does not provide protective seating that is reasonably sufficient to satisfy expectation" or "intentionally injures a spectator."[72] Note that the language in the statute concerning the protective screening basically mirrors the baseball rule.

Interestingly, Colorado passed the Colorado Baseball Spectator Safety Act of 1993, which moderately increases the duty of care that stadium owners owe to fans.[73] Although the statute increases the duty of care, the general assembly, in arguing for greater attendance by fans and families, points out that expanding liability for stadium owners could potentially increase operating costs and make tickets less affordable for fans.[74] Consequently, the statute does not increase the duty of care to a point that completely breaks away from the baseball rule. However, where the statute does differ from the baseball rule is the duty it places on the stadium owner to (1) "make a reasonable and prudent effort to design, alter, and maintain the premises of the stadium in reasonably safe condition[s] relative to the nature of the game of baseball," and (2) post and maintain required warning signs.[75] The warning signs, which are required to be placed in conspicuous locations at the entrances outside the stadium and at stadium facilities where tickets are sold, dictate:

> Warning under Colorado Law, a spectator of professional baseball assumes the risk of any injury to person or property resulting from any of the inherent dangers and risk of such activity and may not recover from an owner of a baseball team or an owner of a stadium where professional baseball is played for injury resulting from the inherent dangers and risks of observing professional baseball, including, but not limited to, being struck by a baseball or a baseball bat.[76]

Thus, although the Colorado statute requires stadium owners to make reasonable efforts to keep the stadium in a reasonably safe condition, it is evident that the stadium operators still enjoy great protection from liability.

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[72] ARIZ. REV. STAT. ANN. § 12-554 (A)(1), (2) (West 1999).
[73] COLO. REV. STAT. ANN. § 13-21-120 (West 1994); Ludden, *supra* note 3, at 134.
[74] COLO. REV. STAT. ANN. § 13-21-120(2) (West 1994).
[75] COLO. REV. STAT. ANN. § 13-21-120(5)(a)(c) (West 1994).
[76] COLO. REV. STAT. ANN. § 13-21-120(6)(a)(b) (West 1994).

The New Jersey Baseball Spectator Safety Act of 2006 is almost identical to the Colorado Baseball Spectator Safety Act of 1993. Both acts require warning signs to be posted—with very similar language—and both provide that the assumption of the risk shall be a complete bar to any lawsuit and shall serve as a complete defense for an owner sued by an injured spectator.[77] However, one difference is that the New Jersey statute explicitly states that the limited duty of providing protection to spectators is satisfied by screening the area behind home plate.[78]

Perhaps the most intriguing statute is the Illinois Baseball Facility Liability Act. The statute was enacted in reaction to a case, *Yates v. Chicago National League Ball Club*, in which an appellate court upheld a trail court's decision finding a baseball team liable for a fan's injury.[79] The fan in the case, a young boy, was struck in the face by a foul ball causing bleeding and a knot to form under his eye.[80] The young boy underwent surgery and had to stay in the hospital for five days.[81] The aftermath left him with "excruciating headaches" and severely affected his ability to continue playing baseball.[82] He prevailed in his lawsuit on the theory that the defendant was (1) negligent in providing adequate screening in the area behind home plate, and (2) negligent in failing to warn as to allow him to avoid harm.[83] The Illinois statute was enacted quickly after the case was decided.[84]

The language of the Illinois statute is markedly different from other state legislation relating to baseball stadium liability. Unlike the Arizona, Colorado, and New Jersey statutes, the Illinois statute limits the liability of stadium owners unless, (1) the screen or netting is defective—in a manner other than width or height—because of the negligence of the stadium owner or baseball facility or (2) the injury is caused by willful and wanton conduct—defined as "actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property."[85] And unlike Colorado or New Jersey, Illinois baseball stadiums are not required to post warning signs

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[77] COLO. REV. STAT. ANN. §§ 13-21-120(4)(b), (6)(a)(b) (West 1994); N.J. STAT. ANN. §§ 2A:53A-46(b)(1), -48(6)(a) (West 2006).
[78] N.J. STAT. ANN. § 2A:53A-47(5)(b) (West 2006).
[79] Ted J. Tierney, *Heads Up! The Baseball Facility Liability Act*, 18 N. ILL. U. L. REV. 601, 608 (1998) (citing Yates v. Chi. Nat'l League Ball Club, 595 N.E.2d 570, 573 (Ill. App. Ct. 1992)).
[80] Yates, 595 N.E.2d at 573.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] Tierney, *supra* note 79, at 601.
[85] 745 ILL. COMP. STAT. ANN. 38/5, 38/10 (West 1992).

alerting fans to their assumption of the risk at the stadium.[86] Essentially, these various statutes, while worded differently in some aspects, all have a common thread; they severely limit recovery for fans that are injured at stadiums unless the fan can prove the stadium operator failed to reasonably maintain the premises, was grossly negligent, or failed to provide adequately protected seating.

IV. MAJOR LEAGUE BASEBALL'S RESPONSE TO THE ISSUE

A. Major League Baseball's Debate on Fan Safety

Although fans have been resistant to increased netting protection, Major League Baseball responded to the wave of fan injuries in the 2015 season and recognized the need for a new policy.[87] Nevertheless, this initiative was not without a historical reluctance. John McHale, Major League Baseball's executive vice-president who oversees stadium security stated, "there is no epidemic of foul ball damage that would warrant some sort of edict of action by the Commissioner's office."[88] Commissioner Manfred also stated,

> We are engaged in really detailed examination of the 30 different ballparks and how they are laid out . . . [and] what we would have to do from a netting perspective in order for it to be effective. We're looking at the different materials that are available for netting. I know this sounds crazy, but there have been real advances in netting and how you see through it. The biggest challenge for us is that our ballparks are really different.[89]

Prior to a 2015 Major League Baseball owner's meeting in Dallas, Commissioner Manfred said that a simple rule to remedy fan injuries is difficult to achieve, given the variations in stadium designs.[90] He argued

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[86] *Id.* (absence language in the statute requiring stadium owners to post warning signs).
[87] *See* Edmonds, *supra* note 59 (in addition to Tonya Carpenter's injury, there were at least five other incidents).
[88] Complaint, *supra* note 1.
[89] Jayson Stark, *Commissioner Rob Manfred Talks About Difficulty of Improving Slide Rule*, ESPN (Oct. 13, 2015), http://espn.go.com/mlb/playoffs2015/story/_/id/13881339/2015-mlb-playoffs-commissioner-rob-manfred-talks-difficulty-improving-slide-rule.
[90] Peter Abraham, *MLB to Consider Adding More Protective Netting at Ballparks*, BOS. GLOBE (Nov. 10, 2015), http://www.bostonglobe.com/sports/2015/11/10/mlbnets/CMDbyNEaGE4JyJlLlV3etM/story.html.

that a uniform net to the edges of the dugout is not possible because of the differences in the ballparks across the league.[91]

One of the difficulties, apart from the difference in ballpark structure, is the notion that increased netting will alter the fan experience. Commissioner Manfred has stated, "There's a big issue on one side, which is fan safety. It's paramount for us … on the other side of it is, you're changing the ballpark experience … you want to find a way to balance the two that's appropriate."[92] The main argument to refute that reasoning is the fact that many of the highest priced tickets are behind home plate, an area that is totally protected by netting. Arizona Diamondbacks reliever Brad Zeigler, a member of the negotiating committee for the player's union, echoes this refutation:

> [The owners] seem afraid that fans will lose access to the players—autographs, getting baseballs, etc. . . . —and that will cause those ticket holders to be unhappy. Or, that they'd have to watch the game through a net. [But] fans behind home plate pay the highest prices, have the same issues, and yet those seats are always full.[93]

Several other Major League Baseball players have discussed the increased netting issue.[94] After a fan was struck by a foul ball at a Detroit Tigers game All-Star pitcher Justin Verlander lobbied that increased netting "needs to be addressed immediately" and appealed to the league to do something "before it's too late."[95] Verlander's teammate, Nick Castellanos, echoed this concern, stating, "nets need to go up all around baseball, without a doubt … if today doesn't get nets up, what is it going to take?"[96] Carlos Villenueva, a players union representative, stated that there should be more protection because of the age gap between fans that attend games and the inability for

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[91] *Id.*

[92] Nightengale, *supra* note 15.

[93] Ken Rosenthal, *MLB Players: Broken-Bat Injury Could Have Been Prevented*, FOX SPORTS (June 7, 2015, 8:23 AM), http://www.foxsports.com/mlb/story/boston-red-sox-fenway-park-mlb-broken-bat-injured-fan-safety-netting-060715.

[94] *See* ESPN News Services, *Justin Verlander Cautions MLB: Extend Netting 'Before it's Too Late'*, ABC NEWS (Aug. 22, 2015, 12:23 AM), http://abcnews.go.com/Sports/justin-verlander-cautions-mlb-extend-netting-late/story?id=33243239. (Justin Verlander, Nick Castellanos arguing for increased netting) [hereinafter *Justin Verlander Cautions MLB*]; Rosenthal, *supra* note 93 (Brad Zeigler, CJ Wilson, and Chris Capuano discussing the netting issue); Complaint, *supra* note 1, at 26 (Derek Holland discussing the netting issue).

[95] ESPN News Services, *supra* note 94.

[96] *Id.*

even normal aged fans to react to a 100mph ball being hit into the stands.[97] A class action lawsuit against Major League Baseball and Commissioner Manfred alleges that many injuries could have been prevented if Major League Baseball had listened to the players proposals for increased netting down the first and third base line during labor agreements in 2007 and 2012.[98]

An incident that took place at the Texas Ranger's ballpark shows the fact that Major League Baseball teams themselves have the ability to increase regulations. On July 7, 2012, 39-year-old Shannon Stone fell over a guardrail in left-center field at a Texas Rangers game after reaching for a ball thrown into the stands by Ranger's player Josh Hamilton.[99] The height of the guardrail was below Stone's waist and he fell twenty feet to a concrete floor below.[100] He died as a result of his injuries.[101] The Texas Rangers subsequently inspected the ballpark's railings and decided to raise the railing height in the front row to forty-two inches.[102] This safety improvement cost the team just over one million dollars.[103] The Ranger's swift response closely parallels the reaction by the NHL after Brittanie Cecil's death.[104] Although it is understandable for Major League Baseball and its teams to place fan enjoyment at a premium, fan enjoyment should certainly not outweigh fan safety.

B. Major League Baseball Responds

Finally, after much debate on the issue, and roughly seven months after Tonya Carpenter's injury, Major League Baseball introduced new recommendations for fan protection which began in the 2016 season. The

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[97] Paul Sullivan, *Baseball Debates Adding Netting for Fan Safety or Sticking to Status Quo*, CHI. TRIBUNE (Aug. 2, 2015, 9:20 AM), http://www.chicagotribune.com/sports/baseball/ct-fan-safety-cubs-white-sox-spt-0802-20150801-story.html.

[98] Complaint, *supra* note 1, at 27; *see also* Rosenthal, *supra* note 93 ("the owners, however, rejected the proposals for the 2007 and 2012 labor agreements, citing concerns that additional netting would detract from the experience…."); Sullivan, *supra* note 97 (quoting Carlos Villenueva, "in the last two rounds of collective bargaining we've made proposals to increase netting … we've gotten some resistance.").

[99] Ludden, *supra* note 3, at 126; Richard Durrett, *Rangers Start to Raise Railings*, ESPN (Jan. 5, 2012), http://www.espn.com/dallas/mlb/story/_/id/7428500/texas-rangers-start-raise-railings-fan-shannon-stone-death.

[100] Ludden, *supra* note 3, at 126.

[101] *Id.*

[102] Durrett, *supra* note 99.

[103] *Id.*

[104] *See* Hine, *supra* note 16.

recommendations proposed that all Major League Baseball teams should lengthen the protective netting at their stadiums.[105] Teams should either expand netting that is already in place or add some kind of extended protective barrier (plexiglass for example).[106] The recommended increase expanded the netting at least 70 feet from home plate to the near side of the dugout.[107] That is, the side of the dugout closest to home plate. The recommendations did not suggest that teams should expand the netting to cover the entire dugout. The Commissioner stated that the new policy is an attempt to strike a balance between fan interaction and fan protection.[108] Major League Baseball also said that it encourages teams to continue to educate fans about the dangers of foul balls and broken bats and remaining alert at all times in injury prone areas.[109]

However, unlike the NHL's reaction to Brittanie Cecil's death, the new Major League Baseball recommendations were not mandatory and each team had the option to ignore the guidelines.[110] It should be noted that NHL arenas follow a much more uniform design, as opposed to the unique layouts seen in Major League Baseball stadiums, making the increased protection more difficult to institute. Nevertheless, the owners reaction to Major League Baseball's proposed guidelines was enthusiastic and several teams immediately stated they would adopt the new recommendations.[111] The Philadelphia Phillies, Los Angeles Dodgers, Chicago Cubs, Texas Rangers, and Tampa Bay Rays all announced their intention to comply with the new policy.[112] The Phillies planned to comply both at their home stadium and spring training stadiums.[113] The expansion at the Phillies stadium only required them to expand the netting approximately ten feet on each side.[114] Perhaps most important for the future of protective netting, the Phillies planned to replace all screening with a newer material that is

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[105] Paul Hagen, *MLB Recommends Netting Between Dugouts*, MLB.COM (Dec. 9, 2015), http://m.mlb.com/news/article/159233076/mlb-issues-recommendations-on-netting.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] Joe Nocera, *Baseball Has a New Policy on Netting, But There's a Catch*, N.Y. TIMES (Dec. 18, 2015), http://www.nytimes.com/2015/12/19/sports/baseball/baseball-has-a-new-policy-on-netting-but-theres-a-catch.html?_r=0.
[111] Hagen, *supra* note 105.
[112] *Id.*; *see also* Associated Press, *Rangers Add More Protective Netting at Ballpark*, ESPN (Feb. 18, 2016), http://espn.go.com/mlb/story/_/id/14801353/texas-rangers-extend-safety-netting-dugouts.
[113] Hagan, *supra* note 105.
[114] *Id.*

stronger and more transparent.[115] In the future, advanced netting technology should be the cornerstone of Major League Baseball's protection policies.

Some teams, such as the Cincinnati Reds, Houston Astros, and Minnesota Twins already met the standards recommended and thus did not have to make any changes.[116] However, the Minnesota Twins, whose lower-level seats are closer to home plate than any other stadium, planned to go above and beyond the recommendations.[117] The Twins opted to install protective screening that ran the length of both dugouts and extend roughly seven feet high.[118] The President of the Twins, Dave St. Peter, recognized the necessity in expanded nets by reminding that "based on the proximity of those seats, the reaction time above our dugouts, particularly in those first few rows, is quite limited."[119] Like the Phillies, the Twins also plan to take advantage of the newest screening technology available.[120] Ultimately, after the 2016 recommendations, sixteen teams added netting to the inner edge of the dugout.[121] Three teams—the Kansas City Royals, Minnesota Twins, and Washington Nationals—went beyond the recommendations by Major League Baseball and extended the netting to the outer edge of the dugout.[122] Eleven teams already met the requirements that were advised in the recommendations.[123] In February 2018, Major League Baseball announced that all thirty teams would extend the protective netting at their stadiums "to at least the far end of each dugout."[124] This response came on the heels of several other incidents that occurred after the recommendations were made by Major League Baseball.

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[115] *Id.*
[116] *Id.*
[117] Associated Press, *Minnesota Twins to Add Protective Netting Above Dugouts*, USA TODAY SPORTS (Dec. 16, 2015, 5:46 PM), http://www.usatoday.com/story/sports/mlb/2015/12/16/minnesota-twins-adding-protective-netting-above-dugouts/77429898/.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] Claire McNear, *The New Era of Baseball's Protective Nets*, SB NATION (last visited Jan. 15, 2018), http://www.sbnation.com/a/mlb-preview-2016/nets.
[122] *Id.*
[123] *Id.*
[124] Tom Schad, *All 30 Teams Will Extend Protective Netting This Season*, USA TODAY SPORTS (Feb. 1, 2018, 12:23 PM), https://www.usatoday.com/story/sports/mlb/injuries/2018/02/01/mlb-teams-extend-protective-netting-season/1086019001/.

V. POST-RECOMMENDATION INCIDENTS

While the heightened awareness surrounding injuries at Major League Baseball games has been a step in the right direction—and while all teams will now institute the recommendations—none of this has stopped incidents from occurring both at stadiums that have adopted the recommendations and stadiums that did not initially adopt the recommendations. For example, on July 3, 2016, Patricia Dowdell was struck by the bat of Orioles hitter Chris Davis when he lost his grip on it.[125] The bat flew into the fourth row where it struck Dowdell in the head, inducing injuries including "skull and orbital fractures and brain swelling."[126] Dowdell ultimately filed a lawsuit against the Orioles seeking more than $75,000 in damages in addition to an injunction against the team to require the installation of netting to the outfield side of each dugout.[127] Dowdell also claimed that she was unaware that bats could even fly into the stands and injure spectators, stating "[h]onest to God, I had no idea a bat could fly into the stands."[128] Her lawsuit is still pending.

Also in late-July 2016, Martha Muir West was struck by a ball hit down the right-field baseline at a Cleveland Indians game.[129] It is possible that she was momentarily blinded by the sun, but the impact broke her cheekbone and she required stitches to a cut on her cheek.[130] She eventually had to be stretchered out of the stadium.[131] Muir West had to have surgery on her eye, but she was expected to be okay.[132] It is interesting to note that in November 2013—before the recommendations from Major League Baseball—there was a lawsuit filed against the Cleveland Indians by Keith Rawlins.[133] Rawlins was struck by a baseball which broke several bones in his face and left him blind in his left eye.[134]

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[125] Jeff Barker, *Injured by Errant Bat at Orioles Game, Woman Sues for More Protection*, BALT. SUN (Apr. 21, 2017), http://www.baltimoresun.com/business/bs-bz-orioles-fan-lawsuit-20170419-story.html.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] Darcie Loreno, *Woman Hit by Foul Ball at Tribe Game to Undergo Surgery*, FOX 8 CLEV. (July 27, 2016), http://fox8.com/2016/07/27/woman-hit-by-foul-ball-at-tribe-game-to-undergo-surgery/.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *See generally* Cory Shaffer, *Jury Sides with Cleveland Indians in Suit Brought by Fan Blinded by Foul Ball*, CLEV.: METRO NEWS (Mar. 26, 2017), http://www.cleveland.com/metro/index.ssf/2017/03/jury_sides_with_cleveland_indi_1.html.
[134] *Id.*

Regarding the injury, Rawlins recounted, "[m]y face exploded … I knew what happened instantly."[135] Rawlins stated that he may still need future surgeries and may be required to use a prosthetic eye.[136] These injuries left him unable to perform his job as a tool and die machinist.[137] In March 2017, a jury returned a verdict siding with the Indians and awarding Rawlins no money.[138] Before the verdict was read, the foreman of the jury actually expressed how terribly the jury felt about the injury.[139] But ultimately it was not enough to overcome the baseball rule.

Another incident occurred on April 15, 2016 when a fan was struck in the eye by a foul ball and had to be taken out of the stadium on a stretcher.[140] The noteworthy aspect to this injury was the fact that the Tampa Bay Rays had increased the netting as per the league recommendations, however, the fan was struck when the ball came through a gap in the protective netting in an area for photographers.[141] The Rays remedied this gap the next day.[142] Although the odds of her being hit where she was sitting were low, due to the netting and only an exposed gap, this incident serves to show how diligent Major League Baseball teams needs to be when it comes to addressing the screening issue. Even simple gaps in the netting protection can lead to significant injuries.

At a Philadelphia Phillies game on August 20, 2016—after the recommended protection was put in place—Phillies shortstop Freddy Galvis hit a line drive into the stands that struck a nine-year-old girl in the face as she sat behind the visitors' dugout.[143] She suffered swollen lips and broken teeth and had to be transferred to the Children's Hospital of

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[135] Jen Steer, *Jury Decides Cleveland Indians Not at Fault for Fan Hit by Ball*, FOX 8 CLEV. (Mar. 27, 2017), http://fox8.com/2017/03/27/jury-decides-cleveland-indians-not-at-fault-for-fan-hit-by-ball/.
[136] Shaffer, *supra* note 133.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] Associated Press, *Fan Struck in Head by Foul Ball at Rays Game in Stable Condition*, L.A. TIMES (Apr. 16, 2016, 3:45 PM), http://www.latimes.com/sports/la-sp-baseball-notes-20160417-story.html.
[141] *Id.*
[142] *Id.*
[143] *See generally* Todd Zolecki, *Galvis Wants More Protective Netting for Fans*, MLB.COM (Aug. 21, 2016), http://m.mlb.com/news/article/196870620/freddy-galvis-still-shaken-after-ball-hit-fan/.

Philadelphia.[144] Galvis was visibly shaken and upset after the game and called for further protection for fans beyond what the Phillies instituted in the 2016 season.[145] Galvis, a described "passionate advocate for installing more protective netting down the left- and right-field lines," explained his position after the game:

> If I hit her in one eye and she loses that, what are they going to do? It's going to be a big deal for two, three days. Everybody in TV, media, whatever. But after three days, what's going to happen? They're going to forget. But that family won't forget that.[146]

At the very next Phillies game a woman, Erin Neyer, was struck in the mouth by a foul ball while she was trying to protect her six-year-old daughter from being hit by the ball.[147] Neyer's bottom teeth were chipped and she now has a crack through the top of her front tooth.[148] Additionally, and again the day after Galvis expressed his discontent with the system, another fan was injured by a line drive at a Milwaukee Brewers game.[149] Colorado player Nick Hundley hit a line drive that struck a women in her left ear resulting in a delay in the game while medical personnel attended to her for around eight minutes.[150] She was eventually taken out on a stretcher and transported to a nearby hospital.[151]

At a San Diego Padres game on May 4, 2017, a fan was injured when Padres hitter Hector Sanchez's bat flew out of his hands and struck a fan in the head.[152] It left a roughly two- to three-inch laceration with an indentation and the game had to be stopped for thirteen minutes while she was attended

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[144] NBC10 Staff & Wire Reports, *Foul Balls Strike Young Girl, Woman in Back to Back Phillies Games*, NBC PHILA. (Aug. 24, 2016), http://www.nbcphiladelphia.com/news/local/Phillies-Cardinals-Foul-Ball-Baseball-Girl-MLB--390865401.html.

[145] *See generally* Zolecki, *supra* note 143.

[146] *Id.*

[147] NBC10 Staff & Wire Reports, *supra* note 144.

[148] *Id.*

[149] *See* Tribune News Services, *Fan Injured by Line Drive at Miller Park*, CHI. TRIBUNE (Aug. 23, 2016), http://www.chicagotribune.com/sports/baseball/ct-mlb-brewers-fan-injured-spt-20160823-story.html.

[150] *Id.*

[151] *Id.*

[152] Kirk Kenney, *Fan Injured by Bat at Petco Park During Rockies-Padres Game*, SAN DIEGO UNION-TRIBUNE (May 4, 2017, 5:30 PM), http://www.sandiegouniontribune.com/sports/padres/sd-sp-padfan-injured-by-bat-0405-story.html.

to.[153] The Padres had extended their netting as recommended by Major League Baseball and released this statement in response to the injury: "Last season, we extended our backstop netting in accordance with Major League Baseball's recommendations. Any injury at the ballpark warrants evaluation and discussion of current practices."[154] Again, the instituted recommendations did not offer sufficient protection.

On August 29, 2017, another devastating injury occurred when John Loos was struck in the head by a foul ball at a Chicago Cubs game.[155] The ball broke his nose and six bones around his left eye.[156] He has since undergone three surgeries and two additional surgeries are expected.[157] He also stated that he may have to replace his left eye with a prosthetic and that his vision problems in his right eye include issues adjusting to light and shadows.[158] Loos has filed a lawsuit against the Chicago Cubs and Major League Baseball, seeking at least $50,000 in damages.[159] The basis of the lawsuit is the Cubs' negligence in not having enough netting to protect him from being injured.[160] The Cubs were also a team that extended the netting after Major League Baseball's recommendations.[161] Loos's lawsuit is still pending.

Perhaps the most high-profile incident of the 2017 season occurred at a New York Yankees game on September 20, 2017.[162] During that game, a two-year-old girl was struck in the face by a foul ball.[163] The father recalled the horror of the situation, describing how he:

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[153] *Id.*
[154] *Id.*
[155] Elvia Malagon, *Schaumburg Man Hit, Blinded by Foul Ball at Wrigley Field Suing Cubs, MLB*, CHI. TRIBUNE (Oct. 9, 2017), http://www.chicagotribune.com/news/local/breaking/ct-met-cubs-lawsuit-foul-ball-netting-20171009-story.html.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] Billy Witz, *Father of Girl Hit by Ball Recounts Ordeal, and the Yankees Promise Fixes*, N.Y. TIMES (Oct. 1, 2017), https://www.nytimes.com/2017/10/01/sports/baseball/yankee-stadium-netting-foul-ball.html.
[163] *Toddler Hit by Foul Ball at Yankee Stadium 'Okay,' Players Call for More Protection*, FOX NEWS (Sept. 21, 2017), http://www.foxnews.com/sports/2017/09/21/toddler-hit-by-foul-ball-at-yankee-stadium-okay-players-call-for-more-protection.html.

> Walk[ed] into a hospital room to find his daughter . . . connected to tubes and machines. Her eyes were swollen shut, she had multiple facial fractures—including those of her orbital bone and nose—and doctors were monitoring the bleeding on her brain, fearing that it might lead to seizures … [a]nd on her forehead . . . was an imprint left by the stitches of the baseball that hit her.[164]

The speed of the ball off the bat of New York Yankees hitter Todd Frazier was measured at 105 mph.[165] Some players even had to fight back tears upon witnessing the injury to the girl.[166] Earlier in the season the Yankees posted on the team website that they were seriously exploring extending the netting prior to the 2018 season.[167] Ultimately, after the two-year-old girls' injury, the Yankees finally decided to "significantly expand" the netting at Yankees stadium.[168] The New York Mets, after the 2017 All-Star break, decided to extend their netting as well.[169] Shortly before this injury, New York City Councilman Rafael Espinal Jr. introduced a bill that would require stadiums that have a capacity of at least 5,000 people to increase its netting from foul pole to foul pole.[170] On the topic of fan injuries, Espinal Jr., stated "[n]ot only are these injuries preventable, but the MLB, Yankees and Mets have been slow to implement a simple solution that would prevent families' fun-filled ballpark outings from turning into nightmares."[171] That bill is still under consideration.[172]

Although it is encouraging to see Major League Baseball take a proactive approach to the situation and receive a positive response from the owners, it is clear that the recommendations are not, and have not, sufficiently prevented these injuries from occurring. Thus, it is likely necessary to go beyond these recommendations and to seek other remedies.

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[164] Witz, *supra* note 162.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Toddler Hit by Foul Ball at Yankees Stadium*, *supra* note 163.
[170] Michael McCann, *Yankees Incident Revives an Old Question: How Responsible Are Teams for Foul Balls Injuries?*, SPORTS ILLUSTRATED (Sept. 21, 2017), https://www.si.com/mlb/2017/09/21/new-york-yankees-netting-ballpark-injury.
[171] Rafael Espinal Jr., *NYC Councilman Rafael Espinal Jr.: Why I Have a Bill to Extend Nets at Citi Field, Yankees Stadium*, N.Y. DAILY NEWS: SPORTS (May 10, 2017 2:06 AM), http://www.nydailynews.com/sports/baseball/mets/espinal-jr-bill-extend-nets-nyc-ballparks-article-1.3151940.
[172] N.Y. City Council Committee on Consumer Affairs, Int. No. 1593 (2017), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3042792&GUID=B307C877-0F6A-49B2-ADAF-FE2FCCAFB0CB&FullText=1.

VI. POTENTIAL REMEDIES TO SUPPORT SPECTATOR SAFETY AND ALLOW FOR RECOVERY

Because there are at least three different bodies able to increase regulation of fan injuries at Major League Baseball games, there is a wealth of existing solutions to remedy the situation. Thus far, the judiciary has handled most of the problems involving fan injuries, with state legislatures supplementing, and at times, creating judicial solutions. Major League Baseball—after opting to limit liability by posting warnings signs, making announcements at the stadiums, and printing exculpatory warnings on the back of tickets—introduced new recommendations for increased screening. The new recommendations resulted from a rash of fan injuries in recent seasons that have heightened the awareness and necessity for Major League Baseball to take initiative and increase protection.

Although there has been some change in the judiciary's stance on the baseball rule, the rule still governs as the majority standard. The same is true for the few state legislatures that have enacted statutes relating to fan injuries at baseball stadiums. There have been several articles that call for a different standard to be implemented by the courts or legislatures.[173] Some different standards called for include: a distraction-type exception to the assumption of the risk doctrine and a comparative negligence and reasonable care standard.[174] Ultimately, judiciary and legislatures should match or go beyond Major League Baseball's semi-progressive approach and endeavor to ensure sufficient fan safety regulations and adequate potential for injured fans to recover damages. There are many reasonable alternatives to the system that currently governs. The judiciary can (1) keep the baseball rule but extend the netting requirement to include the area down the first and third baseline; (2) abolish the baseball rule and adopt a comparative negligence standard with a distraction-type exception; or (3) abolish the baseball rule and allow fans to recover directly from the teams through a baseball arbitration type system applied to fan injuries.

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[173] *See* Kenneth R. Swift, *I Couldn't Watch the Ball Because I Was Watching the Ferris Wheel in Centerfield*, 24 ENT. & SPORTS LAW 1, 33 (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961780; David Horton, *Rethinking Assumption of Risk and Sports Spectators*, 51 UCLA L. REV. 339 (2003); James G. Gaspard, *Spectator Liability in Baseball: Nobody Told Me I Assumed the Risk*, 15 REV. LITIG. 229 (1995) (arguing that the Texas judiciary should adopt Section 343A of the Restatement (Second) of Torts in relation to fan injuries); Mary C. St. John, *Strike One, and You're Out: Should Ballparks be Strictly Liable to Baseball Fans Injured by Foul Balls?*, 19 LOY. L. A. L. REV. 589 (1986) (arguing that major league commercial baseball stadium should be strictly liable for fan injuries, forcing the stadium to update protection of its facilities); Khare, *supra* note 39; Ludden *supra* note 3.

[174] *See* Swift, *supra* note 173; Khare, *supra* note 39; Ludden, *supra* note 3.

A. Expanding the Scope of the Baseball Rule

Despite its prevalence, at its most basic premise the baseball rule is fundamentally unsound. The judiciary believes that the area behind home plate is to be considered the most dangerous section of the field, when in reality the area is one of three different sections of the field that should be regarded as most dangerous.[175] Because the area behind home plate is screened off, the most dangerous sections of the field have now become the areas down the first and third base lines, especially above the team dugouts.[176] Fans simply do not have the reaction time necessary to shield themselves from a ball pulled by a Major League hitter down either base line,[177] especially when factoring in other fans moving out of the way at the last second.

After a fan was struck in the head by a foul ball hit by Detroit Tigers player Anthony Gose last season, Gose commented after the game how he felt the woman might have died if the ball had hit her flush in the face.[178] He further reiterated the issue with fan reaction time, "Pitchers can't react fast enough on the mound. How's a fan going to react? . . . They can't. They physically can't."[179] The force with which Major League players strike a ball has reached such a level that pitchers are experimenting with protective head gear in response to a series of incidents in recent seasons.[180] In 2012 pitcher Brandon McCarthy was struck in the head by a line drive with such force that he sustained a life-threatening injury.[181] He had to undergo surgery to alleviate the pressure in his head after it was revealed he suffered a skull fracture, brain contusion, and epidural hemorrhage.[182] In 2016 pitcher Matt Shoemaker was hit in the head by a line drive off the bat of Seattle Mariners third

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[175] *See supra* notes 45-58.
[176] *Id.*
[177] *See supra* notes 47-49.
[178] Edmonds, *supra* note 59.
[179] *Id.*
[180] *See* Edmonds, *supra* note 59 (Yankees pitcher Bryan Mitchell was struck in the face causing a concussion and small nasal fracture); *see also* William Weinbaum, *Pitchers to Debut New Protective Headware in Spring Training*, ESPN (Feb. 12, 2016), http://espn.go.com/mlb/story/_/id/14765775/mlb-players-association-work-together-develop-more-protective-pitching-hat (in 2014 pitcher Dan Jennings was struck by a 101mph line drive, five other pitchers were struck in the head in the 2015 season).
[181] Jane Lee, *McCarthy Resting, 'Alert' After Surgery on Head*, MLB.COM (Sep. 6, 2012), http://m.mlb.com/news/article/37940042/.
[182] *Id.*

baseman Kyle Seager.[183] The impact caused a small skull fracture and a hematoma and Shoemaker had to have surgery to stop additional brain bleeding.[184] It was calculated that Seager's line drive had an exit velocity of 105 mph.[185] As previously noted,[186] sufficient reaction time at those speeds is incredibly difficult, if not nearly impossible. And if professional baseball players cannot protect themselves from the obvious perils of line drives, how can the common fan be expected to? When factoring in the increased strength and power of Major League players it is simply not feasible.

Essentially, the baseball rule shields stadium operators from liability if a patron chooses to sit anywhere except behind home plate and flatly ignores the dangers of sitting down the first and third base lines at baseball games. Major League Baseball's new policy recommendation will protect some fans down the first and third baselines, but in most stadiums the absence of screening will fail to protect them above the dugouts and beyond. Furthermore, the baseball rule extends to all baseball stadiums, not just Major League Baseball facilities. In fact, the injury that occurred in the case that solidified the baseball rule, *Akins v. Glens Falls City School District*, happened at a high school baseball game.[187] As it stands, there is no financial motivation for facility owners to increase protection, but if the judiciary extends the baseball rule to include the areas down the first and third baseline it would force facility owners to upgrade the protective netting. Because the stadium owners would either have to upgrade or face liability, it would also supply incentive to develop stronger and more transparent screening in an effort to provide fans with a better view of the game. This solution should be attractive to the judiciary and state legislatures because it would not require them to completely abolish the baseball rule, only re-work it to provide a motive for increased protection for fans.

B. Adopting a Comparative Negligence Standard with a Distraction-Type Exception

A comparative negligence and reasonable duty of care standard would have multiple benefits. The standard would (1) dispel a confusing and archaic

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[183] ESPN News Services, *Angels' Shoemaker Has Surgery to Stop Bleeding in His Skull*, ESPN (Sept. 5, 2016), http://www.espn.com/mlb/story/_/id/17470954/angels-matt-shoemaker-surgery-head-taking-liner.
[184] *Id.*
[185] *Id.*
[186] *See supra* notes 45-49.
[187] Akins, 424 N.E.2d at 532.

baseball rule, and (2) force stadium owners to upgrade their facilities to decrease the chance of litigation by protecting the fans from harm.[188] And because it is a comparative negligence standard, a fan's behavior could be taken into account, limiting the liability for the stadium owner.[189] The Restatement (Third) of Torts: Apportionment of Liability, outlines this principle while shifting away from a doctrine such as the baseball rule, "[P]laintiff's negligence is defined by the applicable standard for a defendant's negligence. *Special ameliorative doctrines* for defining plaintiff's negligence are abolished."[190] The Restatement provides an example of a fan attending a baseball game to illustrate a comparative negligence standard.[191] If a fan sits in an unscreened section and is aware that balls are hit into the stands, this is not assumption of the risk and does not bar recovery.[192] The fan's conduct and knowledge of the risk while seated in that area is relevant when determining the percentage of responsibility a fact finder attributes to that fan.[193] But sitting in the stands itself is not unreasonable conduct.[194] This comparative negligence standard would allow fans to recover for injuries notwithstanding their own negligence and taking into account reasonableness of their actions.[195]

However, in the technological era that currently influences society, and consequently baseball games, fans should be able to have their apportionment of responsibility reduced if they can prove they were deliberately distracted at the game. When discussing the technological advancements that have been developed at baseball stadiums, interesting issues arise that have not been addressed by the judiciary or legislature thus far. For example, Major League Baseball's adoption of a cell-phone application (app) called "MLB.com Ballpark." The app allows fans to use their cell-phones to utilize a wealth of different features at baseball stadiums. In particular, and subject to certain baseball stadiums, fans can check-in to the stadium using IBeacon, upload and share personal photos from each ballpark visit, access a social media clubhouse, upgrade seats,

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[188] Ludden, *supra* note 3, at 135.
[189] *Id.*
[190] Crespin v. Albuquerque Baseball Club, LLC, 216 P.3d 827, 834 (N.M. Ct. App. 2009) (citing Restatement (Third) of Torts: Apportionment of Liability § 3 (Am. Law Inst. 2000)).
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*

and order food and beverages and merchandise.[196] Major League Baseball incorporates its own technology driven subsidiary, named, MLB Advanced Media ("MLBAM").[197] Joe Inerillo, Vice President and CTO for MLBAM points to the younger generation of fans, and the advent of social media, for the reasons Major League Baseball is deciding to strive for a more technologically advanced baseball experience.[198] Inerillo believes that it is necessary for Major League Baseball to refrain from separating the younger generation from Twitter and Facebook or email and instant messaging, so MLBAM is attempting to support a sense of connectivity younger fans can feel at baseball games.[199] This leads to interesting legal issues in relation to deliberate distraction of fans.

As the theatrical aspects of attending a Major League Baseball game increase so too does the potential for fan distraction during play. This may occur because of deliberate stadium decisions or because of the fan's own negligence but the consequent increased risk when considering foul balls and the possibility of injury is undeniable. Thus, a fan distraction theory in relation to injuries and remedies naturally arises. A fan distraction theory is not without precedent in the judiciary, at least with respect to denying a summary judgment motion that stadium owners are usually granted on an assumption of the risk theory.[200] In *Lowe v. California League of Professional Baseball*, a fan was seriously injured after he was struck in the face by a foul ball while attending a Class A professional baseball game.[201] The man was distracted when the team mascot repeatedly bumped him with his tail, forcing him to turn towards the mascot, where he was subsequently struck in the face when he turned his attention back to the game.[202] The California Court of Appeals reversed a trial court's decision granting summary judgment, citing a case, *Knight v. Jewett*, and holding that the defendant baseball stadium had a duty "not to increase the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume."[203] The court highlighted the fact that foul balls are an

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[196] Mark Newman, *Home Openers Near, At the Ballpark App Gets Update*, MLB.COM (Mar. 27, 2014), http://wap.mlb.com/ari/news/article/2014032770214274/?locale=es_CO.
[197] *See generally* MLBAM, http://www.mlbam.com/ (last visited Jan. 15, 2018).
[198] Teena Hammond, *Stadiums Race to Digitize: How Sports Teams are Scrambling to Keep Millennials Coming to Games*, TECH REPUBLIC, http://www.techrepublic.com/article/how-sports-teams-are-scrambling-to-keep-millennials-coming-to-games/ (last visited Jan. 15, 2018).
[199] *Id.*
[200] *See* Lowe v. Cal. League of Prof. Baseball, 56 Cal. Rptr. 2d 105 (1997).
[201] *Id.* at 106.
[202] *Id.*
[203] *Id.*; *see also* Knight v. Jewett 834 P.2d 696 (Cal. 1992).

inherent part of the game, which would be impossible to eliminate.[204] However, in keeping with the decision in *Knight,* the court found that a mascot is not so integral to the game that the game would be impaired by the mascots absence. The court held that the mascot was a "marketing tool…not essential to the game of baseball."[205] Finally, the court recognized that the mascot created a distraction that was not an essential aspect of the game itself.[206]

Although it has not been the basis of litigation yet, this poses an interesting question, does a cellphone app that is specifically meant to be used by fans at Major League Baseball and in fact disseminated by Major League Baseball itself, constitute a distraction like the mascot in *Lowe*? The app is clearly a marketing tool. And it seems unlikely that a court would find the app to be "an essential part of the game." It is also likely unreasonable to expect fans to only use the app in-between pitches, considering the plethora of features MLBAM has developed for it; features that are fully accessible while the game is in play. So what happens when a fan is struck by a foul ball while using the MLB.com at Bat application? Under a distraction-type exception to the comparative negligence standard, it is possible the fans apportionment of responsibility would be eliminated or substantially lowered. One commenter has explained that this exception would allow a fan to recover if Major League Baseball or the stadium owner deliberately distracted the fan in a manner that "causes the fan to look away from the game while the ball is in play or creates a situation where a fan is unable to reasonably observe the game."[207]

However, a fan's own negligence would still be applicable to most foul ball injuries, and the exception would be limited to instances where, for example, a mascot is performing and the fan necessarily has to watch.[208] Conversely, if a fan simply looks away to get food from a roving vendor, then fans could not invoke the exception.[209] It is clear that a fan should not be able to utilize the exception simply because the fan was using his or her phone at the time. But when Major League Baseball purposely causes that fan to use his or her phone, or deliberately distracts the fan through some theatrical aspect of the ballpark, a question arises as to whether the fan should be shielded from responsibility.

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[204] Lowe, 56 Cal. Rptr. at 111; Fried & Ammon Jr., *supra* note 39, at 52-53.
[205] Fried & Ammon Jr., *supra* note 39, at 53.
[206] *Id.*
[207] Swift, *supra* note 171, at 36.
[208] *Id.*
[209] *Id.*

C. Baseball Arbitration Applied to Recovery for Fan Injuries

Interestingly, the concept of baseball arbitration applying to fan injury recovery is an idea that derives from an injury sustained by an attorney.[210] The injured fan, Andy Zlotnick, was attending a New York Yankees game in August 2011 and sitting three rows up from the field, about 50 feet past the first base line.[211] There was a rain delay and several patrons had brought umbrellas.[212] Some stadiums forbid the use of umbrellas except during rain delays, while two stadiums forbid them from the park completely.[213] At the time, the Yankees policy is to allow umbrellas as long as they do not interfere with the other fans enjoyment of the game.[214] This has now changed to "permissible use" as long as the umbrella does not obstruct a fan's view.[215] Zlotnick could not see the batter or the pitcher because of the opened umbrellas around him.[216] The batter, Hideki Matsui, pulled a foul ball into the stands which connected with Zlotnick's face, breaking the bones around his left eye socket, fracturing his sinus and upper jaw, and overall extensively damaging the left side of his face.[217] His plastic surgeon later told him that his injuries were similar to being punched in the eye with brass knuckles.[218] His medical bills totaled $100,000, and he had to pay roughly $25,000 out of pocket.[219] Although on the surface the injury appears to have healed, the area where he was struck is still painful to the touch, he has blurred vision, and persistent numbness in his mouth.[220] Zlotnick sued the New York Yankees arguing that allowing open umbrellas "negligently increased the danger posed by the game of baseball." He eventually lost his case.[221]

Ultimately, the best solution to the fan injury issue may not come from a court or a legislature, or even a legal commentator—rather, the best

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[210] Joe Nocera, *Danger at the Ballpark, and in a Baseball Ticket's Fine Print*, N.Y. TIMES (Nov. 20, 2015), http://www.nytimes.com/2015/11/21/sports/baseball/danger-at-the-ballpark-and-in-a-baseball-tickets-fine-print.html.
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] John Harper, *MLB's Announcement of Extended Netting is a Long Overdue Win for Those Seriously Injured by Foul Balls*, N.Y. DAILY NEWS: SPORTS (Feb. 1, 2018), http://www.nydailynews.com/sports/baseball/extended-netting-long-overdue-win-injured-foul-balls-article-1.3793772.

proposed solution may come from someone who intimately appreciates the issue, a victim. Zlotnick's ordeal lead him to develop an idea for how teams could compensate injured fans at games.[222] Basically, the idea is rooted in a fundamental arbitration system. When a fan is injured at a baseball game, that fan would submit all the necessary documentation to prove the severity of the injury, i.e. medical bills, lost wages, and testimony of any permanent damage that might have been sustained.[223] In addition, the fan would submit a dollar amount for just compensation.[224] In turn, the baseball team submits a dollar amount for what it would deem reasonable to compensate for the injury.[225] A neutral arbitrator would then make a decision based off of all the materials submitted and that decision would be binding on both parties.[226] The arbitrator would not be allowed to split the difference.[227]

One advantage to this system would be to take the issue out of the hands of the judiciary and its unsympathetic baseball rule. It would also lessen the need for expensive litigation, while hopefully eliminating frivolous lawsuits and deterring fans wishing to cash in on less serious injuries.[228] It is unlikely that personal injury lawyers—who are already weary of fan injury cases because of the difficulty in winning them—would agree to prepare the necessary work for arbitration if the injury was not serious. And Major League Baseball, which generated $9.5 billion in revenue in 2015, would easily be able to handle the payouts decided by the arbitrator.[229] Additionally, it would give Major League Baseball increased motivation to institute a concrete policy regarding netting recommendations at stadiums instead of the mere suggestions they presented for the 2016 season.[230]

VII. CONCLUSION

American's pastime has hit a critical point in terms of fan safety. As athletes increase in strength and size, fans become more and more vulnerable to injuries, often serious and sometimes fatal, while simply watching a ballgame. It is inconceivable to require the average adult spectator to react fast enough to a line drive foul ball; not to mention a child. If a Major

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[222] Joe Nocera, *Baseball Has a New Policy on Netting, but There's a Catch*, N.Y. TIMES (Dec. 18, 2015), https://www.nytimes.com/2015/12/19/sports/baseball/baseball-has-a-new-policy-on-netting-but-theres-a-catch.html.
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.*

League pitcher, who plays the game at the highest level, and has his glove to assist him, is unable to protect himself then how can a fan be expected to bear the burden of avoiding injury?

The judiciary and state legislatures have options to establish sufficient fan injury remedies and protections. There is simply a refusal to act. Very few courts have recognized the flaws in the baseball rule. It is antiquated. It is unfair. It is rooted in a historical precedence that should not be regarded with such importance as it has failed to adapt to a game that has substantially changed over the past century. If there is a reluctance to abolish the baseball rule, then at the very least it must be re-worked to include the areas down the first and third base line. This easy remedy would spark a chain reaction that would force stadium owners to significantly improve their safety policies for fans or face a wealth of litigation.

With Major League Baseball venturing to improve fan safety, the judiciary must follow suit. The devastation for injured spectators is two-fold, not only are they sustaining serious injuries, they have almost no recourse to recover damages. The blanket shield for stadium owners is skewed so heavily in their favor that there is nothing a spectator can do after suffering harm at a baseball game except bear the cost of damages. Major League Baseball is finally beginning to adjust its fan protection policies to reflect the current nature of the game, but ultimately the judiciary and state legislatures should seek to definitively remedy this severe inequity.