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EDITOR'S NOTE

The Sports and Entertainment Law Journal is proud to complete its ninth year of publication. Over the past nine years, the Journal has strived to contribute to the academic discourse surrounding legal issues in the sports and entertainment industry by publishing articles by students and established scholars.

As editor-in-chief, I wanted to create a new identity for the Sports and Entertainment Law Journal. Volume XVI has six articles discussing issues and proposing solutions for hot topics we face in the sports and entertainment industry.

The first article is written by Connor Bush, a 2015 J.D. candidate of the University of Mississippi School of Law. The article takes an in-depth look at the five college athletic conferences and argues that it should separate from the NCAA and form independent athletic associations.

Michelle Gonzalez, a 2014 graduate of St. Thomas School of Law, writes the second article, which examines how the media popularizes criminal trials featuring female defendants, most infamously Casey Anthony, Amanda Knox and Jodi Arias.

The third article, written by Gregory Huckabee, Professor of Business Law at the University of South Dakota, and Aaron Fox, research assistant and J.D. graduate of the University of South Dakota, looks at ethics of scheduling FBS v. FCS games and an analysis of intercollegiate sport and its purpose.

At the 2014 World Cup in Brazil, Germany scored the winning goal while fans across the United States watched, raking in over 24 million American viewers. The fourth article, written by Joseph Lennarz, a graduate of UCLA School of Law and a managing partner at Ascension Athlete Management, explains why the upcoming Collective Bargaining Agreement renewal will likely

bring structural changes to the Major League Soccer. The article then advocates for two structural changes that address the issues discussed within.

Continuing with the discussion of sports, Mathew Mills, a 2014 graduate of the University of Mississippi School of Law, exposes the constitutional issues raised by the Professional and Amateur Sports Protection Act in the fifth article.

In the sixth article, Geoffrey Palachuk, a graduate of University of Notre Dame Law School and intellectual property and corporate litigation associate at Paine Hamblen, LLP, analyzes the most effective method for courts to guarantee First Amendment protections while also serving the right of publicity.

We are truly pleased with Volume XVI's publication and would like to thank the authors for all of their hard work. We would also like to thank our wonderful faculty advisors, Professor John Soma and Professor Stacey Bowers. Professor Bowers, thank you for your guidance and support in making our journal possible. To the editorial board and staff editors, I appreciate the endless effort and hard work that has perfected the Journal.

Last, we would like to thank everyone in our lives that help us keep our sanity during law school.

NADIN SAID
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THE LEGAL SHIFT OF THE NCAA'S "BIG 5" MEMBER CONFERENCES TO INDEPENDENT ATHLETIC ASSOCIATIONS: COMBINING NFL AND CONFERENCE GOVERNANCE PRINCIPLES TO MAINTAIN THE UNIQUE PRODUCT OF COLLEGE ATHLETICS

Connor J. Bush[*]

ABSTRACT

The National Collegiate Athletic Association (NCAA) can no longer effectively govern big-time intercollegiate athletics. Since the 1984 Board of Regents *decision, college athletics has grown exponentially, yet the NCAA still attempts to govern over 1,000 colleges and universities under a single organization. The "Big 5" college athletic conferences (ACC, Big Ten, Big 12, Pac-12, and SEC) have become more autonomous in recent years, independently negotiating lucrative media rights and post-season bowl agreements. Each conference has also adopted its own constitution and bylaws to effectively manage its unique product.*

This Comment argues that the "Big 5" conferences should separate from the NCAA and form independent athletic associations. Each association should contract with other associations and third party entities for inter-association and post-season competitions, similar to the current FBS post-season system. Organizing as independent associations would provide each entity the ability to: (1) effectively adopt association-specific legislation

*J.D. Candidate 2015, The University of Mississippi School of Law; B.S. 2011, Michigan State University. Connor would like to dedicate this Article to his father, Daniel Bush. He would also like to thank his family for their incredible support, and Professors Jack Nowlin, William Berry, Ron Rychlak, and Mercer Bullard for their advice and guidance. Connor would especially like to thank the entire Compliance staff at the Ole Miss Athletics Department and Ole Miss Director of Athletics, Ross Bjork, for their practical insight and for providing him the opportunity to pursue this topic. Finally, Connor would like to thank his Academic Legal Writing classmates and the Mississippi Law Journal Notes and Comments Membership Development Program.

and policies; (2) efficiently and consistently enforce rules; and (3) manage revenue commensurate with its market value.

This Article examines the current governance structures of the NCAA, the Big 5 conferences, and the NFL, finding that the Big 5 and the NFL adopt similar structures. The Article then formulates a proposed model, combining and modifying aspects from the current Big 5 and NFL systems, which any Big 5 association could adopt after separating from the NCAA.

INTRODUCTION

Big-time college athletics has become a way of life in America. During the fall, a Michigan State football fan can roll out of bed at 9:00 AM, turn on his television, and futilely argue with Desmond Howard and Lee Corso's two-dimensional representations on ESPN's College GameDay program. Following the show's conclusion, the Spartan will pass the time flipping back-and-forth between the three important games on ESPN, ESPN 2, and the new Fox Sports 1 channels, mentally preparing for the 3:30 match-up between State and Nebraska. Once, the clock strikes 3:30 PM, the MSU fan will focus almost exclusively on the ABC broadcast. However, during the multiple television time-outs and stagnant Big Ten offensive drives, Johnny Spirit will check ESPN 2, Fox, and CBS to see how the biggest games of the day are playing out. Following either triumph or heartbreak, the Michigan State fan will spend the rest of the night analyzing West Coast football on ABC and ESPN 2. Every Saturday, Sparty could spend nearly 16 hours watching college football on 13 different channels.[1]

Once March arrives, sports fans are absorbed in college basketball coverage. They will devote the better part of multiple weeks scouting various conference tournaments, watching the

[1] *See 2013 Division 1-A Football Schedule – Week 12, ESPN*, http://espn.go.com/college-football/schedule (accessed Nov. 14, 2013). Example of the typical weekly television broadcast schedule for FBS football.

NCAA Selection Show, and filling out "winning" brackets. On the penultimate week in March, four Turner/CBS-Sports affiliated channels will air 16 college basketball games lasting 12 hours on Thursday and Friday, and will broadcast 8 games spanning 12 hours on Saturday and Sunday.[2]

College sports' popularity has increased continuously since the advent of television. In the monumental 1984 Supreme Court decision, *NCAA v. Board of Regents*, the National Collegiate Athletic Association (NCAA) created an unreasonable horizontal restraint in trade[3] when it negotiated a television plan applicable for all college football programs with ABC and CBS.[4] The Court held that this agreement restricted competition and violated the Sherman Act.[5] Since the *Board of Regents* decision, the five major athletic conferences (ACC, Big 10, Big XII, Pac-12, and SEC)[6], as part of the Bowl Championship Series (BCS), independently contract for television rights and share the resulting revenue among their member institutions.[7] These television contracts are extremely lucrative. Experts estimate that the recent 20-year television deal between ESPN and the SEC is worth $300 million annually.[8]

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[2] *See 2013 March Madness TV Schedule*, SPORTS MEDIA WATCH, http://www.sportsmediawatch.com/2013-march-madness-tv-schedule/#sked (accessed Nov. 14, 2013).

[3] NCAA v. Bd. of Regents, 468 U.S. 85, 98-99 (1984).

[4] *Id.* at 92-93.

[5] *Id.* at 120.

[6] The five major athletic conferences will hereinafter be referred as the "Big 5."

[7] Each Big 5 Conference adopts a bylaw that specifically relates to revenue distribution. *See, e.g.,* Southeastern Conference, *SEC Constitution and Bylaws 2013-2014*, art. 17 (2013), *available at* http://secdigitalnetwork.com/Portals/3/SEC%20Website/compliance/Constitution.pdf [hereinafter *SEC Constitution and Bylaws*]. *See also* Benjamin I. Leibovitz, *Avoiding the Sack: How Nebraska's Departure from the Big 12 Changed College Football and what the Conferences Must do to Prevent Defection in the Future*, 22 MARQ. L. REV. 675, 2012.

[8] Mike Ozanian, *Deal Between ESPN and SEC Likely the Richest Ever*, FORBES (May 31, 2013), http://www.forbes.com/sites/mikeozanian/2013/05/31/deal-between-espn-and-sec-conference-likely-the-richest-ever/ (business analyst estimated worth on accompanying video).

Individual athletic programs also take advantage of their product's popularity by selling licensing rights, merchandise, and event tickets, among other things.[9]

The NCAA is a voluntary unincorporated association composed of 450,000 student athletes attending over 1,000 universities.[10] Generally, member institutions join conferences with other regional, similarly situated institutions. The Big 5 conferences are primarily organized as private associations, and each conference adopts independent bylaws based on NCAA requirements. Conference bylaws are specifically tailored to effectuate their member institutions' goals. Conferences implement schedules among member institutions, manage conference championships, and negotiate on behalf of its member institutions for television deals and bowl invitations.[11]

The NCAA has taken affirmative steps to adapt to the growth of college athletics[12] and has attempted to regulate major programs

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[9] Some major athletics programs have even hired successful businessmen to operate multimillion-dollar athletic department budgets. For example, the University of Michigan hired former Domino's Pizza, Inc. CEO Dave Brandon in March 2010. Brandon had never worked within an athletic department, coached college athletics, or taught university courses; however, the board of regents valued the CEO's business, financial, and managerial experiences. Katie Thomas, *Experience in Sports Optional for New Leaders*, NY TIMES (Feb. 1, 2010), http://www.nytimes.com/2010/02/02/sports/02athletics.html?_r=0. For decades, athletic directors were primarily former coaches who oversaw the daily operations of the athletic department. Today, major athletic departments negotiate multi-billion dollar television contracts, manage multi-million dollar budgets, develop successful marketing strategies, and protect valuable licensing interests. Universities are recruiting prominent business executives to manage their most successful asset, college sports. *Id.*

[10] *About - Who We Are*, NCAA, http://www.ncaa.org/about/who-we-are.

[11] Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA's Amateurism Rules*, 6 VA. SPORTS & ENT. L.J 51, 71-72 (2006).

[12] The NCAA allows members to access the NCAA Student Opportunity Fund, which allows student-athletes to receive money, in addition to their financial aid, that will cover clothing, emergency travel, or health related expenses, among

with astronomical revenues while maintaining an ideal of amateurism. However, the NCAA's current centralized governance structure cannot effectively control the unique product that is big-time college athletics. The NCAA has become overextended and attempts to govern University of Texas football and University of New Orleans golf under the same set of rules. This has created a lengthy, complicated rulebook full of exceptions. Student-athletes, coaches, and staff members must consult the institution's compliance officers for NCAA rule interpretations. Sometimes these compliance officers must request an official interpretation from their respective conference or the NCAA office in Indianapolis. This archaic rulebook is anything but predictable and fosters many of the highly publicized violations reported in the media today.

This Article proposes that the Big 5 separate from the NCAA and form independent athletic associations in order to effectively adapt to the changing landscape of college athletics. These new associations should then contract with one other or with third party organizations for inter-association and post-season competitions, similar to the current FBS post-season system.[13] No longer will a centralized, national authority wield supreme legislative, investigative, and disciplinary power. Instead, authority will reside at the appropriate, "regional" level.

The Article's proposed Big 5 Association model would allow each association to: (1) effectively develop legislation and policy, (2) efficiently enforce rules, and (3) implement specific plans to manage revenue commensurate with its market value. Conferences are already self-sustaining organizations: they are composed of regional, similarly situated universities; they have adopted their own specific bylaws; and they have contracted for lucrative television contracts. Severing ties with the NCAA would allow each

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other things. In theory, it is a possible solution; however, schools may only use the fund for enumerated purposes, which will rarely cover the full cost of attendance.

[13] *See infra*, note 35 and accompanying text.

Big 5 association to focus specifically on its member institutions' goals and devise a unique plan to achieve them.

Part I of this Article will examine the current NCAA governance structure and the problems it facilitates. Part II will analyze the current NFL and SEC governance structures and argue that a Big 5 association should adopt a similar model. Part III will argue that decentralization and subsidarity principles should be applied to big-time intercollegiate athletics. Part IV will offer a proposed model that a Big 5 association should adopt after separating from the NCAA. Part V will highlight some benefits derived from the proposed model. Part VI will address the costs associated with the Big 5 separating from the NCAA, ultimately finding that they are outweighed by the benefits.

II. TODAY'S NCAA: CURRENT GOVERNANCE STRUCTURE AND ITS INHERENT PROBLEMS

A. WHAT IS THE NCAA?

The National Collegiate Athletic Association (NCAA) is a voluntary, unincorporated association of four-year colleges and universities, conferences, and other affiliated associations.[14] Over 1,000 colleges and universities ("member institutions") consisting of over 450,000 student-athletes make up the NCAA.[15] The Association is divided into three divisions: Divisions I, II, and III. Each division has a separate Manual that contains division-specific

[14] WALTER T. CHAMPION JR., FUNDAMENTALS OF SPORTS LAW 340 (2nd ed. 2013).

[15] Gary Brown, *NCAA Student-Athlete Participation Hits 450,000*, NCAA (Sep. 19, 2012), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/September/NCAA+student-athlete+participation+hits+450000 (last accessed Nov. 22, 2013).

legislation.[16] 347 schools are classified as Division I member institutions.[17] These schools are further divided into three subdivisions. The Football Bowl Subdivision (FBS) comprises the 120 members that compete in post-season bowl games.[18] The Football Championship Subdivision (FCS) comprises the 127 schools[19] that compete in an NCAA-sponsored football championship.[20] There are also 100 Division I schools that do not field football programs.[21]

The NCAA Manual - the Association's Constitution and Bylaws - operates as a contract between a member institution and the NCAA. "By joining the NCAA, each member agrees to abide by and to enforce [NCAA legislation]."[22] The purpose of the NCAA, in return, "is to maintain intercollegiate athletics as an integral part of the educational program," and "retain a clear line of demarcation between intercollegiate athletics and professional sports."[23] Generally, the NCAA formulates, oversees, and enforces the policies, rules, and regulations that govern all aspects of intercollegiate athletics.[24] The NCAA also sponsors national

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[16] NCAA, *2013-2014 NCAA Division I Manual* viii (2013), *available at* http://www.ncaapublications.com/productdownloads/D114.pdf [hereinafter *NCAA Manual*].

[17] *Division I Facts and Figures*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/divisioni/di+facts+and+figures (last update May 2, 2013) [hereinafter *Division I Facts*].

[18] *Id*. The FBS itself is comprised of 10 athletic conferences. The five major athletic conferences (the "Big 5") are comprised of 63 member institutions. *The BCS is ... ,* BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/news/story?id=4809716 (last updated Oct. 1, 2013).

[19] *Division I Facts*, *supra* note 17.

[20] *About Division I*, NCAA.org, http://www.ncaa.org/wps/wcm/connect/public/ncaa/divisioni/about+division+I (last updated May 2, 2013).

[21] *Division I Facts*, *supra* note 17.

[22] NCAA v. Tarkanian, 488 U.S. 179, 183 (1988).

[23] *NCAA Manual*, *supra* note 16 at art. 1.3. *See also* NCAA v. Bd. of Regents, 468 U.S. 85, n.60 at 120 (1984) (emphasizing the "unique product" of both collegiate and professional sports).

[24] *NCAA Manual*, *supra* note 16 at art. 1.2.

championships for all of its sports except FBS football. Additionally, the Association devises a formula for distributing revenue to every member institution.[25]

The NCAA has modified its governance structure several times in order to effectively adapt to intercollegiate athletics.[26] Most notably, "[i]n 1973-74, the NCAA divided into three divisions."[27] On September 9, 2013, FBS Faculty Athletic Representatives (FARs) advocated that the FBS subdivision become a fourth NCAA division so larger schools could have adequate voting control.[28] Two notable FARs, Professors Jo Potuto and Brian D. Shannon, summarized that "the simpler the governance structure [is,] the better."[29] There is no question that each NCAA division and subdivision has unique characteristics,[30] but there comes a

[25] The NCAA does not receive revenue produced from post-season bowl games. The FBS conferences contract with bowl organizers and directly receive the revenue resulting from these agreements. *Cf.* NCAA, *2013-14 Division I Revenue Distribution Plan* (2013), *available at* http://www.ncaa.org/about/resources/finances?division=d1.

[26] *See Principles and Model for New Governance Structure: As Developed by the 1A FAR Board*, NCAA 3-4 (Sept. 11, 2013), http://oneafar.org/Governance_Proposal.pdf [hereinafter *1A FAR Proposal*].

[27] *Id.* at 4.

[28] Rachel Axon, *Faculty Group Lobbies for NCAA Changes*, USA TODAY (Sept. 11, 2013), http://www.usatoday.com/story/sports/college/2013/09/11/far-recommendation-ncaa-governance/2802173/

[29] Presentation from Brian D. Shannon & Jo Potuto during September Division I-A Faculty Athletics Representative Board Meeting, *NCAA Governance: Now and in the Future* (Sept. 11, 2013), *available at* www.cbssports.com/images/collegefootball/NCAA-Governance-FAR.pdf.

[30] For example, the average "Division II program with football costs about $4.5 million" compared to $13.1 million for a Division I program. David Pickle, *The Daily Knocks of DII and III Opportunity*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/divisionii/the+daily+knocks+of+dii+and+iii+opportunity (last updated Aug. 15, 2012). Also, less than "50 percent of Division II student-athletes receive some amount athletically related financial aid." *Why Division II?*, NCAA (Oct. 5, 2012), http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2013/whyd2. Very few Division II student-athletes receive full athletics scholarships. Dr. Pat O'Brien, *About Division II*, NCAA,

point when member institutions' policies and goals become so different that a single organization can no longer adequately administer every members' needs.

B. NCAA Governance Structure

The current NCAA governance structure does not provide Big 5 member institutions the ability to pass applicable legislation. Their interest is outweighed by the collective voices of dissimilar NCAA members with substantially smaller operating budgets. The NCAA Executive Committee generally oversees the Association and is "comprised of institutional presidents or chancellors" that "ensure that each division operates with the basic purposes, fundamental policies and general principals of the Association . . . ."[31] Each division, itself, has an "administrative structure," similar to a corporation's board of directors, comprised of institutional presidents and chancellors that "set forth the policies, rules, and regulations for operating the division."[32] Within each division, athletics administrators and FARs handle delegated responsibilities and make recommendations to the division's board of directors.[33]

The composition of each administrative group fails to provide Big 5 member schools appropriate control. Of the 16 voting university presidents and chancellors on the Executive Committee, only eight represent FBS institutions.[34] Furthermore, since the FBS subdivision is comprised of ten conferences, at most, only five of the 16 executives represent the Big 5 members' interests. Similarly, the Division I Board of Directors is composed of 18

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http://www.ncaa.org/wps/wcm/connect/public/ncaa/divisionii/about+dii (last updated Apr. 19, 2013). DIII members are typically smaller liberal arts colleges that do not offer athletically related scholarships. Jack Ohle, *The Division III Experience*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/division+iii/the+division+iii+antidote (last updated Jan. 23, 2013).

[31] *NCAA Manual*, *supra* note 16 at art. 4.01.1

[32] *Id.*

[33] *Id.*

[34] *Id.* at art. 4.1.

voting members, all of who are university presidents or chancellors.[35] The Big 5 only retain five representatives, or 27.8% of the vote necessary to implement divisional policies and legislation. Likewise, the Big 5 only retain 15 of the 54 votes (27.8%) allocated to each of the Division I Leadership and Legislative Councils.[36] Although the Big 5 conference schools are most represented at each level of administration, they fail to obtain the majority control necessary to effectuate their interests. Moreover, the Big 5 even fail to obtain working control since the remaining "shareholders"[37] are similarly situated against the interests of the larger conferences. These smaller FBS conferences are by no means diffuse shareholders. Instead, they often have a unified interest against specific Big 5 policies.[38]

C. NCAA Revenue Distribution

The NCAA has contracted with Turner/CBS Sports for a 14-year media rights agreement worth $10.8 billion.[39] This contract accounts for approximately "81 percent of all NCAA revenue."[40] The remaining revenue is attributed to NCAA championships, investments, and other miscellaneous sources.[41] Only 62 percent of the generated revenue is distributed directly to the Division I

[35] *Id.* at art. 4.2.
[36] The Division I Leadership Council is comprised of athletics administrators and FARs. They make recommendations and suggest policies to the Division I board, and they help manage the division substructure. *NCAA Manual*, *supra* note 16 at art. 4.5; *Id.* at 26, Fig. 4-2. The Division I Legislative Council is comprised of athletic administrators and FARs and is the "primary legislative authority" for the division. *Id.* at art. 4.6.
[37] The Article substitutes the term "shareholder" for "member institution" to further compare NCAA governance and voting procedures to that of corporate law.
[38] *See infra*, note 55.
[39] *NCAA Finances: Revenue*, NCAA, http://www.ncaa.org/wps/wcm/myconnect/public/NCAA/Finances/Revenue. [hereinafter *NCAA Revenue*]. Projected annual income for 2012-2013 is $797 million. *Id.*
[40] *Id.*
[41] *Id.*

Conferences.[42] The remaining 38 percent is distributed to Divisions I, II, and III championships and programs, Association-wide programs, and covered general and administrative costs and other miscellaneous expenses.[43]

The NCAA provides a Division I Revenue Distribution Plan that mandates how the 62 percent of generated television revenue is distributed to the conferences. The revenue "is allocated among five funds: Academic Enhancement, Basketball, Grant-in-Aid, Student Assistance, and Sports Scholarship."[44] The NCAA determines the percentage of revenue allocated to each fund. Some funds, such as the Academic Enhancement Fund, provide a base amount to all Division I members.[45] Other funds indiscriminately provide prorated revenue to Division I members.[46] The only fund that considers actual post-season performance is the Basketball Fund where, based on a six-year average, "[v]alues are assigned to units that are awarded for each stage of the championship to which a conference's teams advance."[47]

D. The "Miscellaneous Expense Allowance" Proposal Illustrates the Divide Between 'Haves' and 'Have-Nots'

A substantial division separates the haves and have-nots in Division I intercollegiate athletics. The NCAA can no longer apply one set of rules to govern 347 diverse Division I member

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[42] *NCAA Finances: Distribution*, NCAA, http://www.ncaa.org/wps/wcm/myconnect/public/NCAA/Finances/Finances+Distributions (last updated Feb. 13, 2013) [hereinafter *NCAA Distribution*].
[43] *NCAA Finances: Expenses*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Finances+Expenses (last updated Feb. 13, 2013) [hereinafter *NCAA Expenses*].
[44] *NCAA Distribution*, *supra* note 42.
[45] *Id.*
[46] Examples include Grant-in-Aid Fund, Student Assistance, Fund, and Sports Sponsorship Fund. Revenue is distributed based on the number of grant-in-aids and sports sponsorships. *Id.*
[47] *Id.*

institutions.[48] Athletic department revenues range from $163 million at the University of Texas to $3.1 million at the University of New Orleans.[49] Although the major athletic programs from the Big 5 conferences most directly cultivate the college athletics brand, they do not "control [their] legislative destin[ies]."[50] Member institutions from the Big 5 cannot effectively manage their unique product of big-time college athletics since they are subject to the overwhelming collective voice of smaller institutions.

These smaller member institutions outvoted major athletics programs during the 2011 Miscellaneous Expense Allowance Proposal proceedings.[51] According to the history of Proposal 2011-96, the Division I Board of Directors sponsored a provision that would provide up to $2,000 in miscellaneous expenses to Division I scholarship athletes.[52] These additional expenses would make up the difference between full grant-in-aid and actual cost of attendance for "counter sport" student-athletes.[53] However, alt-

[48] *Division I Facts*, *supra* note 17.
[49] *See NCAA Finances*, USA Today, http://www.usatoday.com/sports/college/schools/finances/.
[50] Dennis Dodd, *Big Ten's Delany: Let Pros Start Minor Leagues if Athletes Want Pay*, CBSSPORTS, http://www.cbssports.com/collegefootball/writer/dennis-dodd/23847226/big-tens-delany-let-pros-start-minor-leagues-if-athletes-want-pay.
[51] *NCAA Division I Proposal: 2011-96 - Financial Aid – Minimum Limits on Financial Aid – Individual and Team Limits*, NCAA, http://www.ncaa.org/sites/default/files/Board%20Financial%20Aid%20Q%20and%20A%20Vol%204.pdf (last updated Jan. 23, 2012).
[52] *Id.*
[53] *Id.* "Counter Sports" award a specified number of student athletes full-grant-in-aid. These sports include Football, Men's and Women's Basketball, Women's Gymnastics, Women's Tennis, and Women's Volleyball. "Full-Grant-in-Aid" merely covers tuition and fees, room and board, and costs of course-required books. *NCAA Manual*, *supra* note 16 at art. 15.02.5. Although the full grant-in-aid covers most of a student-athlete's expenses, it does not fully account for the actual cost of attendance, which additionally includes "supplies, transportation, and other expenses related to attendance at the institution." *Id.* at 15.02.2. The NCAA caps financial aid awarded to students at the full cost of attendance. *Id.* at 15.1. In recent years, the NCAA has attempted to close this

hough 61 of the 63 Big 5 schools supported this proposal, [54] 160 member institutions voted to override it.[55]

The proposed stipend plan would cost each institution, on average, an additional $400,000 in expenses.[56] Currently, the majority of athletic departments are struggling to stay in the black. In 2011, the NCAA reported that 97 FBS members reported negative net generated revenue, while only 23 FBS members reported positive net generated revenue.[57] Most schools do not have enough

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gap by providing the Student Opportunity Fund. In practice, however, a substantial gap still exists.

[54] *See* NCAA, *Override Period (October 2011 Meetings)*, 5-13, www.bgsfirm.com/images/stories/2k_overrides.pdf (last visited Oct. 12, 2013). Only Rutgers and Wake Forest voted to override the Miscellaneous Expense Proposal. *See also supra* note 51.

[55] *See October 2011 NCAA Override*, *supra* note 54.

[56] Jeremy Fowler, *NCAA President Mark Emmert Hopes to Reveal New Stipend Plan in April*, CBS SPORTS (Jan. 1, 2013, 1:26 PM), http://www.cbssports.com/collegefootball/writer/jeremy-fowler/21483211/ncaa-president-mark-emmert-hopes-to-unveil-new-stipend-plan-in-april.

[57] NCAA, *Revenues and Expenses: 2004-2012*, NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 12-13 (2013), *available at* http://www.ncaapublications.com/DownloadPublication.aspx?download=2012RevExp.pdf. Note that "generated revenue" means revenue produced solely by the athletics department (i.e. ticket sales, radio/television receipts, contributions, royalties, etc.). *Id.* at 9. The amount of members reporting positive net generated revenue can be misleading since the report does not account for revenue attributed to athletic success, but distributed outside of the athletics department. *See also*, Richard T. Karcher, Symposium, *The Battle Outside the Courtroom: Principles of "Amateurism" vs. Principles of Supply and Demand*, 3 MISS. SPORTS L. REV. 47, 65-67 (2013). Some examples of unaccounted benefits attributed to athletics programs include: alumni donations outside the athletics department, increased publicity of institution, and overall increase in number and quality of institutional applicants. *See, e.g.*, Sam Khan Jr., *Texas A&M Raises $740 million*, ESPN (Sept. 18, 2013, 4:19 PM), http://espn.go.com/college-football/story/_/id/9690028/texas-raises-record-740-million-donations-fiscal-year (explaining that Texas A&M University raised a record $740 million - exceeding past record by over $300 million - in the 2012-2013 fiscal year; the fundraising includes gifts to, among other things, the university, research division, alumni programs, university foundation with more than half going outside the athletic department; Texas A&M Foundation Presi-

money in their budget to account for the additional miscellaneous expenses. Former NCAA Committee of Infractions Chair, Gene Marsh, empathized with smaller member institutions, "Why would you vote in favor of a proposal that would further hemorrhage your athletic budget and try to compete with the revenue surplus Alabama has?"[58] Approving the Miscellaneous Expense allowance proposal would further separate the haves from the have-nots. Merely examining the athletic departments' revenues and expenses demonstrates that the Big 5 schools are substantially different from other Division I schools.

II. THE "BIG 5" CONFERENCES AND THE NFL ALREADY ADOPT SIMILAR, ACCOMPLISHED MODELS

The NFL is the most successful professional sports league in America.[59] Both the NFL's and the Big 5 conferences' most valuable asset is their unique product of football, and both derive the majority of their revenue through lucrative media rights agree-

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dent recognized that having a high-profile athletic program in modern-era college athletics contributes to successful fundraising); *TCU's Football Success Rakes in More than Victories*, STAR-TELEGRAM (Aug. 29, 2013), http://www.star-telegram.com/2013/08/29/5119806/tcus-football-success-rakes-in.html (providing data displaying economic benefits Texas Christian University's football program has provided to Dallas-Fort Worth area, and how over five years, in coordination with the success of its football program, TCU's student body, once three-quarters Texas residents now comprises 55% out-of-state residents); Chris Van Horne, *TCU Applicants at Record Number*, NBC DALLAS-FORT WORTH (last updated Jun. 27, 2011, 6:00 PM), http://www.nbcdfw.com/news/local/TCU-Applicants-at-Record-Number-124620824.html (explaining that with success of football and baseball programs, number of applicants has tripled over the past ten years and "all quantitative indicators, grade, test, scores, class rank are running at far record levels").

[58] Fowler, *supra* note 56.

[59] Chris Isidore, *Why Football is Still a Money Machine*, CNN-MONEY (Feb. 1, 2013, 10:00 AM), http://money.cnn.com/2013/02/01/news/companies/nfl-money-super-bowl/.

ments.[60] New college athletic associations should not re-invent an already successful wheel. This Article will use the Southeastern Conference (SEC) as its representative for the typical Big 5 conference.[61]

Both the NFL and SEC organize as voluntary associations in order to receive significant judicial deference.[62] The NFL is a non-profit[63] association composed of 32 independent "member" professional football clubs.[64] Likewise, the SEC is a non-profit association composed of independent colleges and universities primarily located in the Southeast United States.[65] The purpose of the conference is "educational" within the meaning provided by the Internal Revenue Service.[66]

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[60] *See generally*, Isidore, *supra* note 5; *see generally* Ozanian, *supra* note 8.

[61] There are some differences in the way that each Big 5 conference is organized. *See infra* note 94 (providing a brief overview of the structure of each Big 5 conference). These differences further aid the argument that the Big 5 conferences should operate independently and should establish their own, specific policies.

[62] "Courts are reluctant to intervene, except on the most limited grounds in the internal affairs of voluntary associations." Bloom v. NCAA, 93 P.3d 621, 624 (Colo. App. 2004). *See also* Hous. Oilers v. Harris Cnty,, TX., 960 F. Supp. 1202, 1207 (S.D. Texas 1997) (explaining that private associations, like the NFL, can serve a variety of interests, and although courts have the ability to make association-specific decisions, they should not intervene unless practices are corrupt since parties have consensually agreed to abide by association regulations and policies.)

[63] NFL, *Constitution and Bylaws of the National Football League*, art. 2.2 (2006), *available at* http://static.nfl.com/content/public/static/html/careers/pdf/co_.pdf [herinafter *NFL Constitution and Bylaws*].

[64] *Id.* at art. 1.1.

[65] *SEC Constitution and Bylaws* at art. 1.1.

[66] *Id.* at art. 1.2.

A. Members Are Represented Equally Through a Board of Directors

Uniform adoption of an association's constitution and bylaws must provide each member equal representation on the association's supreme administrative body, the board of directors. Each member's representative must be an individual who considers the member's best interest. The NFL's Executive Committee is "composed of one representative from each member club."[67] Each representative must be the owner of the club, [68] and is allocated one vote.[69] The SEC's Chief Executive Officers are composed of the President or Chancellor of each member institution and are each afforded one vote.[70] Both of these administrative groups share similar responsibilities for their respective organization and are comparable to a corporation's board of directors. First, the vote of each administrative group constitutes official action for their respective organization at annual and special meetings.[71] Second, both the Executive Committee and the Chief Executive Officers have the power to punish any member institution that violates the association's rules, regulations, or policies.[72]

B. An Independent Commissioner Facilitates Effective Enforcement

The NFL's and SEC's board of directors elect an independent commissioner to generally administer the association, and each board grants the commissioner broad authority.[73] The NFL, how-

[67] *NFL Constitution and Bylaws* at art. 6.1.
[68] *Id.* at art. 6.3.
[69] *Id.* at art. 6.2.
[70] *SEC Constitution and Bylaws* at art. 4.1.
[71] *NFL Constitution and Bylaws* at art. 5.6; *SEC Constitution and Bylaws* at art. 5.1.
[72] *Compare NFL Constitution and Bylaws* at art. 6.5 *with SEC Constitution and Bylaws* at art 4.1.2.
[73] *Cf. SEC Constitution and Bylaws* at art. 4.4.1 ("The Commissioner shall be elected by a majority vote of the Chief Executive Officers . . . for a term not to

ever, affords more authority to its independent commissioner than conferences typically do. The NFL Commissioner has "full, complete, and final jurisdiction and authority to arbitrate" disputes between league members, players, coaches, and employees,[74] can incur any expense at his sole discretion that "is necessary to conduct and transact ordinary business of the League,"[75] is the "principal executive officer of the League,"[76] can interpret, establish, and enforce any League policy and procedure,[77] can arrange for and negotiate League and media rights contracts,[78] and, most importantly, has "complete authority" to discipline member owners, players, coaches, or employees that violate the League's Constitution and Bylaws or exhibit "conduct detrimental to the welfare of the League."[79] The SEC Commissioner is responsible for the "administration and operations of the Conference," has the duty of administering and enforcing Conference rules and regulations, has broad discretionary disciplinary authority, is the official interpreter of Conference rules, regulations, and policies, and "may enter into contracts . . . on behalf of the Conference." [80]

Even though conference commissioners and member institutions effectuate their disciplinary authority, all violations of NCAA bylaws must be reported to the centralized Association. The NCAA then analyzes the conference's or member institution's imposed sanctions and makes the final determination whether such discipline is appropriate. The NCAA enforcement process can take years to resolve and is subject to inconsistency since each case

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exceed six years."). NFL at Art. 8 (the Commissioner's election requires a two-thirds vote, and the term is set by the Board).

[74] *NFL Constitution and Bylaws* at art. 8.3.

[75] *Id.* at art. 8.4.

[76] *Id.* (the Commissioner generally supervises the League's business and affairs).

[77] *Id.* at art. 8.5.

[78] *Id.* at art. 8.9, 8.10

[79] *Id.* at art. 8.13 (this ambiguous language affords the Commissioner a substantial amount of discretion).

[80] *SEC Constitution and Bylaws* at art. 4.4.2.

is reviewed *de novo*.[81] The NFL, on the other hand, acts swiftly in its enforcement of League rules and regulations. It does not answer to any higher authority, and, having established its league as an association, courts are less likely to interfere with internal operations absent "mistake, fraud, collusion, or arbitrariness."[82] Those most familiar with league policies, member owners and the independent Commissioner, are able to efficiently weigh considerations and hand down an appropriate ruling.

C. Each Organization's Economic Success Is Attributed to Public Demand and Contracting Ability

Both the NFL and the SEC have experienced incredible economic success through strong brand management and successful contracting. Collectively, the 32 NFL member clubs are worth $37.4 billion.[83] Each Big 5 conference receives between $200 and $300 million annually just from television contracts.[84] There is a high demand for NFL football and big-time intercollegiate athletics. Not only do major networks extensively cover these organizations, but there are now television networks dedicated specifically to the NFL or certain conferences. Both the NFL and the Big 5 conferences have considered their advantageous position and have allowed their members to collectively negotiate lucrative media rights contracts. Furthermore, the NFL and the Big 5 conferences adopt a similar revenue sharing system since each member of the NFL or conference contributes to the overall success of the association as a whole.[85]

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[81] *See infra* notes 146-148, 150-151 and accompanying text.
[82] CHAMPION, *supra* note 14, at 335.
[83] Tom Van Ripper, *The NFL Settles Concussion Lawsuit for Peanuts: Just Over 2% of League's Value*, FORBES (Aug. 29, 2013) http://www.forbes.com/sites/tomvanriper/2013/08/29/the-nfl-settles-concussion-lawsuit-for-peanuts/.
[84] *See* Ozanian, *supra* note 8.
[85] *Compare NFL Constitution and Bylaws* at art. 8.3 ("All regular season . . . television income will be divided equally among all member clubs of the League . . . .") *with SEC Constitution and Bylaws* at art. 31.20, 31.21, 31.23 (generally,

The SEC Manual provides an explicit provision that each member's media agreements are "subject and subordinate to all past, present, and future media . . . agreements to which the conference is . . . a party."[86] Since this provision is included in the SEC Manual, there is no conflicting NCAA provision.[87] The NCAA Manual only specifically provides that it owns all rights to NCAA championships and their associated media rights.[88] This further supports the fact that the Big 5 conferences control their own media agreements and have done so successfully.

The typical Big 5 conference structure is similar to the NFL's governance structure. The NFL has applied this structure to develop the most successful entity in sports. It is not far-fetched to imagine that the Big 5 conferences, as they exist today, could flourish as entities independent of the NCAA. A new Big 5 association should follow the NFL's example and grant more authority to an independent commissioner. This would facilitate effective enforcement of association rules and policies. It is important, however, to maintain the unique product of college athletics,[89] so Big 5 conferences must primarily consider their student-athletes' well being when establishing independent associations.[90] These

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revenue received by SEC office is "divided into 15 equal shares with one share being retained by the Conference office and one share being distributed to each member institution," with additional revenue allocated to member institutions participating in certain post-season competitions).

[86] *SEC Constitution and Bylaws* at art. 22.1.1.

[87] *See id.* at Foreword ("In those instances where the NCAA does not have a provision comparable to the SEC, the subparagraph is numbered *considerably higher* than the highest numbered subparagraph in the appropriate section of the NCAA manual.") (emphasis added).

[88] *NCAA Manual* at art. 31.6.4.

[89] *See* NCAA v. Board of Regents, 468 U.S. 85, 101-02 (1984) ("The NCAA seeks to market a particular brand of football . . . this 'product' with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable . . .").

[90] Interview with Ross Bjork, Ole Miss Director of Athletics, in Oxford, Miss. (Nov. 12, 2013) (emphasized that any governance structure should be student-athlete focused; an association's primary objective should promote student-athlete welfare rather than maximize revenue). *See, e.g.* Dan Wetzel, *Athletic*

new entities should continue to follow traditional guidelines, rooted in NCAA policy, that establish basic recruiting, eligibility, and academic requirements.

III. THE NCAA'S DIVISION I IS COMPOSED OF DISSIMILAR SCHOOLS AND SHOULD BE DECENTRALIZED

A. Policy: The Principle of Decentralization and the Doctrine of Subsidarity

The policy underlying decentralization and the doctrine of subsidiarity promote a Big 5 association's ability to adopt specific policies and legislation, efficiently enforce association rules and regulations, and effectively manage economic growth. At the heart of decentralization, power is held by local organizations.[91] Granting decision-making authority to "regional" associations, as opposed to a centralized NCAA, would allow big-time intercollegiate athletics operations to run more effectively since entity-specific issues would be handled at the appropriate "regional" level.[92] The doctrine of subsidiarity "teaches that . . . problems are best addressed at the level closest to the problem," so the NCAA should never intervene when conferences have the ability "to handle matters that are within their capabilities."[93]

Directors Lobbying NCAA for More Control of College Sports, YAHOOSPORTS (Oct. 29, 2013, 10:48 PM), http://sports.yahoo.com/news/athletic-directors-lobbying-ncaa-for-more-control-of-college-sports-024802663.html; *1A FAR Proposal* at 7.

[91] *See, e.g.*, Food and Agric. Org. of the U.N., *A History of Decentralization*, CENTER FOR INTERNATIONAL EARTH SCIENCE INFORMATION NETWORK, http://www.ciesin.org/decentralization/English/General/history_fao.html (last visited Nov. 1, 2013) (applying decentralization to rural development).

[92] *See, e.g., id. See also* Ronald J. Rychlak & John M. Czarnetzky, *The International Criminal Court and the Question of Subsidiarity*, THIRD WORLD LEGAL STUDIES-2000-2003, at 115.

[93] *Id.* at 115-16.

The college athletic conference was originally established through an agreement between similar member institutions. These members should have the ability to develop and implement legislation and policies most relevant toward accomplishing their particular conference's goals. Today, however, everything must go through the NCAA. This single national entity controls legislative, investigative, and enforcement procedures for all of its over 1,000 diverse member institutions. For example, the adoption of a miscellaneous expense would benefit Big 5 student-athletes but it could cripple Sun Belt institutions. Also, the SEC might unanimously approve legislation to effectuate policy, but the Big 10 or Pac 12 might reject that same proposal.[94] In order for these "re-

[94] Although all Big 5 conferences adopt a similar, general governance structure comprised of a Board of Directors and Conference Chancellor, there are notable differences among each conferences' manual or handbook. This Article does not attempt to fully analyze the differences between Big 5 conference compositions, but includes this comparison to further show that even the Big 5 conferences have different goals and policies. Creating independent athletic associations would allow each Big 5 conference to implement specific policies. Compare the following general differences amongst the Big 5 Conferences. (1) The ACC Board of Directors relies on committees chosen by FARs for recommendations and places a high priority on academics. *See* Atlantic Coast Conference, *ACC Manual 2012-2013*, Committees art.I § I.1 (2012), *available at* http://grfx.cstv.com/photos/schools/bc/genrel/...pdf/.../2012_13_ACC.pdf. Each committee is composed of individuals best suited to handle specific issues. *See id.* at Committees art. III. The "'Council of Presidents' has complete responsibility over the conference." *Id.* at Bylaws art. IV-2. Yet, Presidents, ADs, FARs, and Senior Women Administrators (SWAs) are all awarded voting power within their respective governance group. *Id.* at Bylaws art.IV-1. (2) The Big 10 is structured similarly to the SEC. It grants the "Council of Presidents and Chancellors" (COP/C) holding "ultimate authority and responsibility for Big Ten Conference governance" significant authority. *Big Ten Council of Presidents and Chancellors*, BIG TEN CONFERENCE, http://www.bigten.org/genrel/071311aaa.html (last visited Nov. 17, 2013). The Big 10 COP/C elects a powerful conference commissioner who manages broadcast events, "provides legislative and compliance services," and manages championships, among other things. *About the Conference*, BIG TEN CONFERENCE, http://www.bigten.org/school-bio/big10-school-bio.html (last visited Nov. 17, 2013). (3) The Big XII Conference is the only Big 5 conference organized as Delaware corporation. Big XII Conference, *Big 12 Conference*

gional" conferences to effectively control their shared vision of college athletics, they must have the ability to implement their decisions.

B. Working Examples of Federated Non-Profit Associations: The Consumers Federation of America and the United States Public Interest Research Group

The Consumer's Federation of America (CFA) and the United States Public Interest Research Group (U.S. PIRG) are two examples of non-profit associations[95] that have adopted a federalized structure in order to best pursue their organization's mission. Both organizations' goals and policies are strengthened through their regional members.[96] The CFA, a federation of over 300 non-profit organizations, advances "consumer interest through research, advocacy, and education."[97] The U.S. PIRG, active in 47 states, "is a federation of independent, state-based organizations that advocate for the public interest."[98]

2012-2013 Handbook, § 1.1 (2012), *available at* www.big12sports.com/fls/.../handbook/Bylaws.pdf. University Presidents and Chancellors have "authority over all actions and functions of the Conference" and receive recommendations, in a tiered structure, from SWAs and ADs who report to FARs. *Id.* at § 5.1. (4) The Pac 12 members' Presidents and Chancellors also act as CEOs and act as the conference's governing body and manages the conference's businesses and affairs. Pac-12 Conference, *Pac-12 2013-14 Handbook*, Constitution and Bylaws ch. 5 (2013), *available at* http://compliance.pac-12.org/pac-12-handbook/. The Pac 12 also grants authority to a "Council" comprised of each member's FAR, AD, and SWA. The FARs submit the official vote on academic, eligibility, sports management, rules, and legislative issues. *Id.* at Constitution and Bylaws ch. 8.

[95] *See About CFA: Overview*, CONSUMER FEDERATION OF AMERICA, http://www.consumerfed.org/about-cfa/overview (last visited Nov. 17, 2013); *About Us*, U.S. P.I.R.G., http://www.uspirg.org/page/usp/about-us (last visited Nov. 17, 2013).

[96] *See About CFA: Overview*, *supra* note 95; *About Us*, U.S. PIRG, *supra* note 95.

[97] *About CFA: Overview*, *supra* note 95.

[98] *About Us*, U.S. PIRG, *supra* note 95.

A federated structure allows regionally situated members to most effectively manage their specific concerns. It is a CFA priority to strengthen the consumer movement "through the development of state and local organizations."[99] These 'regional' organizations encounter unique problems on a regular basis. They are best able to handle these problems, and, if necessary, they can make recommendations to the national organization. Member control and participation is an essential aspect for CFA Consumer Cooperatives.[100] Regional CFA members establish policy and elect directors.[101] The board then elects managers to carry out the cooperative's day-to-day functions.[102] The regional members, therefore, have a substantial voice in cooperative operations. Big 5 association members would share a similar ability to influence policy and pursue goals through the independent election of a commissioner. University presidents and chancellors would wield paramount influence over the association's policies and goals since they collectively elect an independent conference Commissioner who would administer general association operations.

IV. A PROPOSED MODEL THAT BIG 5 ASSOCIATIONS SHOULD ADOPT

Bureaucratic, centralized governance can no longer effectively manage modern intercollegiate athletics. Each of the Big 5 Conferences should separate from the NCAA and form independent athletic associations. Each new entity, for example the SEC, would become the sole athletic association responsible for govern-

[99] *About CFA's State and Local Program*, CONSUMER FEDERATION OF AMERICA, http://www.consumerfed.org/about-cfa/7 (last visited Nov. 17, 2013).
[100] *Consumer Cooperatives*, CONSUMER FEDERATION OF AMERICA, http://www.consumerfed.org/about-cfa/consumer-cooperatives (last visited Nov. 17, 2013).
[101] *Id.*
[102] *Id.*

ance of its member institutions. These new associations would have the authority to adopt association-specific bylaws, policies, and procedures as long as they reasonably promote their particular brand of college athletics[103] and do not violate law or public policy.[104] A Big 5 association should continue to apply established conference-specific structures and policies and should integrate successful aspects from the NFL governance model. In order to facilitate inter-association competitions and national championships, the new associations should contract for "national" events, similar to today's Bowl Championship Series (BCS) and the College Football Playoff.

A. The Importance of Organizing as a Voluntary Association

"Freedom of association is a fundamental liberty guaranteed and protected by the First Amendment."[105] Currently, the NCAA and professional sports leagues receive significant judicial deference by organizing as an association.[106] An association cannot properly function if every decision were subject to judicial scrutiny.[107] Courts find that an association's adopted constitution and bylaws effectively act as a contract between the association and its members.[108] For efficiency and policy reasons, courts are reluctant to interfere with contractual agreements.[109] An association's constitu-

[103] *See* NCAA v. Bd. of Regents, 468 U.S. 85, 101-02 (1984).
[104] CHAMPION, *supra* note 14 at 335-36.
[105] 16A AM. JUR. 2D *Constitutional Law* §578 (2014). *See also* Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L.J. 65, 76-77 (1995).
[106] *See* CHAMPION, *supra* note 14 at 335-336; Lentze, *supra* note 105 at 76-77.
[107] *See* CHAMPION, *supra* note 14 at 335-336; Lentze, *supra* note 105 at 76-77.
[108] Lentze, *supra* note 105 at 76-77 n.70. *See also*, CHAMPION, *supra* note 14 at 340.
[109] Lentze, *supra* note 105 at 76-77.

tion and bylaws must not violate law or public policy, and its method of control must not be arbitrary, fraudulent, or collusive.[110]

A Big 5 conference should organize its new entity as a private, voluntary association. Currently, most Big 5 conferences are already organized as voluntary associations, established through an agreement between colleges and universities embodied in the conference manual.[111] Each conference's rules and regulations are based on NCAA requirements.[112] Some conference provisions "are more restrictive than those of the NCAA," but there are no provisions less restrictive than an NCAA provision.[113] Conferences have already effectively established entity-specific rules, policies, and procedures, and each Big 5 conference has successfully contracted for lucrative media rights agreements. Separating from the NCAA's totalitarian control would allow new associations to pass bylaws specific to that entity's unique product of college athletics.[114]

The five new college sports entities should continue to enjoy the freedom provided to associations since courts already grant judicial deference to an overextended NCAA and a moneymaking machine in the NFL.[115] Independent college athletic associations

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[110] CHAMPION, *supra* note 14 at 335-36. Lentze, *supra* note 105 at 77. *See also* Bloom v. NCAA, 93 P.3d 621, 627 (Colo. App. 2004) (quoting Cole v. NCAA, 120 F. Supp. 2d 1060, 1071-72 (N.D. Ga. 2000); NCAA v. Lasege, 53 S.W. 3d 77, 83 (Ky. 2001)).

[111] Leibovitz, *supra* note 7 at 678-79. *See supra* note 94 (indicating that the Big 12 is organized as a Deleware corporation).

[112] *SEC Constitution and Bylaws* at Foreword.

[113] *Id.*

[114] *See supra* note 94 and accompanying text (for example, an association could define "amateur" in the most applicable way to its student-athletes; "amateur" is a flexible term, and is defined by a particular organization). CHAMPION, *supra* note 14 at 335 (the meaning of "amateur" varies from one organization to another). *See, e.g. Bloom*, 93 P.3d at 626-27 (explaining that although Jeremy Bloom was eligible to compete in the Olympics as an amateur, even though he received sports-related endorsements, he did not qualify as an amateur under the NCAA Bylaws).

[115] *See supra* note 62 and accompanying text.

would be comprised of similarly situated member institutions that share specific membership requirements and goals.[116] Since these entities would qualify as "sports leagues"[117] and could more effectively control intra-association competition, championships, and rules enforcement, courts should logically extend judicial deference to these new, efficiently managed associations.

1. Board of Directors

Each association should institute a Board of Directors, which shall establish and direct general association policy, implement the association's strategic plan, and vote for the association's independent commissioner. The Board shall have the power to impose penalties on any member that violates any provision of the association's constitution, bylaws or other rules and regulations. The Board of Directors shall be comprised of each member institution's President or Chancellor. Each director is afforded one vote, and all Board actions must be approved by a two-thirds affirmative vote.

Presidents or Chancellors establish and oversee general university policy and strategy. As leaders of their respective member institution, university presidents best represent both their school's academic and athletic interests. The captain of the institution ultimately determines how much emphasis he will allocate to athletics. These leaders' votes should represent their member's interest in establishing association policy and strategic plans for college athletics.

The purpose of the Board is to provide equal representation to all member institutions. Each member institution, and its associat-

[116] *Cf.* Liebovitz, *supra* note 7 at 678 (applying conference principles to that of new Big 5 association).

[117] Language obtained from *NCAA v. Board of Regents* majority opinion, when Justice Stevens quotes Judge Robert Bork's book, THE ANTITRUST PARADOX. *See also*, Kreher, *supra* note 11 at 57-58 ("A traditional sports league creates rules for on-field play, sets members' regular season schedules, crowns an on-field champion, and creates some system of distributing the revenue it generates . . . . leagues create a new product: league competition itself.").

ed fan base, is an essential asset to the overall brand of the new athletic association and should be afforded equal representation on the Board. These schools originally organized as a Big 5 conference in order to establish policies and pursue goals common to all members. These colleges and universities were, and still are, similarly situated. They enroll top-quality athletes, build world-class athletic facilities, operate under comparable, multi-million dollar budgets, produce a desirable product for consumers, and contract for incredible media rights agreements.

2. Management Council

Each association should establish a "Management Council" that shall make recommendations and suggest policies to the Board of Directors after examining issues within the association and college athletics in general. The Council shall also serve as the association's primary legislative authority, subject to review by the Board of Directors and Commissioner. The Management Council shall consist of two sub-groups with identical duties and powers, one composed of each member's athletic director (AD), and the other composed of each member's faculty athletic representative (FAR).[118] The association's Board of Directors and Commissioner should extensively rely on the Management Council's expert suggestions since they are often far-removed from specific athletic and academic issues.

ADs are the ultimate leaders of athletics programs and handle a broad range of athletics-related issues daily.[119] An athletics

[118] The idea for a proposed Management Council developed as a combination of new governance systems proposed by Division I Athletic Directors, the 1A Faculty Athletic Representative Board, and through a conversation with the Ole Miss Director of Athletics, Ross Bjork. *See* Wetzel, *supra* note 90; *see also supra note* 36. *Cf. 1A FAR Proposal* (this Article's proposed structure is similar to the 1A FAR Proposal; however, this Article advocates complete separation from NCAA, and the FAR proposal does not create equivalent subgroups for FARs and ADs).

[119] *1A FAR Proposal* at 2-3 ("Athletics administrators have overall responsibility to administer athletics programs. They daily deal with the stresses and requi-

director, as head of the college athletics department, provides invaluable input since he oversees all athletics operations. He personally interacts with student-athletes, coaches, and athletics staff on a daily basis, and his department communicates extensively with the university's academic, admissions, and financial aid staff. FARs are members of an "institution's faculty or administrative staff who [are] designated by the institution's president or chancellor . . . to represent the institution and its faulty in the institution's relationships with the NCAA and its conference(s)."[120] FARs represent the member's "faculty voice" and understand the nature of "the campus environment" and its interplay with athletics and NCAA rules.[121] Dividing the Management Council into two subgroups represents the new association's athletic and academic interests. Each institution's AD and FAR should meet at least twice per year and present recommendations to the Board.

3. Independent Commissioner

The Board of Directors shall elect, by a two-thirds majority vote, a Commissioner to a term designated by the Board. The Commissioner must be an impartial individual.[122] He is responsible for the administration and operation of the new college athletic association and shall be granted broad discretionary power. The Commissioner is the official interpreter of the association's consti-

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sites of the competitive environment, including student-athletes, coaches, boosters, and agents, and they also have end-line responsibility to manage finances and increase resources.") *See also* Wetzel, *supra* note 90 ("Experienced AD's should be essential leaders of the new governance system and should be represented at all levels. The ADs', who were selected by their Presidents, are in the position of leadership, responsibility and accountability for Intercollegiate Athletics and the well-being/welfare of student-athletes on their campus.").

[120] *NCAA Manual* at art. 4.02.2.

[121] *1A FAR Proposal* at 3.

[122] *See* Lentze, *supra* note 105, at 80 ("[S]ports leagues are regarded as monopolistic business associations," so employing an independent authority to review internal issues would protect "participants from the owners' monopoly power.") (Lentz also notes that an independent commissioner would serve as an efficient decision-maker.)

tution, bylaws, and other rules and regulations, and he has the authority to arbitrate any disputes arising amongst association members. The Commissioner may also enter into contracts on behalf of the association.

New athletic associations should grant their commissioners authority similar to the NFL's Commissioner. The NFL has successfully operated a profitable model under the guidance of an independent commissioner, although without criticism. Decision-making consistency and efficiency is the most valuable asset an independent commissioner provides. Ideally, the commissioner should be an impartial supervisor of the association.[123]

Although the commissioner would be responsible for overseeing the association's business, his primary responsibilities should be enforcement of association rules and regulations and arbiter of intra-association disputes. Unlike the NFL, whose main purpose is to "promote and foster the primary business of League members,"[124] Big 5 associations should be primarily concerned with maintaining their unique product of college athletics, in whichever form a Big 5 association may adopt. Rather than merely considering an association's business interests, the Commissioner, as elected by university representatives, should make timely decisions based

[123] *Id.* at 81. In reality; however, commissioners have conflicting interests. (1) As "employee[s] of the league," they must promote the league's business. *Id.* (2) They must use *independent* discretion "to resolve disputes and to enforce the disciplinary process . . . . to maintain the integrity of the game. . ." *Id.* at 79. (emphasis added)

[124] *NFL Constitution and Bylaws* at art. 2.1(A).

B. Big 5 Associations Should Expand on the Current FBS Post-Season Model and Use Their Contracting Power to Arrange Inter-Association and Post-Season Competitions

Big 5 associations should no longer subject themselves to the sole authority of the NCAA to control lucrative collegiate tournaments and national championships. Instead, new Big 5 associations should contract with each other and third-party organizations for inter-association regular and post-season competitions, similar to the current Bowl Championship Series and the future College Football Playoff System. Establishing agreements through mutual contracts between similarly situated entities would eliminate the need for a centralized organization with broad legislative, investigative, and disciplinary authority to also negotiate for its over 1,000 diverse members.

"The BCS is not an entity," but is "instead an event managed by the NCAA FBS conferences and the University of Notre Dame."[125] Bowl game organizers, television providers, and FBS institutions use contracts to create interesting, profitable competitions.[126] The conference commissioners and the Notre Dame Athletics Director represent their member institutions, and "make decisions regarding all BCS matters."[127] The 27 non-BCS bowl games are also "are managed independently by [business] enti-

[125] *The BCS is...*, BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/news/story?id=4809716 (last updated Oct. 1, 2013 at 4:22 PM). *See also* Christopher Pruitt, *Debunking a Popular Antitrust Myth: The Single Entity Rule and Why College Football's Bowl Championship Series does not Violate the Sherman Antitrust Act*, 11 TEX. REV. ENT. & SPORTS L. 125 (2009).

[126] *See generally* Dylan Williams & Chad Seifried, *The Taxing Postseason: The Potential Impact of Unrelated Business Income Taxation on College Football Bowl Organizers*, 23 J. LEGAL ASPECTS SPORT 72 (Aug. 2013).

[127] *The BCS is...*, *supra* note 125. The conference commissioners sand the Notre Dame AD consult with the Athletic Director Advisory Board, and all decisions are subject to the Board of Managers. *BCS Governance,* BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/news/story?id=4809846 (last updated Oct. 29, 2013 at 8:50 PM).

ties."[128] The College Football Playoff will succeed the BCS for the 2014 FBS football post-season. The Playoff will implement a structure similar to the current BCS system, but it will include two semifinal games and a championship game.[129] Corporate sponsors will still receive similar benefits previously associated with bowl games.

Conferences have successfully contracted with event management for big-time college football since the 1998 season.[130] It should not seem unreasonable for this type of agreement to continue if Big 5 conferences become separate associations. Furthermore, other sports, most notably men's basketball, could adopt the College Football Playoff model for other national championships.

The NCAA has successfully cultivated and managed its championship trademarks. Similar to the BCS and the proposed College Football Playoffs, the NCAA currently relies on committees comprised of conference commissioners and athletic directors[131] to determine which colleges and universities will compete in NCAA championships.[132] Rather than permitting the NCAA to be the sole negotiator for national championships, Big 5 associations would have a seat at the table.

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[128] *The BCS is...*, *supra* note 125.
[129] Stewart Mandel, *Breaking Down the New College Football Playoff System*, SI.COM (Apr. 24, 2013), http://sportsillustrated.cnn.com/college-football/news/20130424/breaking-down-the-new-college-football-playoff-system/.
[130] *See BCS Selections History*, BOWL CHAMPIONSHIP SERIES, http://www.bcsfootball.org/news/story?id=5528971 (last updated Oct. 7, 2013).
[131] CNN Library, *NCAA Men's Basketball Tournament Fast Facts*, CNN (Sept. 6, 2013), http://www.cnn.com/2013/09/06/us/ncaa-mens-basketball-tournament-fast-facts/.
[132] *See, e.g.* Rachel Bachman, *College Football Playoff Unveils Selection Panel*, WALL ST. J. (Oct. 16, 2013, 6:24 PM), http://online.wsj.com/news/articles/SB10001424052702304864504579139693856771348. *See also* NCAA, *Sports Committees* (May 9, 2012), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Championships/Sports+Committees/ (noting that all NCAA Championships are overseen by respective sports committees).

V. ESSENTIAL BENEFITS DERIVED FROM THE MODEL BIG 5 ASSOCIATION

A. Each Big 5 Association Could Effectively Develop Specific Legislation and Policy

The most important effect of the Article's proposal is that each Big 5 association will be able to control its legislative destiny.[133] Rather than controlling less than one-third of the NCAA Division I Board's votes, Big 5 members will comprise the entirety of each association's board. Therefore, member schools, through their university president or chancellor, can directly affect association policy, rules, and regulations. FARs and ADs, in their capacities as Management Council, will promote association-specific legislation, policies, and strategies for the board's consideration. The Board of Directors will then, through equal member representation, consider these recommendations. It is important to remember that each conference was originally established in order to pursue its unique members' goals.

According to the principle of decentralization and doctrine of subsidiarity, power should reside with local organizations, which are best able to handle their specific issues.[134] The 63 Big 5 schools are substantially different from the other 284 Division I programs, and the Big 5's success is evidenced by their enormous operating budgets. Notable schools have considered different purposes for their athletics programs as intercollegiate athletics has changed from its foundation in 1905, through the advent of television, and, most significantly, since the 1984 *Board of Regents* decision.[135] Although education has always been a top priority,

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[133] *See* Dodd, *supra* note 50.

[134] *See* Food and Agric. Org. of the U.N., *supra* note 91; *see also* Rychlak & Czarnetzky, *supra* note 92.

[135] *Prospective Student Athlete Information*, THE IVY LEAGUE, http://www.ivyleaguesports.com/information/psa/index (last visited) (noting that Ivy League schools do not award academic or athletic scholarships).. *See supra* note 30 and accompanying text.

some institutions have used athletics as a vehicle to obtain additional revenue through marketing.[136] Programs that do not share the same interests and concerns as the 63 Big 5 schools should not represent the product of 'big-time' college athletics. Providing actual voting power to the Big 5 schools would allow the new conference-turned-association to function as the members initially intended.

B. Independent Associations Would Facilitate More Consistent and Efficient Rule Enforcement than the Current NCAA

Seemingly everyday, the media reports new instances of NCAA violations within major athletics departments.[137] Two major problems attributed to the current NCAA system are inconsistent rules enforcement and prolonged investigations. Under the current NCAA structure, major programs may consider whether the benefits derived from potential rules violations outweigh the risk of NCAA punishment.[138] The NCAA would be severely harmed if it excessively punished certain hallmark programs. Therefore, some schools may be considered "too big to fail" and are essentially exempt from appropriate punishment.[139] In order to maintain its authoritative perception, the NCAA imposes proportionally harsher penalties on less essential schools.[140]

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[136] *See supra* note 57.

[137] At the time this Article was written, the NCAA issued rulings regarding Johnny Manziel and the University of Miami, Sports Illustrated exposed the Oklahoma State football program, and Yahoo Sports reported that five high-profile SEC student-athletes received extra benefits.

[138] Jason P. Rudderman, *Major Violation for the NCAA: How the NCAA Can Apply the Dodd-Frank Act to Reform its Own Corporate Governance Scheme*. 23 MARQ. SPORTS L. REV 103, 113 (2012).

[139] *Id.* at 116-18.

[140] *See id.* at 118. *See also* Bill N., *Auburn's Cam Newton Got a Day and USC Trojans' Football Got Bush-Whacked by NCAA*, BLEACHER REPORT (Dec. 1, 2010), http://bleacherreport.com/articles/532046-usc-football-auburns-cam-newton-got-a-day-and-the-trojans-got-bushwhacked (Cam Newton and Reggie Bush had factually similar amateurism violation cases, yet Cam Newton received a nominal penalty while USC had to vacate 15 wins, lost 30 scholarships,

1. Inconsistent NCAA Rule Enforcement

In November 2009, the University of Miami began investigating potential NCAA violations committed by its Men's Basketball and Football programs.[141] There were 18 reported allegations, consisting of 79 issues that spanned over a decade, which involved a booster providing multiple student-athletes with free meals and clothing, and hosting house, yacht, and strip club parties.[142] Compare these violations with the 2010 University of Southern California investigation, which only involved two high profile student-athletes who violated NCAA rules by receiving impermissible benefits.[143] The NCAA made an example out of USC by vacating 15 football wins, along with their 2004 National Championship, imposing a reduction of 30 scholarships, a two-year bowl ban, four years probation, and limiting the number of incoming recruits by 10 under the normal limit.[144] Miami, on the other hand, was placed on two years probation and lost a total of nine scholarships.[145]

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and was deemed inactive for two post-season bowl games). Also consider the excitement surrounding returning Heisman winner Johnny Manziel in the summer of 2013. "Johnny Football" was one of the biggest s in college football and was extremely valuable to the NCAA. Just prior to the beginning of the 2013 football season, the NCAA investigated reports of a widespread autograph ring involving Manziel. However, the NCAA only suspended Manziel for one-half of a game.

[141] Andrea Adelson, *No Bowl Ban for Miami Hurricanes*, ESPN (Oct. 23, 2013), http://espn.go.com/college-sports/story/_/id/9861775/miami-hurricanes-avoid-bowl-ban-lose-nine-scholarships-part-ncaa-sanctions

[142] *Id.*

[143] Brent Schrotenboer, *Haden: NCAA Decision on Miami Only 'Bolsters' USC's Gripe,* USA TODAY (Oct. 22, 2013), http://www.usatoday.com/story/sports/ncaaf/2013/10/22/miami-hurricanes-usc-trojans-pat-haden/3151145/.

[144] *Id.*

[145] *Id.* (USC's Athletic Director feels that the Miami decision only supports his opinion that USC was unfairly punished); Adelson, *supra* note 141 (experts speculate that Miami's cooperation with the NCAA and its imposition of "'un-

A glaring problem with NCAA enforcement is that each case is investigated *de novo*. Although the NCAA's research database is replete with prior cases and interpretations that explain the reasoning behind final decisions, the current chairman of the NCAA infractions committee admits that "[e]ach case is unique,"[146] and that the NCAA doesn't "do a great deal of comparative analysis."[147] The fact that "different cases are decided by different infractions committees"[148] and that each committee is composed of a unique set of people most attributes to the inconsistency of NCAA enforcement.

2. Prolonged NCAA Investigations

The current NCAA investigative process is unnecessarily lengthy. By the time some NCAA investigations conclude, the responsible offenders no longer attend the institution, and, thus, cannot be punished deservedly. For example, youth and high school athletes who had dreams of following in Reggie Bush and O.J. Mayo's footsteps at Southern California were subjected to the brunt of the NCAA hammer years later when they pulled on their USC Cardinal and Gold uniforms.[149] Innocent student-athletes, coaches, students, and employees are subjected to the delayed NCAA response. Prospective student-athletes sign their National Letter of Intent uncertain of their new school's fate.

The University of Miami reported institutional investigation of potential violations to the NCAA in November 2009.[150] Almost four years later, the NCAA released its judgment on October 22, 2013.[151] During this four-year span, the University of Miami

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precedented' self-imposed sanctions" during the investigative process, which included a two-year bowl ban, minimized additional penalties).

[146] Adelson, *supra* note 141.

[147] Schroetenboer, *supra* note 143.

[148] *Id.*

[149] *See* Pat Forde, *USC's Punishment Sends Shockwaves*, ESPN (June 10, 2010), http://sports.espn.go.com/ncf/columns/story?id=5273422.

[150] Adelson, *supra* note 141.

[151] *See id.*

football and men's basketball programs were shrouded in a "cloud of uncertainty." Coaches could not accurately predict the future state of their programs, and therefore had a difficult time recruiting highly touted student-athletes. The university's image was damaged exceedingly due in part to the prolonged investigation.

Following the investigative stage, the NCAA typically attempts to issue decisions in six to eight weeks.[152] Due to the complexity of the Miami case, however, the committee on infractions handed down its decision after four months of consideration.[153] The NCAA also received a black eye when it improperly obtained evidence during the investigative proceedings.

Subjecting fourteen member institutions to the authority of an individual athletic association, headed by an independent commissioner would promote rule enforcement efficiency. It is important that these independent associations appoint an "impartial and fair authority to resolve disputes and to enforce the disciplinary process . . . to provide basic due process in order to avoid judicial interference with [association] affairs."[154] A Big 5 association could enact specific bylaws for enforcement and investigative procedures. This would establish predictability and force members to conform to tailored regulations. Intuitively, it is far easier for each commissioner, intimately familiar with his association's policies, rules, and procedures, to evaluate potential violations and administer consistent and fair judgments. Additionally, efficient enforcement would enhance the association's product as a valid intercollegiate athletic association in the eyes of the public.[155] Following principles of decentralization and subsidiarity, authority should be divested to local associations and "problems are best addressed at the

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[152] *Id.*
[153] *Id.*
[154] Lentze, *supra* note 105, at 79-80.
[155] *Cf. 1A FAR Proposal* at 7 ("[T]he 1A FAR Board supports a new, separate, FBS Division as the best alternative to achieve confidence and buy-in in NCAA Division I governance, something widely acknowledged as missing in the current structure.")

level closest to the problem."[156] A Big 5 association, in establishing its own specific rules and regulations is best able to handle enforcement issues. A centralized body that is far removed from the situation and considers multiple schools' interests should not intervene with these regional associations' procedures.

C. Revenue Produced by Each Association Would Be Managed According to the Association's Specific Policies

Big 5 conferences have become more autonomous in recent years due to its members' success on the field and focused conference marketing campaigns, which in turn, increased the public demand for the unique conference product. Previously, the NCAA seal of approval was necessary to validate a collegiate athletics program. Yet today, because of the Big 5 conferences' success, independent intercollegiate athletic associations could survive without the NCAA brand. In 2013, the Southeastern Conference (SEC) extended its contract with ESPN for an additional 20 years, and established a conference-specific channel.[157] Experts predict that the newly created SEC Network will provide the conference an additional $300 million in annual revenue.[158] Other conferences have negotiated valuable television deals as well.[159] The Big 10 Network, for example, has broadcasted conference competitions and programs for the past six years.[160]

Although the Big 5 conferences are in sole control of revenue earned from conference negotiated television contracts and post-

[156] *See* Rychlak & Czarnetzky supra note 92, at 115.
[157] Ozanian, *supra* note 8.
[158] Ozanian, *supra* note 8. *SEC Constitution and Bylaws* at art. 31.20-31.23 (revenue is split into 15 equal shares; one share is retained by the conference and the other shares are distributed to each member institution).
[159] Ozanian, *supra* note 8 (each of the Big 5 conferences currently contracts with major television networks for deals ranging from $200-$250 million annually).
[160] Jeff Smith, *Big Ten Network Celebrates Anniversary of Launch*, BIGTEN.ORG (Aug. 29, 2008), http://www.bigten.org/genrel/082908aal.html. Pac 12, Big XII, and Longhorn Network are other examples of conference or institutional television contracts.

season football games, they are still subject to the NCAA's Distribution Plan for the Division I Men's Basketball Championship earnings. The NCAA presumably has the best intentions in distributing almost 40% of the revenue across the entire Association; however, the programs that directly contribute to these astronomical proceeds are not able to manage the revenue as they see fit. It is the NCAA's duty to look after all 1,000 plus member programs, but it is managing money earned primarily by its most valuable members.

Separating from the NCAA would allow each Big 5 association to contract for additional revenue and have the authority to manage it as each association desires. According to principles of decentralization and subsidiarity, management of revenue produced by Big 5 associations should be determined by those local associations best able to consider the association's interests.[161] A centralized authority should not take the contributing members' due revenue and re-distribute it as the central body sees fit.[162] As mentioned previously, the vast majority of the NCAA does not share the same interests as the 63 Big 5 schools.

New Big 5 associations should separate from the NCAA and expand the BCS/College Football Playoff model by independently contracting with third-party entities for intercollegiate competitions and post-season championships. Independent associations could use their bargaining power to receive a larger share of earned revenues. Although part of March Madness' appeal comes from the opportunity for unheralded "Cinderella" programs to upset traditional powerhouses, the tournament could not survive without Big 5 programs. The NCAA, Turner/CBS Sports, and the Big 5 conferences recognize this leverage. Rather than allowing the NCAA to determine the best use for the retained revenue among all of its member institutions, the schools that contribute most to these lucrative deals should be able to manage revenue represent-

[161] *See supra* notes 91 and 92.
[162] *See supra* note 42.

ing their actual value according to association-specific policies. This does not necessarily mean a death-knell for March Madness, the Women's Final Four, the College World Series, or other popular NCAA championships and their opportunistic images. The NCAA would continue to benefit from these valuable and established championships; however, Big 5 associations would receive revenue commensurate with their market value.

VI. COSTS ASSOCIATED WITH BIG 5 INDEPENDENCE ARE NOMINAL AND WOULD BE OUTWEIGHED BY THE BENEFITS OF THE PROPOSED INDEPENDENT ASSOCIATION MODEL

A. The Unique Product of College Athletics Would Not be Diluted if the Big 5 Separated from the NCAA

In order to operate an economically successful college athletics program in previous years, it was necessary to join the NCAA. However, due in part to the increased amount of television packages containing conference-specific networks and college-athletic specific programs, the Big 5 brands have strengthened considerably. Some might argue that certain conferences have stronger brands than the NCAA. Although Big 5 chancellors, presidents, and commissioners should strongly consider whether their brand would lose value after separating from the NCAA, ultimately, any resulting harm should be offset by increased control and revenue.

New "Big 5" associations would still be motivated to distinguish college athletics from professional sports.[163] Some sports fans prefer college athletics or Olympic sports to professional sports because of the ideal of amateurism. "Amateurism," however, is a flexible term that means whatever the particular sports governing body decides.[164] For example, in *Bloom v. NCAA*, United States Olympic skier, Jeremy Bloom "was offered various

[163] *Cf. supra* note 23 and accompanying text.
[164] CHAMPION, supra note 14, at 335.

paid entertainment opportunities" and commercial endorsement deals for ski equipment and Tommy Hilfiger clothing due to his participation in the Olympics.[165] Under, United States Olympic Committee (USOC) rules, Bloom could compete for the United States as an "amateur."[166]

Bloom, however, "discontinued his endorsement, modeling and media activities" [167] when he enrolled at the University of Colorado-Boulder and competed on the university's football team since "NCAA bylaws prohibit every student-athlete from receiving money for advertisements and endorsements."[168] The NCAA denied the University of Colorado's requests for waivers of NCAA rules and a favorable rule interpretation.[169] Bloom then sought declaratory and injunctive relief, arguing that the "NCAA's restrictions on endorsements and media appearances were arbitrary and capricious; and . . . constituted improper and unconscionable restraints of trade."[170] The Colorado Court of Appeals, providing "considerable deference" to the Association,[171] upheld the NCAA bylaws and administrative review process as reasonable.[172]

Individual conferences have the ability to establish applicable amateurism rules.[173] It is important for the Big 5 associations to maintain some form of amateurism so their product is distinguished from professional sports. Each association could independently adopt a specific form of amateurism. Some could

[165] Bloom v. NCAA, 93 P.3d 621, 622 (Colo. App. 2004).
[166] CHAMPION, *supra* note 14, at 334-45 (categorizing Olympic competition as "unrestricted competition," and as one form of amateur sports; recognizing that the definition of amateur is flexible in "that an individual can be viewed as an amateur under the rules of the USOC but not . . . under the NCAA rules.").
[167] *Bloom*, 93 P.3d at 622.
[168] *Id.* at 626 (citing *NCAA Manual* at art. 12.5.2.1, 12.5.1.3, 12.4.1.1).
[169] *Id.* at 622.
[170] *Id.*
[171] *See id.* at 627 (quoting Cole v. NCAA, 120 F. Supp. 2d 1060, 1071-72 (N.D. Ga. 2000)).
[172] *Id.* at 628.
[173] *See* Kreher, *supra* note 11, at 83.

continue to adopt the NCAA's definition of amateurism. Others could, however, could expand their definition of amateurism, allowing student athletes to retain revenue earned from their images.[174] Separating into separate associations allows member institutions to determine which form of intercollegiate athletics it should adopt in today's market.

B. Administrative Costs Would Be Nominal Since Big 5 Conferences Are Already Staffed Appropriately

Although new Big 5 associations would incur some administrative costs in establishing a new entity, these costs should be nominal. The Big 5 conferences have already established offices staffed with appropriate personnel,[175] and major athletic departments employ a substantial number of individuals within specialized athletic-specific departments (i.e. Academics, Compliance, Business, Development, Marketing, Facilities, Ticketing, etc.).[176] Rather than reporting to the NCAA, member institutions would report directly to their respective Big 5 association.

Currently, the NCAA is primarily responsible for investigative and enforcement procedures for over 1,000 member intuitions. Each new association would have to create new positions in order

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[174] *See generally* In re Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9th Cir. 2013) (holding that EA Sports' use of college athletes' likenesses is not protected by the First Amendment). *See also*, Andy Staples, *Online Jersey Sales Highlight NCAA's Hypocrisy on Amateurism*, SI.COM (Aug. 7, 2013), http://sportsillustrated.cnn.com/college-football/news/20130807/jersey-ncaa-sales-manziel-clowney/ (The NCAA prohibits student-athletes from profiting off of their name or likeness; however, fans can type the names of famous student-athletes, such as Johnny Manziel and Jadeveon Clowney, into the "NCAA Shop" where they are directed to a web page where they can purchase the student-athlete's replica jersey.).

[175] *See, e.g.*, *Staff Directory*, PAC-12, http://pac-12.com/content/staff-directory (last visited Nov. 17, 2013) (providing list of Pac-12 Conference employees and their positions).

[176] *See*, *e.g.*, *Staff Directory*, OLE MISS ATHLETICS DEPARTMENT, http://www.olemisssports.com/school-bio/ole-staff-directory.html (last visited Nov. 17, 2013).

to take on enforcement responsibilities. However, these costs should be nominal since each association would only need to employ an investigative and enforcement staff that would oversee 12-14 member institutions. Furthermore, any costs incurred should be outweighed by increased revenue and association control.

C. Litigation Concerns Are Limited: Courts Should Grant Independent Associations Judicial Deference, Reducing the Number of Meritorious Lawsuits Filed Against Intercollegiate Athletic Associations

Establishing new association operating rules would create a contract between each Big 5 association and its members.[177] Students would have third-party beneficiary standing to sue the new association rather than the NCAA.[178] It might seem counterintuitive for the Big 5 conferences to take on the high-profile litigation currently being filed against the NCAA,[179] but the Big 5, as independent associations, would collectively take on fewer lawsuits since intercollegiate athletics would operate more efficiently. The Big 5 associations should receive even more judicial deference than is currently awarded to the NCAA.[180] Courts would more likely abstain from interfering with contractual agreements between similarly situated member schools and a Big 5 association since each association would specifically tailor their constitution and bylaws to unique association policies and goals. Additionally, the new association's application of its rules and regulations would not be arbitrary or capricious since an independent commissioner and a closely held board of directors could effectuate consistent and fair procedures that apply to 12-16 members.

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[177] *See supra* notes 108 and 111 and accompanying text. *See generally* Bloom v. NCAA, 93 P. 3d 621 (Colo. App. 2004).
[178] *See supra* note 111 and accompanying text. *See generally* Bloom v. NCAA, 93 P. 3d 621 (Colo. App. 2004).
[179] *See generally* In re Student-Athlete Name & Likeness Litigation, 724 F.3d 1268 (9th Cir. 2013).
[180] *See supra* note 110.

D. The Formation of Big 5 Associations Would Not Violate Antitrust Laws

Antitrust issues should not dissuade Big 5 conferences from organizing as independent athletic associations since new associations would qualify as "sports leagues"[181] and would pass antitrust review.[182] The sports industry presents a unique case for antitrust review because, "in order to preserve the character and quality of the 'product,'"[183] members must mutually adopt rules that "restrain the manner in which institutions compete."[184] Each new association would create a new product that would compete at a system level with other associations, the remaining NCAA, and professional sports leagues.[185] Furthermore, intra-association agreements for regular season and post-season competitions should not violate antitrust laws since they are necessary to promote the unique product of big-time college athletics.[186] College sports are clearly distinguishable from professional sports. Many fans are current students or alumni of their favored member institution. College sports fandom elicits more personal sentiments since many supporters have actually attended the university.

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[181] *See supra* note 117 and accompanying text. *See also* Kreher, *supra* note 11, at 81 ("Unlike the NCAA, the conferences are sports leagues . . . because they create an interrelated set of games that culminates in a championship. [T]he conferences allow[ing] members to compete in non-league games means that they are structured as open leagues; it does not strip the conferences of sports league status.").

[182] Kreher, *supra* note 11, at 52 (referencing Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model,* 82 MICH. L. REV. 1 (1983)). CHAMPION, *supra* note 14, at 529 (Major League Baseball is the only sports organization that is exempt from antitrust review.).

[183] NCAA v. Bd. of Regents, 468 U.S. 85, 102 (1984).

[184] *Id.* at 101. *See also* Kreher, *supra* note 11, at 54.

[185] *See* Kreher, *supra* note 11, at 59.

[186] *Id.* ("[C]ourts have properly sought to protect system-level competition by closely scrutinizing agreements between them.").

Independent associations would compete amongst each other for college sports fans. Each association would form a distinct brand through adoption of unique policies and regulations. Similar to CFA Cooperatives, formation of new associations would enhance market competition "by providing consumers with an alternative source of products."[187] Rivalries between members have distinctive histories. Neighbors can have contrasting loyalties spanning generations. Considering the close proximity amongst member institutions, fans of Alabama athletics, for example, can be found in the states of Mississippi, Georgia, or Tennessee. This regional similarity enhances the identity of the conference-turned-association's brand and fosters competition amongst the member institutions.

In contracting for inter-association competitions, Big 5 associations would adopt comparable bylaws regarding academic eligibility, recruiting, and benefits so one entity does not enjoy unfair advantage over its competitors.[188] These unofficial agreements, approved through mutual contracts, would parallel the current BCS system and "would be justified as necessary to create a new product, just like two competing automakers can form a joint venture to create a new car."[189]

CONCLUSION

Big-time intercollegiate athletics' popularity has ballooned in recent years. In accordance with decentralization principles and the doctrine of subsidarity, the NCAA should no longer be the primary governing body for over 1,000 member institutions. Each Big 5 conference should separate from the NCAA and form independent associations, so the 63 outliers could effectuate and en-

[187] *Consumer Cooperatives*, *supra* note 100.
[188] *Cf.* Kreher, *supra* note 11, at 82-83 (arguing that "the NCAA is an inter-league agreement designed to limit system-level competition" and its requirement of "specific form of amateurism" has an anticompetitive effect; but conferences "could create amateur football through intraconference rules.").
[189] Kreher, *supra* note 11, at 88.

force specific policies and legislation and manage their deserved revenue.

Ultimately each Big 5 conference must determine whether the benefits of separating from the NCAA outweigh the costs. Realistically, in order for this Article's proposal to work, all Big 5 conferences must separate from the NCAA. The Association would not be willing to let its most important members leave since these 63 schools are essentially responsible for the NCAA's entire operating budget. However, the NCAA could continue to operate through management of its valuable championships. It could distribute earned revenue to the remaining Division I conferences that would not survive independent from the NCAA[190] as well as all Division II and III programs. The NCAA would return to its fundamental purpose of maintaining "intercollegiate athletics as an integral part of the education program" for schools that still require NCAA administration.

[190] Some examples of conferences that might not survive include: Conference USA, the Mid-American Conference, the Mountain West Conference, and the Sunbelt Conference. The American Athletic Conference ("AAC") could potentially separate from the NCAA if it decided that the benefits outweighed the costs. *See 1A FAR Proposal* at 1 (alluding to the similarity of the AAC with the Big 5 conferences).

INNOCENT BLOOD ON MANICURED HANDS: HOW THE MEDIA HAS BROUGHT THE NEW ROXIE HARTS AND VELMA KELLYS TO CENTER STAGE

MICHELLE GONZALEZ[1]

I. INTRODUCTION

"It's all a circus. A three-ring circus. These trials, the whole world. It's all show business."[2] In the 2002 film adaptation of Tony Award® winners Bob Fosse[3] and Fred Ebb's[4] Broadway musical *Chicago*,[5] the notorious lawyer Billy Flynn utters those

[1] Michelle Gonzalez, Esq.; J.D., St. Thomas School of Law, 2014; B.A. in Political Science, Florida International University, 2011.

[2] *Chicago Script*, DREW'S SCRIPT-O-RAMA, http://www.script-o-rama.com/movie_scripts/c/chicago-script-transcript-play-lyrics.html (last visited Dec. 4, 2013).

[3] *See The Stars - Bob Fosse*, PBS, http://www.pbs.org/wnet/broadway/stars/bob-fosse/ (last visited Dec. 4, 2013) (providing the biography of director-choreographer Robert Louis Fosse); *see also Our History*, TONY AWARDS, http://www.tonyawards.com/en_US/history/index.html (last visited Dec. 4, 2013) (elaborating on the history and development of the Tony Awards®). Tony Award® winner director-choreographer Robert "Bob" Louis Fosse was born on June 23, 1927. *The Stars*, *supra*. Fosse's contribution to the stage and to film were revolutionary as his work was "always provocative, entertaining, and quite unlike anything ever before seen." *Id.* "The American Theatre Wing's Tony Awards® got their start in 1947 when the Wing established an awards program to celebrate excellence in theatre." *Our History*, *supra*.

[4] *See Fred Ebb*, THE KENNEDY CENTER, http://www.kennedycenter.org/explorer/artists/?entity_id=3725&source_type=A (last visited Dec. 4, 2013) [hereinafter *Fred Ebb I*]; *see also Fred Ebb*, FRED EBB FOUNDATION, http://www.fredebbfoundation.org/fred-ebb.htm (last visited Dec. 4, 2013) [hereinafter *Fred Ebb II*] (providing the biography of Fred Ebb). Writer, lyricist, composer, and director Fred Ebb was born on April 8, 1935. *Fred Ebb I*, *supra*. "[Ebb] is a Tony®, Grammy®, Emmy®, Olivier® and Kennedy Center Honors Lifetime Achievement Award winning recipient." *Fred Ebb II*, *supra*.

[5] *See* Elvis Mitchell, *Chicago (2002) Film Review; 'Chicago,' Bare Legs and All, Makes It to Film*, N.Y. TIMES (Dec. 27, 2002), http://movies.nytimes.com/movie/272628/Chicago/overview (reviewing the film adaptation of Bob Fosse and Fred Ebb's musical *Chicago*).

words to his client Roxie Hart who is on trial for the murder of her paramour.[6] The peculiarity of the statement is how accurately the fictional lawyer has described, most especially, trials that involve female criminal defendants. This article will explore how the media has unfairly exploited and commodified female criminal defendants through the recent cases of Casey Anthony[7] ("Anthony"), Amanda Knox[8] ("Knox"), and Jodi Arias[9] ("Arias").

In *Chicago*, it is the year 1929, and vaudeville star Velma Kelly ("Kelly") and small-time chorus dancer Roxie Hart ("Hart") find themselves in a dueling media frenzy after each faces trial for two separate and distinct murders.[10] Kelly is on trial for the murder of her husband and her sister (also her dance partner) after discovering they were engaged in an affair.[11] Hart, desperately seeking fame, cheats on her husband with a man whom she believes is connected to show business.[12] After discovering the man is simply a furniture salesman and has no intent to make her famous, Hart shoots the man to death.[13] As the story unravels, Kelly and Hart battle for the spotlight in the public eye as the media

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[6] *See Chicago Script*, *supra* note 2; *see also* Valerie Valdez, *"Chicago" Broadway Musical Summary*, LOCAL.COM ENT. GUIDE, http://entertainmentguide.local.com/chicago-broadway-musical-summary-5157.html (last visited Dec. 4, 2013) (describing the essence of the charges against Roxie Hart and the nature of her "sleazy" lawyer Billy Flynn).

[7] *See infra* Part III.A.

[8] *See infra* Part III.B.

[9] *See infra* Part III.C.

[10] Rebecca Murray, "*Chicago" Movie Review*, ABOUT.COM HOLLYWOOD MOVIES, http://movies.about.com/library/weekly/aachicagoreview.htm (last visited Dec. 4, 2013); *see Chicago*, MIRAMAX, http://www.miramax.com/movie/chicago (last visited Dec. 4, 2013) (providing a brief synopsis of the film); *see also* Valdez, *supra* note 6 (describing how the character Mary Sunshine, a news reporter, "create[s] a frenzy where facts are easily twisted").

[11] Murray, *supra* note 10.

[12] *Id.*

[13] *Id.*

obsesses, fascinates, and exploits the separate trials of the two women.[14]

The obsession, the fascination, and the exploitation of cases involving female criminal defendants is not a fabrication of the theatre or the silver screen,[15] but the reality of the past as well as the present. The media are instrumental in popularizing criminal trials featuring female defendants.[16] Statistically, men perpetrate the majority of crimes.[17] "Gender is among the strongest predictors of crime, particularly violent crime. Arrest, self report, and victimization data consistently show that men and boys commit significantly more crime both serious and not, than women and girls."[18] However, it is the spectacle surrounding females who carry out crimes similar to those more serious crimes committed by men that captivates audiences across the nation.[19]

The "three-ring circus"[20] surrounding female criminal defendants is hardly a new development in the United States, let alone the world. It should be of no surprise that women have committed crimes spanning all ranges. Some of the most heinous and gruesome crimes have been committed by women.[21] Howev-

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[14] *Id.*
[15] *See* Robert Vaux, *The History of Black & While Film,* EHOW, http://www.ehow.com/about_5099040_history-black-white-film.html (last visited Dec. 4, 2013) ("[T]he phrase 'silver screen' stems from those early days, when shimmering black and white images became synonymous with the medium.").
[16] *See infra* Parts II & III.
[17] Deborah W. Denno, *Gender Issues and the Criminal Law: Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 80-81 (1994).
[18] *Id.*
[19] *See infra* Part III.
[20] *See supra* text accompanying note 2.
[21] *See, e.g.*, Richard Pallardy, *Elizabeth Báthory*, BRITANNICA ENCYCLOPEDIA, http://www.britannica.com/EBchecked/topic/1489418/Elizabeth-Bathory (last visited Dec. 4, 2013) (detailing the biography of the infamous Hungarian Countess Elizabeth Báthory who allegedly "tortured and murdered hundreds of young

er, it is fair to mention that men have been behind a good number of the most horrific crimes in history.[22] Most people's awareness and knowledge of crimes committed by women and men can be attributed to mass media,[23] *i.e.*, television, radio, newspapers,

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women in the 16th and 17th centuries"); *see also, e.g.*, *Irma Grese*, JEWISH VIRTUAL LIBRARY, http://www.jewishvirtuallibrary.org/jsource/biography/grese.html (last visited Dec. 4, 2013) (providing a brief biography of the female Nazi war criminal Irma Grese). *See generally*, Allan Hall, *Nazi Women Exposed as Every Bit as Bad as Hitler's Deranged Male Followers*, DAILY MAIL (Feb. 11, 2009, 7:42 PM), http://www.dailymail.co.uk/news/article-1142824/Nazi-women-exposed-bit-bad-Hitlers-deranged-male-followers.html ("'The fact is that women allowed their female characteristics to be suppressed to bind themselves to the Nazi state and its agencies. To say . . . that they knew nothing of the terror and torture is absolutely unbelievable. They supported and underwrote such terror and torture.'"). At only 19 years of age, Irma Grese ("Grese") was a source of some of the most inhumane murders and tortures at the concentration camps at Auschwitz and Bergen-Belsen during World War II. *Irma Grese*, *supra*. It was reported that Grese had "the skins of three inmates . . . made into lamp shades [which] were found in her hut." *Id.* Following the war, "[survivors of the concentration camps] testified to her acts of pure sadism beatings and arbitrary shootings of prisoners, savaging of prisoners by her trained and half starved dogs, to her selecting prisoners for the gas chambers." *Id.*

[22] *See, e.g.*, *Gilles de Rais*, BRITANNICA ENCYCLOPEDIA, http://www.britannica.com/EBchecked/topic/489979/Gilles-de-Rais (last updated Sep. 9, 2013) (detailing the biography of French baron and marshal of France Gilles de Rais who was accused of "abduct[ing], tortur[ing], and murder[ing] more than 140 children"); *see also, e.g.*, *Joseph Mengele*, U.S. HOLOCAUST MEMORIAL MUSEUM, http://www.ushmm.org/wlc/en/article.php?ModuleId=10007060 (last updated June 10, 2014) (chronicling the life of Nazi Joseph Mengele whose cruel and sadistic experimentation played a horrific role in the Holocaust). Joseph Mengele, also known as the "Angel of Death," "engaged in a wide spectrum of experiments which aimed to illustrate the lack of resistance among Jews." *Mengele*, *supra*. "Many of his 'test subjects' died as a result of the experimentation or were murdered in order to facilitate post-mortem examination." *Id*.

[23] *See* RICHARD T. SCHAEFER, SOCIOLOGY: A BRIEF INTRODUCTION (NAI) 137 (5th ed. 2004), *available at* http://highered.mcgraw-hill.com/sites/dl/free/0072824131/77252/Schaefer5ChapterPreview.PDF (defining mass media as viewed by sociologists). "By *mass media*[,] sociologists refer to the print and electronic instruments of communication that carry messages to often widespread audiences." *Id.*

internet, magazines, etc.[24] Though there have been numerous highly publicized trials involving male defendants,[25] there is arguably a unique public interest surrounding female criminal defendants.

This article will examine poignant cases within the past seven years where three female criminal defendants accused of

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[24] *See* Robert J. McDermott & Terrance L. Albrecht, *Mass Media*, ENCYCLOPEDIA.COM (2002), http://www.encyclopedia.com/topic/Mass_media.aspx (providing several types of media).

[25] *See, e.g.*, *Charles Manson on Trial: Madness Visible*, LIFE, http://life.time.com/history/charles-manson-on-trial-madness-visible/#1 (last visited Dec. 4, 2013) (recounting the highly publicized nine month trial of the ultimate conspirator Charles Manson for the murders of Sharon Tate and Rosemary LaBianca); *see also, e.g.*, Rachael Bell & Marilyn Bardsley, *John Wayne Gacy, Jr.*, CRIME LIBRARY, http://www.crimelibrary.com/serial_killers/notorious/gacy/gacy_1.html (last visited Dec. 4, 2013) (detailing the trial of Chicago serial killer John Wayne Gacy, Jr.); *see also, e.g.*, *Scott Peterson*, BIOGRAPHY.COM, http://www.biography.com/people/scott-peterson-12353513 (last visited Dec. 4, 2013) (elaborating on the life and murder conviction of Scott Peterson). Charles Manson ("Manson") was convicted for ordering the murders of Sharon Tate, Leno LaBianca, and Rosemary LaBianca. *Charles Manson on Trial*, *supra*. Manson did not kill the two women himself but instructed members of his "Family" (cult) to act on his orders. *Id.* Acting on Manson's orders, "the Family" savagely murdered: Sharon Tate; Jay Sebring; Wojciech Frykowski; Abigail Folger; Steven Parent; Leno and Rosemary La Bianca. *Id.* Serial killer John Wayne Gacy, Jr. ("Gacy") was found guilty for the grisly murder of thirty-three young men. *John Wayne Gacy, Jr.*, *supra*. Gacy handcuffed his victims, lodged underwear or socks in their mouths, and then sodomized them. *Id.* While Gacy sexually assaulted his victims, he pulled a rope or board against their throats to suffocate the young men. *Id.* After Gacy commited his murders, he would bury the bodies in the crawlspace of his Chicago home. *Id.* In 2002, Scott Peterson's ("Peterson") pregnant wife Laci Peterson ("Laci") went missing. *Scott Peterson*, *supra*. Laci's disappearance launched a "media frenzy." *Id.* "Peterson was arrested in April 2003 after [Laci's] body and the fetus of their unborn son washed up on the shores of the San Francisco Bay." *Id.* It was the state's position that Peterson's motivation was his affair with a masseuse. *Id.* Peterson was convicted of first degree murder for the death of Laci and second degree murder for the death of the fetus. *Id.* Peterson was sentenced to death by lethal injection. *Id.*

murder became the obsession of a nation, and how their grotesque treatment in the public eye is influenced by the media's control over the legal discussion. Part II explains key literary and psychological concepts such as character, archetypes, and stereotypes that help in understanding how the media is capable of effectively relating a case how they want you to perceive it.[26] Part III provides an extensive explanation and analysis of the Anthony, Knox, and Arias cases, and how the media utilized factors such as youth, beauty/sexuality, and murder to influence society's view of each woman's character, and create archetypes and stereotypes for each.[27] Part III analyzes the unfairness and injustice towards female criminal defendants and how the media must dispose of the stereotypical notions of females when reporting cases involving female criminal defendants.[28]

II. KEY CONCEPTS

If trials, especially those of female criminal defendants, are "all show business,"[29] then it is appropriate to assume that there are certain roles that females are categorized into by the media. Prior to exploring the media-fueled public intrigue in female criminal defendants, a foundation must be laid so that there is a clear understanding of what certain terminology connotes throughout this article.

A. CHARACTER

Though one could say that a defendant in a trial is the main "character,"[30] it is the moral character ("character") of the defend-

[26] *See infra* Part II.
[27] *See infra* Part III.
[28] *See infra* Part III.
[29] *See supra* text accompanying note 2.
[30] *See Literary Analysis: Using Elements of Literature*, ROANESTATE.EDU, http://www.roanestate.edu/owl/-elementslit.html (last visited Dec. 4, 2013) (defining character as a "representation of a person, place, or thing performing traditionally human activities or functions in a work of fiction").

ant that can play a significant part in a court of law.[31] Although character evidence, legally, should not play a role in court, it is inevitable that uncontrollable character traits such as dishonesty or unprofessionalism can come to light just by a defendant being his– or herself.[32] The defense attorney, the prosecuting attorney, and the media will find themselves in a tug of war. The defense will pull for one representation of his or her client's moral character and, usually with female criminal defendants, the prosecution *and* the media will pull for an opposing representation. If the audience (the jury and society) feels that the defendant lies, cheats, deceives, or misleads, then they will believe the defendant does not possess good character or, at minimum, the defendant's character will come into question.[33] In order to evince good moral character, it is crucial that the following traits be demonstrated by a defense attorney and, arguably, by the defendant as well: "[1.] Truthfulness[,] [2.] Candor[,] [3.] Zeal[,] [4.] Respect[,] [and] [5.] Professionalism."[34]

B. ARCHETYPES

A defendant's character will assist in the overall public perception of who they are. However, the media must walk a fine line when molding the public view of a defendant. Defendants

[31] *Cf.* FED. R. EVID. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."). Character is not meant to persuade a jury as to whether it is more likely one of a certain character is more likely to commit a specific crime. FED. R. EVID. 404(a)(1). However, if a jury should perceive a defendant as dishonest through their demeanor or inability to stay consistent with their testimony, then a poor character trait such as being dishonest will be created via mere perception rather than evidence which a court cannot necessarily control. *Id.*

[32] *See supra* note 31 and accompanying text.

[33] MICHAEL R. SMITH, ADVANCED LEGAL WRITING 127 (3d ed. 2013) (discussing how a writer must show a reader that he or she is trustworthy and holds good moral character so that the "reader will be more receptive to the writer's arguments and assertions").

[34] *Id.* at 128.

may be portrayed as a certain archetype[35] or, more unfortunately, a stereotype.[36] Archetypes and stereotypes are two very similar yet very different terms.[37] The distinction between the two must be clearly delineated because many are unfamiliar with falling into a certain archetype, but, on the contrary, most would understand and loathe the notion of falling into a stereotype.

According to psychiatrist and psychotherapist Carl Jung, "an archetype . . . derives from the often repeated observation that myth and universal literature stories contain well defined themes which appear every time and everywhere. We often meet these themes in the fantasies, dreams, delirious ideas and illusions of persons living nowadays."[38] More easily stated, "*archetypes are inborn tendencies which shape the human behavior*."[39] Some recognizable archetypes that Jung describes are: the father,[40] the mother,[41] the child,[42] the wise old man,[43] the hero,[44] the maiden,[45] and the trickster.[46] Characters in a fictional story may be written to fulfill certain archetypes that have been theoretically adopted from the real world. Therefore, it is safe to presume that the media, when handing the responsibility of reporting a story involving a criminal defendant, will often attempt to place the defendant in a certain archetype. Jung's theory on archetypes essentially states

[35] *See infra* text accompanying note 38.
[36] *See infra* Part II.C.
[37] *See infra* text accompanying notes 38 & 48.
[38] *See Archetypes*, Carl-Jung.net, http://www.carl-jung.net/archetypes.html (last visited Dec. 4, 2013).
[39] *Id.*
[40] *See* Kendra Cherry, *Archetypes*, ABOUT.COM, http://psychology.about.com/od/personalitydevelopment/-tp/archetypes.htm (last visited Dec. 4, 2013) (defining 'father' as "[a]uthority figure; stern; powerful").
[41] *See id.* (defining 'mother' as "[n]urturing; comforting").
[42] *See id.* (defining 'child' as "[l]onging for innocence; rebirth; salvation").
[43] *See id.* (defining 'wise old man' as "[g]uidance; knowledge; wisdom").
[44] *See id.* (defining 'hero' as "[c]hampion; defender; rescuer").
[45] *See id.* (defining 'maiden' as "[i]nnocence; desire; purity").
[46] *See* Cherry, *supra* note 40 (defining 'trickster' as "[d]eceiver; liar; trouble-maker").

that they are translatable to almost every culture.[47] Thus, a story can become clearer when there is a foundation of a certain persona in a defendant that most can understand.

C. STEREOTYPES

In contrast to archetypes, stereotypes do not hold the same respectable theory for the most part. A stereotype is "a widely held but fixed and oversimplified image or idea of a particular type of person or thing."[48] The mere definition of a stereotype implicates a lack of depth in rationalizing a belief. Prevalent examples of stereotypes of women specifically have been found in literature.[49] These stereotypes include: the mother (wife),[50] the old maid,[51] the virgin,[52] and the seductress-goddess [commonly seen with women who commit murder].[53] These stereotypes do not solely appear in works of literature, but, arguably, as well as in the

[47] *See supra* text accompanying notes 38–46.
[48] *Stereotype Definition*, OXFORD DICTIONARIES ONLINE, http://oxforddictionaries.com/us/definition/-american_english/stereotype (last visited Dec. 4, 2013).
[49] *See* D. Jill Savitt, *Female Stereotypes in Literature (With a Focus on Latin American Writers)*, YALE-NEW HAVEN TEACHERS INSTITUTE, http://www.yale.edu/ynhti/curriculum/units/1982/5/82.05.06.x.html (last visited Dec. 4, 2013).
[50] *See id.* (presenting the mother(wife) stereotype in literature as passive and willing to please in some situations and in others as foul, cruel, and belittling toward her spouse).
[51] *See id.* ("[The old maid] is the ultimate in rejection. She is almost always physically unattractive . . ., and is seen by others as either crazy or pitiable.").
[52] *See id.* (asserting that the virgin stereotype in literature is seen as one who "is always chaste, innocent and ignorant of worldly things"). The virginity of a woman in literature restricts her "mobility, knowledge and curiosity." *Id.* "[The virgin] is passive and worshipped." *Id.*
[53] *See id.* (detailing the seductress-goddess stereotype as "the opposite of the *Virgin*"); *see also infra* Parts III.A–C. The seductress-goddess takes pleasure in the weakness of men. Savitt, *supra* note 49. The seductress-goddess defies the stereotypical role of women in their own lives and will become a pariah because of their resistance to conform. *Id.*

media.[54] It is not necessarily unusual or inaccurate to state that female criminal defendants often are placed into a category beyond the archetype and inappropriately into a stereotype.[55]

III. THREE WOMEN, THREE REASONS

It has become a near impossibility to come across a news headline that does not involve an allegedly sadistic or well-calculated female at the center of a crime. Within the past ten years, three particular crimes allegedly committed by three peculiar women have saturated the media.[56] These particular women have been dragged into the spotlight because of three factors: (1) youth; (2) beauty/sexuality; and (3) murder. The first two observations are seemingly normal points of interest for most. However, it is murder in conjunction with youth and beauty/sexuality that has become an equation for fascination, exploitation, and intrigue. In exploring the cases behind single mother Anthony, roommate Knox, and girlfriend Arias, it will become evident that these observations and certain typologies[57] (archetypes and stereotypes) will emanate from the portrayal of each.[58]

A. CASEY ANTHONY

When one states that a certain person has become a "household name," it is often a sign that the person has achieved such tremendous success that people almost anywhere can recog-

[54] *See infra* Parts III.A–C.
[55] *See infra* Parts III.A–C.
[56] *See infra* Parts III.A–C.
[57] *Typology Definition*, Merriam-Webster Online, http://www.merriam-webster.com/dictionary/typology (last visited Dec. 4, 2013) (defining 'typology' as "a system used for putting things into groups according to how they are similar[;] the study of how things can be divided into different types"); *see also supra* Part II (discussing key concepts and typologies).
[58] *See infra* Parts III.A–C.

nize the person's name.[59] Some inspiring women that have achieved the "household name" status are Hillary Rodham Clinton,[60] Martha Stewart,[61] and Oprah Winfrey.[62] Each woman's success and drive has pushed them unquestionably into a renowned position. However, household names are not categorically successful. There are certain household names that are spoken with detest and ire.

In 2008, Florida mother Anthony became a household name that brought anger, disgust, and revulsion to many across the United States.[63] On June 15, 2008, Anthony's two year old daughter Caylee Anthony ("Caylee") was reported missing by her grandmother Cindy Anthony ("Cindy").[64] In the 911 call reporting the missing child, Cindy said, "'I found out my granddaughter has been taken, she's been missing for a month.'" Furthermore, in one

[59] *Household Name Definition*, COLLINS DICTIONARY, http://www.collinsdictionary.com/dictionary/english/-household-name (last visited Dec. 4, 2013) (defining 'household name' as "a person or thing that is very well known").

[60] *See generally* Allida Black, *Hillary Rodham Clinton*, THE WHITE HOUSE, http://www.whitehouse.gov/about/first-ladies/hillaryclinton (last visited Dec. 4, 2013) (providing the biography of former First Lady, United States Senator for New York, and Secretary of State Hillary Rodham Clinton).

[61] *See generally Martha Stewart Biography*, ACADEMY OF ACHIEVEMENT, http://www.achievement.org/autodoc/page/ste0bio-1 (last revised Aug. 17, 2010, 4:53PM) (detailing the biography of "Multi-Media Lifestyle Entrepreneur" Martha Stewart whose ever-evolving lifestyle brand has made her a household name).

[62] *See generally Oprah Winfrey*, BIOGRAPHY.COM, http://www.biography.com/people/oprah-winfrey-9534419 (last visited Dec. 4, 2013) (providing the biography of media maven Oprah Winfrey who went from rags to riches by taking her journalism career and turning it into an empire).

[63] *See* Marisol Bello, *Casey Anthony Verdict Doesn't Sit Well with Most Americans*, USA TODAY, http://usatoday30.usatoday.com/news/nation/2011-07-07-casey-anthony-trial_n.htm (last updated July 8, 2011, 12:38 AM) (providing that two-thirds of Americans still believed that Anthony "definitely or probably murdered her daughter" following the verdict).

[64] *Casey Anthony Trial: Timeline of Key Events*, ABC NEWS (July 6, 2011), http://abcnews.go.com/US/casey-anthony-trial-timeline-key-events/story?id=13990853.

of Cindy's three 911 calls that day, she said, "'I found my daughter's car today and it smelled like there's been a dead body in the damn car.'"[65] Cindy later retracted her "dead body" statement.[66]

According to Anthony, Caylee had been missing since June 9, 2008.[67] Anthony told the 911 emergency dispatcher that "Caylee had been missing for thirty-one days with a babysitter she identified as Zenaida [Fernandez-Gonzalez]."[68] When pressed by the dispatcher as to why Anthony had not notified officials, she said "'I've been looking for her and just gone through other resources to find her, which was stupid.'"[69] The following day, officials realized Anthony's story was not adding up.[70] The apartment of the fictitious babysitter Zenaida Fernandez-Gonzalez ("Fernandez-Gonzalez") had been vacant for 140 days.[71] That same day, Anthony was arrested and charged with child neglect.[72]

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[65] *Id.*
[66] *Id.*
[67] Travis Reed, *Files Untangle Tales from Missing Fla. Girl's Mom*, USA TODAY (Aug. 28, 2008, 4:56 PM), http://usatoday30.usatoday.com/news/topstories/2008-08-26-3825124179_x.htm.
[68] Barbara Liston, *On 911 Call, Casey Anthony said Tot was Missing for 31 Days*, REUTERS, May 31, 2011, *available at* http://www.reuters.com/article/2011/05/31/us-crime-anthony-idUSTRE74U5W720110531; *see* Graham Winch, *Delayed: Casey Anthony's Defamation Suit*, HLN TV, http://www.hlntv.com/article/2012/11/16/casey-anthonys-defamation-suit-delayed (last updated Nov. 16, 2012, 2:55PM) (explaining how Zenaida Fernandez-Gonzalez had absolutely no connection to Anthony or Caylee, and the defamation claim that she filed against Anthony). "Anthony came up with a fictitious nanny named Zenaida Fernandez-Gonzalez, also known as 'Zanny the Nanny.' Anthony accused the fictitious nanny of kidnapping her daughter, Caylee." Winch, *supra*. Zenaida Fernandez-Gonzalez filed suit against Anthony for defamation after she was harassed and threatened following the fake nanny kidnapping claim concocted by Anthony. *Id.*
[69] Liston, *supra* note 68.
[70] *Casey Anthony Trial: Timeline of Key Events*, *supra* note 64.
[71] *Id.*; *see* Winch, *supra* note 68.
[72] *See Casey Anthony Trial: Timeline of Key Events*, *supra* note 64.

Anthony's bond hearing on July 22, 2008 revealed new disturbing information.[73] "Detectives revealed that they had found strands of hair that looked like Caylee's in the trunk of the Anthony family car, and that cadaver dogs had smelled human decomposition in the trunk. Bail was set at $500,000."[74] That same day, Anthony became a person of interest in the potential homicide.[75] Nearly one month later, Anthony's bond was posted by reality television show bounty hunter Leonard Padilla, but on August 30, 2008, Anthony was taken back into custody and charged with petty theft.[76] On September 29, 2008, Anthony was returned to jail for "charges including child neglect, lying to investigators, petty theft and use of a forged check."[77]

On October 14, 2008, Anthony was charged with first degree murder for the murder of her daughter Caylee.[78] Additionally, she was "charged with aggravated child abuse, aggravated manslaughter and providing false information to law enforcement."[79] On October 24, 2008, officials stated that there was evidence of body decomposition and chloroform[80] in Anthony's car.[81] Almost two months later, the skeletal frame of a small child was discovered a half-mile away from the Anthony family's

[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Casey Anthony Trial: Timeline of Key Events*, *supra* note 64.
[79] *Id.*
[80] *See* AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, CAS#:67-66-3, PUBLIC HEALTH STATEMENT CHLOROFORM 1(1997), *available at* http://www.atsdr.cdc.gov/ToxProfiles/tp6-c1-b.pdf (explaining that chloroform is "a colorless liquid with a pleasant, nonirritating odor and slightly sweet taste"). Chloroform was once used as an inhalable anesthetic for surgery in the United States. *Id.* "In humans, chloroform affects the central nervous system (brain), liver, and kidneys after a person breathes air or drinks liquids that contain large amounts of chloroform." *Id.* Chloroform is considered a hazardous chemical substance. *Id.*
[81] *Casey Anthony Trial: Timeline of Key Events*, *supra* note 64.

home.[82] On December 19, 2008, DNA testing confirmed that the remains found were those of Caylee.[83]

The unraveling of events following the first 911 phone call is logical and comprehensible. Yet, the events leading to the untimely death of Caylee are incomprehensible and completely clear in the same respect. Anthony used her "employment" at Universal Studios in Orlando during that thirty-one day period to keep grandparents Cindy and George Anthony ("George") at bay.[84] At one point, Anthony even told Cindy that she had an extended job conference in Tampa.[85] Anthony also told Cindy that "babysitter" Fernandez-Gonzalez had been in a car accident in Tampa during that event which required Anthony to stay at the hospital to care for her while Caylee stayed with Juliette and Anabelle.[86] Juliette and Anabelle do not exist, and neither does babysitter Fernandez-Gonzalez.[87] After Caylee had been "missing" for thirty-one days and officials were finally informed, Anthony was questioned by detectives.[88] Anthony "told a detective during questioning that she worked at Universal Studios in Orlando, and took the police to the park, admitting at the last minute that she did not work there."[89] Anthony's lies snowballed without any real explanation for the alleged disappearance of her daughter.

The most disturbing aspect of the thirty-one days Caylee is unaccounted for is Anthony's activity during that time. Initially,

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[82] *Id.*
[83] *Id.*
[84] Lizette Alvarez & Timothy Williams, *Anthony is Sentenced to 4-Year Term for Lying*, N.Y. TIMES (July 7, 2011), http://www.nytimes.com/2011/07/08/us/08anthony.html?_r=0.
[85] Stephen Loiaconi, *Tot Mom Murder Trial: Prosecution Opening Statement*, HLN TV, http://www.hlntv.com/article/2011/05/23/tot-mom-murder-trial-prosecution-opening-statement (last updated Mar. 5, 2012, 9:23 PM).
[86] *Id.*
[87] *Id.*; *see* Winch, *supra* note 68.
[88] Alvarez & Williams, *supra* note 84.
[89] *Id.*

Anthony claimed her daughter was missing for thirty-one days and that she was looking for Caylee during that time period. However, with the help of social media and witnesses, Anthony's behavior during that time came to light.[90] Anthony spent her time without Caylee staying with her boyfriend, partying, going to nightclubs where she entered into a "hot body contest," hanging out with friends, drinking, and, at one point, getting a tattoo reading "'*Bella Vita*,'" which is Italian for "beautiful life."[91] This unseemly behavior of a mother who knew her daughter was missing or deceased ignited a fire across the nation.[92]

Anthony lied over and over again about every aspect of Caylee's "disappearance." She never showed signs of searching for Caylee within the thirty-one day period, and when records showed that nobody else but Anthony could have researched 'chloroform' on March 17 and March 21, it appeared as if there could

[90] *See infra* text accompanying notes 91–92; *see also Prosecutors Can Show Jury Casey Anthony's MySpace Postings*, CBS MIAMI (Feb. 11, 2011, 8:45 AM), http://miami.cbslocal.com/2011/02/11/prosecutors-can-show-jury-casey-anthonys-myspace-postings/ (explaining how prosecutors were permitted to show postings from Anthony's personal account on a social media website while Caylee was "missing" in order to expose her state of mind).

[91] Ashley Hayes, *After Arrest, Casey Anthony Insisted Her Focus is On Finding Caylee*, CNN (June 2, 2011, 8:11 PM), http://www.cnn.com/2011/CRIME/06/02/florida.casey.anthony.trial/; *see* John Cloud, *How the Casey Anthony Murder Case Became the Social-Media Trial of the Century*, TIME (June 16, 2011), http://content.time.com/time/nation/article/0,8599,2077969,00.html (describing how Anthony got a tattoo on "July 2, 2008, about two weeks after Caylee was last seen alive").

[92] *See* Mikaela Conley, *Public Irate Over Casey Anthony Verdict; Social Media Sites Explode with Opinions*, ABC NEWS (July 5, 2011), http://abcnews.go.com/Health/casey-anthony-verdict-outrage-spills-online/story?id=14002257 (explaining how Americans were outraged by the verdict in the Anthony trial and how "'nobody liked the fact that [Anthony] was partying after Caylee's death'").

be no greater signs pointing to Anthony as the guilty party.[93] However, without direct DNA evidence linking Anthony to the death of Caylee, the prosecution carried a heavy burden when their case relied on circumstantial evidence alone.[94] At trial, "[p]rosecutors alleged Casey Anthony used chloroform to render her daughter unconscious and then duct-taped her mouth and nose to suffocate her. They alleged that she put the child's body in the trunk of her car for a few days before disposing of it."[95] The tape found with the skeletal remains was distinct and not widely available, and it matched the "tape found on George's gas cans and on a missing child poster for Caylee."[96] It appeared to most that the only logical conclusion was that Anthony was responsible for the death of Caylee.

At trial, Jose Baez, Anthony's key attorney, argued in Anthony's defense that Caylee was not murdered.[97] The defense asserted that Caylee drowned in the Anthony family swimming pool on July 16, 2008, and, in a state of panic, Anthony and her father George covered up the death of the child.[98] George denied the testimony relating to Caylee's "drowning" and stated he had never even heard of the alleged drowning until he testified in court.[99] Additionally, the defense alleged that Anthony was sex-

[93] *See supra* text accompanying notes 91–92; *see also* Loiaconi, *supra* note 85 (addressing the evidence found on the computer in the Anthony home of web searches for chloroform).
[94] Alvarez & Williams, *supra* note 84.
[95] *Casey Anthony: "I Didn't Kill My Daughter*,*"* CNN, http://www.cnn.com/2012/06/12/justice/florida-casey-anthony/ (last updated June 13, 2012, 9:03 AM).
[96] Alvarez & Williams, *supra* note 84.
[97] *Casey Anthony: "I Didn't Kill My Daughter*,*" supra* note 95.
[98] *Id.*; *see Casey Anthony Trial: Timeline of Key Events*, *supra* note 64 (providing that Jose Baez acted as one of Anthony's defense attorneys).
[99] *Casey Anthony: "I Didn't Kill My Daughter*,*" supra* note 95; Jessica Hopper & Ashleigh Banfield, *Casey Anthony Trial: Defense Team Claims Caylee Anthony Drowned in Family Pool*, ABC NEWS (May 24, 2011), http://abcnews.go.com/US/casey_anthony_trial/casey-anthony-trial-defense-claims-caylee-anthony-drowned/story?id=13674375.

ually abused by her father George and her brother.[100] George denied any abuse of his daughter.[101] By the end of the trial, the defense abandoned the allegations of abuse by George, and "focused instead on creating reasonable doubt in the jurors' minds."[102]

The burden of proof for the prosecution was guilt *beyond* a reasonable doubt.[103] This means "the evidence must be so strong that there is no reasonable doubt that the defendant committed the crime."[104] With so much circumstantial evidence weighing in the balance, the prosecution faced an uphill climb in the courtroom. A verdict was returned on July 5, 2011.[105]

> [T]he jury returned a verdict that shocked the *armchair jurors* of the world. Casey Anthony was found not guilty of first-degree murder, aggravated manslaughter or child abuse. She was only found guilty of four misdemeanor counts, which dealt with her lying and misleading police officers; she was released a few weeks later with time served, having been in jail for three years before trial.[106]

[100] *Casey Anthony Trial: Timeline of Key Events*, *supra* note 64.
[101] Hopper & Banfield, *supra* note 99.
[102] Tricia Romano, *The Murder Trial of Casey Anthony – Closing Arguments*, CRIME LIBRARY, http://www.crimelibrary.com/notorious_murders/classics/casey-anthony-trial/closing-arguments.html (last visited Nov. 11, 2014).
[103] *How the Federal Courts Work - Criminal Cases*, USCOURTS.GOV, http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CriminalCases.aspx (last visited Dec. 4, 2013).
[104] *Id.*
[105] Romano, *supra* note 102.
[106] *Id.* (emphasis added).

1. CHARACTER/ARCHETYPE/STEREOTYPE

The trial of twenty-five year old Anthony captivated the nation.[107] The young woman, who was described at trial by her ex-boyfriend Tony Lazarro as a "'pretty girl,'" became the most hated person in the United States after her acquittal.[108] After Anthony's acquittal, there was one last piece of information that truly acted as fuel to the fire of disappointed and infuriated Americans. According to the Florida sheriff's office, an investigator had overlooked an additional search on the Anthony family computer that could have potentially changed the outcome of the trial.[109] On the last day Caylee was seen alive, a Google[110] search for "fool-proof" suffocation methods was conducted on the Anthony family computer which was mainly used by Anthony.[111]

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[107] *Factbox: Trials that Captivated U.S. Public Over Past Decade*, REUTERS (Jul. 13, 2013, 11:28PM), http://www.reuters.com/article/2013/07/14/us-usa-florida-shooting-trials-idUSBRE96D00P20130714.

[108] Ashleigh Banfield & Jessica Hopper, *Casey Anthony Trial: Former Boyfriend Describes Casey Anthony Romance*, ABC NEWS (May 25, 2011), http://abcnews.go.com/US/casey-anthony-trial-tony-lazzaro-describes-romance-caylee/story?id=13682814; *Casey Anthony is Most Hated Person in America: Poll*, REUTERS (Aug. 10, 2011), http://www.reuters.com/article/2011/08/10/us-caseyanthony-idUSTRE77934O20110810 (describing the E-Poll Market Research celebrity that revealed Anthony to be the most-hated person in America after she was acquitted for the murder of Caylee in 2008). "E-Poll's E-Score Celebrity research for the first week of August showed that 53 percent of those questioned were aware of Casey Anthony and her story, and 94 percent of those people disliked her." *Casey Anthony is Most Hated Person in America: Poll*, *supra*. "Anthony was also considered 'creepy' by 57 percent of those questioned and 'cold' by 60 percent of respondents." *Id.*

[109] *Casey Anthony Detectives Overlooked 'Fool-Proof Suffocation Methods' Google Search*, HUFFINGTON POST, http://www.huffingtonpost.com/2012/11/25/fool-proof-suffocation-methods_n_2188034.html (last updated Jan. 25, 2013, 5:12AM).

[110] *See generally* Marziah Karch, *What is Google?*, ABOUT.COM, http://google.about.com/od/googlebasics/p/-whatisgoogle.htm (last visited Nov. 11, 2014) (providing an overview of one of the most popular internet search engines in world).

[111] *Casey Anthony Detectives Overlooked 'Fool-Proof Suffocation Methods' Google Search*, *supra* note 109.

> Whoever conducted the Google search looked for the term 'full-proof suffication,'misspelling 'suffocation,' and then clicked on an article about suicide that discussed taking poison and putting a bag over one's head. The browser then recorded activity on the social networking site MySpace, which was used by Casey Anthony but not her father.[112]

Anthony lied to her family and to investigators when handling the "disappearance" of Caylee. Anthony was viewed as a person of poor character; she was seen as deceptive and untrustworthy. Though the jury ruled in her favor, Americans across the United States maintained the opinion that the deceitful young mother is guilty.[113] Anthony's dishonesty throughout the ordeal became one of the most important inferential pieces of evidence for most. The idea that a mother could be without her child for a month and lie about the child's whereabouts was enough for some to find Anthony guilty.[114] By the time Anthony's defense came out as a supposed drowning cover-up, it appeared fabricated out of thin air. The media was supremely critical of Anthony. However, the jury was not convinced by the prosecution, and it appeared certain that the media was no influence when they returned a verdict of not guilty.

When categorized by the media, Anthony fell into two categories: (1) the trickster archetype, and (2) the seductress-goddess stereotype. The trickster came out in the Anthony trial when it was revealed that Anthony had a knack for lying. Anthony's deceitful ways were a bone of contention with the court, the media, and America. Anthony's greatest trick yet may have been convincing a jury of a long line of far-fetched, baseless rationales

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[112] *Id.*
[113] *See* Bello, *supra* note 63.
[114] *See generally* Bello, *supra* note 63 (providing the opinions of some mothers on how unfathomable it is to not know where their child is for even the smallest period of time without panicking).

for what happened to Caylee. The media honed in not only on Anthony's web of lies, but also on her partying ways immediately after Anthony was aware of her daughter's death. Anthony was portrayed as the "bad mother" who lived life in pursuit of vices while the "typical" mother would grieve following the death of a young child. It would be unfair to say that this is flat out judgmental or a stereotypical assumption of mothers when it innately raises very real questions in Anthony's innocence.

The intriguing point though is that this type of case and behavior is not unique or especially nationally newsworthy as the larger media outlets would have you think. If one takes the time to watch their local news for one month, cases similar or even more severe than Anthony's are reported yet never gain the same national attention. Anthony, a young *woman* who was described as "pretty" at trial, was accused of murder. Youth, beauty, and murder taken together practically gift wrap a national news story. The question is: Was this fair? Was it fair for Anthony to be catapulted into the public eye by virtue of being a pretty young woman who may have committed murder? By law, Anthony was found not guilty. Presumably, Anthony had gained the right to go back to living her life amongst society. With death threats toward Anthony and her family, Anthony was forced into hiding.[115] Anthony might as well have been sentenced to life in prison considering what became of her following her acquittal. The "bad mother" persona perpetuated by the media put an enormous target on Anthony's back. It may be bold, or completely conspicuous, to state that the only reason a female criminal defendant like Anthony garnered national attention was because she was a young, attractive female and society is still unreasonably baffled by the idea of an

[115] Suzan Clark, *Casey Anthony Verdict: Anthony Family Gets Death Threats in Wake of Acquittal, Asks for Privacy*, ABC NEWS (Jul. 5, 2011), http://abcnews.go.com/US/casey-anthony-verdict-anthony-family-death-threats-wake/story?id=14004306; *Casey Anthony Free, Goes Into Hiding*, ABC NEWS, http://abcnews.go.com/US/slideshow/casey-anthony-free-hiding-14003550 (last visited Dec. 4, 2013).

attractive woman committing murder. If men commit more crimes, then it is logical that there are many men who are acquitted of crimes. With the amount of men (and women) who are acquitted of crimes (and were likely guilty), it was unjust that Anthony was forced into reclusion when most acquitted defendants go unnoticed, simply because she was pushed into the spotlight for the media's self-serving reasons. Is it possible that Anthony murdered her daughter? *Absolutely*. Was she entitled to live amongst society without fear for her life? *Absolutely*.

B. AMANDA KNOX

A 2011 article published in *Rolling Stone* magazine put it best when it described the mayhem surrounding one of the most highly publicized criminal trials in the past decade.[116]

> When an attractive young woman from a privileged British family is murdered in Italy, you've got a popular crime story. When the person suspected of killing her is an attractive young woman from a privileged American family, you have tabloid gold. When the prosecutor hypothesizes that the victim was slaughtered during a satanic ritual orgy, you've got the crime story of a decade.[117]

When youth, feminine beauty/sexuality, and murder fall into one equation, media chaos is sure to follow.

Seattle native Knox, a twenty year old college student on the Dean's List, decided to further pursue her linguistics degree in Perugia, Italy at the University for Foreigners.[118] Twenty-one year

[116] *See infra* text accompanying notes 117–171.
[117] Nathaniel Rich, *The Neverending Nightmare of Amanda Knox*, ROLLING STONE (Jun. 27, 2011), http://www.rollingstone.com/culture/news/the-neverending-nightmare-of-amanda-knox-20110627.
[118] *Amanda Knox*, BIOGRAPHY.COM, http://www.biography.com/people/amanda-knox-20663285?page=1 (last visited Dec. 4, 2013).

old Meredith Kercher ("Kercher") from Coulsdon, Surrey was a student of the Erasmus program of international exchanges.[119] In 2007, Knox and Kercher became roommates in Perugia.[120] It is a seemingly ideal situation—two bright, young roommates working toward a higher education in Italy. Sadly, the fate of both women would be changed forever on November 1, 2007.[121]

On November 1, 2007, Kercher decided to return to the home she shared with Knox after going out that evening with a friend.[122] The following day, Kercher was discovered with her throat slit in the cottage she shared with Knox.[123] Kercher was found fatally stabbed and "lying in a pool of blood on her bedroom floor."[124] Kercher was only partially dressed and her body was covered by a duvet.[125] On November 4, 2007, a postmortem examination revealed that Kercher was involved in sexual activity at some time before her death.[126] Five days after Kercher was murdered, the police made an arrest.[127] The Italian police arrested "Knox, then 20; Knox's boyfriend, Italian student Raffaele Sollecito, 23; and Congolese Diya 'Patrick' Lumumba, 38, who runs a local bar."[128] In only five short days, the police began claiming that Kercher was murdered after refusing to partake in violent

[119] *Profile: Meredith Kercher*, BBC NEWS, http://news.bbc.co.uk/2/hi/7693702.stm (last updated Dec. 4, 2009, 11:24PM).
[120] *Id.*
[121] *See Meredith Kercher Murder Timeline: Key Events*, THE GUARDIAN (Mar. 26, 2013, 5:45AM), http://www.theguardian.com/world/2011/oct/03/meredith-kercher-murder-timeline (providing the date Kercher was last seen alive).
[122] *See* Tom Kington, *The Meredith Kercher Case*, THE GUARDIAN (Oct. 28, 2008, 9:18AM), http://www.theguardian.com/world/2008/oct/28/meredith-kercher-background (providing the date Kercher was last seen alive).
[123] *Meredith Kercher Murder Timeline: Key Events*, *supra* note 121.
[124] Tom Kington, *Accused 'Kissed and Joked' After Kercher's Body Found, Court Told*, THE GUARDIAN (Feb. 13, 2009), http://www.theguardian.com/world/2009/feb/14/meredith-kercher-trial.
[125] *Meredith Kercher Murder Timeline: Key Events*, *supra* note 121.
[126] *Id.*
[127] *Id.*
[128] *Id.*

sex.[129] Police asserted that Knox confessed to the crime and pointed the proverbial finger at Diya "Patrick" Lumumba ("Lumumba").[130] "The three [were] held on suspicion of conspiracy to commit manslaughter and sexual violence."[131]

Knox was a waitress at Lumumba's bar.[132] The night of Kercher's murder, Lumumba told Knox not to go into work, so she decided to go to the home of her boyfriend Raffaele Sollecito ("Sollecito") where she spent the night.[133] The following morning, Knox returned home to shower and change her clothes.[134] Knox noticed the door to the cottage had been left ajar, and when she entered the bathroom, she found dried blood drops in the sink.[135] Kercher's bedroom door was closed so Knox assumed Kercher was still asleep.[136] After showering, Knox went into the second bathroom in the cottage where she found fecal matter in the toilet, but she knew that neither Kercher nor their other roommate Filomena Romanelli ("Romanelli") would have forgotten to flush the toilet.[137] Knox fled the home immediately, suspecting there had been an intruder.[138] Knox phoned Kercher and Romanelli, but was only able to get in contact with Romanelli.[139] Knox returned to the cottage with Sollecito to inspect the home for signs of a burglary.[140] Romanelli's bedroom window had been smashed, and after realizing Kercher's bedroom was locked and there was no response

[129] *Id.*
[130] *Id.*
[131] *Meredith Kercher Murder Timeline: Key Events*, *supra* note 121.
[132] Rich, *supra* note 117.
[133] *See id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] Rich, *supra* note 117.
[139] *Id.*
[140] *Id.*

to Knox's knocking, Sollecito attempted to break down the door.[141] Sollecito was unable to enter the room.[142]

Sollecito phoned the Italian military police to report the burglary.[143] However, the Italian military police were not sent, rather postal police ("the state police responsible for investigating crimes like Internet fraud and stolen phones") were sent to investigate the home.[144] Knox and Sollecito explained to the officers that there had been a burglary and allowed the two postal-police officers to investigate the premises.[145] Shortly thereafter, Romanelli and her boyfriend arrived at the home with another couple who were friends of Romanelli.[146] The officers did not break into Kercher's bedroom so one of the boyfriends took it upon himself to break down the door.[147] To the horror of the group, Kercher's bedroom had become a grisly crime scene.[148]

On November 20, 2007, fourth suspect Rudy Hermann Guede ("Guede") was arrested in Germany.[149] The same day, Lumumba was released from custody without charges.[150] Guede admitted to engaging in sexual relations with Kercher the night that she was murdered in the cottage, but denied any involvement in the murder.[151] According to Guede, while he was in the bathroom listening to his iPod suffering from the effects of a bad meal,

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[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] Rich, *supra* note 117.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Meredith Kercher Murder Timeline: Key Events*, *supra* note 121.
[150] *Id.*
[151] Kristal Hawkins, *Murder in Umbria: The Murder of Meredith Kercher – Guilty? Rudy Hermann Guede*, CRIME LIBRARY, http://www.crimelibrary.com/notorious_murders/young/amanda_knox/5.html (last visited Nov. 17, 2014).

Kercher's screams were muffled by his music.[152] Guede's take on the night was that Kercher and Knox got into a heated argument over money which led to the murder of Kercher.[153] When Guede exited the bathroom, he saw an Italian man whom he believed to be Sollecito and heard but did not see Knox.[154] Guede claimed he then tried to help Kercher, but, out of fear and panic, he fled the crime scene and left for Germany the next day.[155] Guede accepted a fast-track trial and was sentenced to thirty years in prison for the murder of Kercher.[156] After Guede appealed his conviction, his sentence was reduced to sixteen years.[157]

Although Guede was convicted for the murder of Kercher, Knox and Sollecito were still poised to stand trial for murder and sexual violence.[158] "Italian prosecutors, while pleased with the conviction of Guede, remained convinced that Guede could not have acted alone."[159] Not only was there evidence of Guede in the home, but also of Knox and Sollecito.[160] Police found a knife belonging to Sollecito which had traces of Kercher and Knox's DNA.[161] Sollecito's DNA was also recovered from a metal clasp on Kercher's brassiere which had been cut from her body at the

[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*; *Meredith Kercher Murder Timeline: Key Events*, *supra* note 121.
[157] *Meredith Kercher Murder Timeline: Key Events*, *supra* note 121.
[158] *Id.*
[159] Hawkins, *supra* note 151.
[160] *Id.*
[161] *Meredith Kercher Murder Timeline: Key Events*, *supra* note 121.; *See generally Amanda Knox Trial: No Trace of Victim's DNA on Knife*, FOX NEWS (Nov. 1, 2013), http://www.foxnews.com/world/2013/11/01/amanda-knox-trial-no-trace-victim-dna-on-knife/ (explaining how during the retrial of the Knox case it was revealed that the confiscated knife matching the wounds on Kercher, but did not have any of the victim's DNA on the knife).

time of her murder.[162] Evidence pinning Knox, Guede, and Sollecito at the crime scene were taken together by prosecutors to bolster their theory that the murder was the result of a "'drug-fueled sex game.'"[163]

> The Italian prosecutors asserted that after an evening of smoking marijuana with her boyfriend, the scrubbed American, Amanda Knox had plunged a knife into the throat of the roommate she'd quickly grown to hate, simmering tensions over money, men and drugs suddenly flaring into sexual humiliation turned murderous. Three-on-one: Rudy Guede accused of sexually assaulting the unwilling English woman from behind, as Sollectio the boyfriend gripped her arms and pushed her to her knees. Amanda Knox, the theory went, was in front, taunting her roommate with a kitchen knife.[164]

With little to no real evidence to prove the sex-game gone wrong theory, the prosecution abandoned the motive at trial.[165] Due to the miniscule amount of DNA evidence and conflicting testimony, it appeared that Knox's trial hinged on her portrayal by the Italian media.[166] Knox was portrayed in court as a "'witch' and a 'she-devil, a diabolical person focused on sex, drugs and alco-

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[162] *Amanda Knox: 'I Don't Know What Happened That Night,'* CNN WORLD (June 28, 2011, 3:06AM), http://www.cnn.com/2011/WORLD/europe/06/27/italy.knox.trial/.

[163] *Alibi Undermined in Kercher Murder Trial*, CNN EUROPE, http://www.cnn.com/2009/WORLD/europe-/03/23/italy.student.kercher.trial/index.html (last updated Mar. 23, 2009, 7:33AM).

[164] Dennis Murphy, *The Trial of Amanda Knox*, NBC DATELINE, http://www.nbcnews.com/id/28057560-/#.Un_Crfmsidk (last updated Dec. 5, 2009, 5:28 PM).

[165] Christina Ng, Phoebe Natanson, & Nikki Battiste, *Amanda Knox Court Cites Abandoned Theory of Sex Game Gone Wrong*, GOOD MORNING AMERICA YAHOO! NEWS (June 18, 2013, 4:51 PM), http://gma.yahoo.com/amanda-knox-court-cites-abandoned-theory-sex-game-144311764--abc-news-topstories.html.

[166] *See infra* text accompanying note 175.

hol.'"[167] In the Italian press, Knox was often dubbed "'angel face'" and "'Foxy Knoxy'" in reference to her looks and the hyper-sexualized image that had been created by the court and perpetuated by the media.[168]

On December 4, 2009, Knox and Sollecito were found guilty for the murder of Kercher.[169] "Knox [was] sentenced to [twenty-six] years in prison and Sollecito to [twenty-five]."[170] Vilified Knox maintained her innocence and appealed her conviction as well as Sollecito.[171]

1. CHARACTER/ARCHETYPE/STEREOTYPE

The Knox family released a statement following the initial verdict which aptly summarized the source of Knox's conviction: "'It appears clear to us that the attacks on Amanda's character in much of the media and by the prosecution had a significant impact on the judges and jurors and apparently overshadowed the lack of evidence in the prosecution's case against her.'"[172] Despite the discovery of DNA evidence at the initial trial, there were many accusations by the defense on appeal that much of the recovered DNA was a product of tampering by the police.[173] On appeal,

[167] Pari Thomson, *Meredith Kercher Murder: Dramatis Personae*, THE GUARDIAN (Oct. 3, 2011, 3:58PM), http://www.theguardian.com/world/2011/oct/03/amanda-knox-verdict-main-characters.
[168] Catherine Hornby, *Amanda Knox Back on Trial for Kercher Murder in Italy*, YAHOO! NEWS (Sept. 29, 2013, 6:03PM), http://news.yahoo.com/amanda-knox-back-trial-kercher-murder-italy-220319355.html; Thomson, *supra* note 167.
[169] *Meredith Kercher Murder Timeline: Key Events*, *supra* note 121.
[170] *Id.*
[171] *Id.*
[172] Richard Allen Greene, Hada Messia & Mallory Simon, *Amanda Sobs as Guilty Verdict Read*, CNN JUSTICE (Dec. 5, 2009, 12:01AM), http://www.cnn.com/2009/CRIME/12/04/italy.knox.trial/.
[173] *Amanda Knox Update: Serious Questions Arise Over DNA Evidence*, THE CHRISTIAN POST N. AMERICA, http://www.christianpost.com/news/italian-police-allegedly-tampered-with-evidence-in-knox-trial-52811/ (last visited Dec. 4, 2013).

independent forensic specialists were hired to examine whether proper police procedures had been used when handling the evidence.[174] The forensic experts testified that the amount of DNA on the knife was insufficient to uphold Knox's conviction.[175] The experts claimed that "[t]he genetic evidence was tainted by the use of a dirty glove and failure to wear protective caps."[176] In a report produced by the experts, they asserted that the initial DNA results could have certainly been a product of evidence contamination.[177] On October 3, 2011, Knox and Sollecito's convictions were overturned by the court.[178]

On March 26, 2013, Italy's highest appellate court ordered a new trial for Knox and Sollecito after six years of ongoing legal issues.[179] The wound of the ordeal had barely scabbed over for the two youths who had spent the better time of their twenties embroiled in litigation. Knox's lambasted character likely put her in prison and put a target on her back following the initial acquittal. Knox was portrayed in the media as dishonest and impure, a twenty-first century Jezebel[180] with no moral compass. Whether Knox possessed either characteristic is of no consequence in a criminal trial where neither the circumstantial evidence nor the DNA evidence could support a finding of guilt. However, in this case, it appears that Knox's "questionable" character was the lynchpin of the trial and possibly a factor in deciding to order a new trial.

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[174] *Id.*
[175] *Id.*
[176] *Meredith Kercher Murder Timeline: Key Events*, *supra* note 121.
[177] *Amanda Knox Update: Serious Questions Arise Over DNA Evidence*, *supra* note 173.
[178] *Meredith Kercher Murder Timeline: Key Events*, *supra* note 121.
[179] *Id.*
[180] *See* Janet Howe Gaines, *How Bad Was Jezebel?*, BIBLICAL ARCHAEOLOGY SOCIETY (May 6, 2013), http://www.biblicalarchaeology.org/daily/people-cultures-in-the-bible/people-in-the-bible/how-bad-was-jezebel/ (providing the history and background of biblical Queen Jezebel, wife of King Ahab of Israel) ("Jezebel has been saddled with a reputation as the bad girl of the Bible, the wickedest of women.") ("This ancient queen has been denounced as a murderer, prostitute and enemy of God.").

The cunning media placed Knox into two categories: (1) the trickster archetype, and (2) the seductress-goddess stereotype. By the prosecution referring to Knox as a "witch," the Italian media circulated the idea that Knox was deceptive, that she was capable of manipulating and creating a most sinister plan. The notion that Knox was deceitful and manipulative placed her into the trickster-archetype. This poison ran through the court, the media, and those in society who believed Knox was a bewitching defendant guilty of murder.

The most disturbing aspect of Knox's trial was the fact that she had been categorized into the seductress-goddess stereotype. The "angel face" was painted as the "bad roommate" who had succumbed to vices such as drug use and engaging in violent pre-marital sex. Was Knox on trial for murder or for allegedly being impure and the furthest thing from a "Madonna"?[181] The sex-game gone wrong theory was a product of the prosecution. However, it was the media that took this theory and created a Leviathan of a story. Italian newspapers and tabloids were splashed with Knox's image and headlines that incensed the masses in Italy.[182] The equation of young woman plus beauty plus murder equals media chaos was no longer a speculative formula; it essentially became a theorem (the "female murderer theorem"). Despite the female murderer theorem being solidified in Italy, this was only evidence that the same theorem seen in the Anthony trial could translate overseas. This obsession is not limited to the United States.

Though Sollecito experienced the ordeal in almost a mirror image fashion with Knox, the scrutiny he received was incomparable to that of Knox. There was no evidence to show that either

[181] *Madonna Definition*, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/dictionary/madonna (last visited Dec. 4, 2013) (defining 'Madonna' as "3b: an artistic depiction (as a painting or statue) of the Virgin Mary[;] 4: a morally pure and chaste woman").

[182] Stephan Faris, *Verdict Watch: Amanda Knox's 'Trial by Tabloid' Comes to an End*, TIME WORLD (Oct. 2, 2011), http://content.time.com/time/world/article/0,8599,2095962,00.html.

Knox or Sollecito was more or less likely to have wielded the knife that killed Kercher, and it took both of them to engage in the sexual relations for which Knox was so heavily criticized in the public forum. Thus, it perturbed the mind that Knox received the most overwhelming backlash of the two. It can be postulated with one easy guess as to why this case unraveled as it did. Sollecito is a male and Knox is a female. By utilizing the female murderer theorem, a more sensationalized story could take over the media. If Knox was taken out of the equation and Sollecito was put in her place, the murder of Kercher would have become a local evening news report rather than an international story. Like Anthony, Knox's situation seemed to be that society held against her the notion that it is unfathomable how a young, attractive woman could be embroiled in a murder trial, and when she is, the utmost scrutiny of her character is certain to follow in the public eye no matter the plausibility of her involvement in the crime.

In January 2014, the Italian court upheld the 2009 guilty verdict of Knox and Sollecito, once overturned, and sentenced the two to over twenty-five years in prison.[183] As of November 2014, Knox maintains her innocence while she finds refuge in the United States; her appeal of said sentence is currently pending in Italy.[184]

C. JODI ARIAS

After Anthony and Knox polarized the media for six years, it was finally time for the media to move onto another case involving a new "character" to fit the bill. Femme fatale Arias would take her place center stage where Anthony and Knox had before her. This time, the case did not involve a "bad mother" or a "bad roommate." From the beginning, the focus of the case was the

[183] Sadie Hale, *Amanda Knox Working as a Freelance Reporter While Her Appeal Takes Place*, THE GUARDIAN (Nov. 5, 2014, 1:35PM), http://www.theguardian.com/us-news/2014/nov/05/amanda-knox-working-as-reporter-for-west-seattle-herald.
[184] *Id.*

tumultuous relationship of a young, good looking couple that struggled with jealousy issues, but always found time for their adventurous sexual escapades.[185] It is the worst possible case of a "bad girlfriend"; a set of facts that could have been taken straight from a *Lifetime* original movie. Consequently, the case was taken from the court room and made into a *Lifetime* movie.[186]

In September 2006, salesman and motivational speaker Travis Alexander ("Alexander") from Phoenix, Arizona attended a work conference in Las Vegas, Nevada.[187] It is there that Alexander met "aspiring saleswoman and photographer" Arias from California.[188] The two began their turbulent, long-distance relationship the moment they met. Alexander was a Mormon, so in November 2006, Arias became a Mormon and was "baptized into the Church of Jesus Christ of Latter-Day Saints."[189]

In February 2007, Alexander and Arias entered into a relationship.[190] On June 29, 2007, Alexander and Arias broke up but continued to carry on a strictly sexual relationship.[191]

Despite the break up, shortly thereafter, Arias moved to Phoenix where she began working as a waitress and cleaning Alexander's home.[192] At some point, the sexual relationship be-

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[185] Eliot C. McLaughlin, *Haven't Been Following the Jodi Arias Trial? Read This*, CNN, http://www.cnn.com/2013-/05/04/us/jodi-arias-primer/ (last updated May 8, 2013, 8:19AM).
[186] JODI ARIAS: DIRTY LITTLE SECRET (SilverScreen Pictures 2013).
[187] *Timeline of Key Events in the Jodi Arias Murder Case*, FOX NEWS (May 8, 2013), http://www.foxnews.com/us/2013/05/08/timeline-key-events-in-jodi-arias-murder-case/.
[188] *Id.*
[189] *Id.*
[190] Casey Glynn, *Jodi Arias: A Timeline of a Sensational Murder Case*, CBS NEWS (May 3, 2013, 1:58PM), http://www.cbsnews.com/8301-504083_162-57582580-504083/jodi-arias-a-timeline-of-a-sensational-murder-case/.
[191] *Timeline of Key Events in the Jodi Arias Murder Case*, *supra* note 187.
[192] *Id.*

tween the two took a turn for the worse.[193] At first, the sexual text messages between the two are reciprocal, but eventually the texts from Alexander expressed anger toward Arias and dissatisfaction with their "relationship."[194] In one text, Alexander referred to Arias as "'the sociopath I know so well.'"[195] In another, Alexander tells Arias, "'I don't want your apology, I want you to understand what I think of you. I want you to understand how evil I think you are. You are the worst thing that ever happened to me.'"[196] Arias moved back to California in the spring of 2008 to live with her grandparents.[197]

On May 28, 2008, a .25 caliber gun from the home of Arias' grandparents was reported stolen.[198] The gun had been in the home where Arias was staying after her break-up with Alexander. Less than a week later, Arias rented a vehicle.[199]

On June 4, 2008, Arias embarked on a road trip to Utah but decided to pay her former lover Alexander a visit in Arizona.[200] Arias was the last person to see Alexander alive on that June day.

Arias' visit led to sex with Alexander and a graphic, sexually-charged photo shoot in Alexander's home.[201] It was the events that follow Arias and Alexander's sexual tryst that are somewhat unclear. Though Arias provided three completely different explanations for what happened on June 4th, it was certain that

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[193] Madison Gray, *5 Bizarre Revelations from the Jodi Arias Trial*, TIME NEWSFEED (May 9, 2013), http://newsfeed.time.com/2013/05/09/5-bizarre-revelations-from-the-jodi-arias-trial/.
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Timeline of Key Events in the Jodi Arias Murder Case*, *supra* note 187.
[198] *Id.*
[199] Glynn, *supra* note 190.
[200] *Timeline of Key Events in the Jodi Arias Murder Case*, *supra* note 187.
[201] *Id.*

Alexander was murdered that day.[202] Alexander's body was discovered in his shower several days later by his close friends.[203] When questioned by police, Alexander's friends immediately alerted them of Arias and pushed them to question her for the murder of Alexander.[204]

The gruesome crime scene revealed that "[Alexander] suffered nearly [thirty] knife wounds, was shot in the head with what was ultimately determined to be a .25-caliber gun and had his throat slit."[205] Arias' bloody handprint and hair were found at the crime scene.[206] Arias was indicted for first-degree murder some time after police questioned her.[207] Arias pled not guilty to the murder, and the prosecution sought the death penalty for Arias in the murder of Alexander.[208]

On September 12, 2008, Arias denied killing Alexander in a newspaper interview.[209] Twelve days later, Arias told the television show "Inside Edition" that she was in the home with Alexander when he was killed by two intruders.[210] At trial, Arias provided her third account of what happened the day that Alexander was murdered.[211] Arias claimed that Alexander was physically and emotionally abusive towards her.[212] However, the prosecution revealed that Arias' personal diary *never* made mention of the alleged abuse.[213] Arias claimed that during their sexual escapades

[202] *See infra* text accompanying notes 207-220.
[203] Glynn, *supra* note 190.
[204] *Id.*
[205] *Id.*
[206] *Id.*; *Timeline of Key Events in the Jodi Arias Murder Case*, *supra* note 187.
[207] Glynn, *supra* note 190.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Timeline of Key Events in the Jodi Arias Murder Case*, *supra* note 187.
[213] Colleen Curry, *9 Most Shocking Moments of the Jodi Arias Trial*, ABC NEWS (May 9, 2013), http://abcnews.go.com/US/shocking-moments-jodi-arias-trial/story?id=19135206#.

Alexander became violent and she was put in a position to kill him in self-defense.[214] Though photographs and text exchanges showed that Arias and Alexander were sexually adventurous, there was no evidence that Alexander was *ever* violent or abusive towards Arias. However, evidence that Arias harbored jealousy and engaged in stalker-like behavior was quite prevalent. A close friend of Alexander's testified at trial that "Alexander had informed her that Arias had followed him on dates with other women and once wriggled through his home's doggy door so she could sleep on his couch."[215] She further stated that "Arias had slashed his tires on his car more than once and sent him threatening emails."[216] Furthermore, one of Alexander's friends explained in a television interview that Alexander had expressed concern when Arias had hacked into his social media website profile to which Alexander harshly confronted Arias through a message.[217] Days after the hacking incident, Alexander was murdered.[218]

One of the most curious and powerful pieces of evidence presented at trial was the camera used by Arias and Alexander to take their provocative photographs the day that Alexander was murdered.[219] Police recovered the camera from inside the washing machine in Alexander's home.[220] The camera captured not only their scandalous activities in the home, but also images of Arias dragging Alexander's dead body across the floor and "one of her reflection in his eyes seconds before she killed him."[221] On May 8,

[214] *Timeline of Key Events in the Jodi Arias Murder Case*, *supra* note 187.
[215] Denise Noe, *The Jodi Arias Trial: An Overview*, CRIME LIBRARY: CRIMINAL MINDS & METHODS (June 18, 2014, 10:33 AM), http://www.crimelibrary.com/blog/article/the-jodi-arias-trial-an-overview/index.html.
[216] Noe, *supra* note 215.
[217] Katy Rogers, *Jodi Arias Murder Case: The Trial of 2012?*, HLN TV, http://www.hlntv.com/article/2011/12/14/jodi-arias-case-trial-2012 (last updated Oct. 15, 2012, 2:19PM).
[218] *Id.*
[219] Gray, *supra* note 193.
[220] *Id.*
[221] *Id.*

2013, the jury found Arias guilty of first-degree murder in the death of Alexander.[222] However, when it came down to the penalty phase of the trial, the jurors could not unanimously determine whether Arias should be sentenced to death or life in prison.[223] As of November 2013, Arias had not faced a second penalty phase to determine her fate. If the jurors in the second penalty phase cannot reach a decision, then Arias will face life in prison or she will be eligible for release after twenty-five years.[224]

1. CHARACTER/ARCHETYPE/STEREOTYPE

Arias, like Anthony, was no stranger to lying. Arias' relationship with truthfulness and the ability to provide a linear story is comparable to Superman and kryptonite; the two simply cannot coexist.[225] Arias was deceitful and quite intrusive based on the allegations of her stalking Alexander and hacking into his personal social media site. These flaws taken in conjunction can be truly damning in everyday life and, more importantly, in a murder trial. Neither the media nor the prosecution skipped a beat when covering Arias' constant inconsistencies and stalking behavior. Lying and stalking are not nouveaux concepts, but the idea of a young,

[222] Catherine E. Shoichet, *Jodi Arias Guilty of First-Degree Murder; Death Penalty Possible*, CNN, http://www.cnn.com/2013/05/08/justice/arizona-jodi-arias-verdict/ (last updated May 9, 2013, 2:26AM); *Timeline of Key Events in the Jodi Arias Murder Case*, *supra* note 187.

[223] Graham Winch, *No Date Set for Jodi-Arias Penalty-Phase Retrial*, HLN TV, http://www.hlntv.com/article/2013/08/26/jodi-arias-retrial-no-date-set (last updated Aug. 26, 2013, 2:38PM).

[224] *Jodi Arias Trial Update: Judge Hears Arguments for Media Coverage at Retrial*, ABC 15 (Oct. 4, 2013), http://www.abc15.com/dpp/news/region_phoenix_metro/central_phoenix/jodi-arias-trial-update-will-judge-sherry-stephens-set-a-start-date-for-the-sentencing-phase.

[225] *See* Tracy V. Wilson, *How Kryptonite Works*, HOW STUFF WORKS (June 19, 2006), http://entertainment.howstuffworks.com/arts/comic-books/kryptonite.htm (explaining how kryptonite weakens the strength of comic book superhero Superman).

sexually adventurous woman engaging in such behavior riled up the masses and destroyed the public perception of Arias' character.

The media's approach on archetypes and stereotypes are essentially the same with Arias as it was with Anthony and Knox. Arias is categorized as follows: (1) the trickster archetype, and (2) seductress-goddess stereotype. With all of the facts taken together, it can be reasonably inferred that Arias' visit to Alexander was all in the grand scheme to murder him. The weapon stolen from Arias' grandparents' home was of the same caliber as the gun used to kill Alexander. By this estimation, Arias took the gun, went to Alexander's home with the intent to engage in sexual relations with Alexander, and then execute her plan to murder him. There is arguably no other logical reason for Arias to secretly steal the gun and take it into Alexander's home. The excessive manner of Alexander's murder seemed too unreasonable for someone allegedly attempting to escape a violent attack.

The grisly manner in which Alexander was murdered was no reflection of self-defense, but evidence of true anger and psychosis. Arias' trickery culminated in murder and the media was sure to paint this picture of the trickster archetype.

However, it is the stereotype of the seductress-goddess that most accurately reflects how the media wanted to build the story in the public eye. The idea is that Arias used her feminine wiles to bed Alexander and then murder him; a scheme so provocative and sickening that it would be sure to gain national attention.

It would be difficult to dispute that this sequence of events happened as reported by the media. Although, was the portrayal of Arias as a femme fatale just? Arias' actions were clearly egregious and cruel, but the constant spotlight and attention by the media was undoubtedly because the Arias case fulfills the female murderer theorem. Should Arias be judged for being a sexual person who committed murder? *No*. The acts committed by Arias were inex-

cusable, but chastising her for her behavior behind closed doors took the case beyond the facts and into a stereotype. With the unfortunate abundance of crimes committed that involve sex and sexual assaults that lead to murder, it appeared unusual that Arias's crime was any different or any more heinous. The underlying motivation by the media to propel Arias into the spotlight for her sexual behavior and murder was clear. Arias' crime was reprehensible enough as is, so when she was also castigated in the public eye for promiscuity, the result was a dated stereotype. Once again, it was a pathetic attempt at playing into an outdated belief that it is unfathomable how a young woman could commit such a crime, and if she has, she must not only live with the legal consequences but also the ridicule and scorn of an entire country for a crime similar to those more often committed by men which the media does not give the same treatment.

IV. CONCLUSION

Anthony, Knox, and Arias took center stage and felt the effects of vicious print and the nuisance of the ever-present camera lens. When criminal defendants, men and women alike, appear more guilty than others, it becomes difficult to remove oneself from a state a fury when following certain highly-publicized trials. This piece in no way requests sympathy for Anthony, Knox, or Arias. The concern addressed is the unjust treatment of female criminal defendants as compared to male criminal defendants. The media has commodified female criminal defendants by publishing convenient characterizations, archetypes, and stereotypes of women for the purpose of advancing their own industry. The obsession and fascination with female criminal defendants has been perpetuated by the media and, in effect, has furthered the unrealistic perception that females who *may* have committed murder are worthy of justice by witch trial and national ridicule stemming from what is perceived as immoral lifestyle choices. The female murderer theorem (young woman plus beauty plus murder equals media chaos) is an injustice to female criminal defendants. Whether

innocent or guilty, Anthony, Knox, and Arias were forced into the public eye when most crimes of similar or worse circumstances will never even find their place on a news desk. Though characterizations and archetypes often come with the burden of reporting, the utilization of stereotypes is inexcusable. Knox, Anthony, and Arias are examples of women who were on trial for murder, but also essentially on trial in the public for sexual choices. The seductress-goddess stereotype must be disposed of by the media especially when handling a criminal trial. The media's legal dialogue must rise above stereotypes concerning women and find a voice in respectable journalism so that society can not only better understand the justice system but also focus on the truly crucial facts in the eyes of the law. It is time for the media to recognize that women have made great strides in the last 100 years and let the curtain fall on antiquated stereotypes of women.

IS IT ETHICAL TO SELL A LOWER TIER COLLEGE SPORTS TEAM TO PLAY ANOTHER TEAM OF FAR GREATER COMPETITIVE SKILL?

GREGORY M. HUCKABEE AND AARON FOX[1]

"Upon the fields of friendly strife are sown the seeds that, on other fields, on other days, will bear the fruits of victory."[2]

I. INTRODUCTION.

Intercollegiate sport and the NCAA have faced many controversies since its inception in 1910. One controversy which is gaining attention involves Football Bowl Subdivision (FBS) (formerly Division 1-A) higher competitive tier teams that pay Football Championship Subdivision (FCS) (formerly Division I-AA) lesser tier teams for games. The topic has been gaining attention because these games are considered noncompetitive. Some argue, however, competitiveness does not matter because these games are played by college athletes, and other economic values take precedence over considerations of competitiveness. This study will

[1] † † Associate Professor of Business Law, University of South Dakota. Prior to assuming his teaching duties, he served 27 years as a Regular Army Judge Advocate. He received his A.B., M.B.A., and J.D. from Gonzaga University in Spokane, WA; an LL.M. from The Judge Advocate General's School in Charlottesville, VA; an M.S. in Education from Jacksonville State University in Jacksonville, AL; and M.A. in Congressional Studies from The Catholic University of America in Washington, D.C.; and an LL.M. from The George Washington University National Law Center in Washington, D.C. He served on the faculty at the U.S. Military Academy at West Point, N.Y. 1980-83, and as a Distinguished Visiting Professor at the U.S. Air Force Academy in Colorado Springs, CO. 2012-13.Aaron Fox performed Graduate Assistance for Professor Gregory Huckabee at the University of South Dakota in Vermillion, S.D in 2013-14. He received his B.B.A., M.B.A., and J.D. from the University of South Dakota.

[2] PAUL HOCH, RIP OFF THE BIG GAME: THE EXPLANATION OF SPORTS BY THE POWER ELITE 70 (1972) (quoting Gen. Douglas MacArthur).

show that over 90% of games played between FBS v. FCS teams are statistically noncompetitive. This study will discuss the underlying question, in view of such data, whether scheduling such FBS v. FCS games is ethical.

This is a two part study. Part I involves identifying and addressing the ethics of scheduling FBS v. FCS games, and an analysis of intercollegiate sport and its purpose. Part I of the study will discuss factors that affect intercollegiate sport and its true educational purpose, but also the purported ethics that surround it. The study will discuss the factors affecting why these games are noncompetitive, and why such competition may be unethical in FBS v. FCS games. Finally, the study provides solutions how future FBS v. FCS football games can be ethically competitive when scheduled.

Part II of the study provides qualitative data, acquired through candid face-to-face interviews with 10 university presidents. The interviews provide insight as to why these university presidents believe intercollegiate sport exists, the ethics that apply to this subject in higher education, what they have learned from unethical conduct in the college sport arena, and whether they believe FBS v. FCS scheduling as currently practiced is ethical. In order to gain access and candor in the interview process, the responses are anonymous.

II. DEFINITIONS.

A. Ethics.

While reasonable minds may sometimes differ, French philosopher François-Marie Arouet, also known as Voltaire, set down a helpful first step for intellectual inquiry. He once stated, "Before you address me, define your terms."[3] Educator Socrates, 2500 years ago, gave us a starting point by observing "Ethics consists of

[3] Darrell Anderson, *Define Your Terms*, SIMPLE LIBERTY (last visited Mar. 8, 2014), http://www.simpleliberty.org/main/define_your_terms.htm.

knowing what we ought to do."[4] Socrates' fellow Greeks responded to his wisdom by sentencing him to drink poison hemlock. Another philosopher Robert Solomon traces the word ethics to the Greek word *ethos* which means character or custom. His historical research suggests that ethics "…[B]egins with a concern for the individual—including what we blandly call "being a good person"— but it is also the effort to understand the social rules which govern and limit our behavior, especially those ultimate rules—the rules concerning good and evil—which we call morality."[5]

Yet another Greek elucidated ethics further. Aristotle's consideration of ethics observes "It is thought that every activity, artistic or scientific, in fact every deliberate action or pursuit, has for its object the attainment of some good. We may therefore assent to the view which has been expressed that `the good' is `that at which all things aim.'"[6] Pursuit of the "good" involves values. Thomas Davitt in his *Ethics in the Situation* argues "Ethics can be taken to mean philosophical value-judging and deciding within a context which is philosophical only."[7] Richard T. De George in his epic *Business Ethics* observes:

> Ethics studies morality. *Morality is a term used to cover those practices and activities that are considered importantly right and wrong; the rules that govern those activities; and the values that are embedded, fostered, or pursued by those activities and practices...*Hence, ethics presupposes the existence of morality, as well as the existence of moral people who judge right from wrong and generally act in accordance with norms they accept and to which they and the rest of society hold others.[8]

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[4] Claire Andre & Manuel Velasquez, *Can Ethics be Taught?*, SANTA CLARA UNIV. (Mar. 8, 2014), http://www.scu.edu/ethics/publications/iie/v1n1/taught.html.
[5] ROBERT C. SOLOMON, MORALITY AND THE GOOD LIFE 3 (1984).
[6] THE ETHICS OF ARISTOTLE 25 (J.A.K. Thompson trans. 1953).
[7] THOMAS DAVITT, ETHICS IN THE SITUATION 20 (1970).
[8] RICHARD T. DE GEORGE, BUSINESS ETHICS 19 (2006).

When considering ethics as a form of inquiry, Paul W. Taylor defines ethics as "[I]nquiry into the nature and grounds of morality where the term morality is taken to mean moral judgments, standards and rules of conduct."[9] When considering ethics in terms of simple rectitude, "Ethics has also been called the study and philosophy of human conduct, with an emphasis on determining right and wrong."[10] These sources would lead us to believe ethics is not only about doing good, it is also about doing right. This leads us to our next definition inquiry.

B. Sport.

What is meant by sport? Sports enthusiasts and amateur participants likely agree that professional sports and amateur sports are not the same thing. One historiographer offers: "In summary it can be said that sport, as a culturally valued practice, can be thought of as: A competitive rule-bound physically demanding activity in which its internal goals and standards are pursued in a moral way for their own sake."[11] But to what ends?

> Like every other instrument that man has invented, sport can be used for good or evil purposes. Used well, it can teach endurance and encourages a sense of fair play and a respect for rules, coordinated effort and subordination of personal interest to those of the group. Used badly it can encourage personal vanity and group vanity, greedy desire for victory and hatred for rivals, an intolerant esprit de corps and contempt for people who are beyond a certain selected pale.[12]

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[9] PAUL W. TAYLOR, PRINCIPLES OF ETHICS: AN INTRODUCTION TO ETHICS 1 (1975).
[10] O.C. FERRELL, JOHN FRAEDRICH & LINDA FERRELL, BUSINESS ETHICS: ETHICAL DECISION MAKING AND CASES 5 (6th ed., 2005).
[11] PETER J. ARNOLD, SPORTS, ETHICS, AND EDUCATION 16 (1997) [hereinafter Arnold].
[12] *Id.* at 8-9.

Good or evil purposes, sense of fair play, respect for rules, greedy desire for victory, all seem to implicate values. Peter Arnold argues "…[T]he historical normative framework associated with sport is essentially an ethical one."[13] If true, what are sports' intrinsic ethical values?

C. Moral Values.

While culture affects moral values, historically there are a number of identifiable values that are viewed as intrinsic to sport. "Respect, leadership, generosity, courage, compassion, teamwork, self-reliance, self-discipline, perseverance, fair play, sportsmanship, magnanimity, concern for others. The concept of the practice of sport, it has been suggested, is intrinsically concerned with moral value."[14] So if ethics involves moral values such as those listed above, and moral values are inextricably a component of sport, is this important and who should care?

If sport is viewed as a transformative part of the overall collegiate educational experience, the moral values previously listed can be characterized as intrinsic values of the sport—important in learning and character development in and of themselves. Like all intrinsic moral values and ethics, they are subject to being overwhelmed by external ones. When reviewing the present Division I football financial arms race, schools are increasingly finding themselves in the external moral value and ethics education business, rather than the intrinsic one. Therein lies the pitfall. "Their collective message is that the intrinsic values of sport are replaced by those that are external to it, there is the distinct possibility that it will be manipulated or worse irredeemably undermined and corrupted."[15]

[13] *Id.* at 39.
[14] *Id.* at 5.
[15] *Id.*

What external values might be connected to the intercollegiate sport of football that can undermine internal ones? Would the reader be surprised to see power, status, prestige, and money as external values that could corrode or corrupt football's internal ones?[16] "Put differently institutions are likely to corrupt practices when they demonstrate an undue interest in the promotion and extension of external goods at the expense of the preservation and cultivation of internal ones."[17] Before proceeding further, it is enlightening to review what ethical standards apply to college athletics.

III. THE ROLE OF THE NCAA IN SETTING ETHICAL STANDARDS.

The basic ethical standard for NCAA member schools is found in the NCAA Handbook, under **Commitments to the Division I Collegiate Model** that states: "**Commitment to Integrity and Sportsmanship**…All individuals associated with intercollegiate athletics programs and events should adhere to such fundamental values as respect, *fairness,* civility, honesty, responsibility, academic integrity and *ethical conduct* (emphasis added). These values should be manifest not only in athletics participation, but also in the broad spectrum of activities affecting the athletics programs."[18] This ethical standard is reiterated in rules **2.4 The**

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

[17] *Id.* at 19.

[18] NCAA ACADEMIC AND MEMBERSHIP AFFAIRS, NCAA DIVISION I MANUAL XIV (2013), *available at* http://grfx.cstv.com/photos/schools/loyc/genrel/auto_pdf/2013-14/misc_non_event/NCAAManual.pdf.

Principle of Sportsmanship and Ethical Conduct, and **20.9.1.4 The Commitment to Integrity and Sportsmanship.**[19] This would appear to unequivocally affirm the NCAA is committed to ethical behavior—good and correct moral conduct applying the earlier definitions in context.

The NCAA further requires in another rule a **The Commitment to Student-Athlete Well-Being.** Intercollegiate athletics programs shall be conducted in a manner designed to enhance the well-being of student-athletes who choose to participate and to prevent undue commercial or other influences that may interfere with their scholastic, athletics, or related interests.[20] Reasonable minds might agree that power, status, prestige, and money are external values that could corrupt these ethics. But how serious a threat are these external values to the NCAA ethical standards with respect to Division I football?

IV. THE THREAT OF EXTERNAL VALUES AND COMPETITION.

There are at least two views about the moral value of competition. The first is the positivist view "that holds that competition is a precondition of personal development and social progress and that it provides a framework from which benefits and burdens can be distributed fairly and freely. Such a framework it is argued is necessary if such qualities as initiative resource and independence are to be fostered and preserved."[21] This is a time honored foundational purpose for sport at the intercollegiate level. But, when infected by the corrosion of external values, can the positivist value of competition be discredited?

The second view of competition's value holds "The negativist view, on the other hand, maintains that competitive situations

[19] *Id.* at 4, 344-45.
[20] *Id.* at 345.
[21] Arnold, *supra* note 11, at 32.

threaten cooperative ventures and help undermine worthwhile personal and social relationships and form a vicious distinction between winners and losers. Competition, it is said, is often the source of envy, despair, selfishness, pride and callousness."[22] When external values such as power, status, prestige, and money are sought and rewarded within the model of Division I football competition, might internal values be corrupted? If so, why would an educational system that promotes this be deemed ethical?

A. The Cartel.

The NCAA is admittedly something of a cartel. The worst kept secret is that the NCAA profits from the commercialism of collegiate sports. Perhaps Harvard's president Charles Eliot characterized the ethical dilemma best during his college's early experience with football observing, "Deaths and injuries are not the strongest argument against football. That cheating and brutality are profitable is the main evil."[23]

When it comes to the emotionally charged popular sport of football, especially at the Division I level, it is difficult to get a truly unbiased review of the ethical climate and challenges in play—enter The John S. Knight Foundation. This is a nonprofit organization supporting transformational ideas that promote quality journalism, advance media innovation, engage communities, and foster the arts. The Foundation established a commission (The Knight Commission on Intercollegiate Athletics) to explore college athletics and its alleged runaway commercialism. What follows, should be a wake-up call for even the most ardent intercollegiate Division I football supporter.

> Conducting a closed hearing in 2001 in Washington, D.C. at the Willard Hotel, the Commission invited

[22] *Id.*
[23] Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, at 83 (quoting Charles Elliot) [hereinafter Branch].

> Sonny Vacaro to appear before it. He is known for building sponsorship empires at Nike, Adidas, and Reebok. Representing his commercial interests Vacaro candidly testified "We want to put our materials on the bodies of your athletes, and the best way to do that is to buy your school. Or buy your coach." Commission member and president emeritus of Penn State Bryce Jordan asked, "Why should a university be an advertising medium for your industry?" Without hesitation Vacaro replied, "They shouldn't, sir. You sold your souls, and you're going to continue selling them. You can be very moral and righteous in asking me that question, sir, but there's not one of you in this room that's going to turn down any of our money. You're going to take it. I can only offer it."[24]

Is this what external value corrosion might look like that impacts ethical decision-making of intercollegiate Division I football? As author, historian, former Georgia Tech football player, and Pulitzer Prize winner Taylor Branch reported in his 2011 article, *The Shame of College Sports,*

> …[U]niversities grab it. In 2010, despite the faltering economy, a single college athletic league, the football-crazed Southeastern Conference (SEC) became the first to crack the billion-dollar barrier in athletic receipts. The Big Ten pursued closely at $905 million. That money comes from a combination of ticket sales, concession sales, merchandise, licensing fees, and other sources—but the great bulk of it comes from television contracts.[25]

"So what," many fans may ask. Fielding 88 players and a like number of coaches, trainers, and support staff takes money.

[24] *Id.* at 81.
[25] *Id.,* at 82.

Money is not by itself inherently bad or evil. But it is an external value that can corrupt internal values. If that could be true, what might it look like at the Division I football level? To start with, what role does winning play as an external value? W.J. Morgan argues "…[T]he mania for winning, the widespread cheating, the economic and political trivialization of sport, the thirst for crude sensationalizing and eccentric spectacle, stars and celebrity, and the mindless bureaucratization are just some of the ominous signs."[26]

Everyone in intercollegiate athletics wants "to win." But at what border can that desire cross over into the terrain of corrosive external values that lead to unethical conduct? In arguing that "winning" and what it takes to sustain that advantage can breed corrupting external values, Peter J. Arnold asserts:

> It is not a part of my present task to bring corroborative empirical evidence to substantiate such tendencies, though I am sure there would no great difficulty in doing this; rather it is to show at a conceptual level that when competition in sport is too heavily involved with the pursuit of external goals and and/or places too much emphasis on winning, the idea of sport as a culturally valued practice is more likely to become corrupted.[27]

Intrinsic values or goals such as respect, leadership, generosity, courage, compassion, teamwork, self-reliance, self-discipline, perseverance, fair play, sportsmanship, magnanimity, concern for others, can be adversely affected by external goals of power, status, prestige, and money. Historiographer Arnold connects the conceptual dots between internal and external values or goals concluding:

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[26] WILLIAM MORGAN, LEFTIST THEORIES OF SPORT: A CRITIQUE AND RECONSTRUCTION 1 (1994).
[27] Arnold, *supra* note 11, at 22.

> This is so because when the pursuit of external goals is seen to be more important that the pursuit of internal goals, the former take priority over the latter; that is to say the key characteristics of sport as a practice—the pursuit of its own skills, standards, and excellences for their own sake—get usurped. The ends in effect become reduced to means, means in the service of an extrinsic goal. The transformation of the intrinsic goals in sport as a practice into an instrumental means for the achievement of extrinsic goals or purposes, be they political, social or economic, is to corrupt and undermine it.[28]

B. The Knight Commission and the NCAA.

As far back as 1991 the Knight Commission studied college athletics and its growing conflict between internal and external values. Titling its first report "Keeping Faith With the Student-Athlete," the Commission recognized the ethical tension observing "the commission's "bedrock conviction" was that university presidents must seize control of the NCAA from athletic directors in order to restore the preeminence of academic values over athletic or commercial ones." Ten years later, unsatisfied that its clarion call had been sufficiently heard, the Knight Commission issued a second report with an even stronger title "A Call to Action: Reconnecting College Sports and Higher Education." The Commission reported "that problems of corruption and commercialism had "grown rather than diminished."[29] Is the external value of "money" corrupting the internal values of intercollegiate sport?

1. Gold.

> Commerce has set the mark of selfishness,
> The signet of its all-enslaving power,
> Upon a shining ore, and called it gold;

[28] *Id.*
[29] *Id.* at 87

> Before whose image bow the vulgar great,
> The vainly rich, the miserable proud,
> The mob of peasants, nobles, priests, and kings,
> And with blind feelings reverence the power
> That grinds them to the dust of misery.
> But in the temple of their hireling hearts
> Gold is a living god, and rules in scorn
> All earthly things but virtue.[30]

What did English poet Percy Shelley have in mind when he penned these words? Did he recognize an inherent fatal attraction of money? Why is intercollegiate sport immune from this external value? The NCAA confesses that it is not. The first executive director of the NCAA Walter Byers, who served from 1951-1987, wrote in his 1997 memoir *Unsportsmanlike Conduct: Exploiting College Athletes*: "The college player cannot sell his own feet (the coach does that) nor can he sell his own name (the college will do that). This is the plantation mentality resurrected and blessed by today's campus executives."[31] This observation would appear to connect money and Division I football at some level.

So how popular is football in intercollegiate athletics when considering the external value of money in its operation? The NCAA reports "In the 1988-1989 academic year, 524 schools were sponsoring collegiate varsity football teams. By 2003-2004, the number of varsity teams had increased 18% to 621, involving 59,980 participants."[32] Clearly football has a greater participation

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[30] Percy Bysshe Shelley, QUEEN MAB, (The Complete Poetical Works of Shelley, Percy Bysshe Shelley, Thomas Hutchinson ed., Oxford University Press, London. 1961. p.762) (1813).

[31] WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 390-91 (1997).

[32] Randall Dick et al., *Descriptive Epidemiology of Collegiate Men's Football Injuries: National Collegiate Athletic Association Injury Surveillance System, 1988-1989 through 2003-2004*, J. ATHL TRAIN., Apr.-June 2007, at 221 *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1941296/ [hereinafter Dick et al.].

rate than swimming, volleyball, or baseball. What are the economics of such an intercollegiate program? Former NCAA leader (2003-2009) Myles Brand argues the economics of college sports is the result of a smoothly functioning free market system.[33] Assuming he is correct, where might the external value line be between amateurism and commercialism? On one hand, the NCAA sanctioning of Georgia football wide receiver A.J. Green for selling his own jersey from the Independence Bowl to raise funds for his spring vacation would appear to support amateurism. While Green received a four game suspension for profiting from his amateurism, however, the University of Georgia continued to sell replicas of Green's famous "No. 8 jersey for $39.95 and up."[34]

Amateurism implies non-paid volunteers while commercialism normally involves payment of some form in exchange for a product or service.

> Last year [2010], CBS Sports and Turner Broadcasting paid $771 million to the NCAA for television rights to the 2011 men's basketball tournament alone. That's three-quarters of a billion dollars built on the backs of amateurs—on unpaid labor. The whole edifice depends on the players' willingness to perform what is effectively volunteer work.[35]

Reflecting back on NCAA founding executive director Byers' observation about schools selling their players' for money, how should the NCAA's licensing of football and players likenesses to video-game manufacturers be viewed—in support of amateurism or commercialism?

> One such NCAA deal in 2008 through IMG College to Electronic Arts reportedly sold 2.5 million copies. Recog-

[33] Branch, *supra* note 23, at 94.
[34] *Id.* at 94.
[35] *Id.* at 93.

> nizing the ethical implications of profiteering from amateur athletes, former Ohio State president and current chancellor of the Maryland University system Brit Kirwan confessed "there were "`terrible fights"' between the Knight Commission and the NCAA over the ethics of generating this revenue."[36]

Why should the Knight Commission studying the ethics of intercollegiate football be concerned over the ethics of generating this revenue? Could it be that the external value of money might corrode the internal values of sport? The road to hell is said to sometimes be paved with good intentions. Nevertheless, corruption scandals keep the NCAA's investigations division in a full employment mode. What is the one common denominator in these corruption scandals? Might it be the external value of money?

The University of Southern California was sanctioned by the NCAA after finding star running back Reggie Bush and his family received improper benefits while playing for USC. Bush even had to return his Heisman Trophy received in 2005. Then there was Auburn's quarterback—Cam Newton's allegations that his father had used a recruiter to solicit up to $180,000 from Mississippi State in exchange for his son's matriculation from there after junior college. How about Ohio State's highly successful football coach Jim Tressel who resigned after the NCAA alleged he had "feigned ignorance of rules violations by players on his team? At least 28 players over the previous nine seasons, according to *Sports Illustrated*, had traded autographs, jerseys, and other team memorabilia in exchange for tattoos or cash at a tattoo parlor in Columbus in violation of NCAA rules." Then of course, there is the celebrated NCAA investigation of the University of Miami booster who gave millions in cash and services to more than 70 football players over eight years.[37] The list of similar corruption can go on for far more pages than space permits, but the point is—

[36] *Id.* at 93.
[37] *Id.* at 82.

this is what corruption in sport looks like. At its basis, corruption has everything to do with money, especially lots of it. Is this what exploitation of the skills and fame of young athletes looks like? Do the ends of meeting ever burgeoning athletic program costs justify the means of exploiting the unpaid labor of young alleged amateur student-athletes?

2. The Necessity of More.

So what does the coaching part of the economic playing field look like? Duke economist Charles Clotfelter conducted a research study of college coaches discovering the average compensation for head coaches at public universities is now more than $2 million—growing 750 percent (adjusted for inflation) since 1984 while being 20 times the cumulative 32 percent raise for college professors. The question naturally arises—which has a more lasting impact on the intellectual growth of the student-athlete?[38]

Pulitzer Prize columnist George Will is an athletics aficionado. He writes in the Washington Post:

> Gregg Easterbrook, an intelligent journalist who nevertheless loves football, has a new book ("The King of Sports: Football's Impact on America") that is hardly a love letter. "At many big college sports programs," he writes, "the athletic department is structured as an independent organization that leases campus space and school logos, then operates a tax-exempt business over which the school's president and board of trustees have little control."[39]

[38] *Id.* at 93.
[39] George Will, *Out of Bounds*, WASH. POST, Sept. 19, 2013 *available at* http://www.washingtonpost.com/opinions/george-f-will-college-football-is-out-of-bounds/2013/09/18/0cb37c38-1fb9-11e3-8459-657e0c72fec8_story.html.

Is this a problem? What role does money play with this athletic business leadership? Both Will and Easterbrook note "Auburn's head coach, Gene Chizik, was paid $3.5 million that year [when it won the 2010 championship and had $37 million in football revenue] (in most states, the highest paid person on the public payroll is a university coach), a sum justified because, said Auburn's $600,000 athletic director, "Coach Chizik is a great mentor to our student-athletes." If this is true, then why, two years later, did Chizik's mentoring greatness count for less than his 3-9 win-loss record? Despite the alleged mentoring greatness, he was fired, the blow cushioned by a $7.5 million buyout, more than the approximately $5 million Auburn had paid to buy out Chizik's predecessor. Then in 2012, the University of Tennessee fired its losing coach with a $5 million severance—and the athletic department (annual revenue, more than $70 million) was given a three-year exemption from its annual $6 million contribution to the university's academic side…In 2011, Texas Tech gave its head coach a $500,000 raise while freezing faculty salaries.[40] Easy come, easy go. But what impact might this external value have on student-athletes?

George Will notes that "the NCAA has approximately 70 pages of stern rules about dealing with recruits:

> "An institution may provide fruit, nuts and bagels to a student-athlete at any time." Cookies? See the relevant regulation. In 2008, book author "Easterbrook notes, the Raleigh News & Observer "reported that the University of North Carolina football and men's basketball players were enrolled in email Swahili `courses' that had no instructors and never met and always led to A's." There was, however, no evidence of cookie corruption.[41]

[40] *Id.*
[41] *Id.*

Is this what external value corrosion of internal values looks like? Why is this ethical? Is this a pandemic, or limited to a few miscreant schools mesmerized by gold?

Rachel Bachman, in her Wall Street Journal article "*Colorado State University Bets on a Stadium to Fill Its Coffers*", reported:

> Faced with declining state funding, CSU is raising money to build a $246 million, 40,000-seat football stadium on its Fort Collins campus. University President Tony Frank says the new facility will help build a winning football team while advancing one of the school's highest priorities: attracting more out-of-state students paying higher tuition. Skeptics, including some alumni and faculty, see the project as a boondoggle—especially for a team that plays in a relatively low-profile athletic conference and doesn't sell out its current 32,500-seat stadium off campus. ...To secure the project, the school said it must raise half the stadium's cost, $125 million, in private donations and pledges by October 2014. It will sell bonds to cover the rest…No academic research exists to support the notion that a new stadium helps a college football team win, experts say. Nor will it necessarily attract more fans.[42]

By comparison, the "universities of Akron and Minnesota both moved from off-campus to new on-campus stadiums in 2009. Both saw initial attendance bumps before attendance dropped below pre-new-stadium levels. Both teams have worse records since the stadium opened…Akron's athletic department is generating less from annual ticket sales and other direct sources

[42] Rachel Bachman, *Colorado State University Bets on a Stadium to Fill its Coffers*, WALL ST. J., Sept. 27, 2013, *available at* http://online.wsj.com/news/articles/SB10001424052702303983904579093432304563144.

that its $2.2 million in annual debt service on the $65 million stadium…[43]

Bachman concludes with a poignant analysis:

> In a 2004 study of the University of Oregon, researchers Jeffrey Stinson and Dennis Howard found that significant increases in private donations to athletics were associated with decreases in giving to academics. A 2007 study by researchers Brad Humphreys and Michael Mondello that examined nationwide data over 20 years concluded that when athletic success spurred increases in private donations, the increases usually lasted only as long as the success, and tended to be concentrated in athletics.[44]

Admittedly, college football as a sport has evolved over time into a very big business. Football teams at Texas, Florida, Georgia, Michigan, and Penn state---to illustrate, earn between $40 million and $80 million in profit annually. What does so much money in college sports beget? As Pulitzer Prize winning author Taylor Branch observes, "When you combine so much money with such high, almost tribal, stakes—football boosters are famously rabid in their zeal to have their alma mater win—corruption is likely to follow."[45] Might not this be a significant reason why non-American colleges and universities have avoided this path? Would the reader be surprised to learn that "[T]he United States is the only country in the world that hosts big-time sports at institutions of higher learning"?[46] Why is that, do you suppose? Perhaps, because we can, but other nation-states can do this too, but elect not to. Why is that? What might they see that we culturally ignore?

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[43] *Id.*
[44] *Id.*
[45] Branch, *supra* note 23, at 82
[46] *Id.* at 82.

Perhaps the worst kept secret in collegiate athletics is that the financial pressures create incentives "to disregard obvious academic shortcomings and shortcuts…." among other things.[47] Is this how corrosive corruption of internal values or goals by external ones manifests itself? Addressing this specific connection, Glenn Harlan Reynolds writes in an expose in USA TODAY:

> More than 50 classes offered by the African Studies department [at the University of North Carolina at Chapel Hill] and very popular with athletes, appear to not have actually existed. Some of these courses listed instructors who had not "supervised the course and graded the work," and others "were taught irregularly," a university review said. UNC's chancellor and football coach lost their jobs. The African Studies department chair, professor Julius Nyang'oro, is under indictment for fraud." In addition, it is asserted that "many UNC athletes can't read or write…."[48]

Reynolds turns a floodlight on the salient problem of money in Division I football observing: "But "students" who are functionally illiterate strike at the very point of college—to educate." Following up, Kevin Carey, director of the Education Policy Program at the new America Foundation writes that "UNC-Chapel Hill is not a coherent undergraduate institution. It's a holding company…it's the only possible explanation other than a huge, organization-wide conspiracy in which the university administration, department, and football team colluded to hand out fake grades to hundreds of athletes." How pandemic is this money external value issue? "After the Chapel Hill scandals broke, CNN conducted an investigation of athletic programs, finding that at public universities, many football and basketball players are read-

[47] *Id.* at 100.
[48] Glenn Harlan Reynolds, *Higher Ed Sports Lower Standards*, USA TODAY, Jan. 15, 2014, at A.10, *available at* http://www.usatoday.com/story/opinion/2014/01/13/higher-education-college-university-column/4440369/.

ing at the eighth-grade level, making it doubtful that they're passing college classes."[49]

3. Saying "No" is Not an Option.

How intense is the "money" making external goal in Division I football? Another USA TODAY investigative report reveals: "The average compensation package for major-college coaches is $1.81 million, a rise of about $170,000, or 10%, since last season—and more than 90% since 2006."[50] If trajectory means something, the calculus says coaches' compensation will more than double in less than a decade. Does this present an ethical conflict of interest between coaches and players? If data-mining means something, the Delta Cost Project at the American Institutes for Research that was based on data from the U.S. Department of Education and data collected by USA TODAY Sports, provides fascinating reading. Their research reveals "Among FBS schools, median athletic spending per student-athlete increased by 51% from 2005 through 2010…while median academic spending per student rose by 23% in the same period." Perhaps Colorado physics professor Jerry Peterson, a member of the Coalition on Intercollegiate Athletics, an alliance of faculty senates from major football schools, captured it best when he said "I don't know how to slow this down. It's an arms race."[51]

Is greed an ethical issue, and if so, how do you distinguish unethical corruption from ethical and fair compensation? The Southeastern Conference (SEC) has the dubious honor of having the highest average compensation for its football head coaches. According to USA TODAY Sports' annual analysis of major-college football coaches' compensation, the SEC's 14 coaches receive

[49] *Id.*
[50] Erick Brady, Christopher Schnaars & Steve Berkowitz, *Colorado Banks on Football, and Coach Cashes in—Seeking Payoff, Colorado All-in on Football*, USA TODAY, Nov. 7, 2013, at A.1, A.9.
[51] *Id.*

more than $3.3 million each. Not surprisingly this represents an average increase of nearly $560,000 from the prior year [2012]. The Big Ten since 2011 has only increased its coaches' compensation a mere 36%. Reviewing the spectrum of coaches' compensation tipping the monetary scales, USA TODAY's report reveals the Big 12's 10 coaches receive an average of $3,072,835, the Big Ten's 12 coaches get $2,638,213, the Atlantic Coast's 11 coaches command $2,277,210, the PAC 12's 11 coaches garner $2,237,687, the Mountain West's 12 coaches collect $874,954, while the Sun Belt's 8 coaches have to settle for $552,536, and the players they coach—receive a free education.[52]

4. Greed Gives Birth to the Ethical Dilemma.

The level of compensation paid to football coaches across the nation, especially at Division I, compared to what is provided players presents an ethical dilemma. When considering the possibility of corruption and ethical conflict of interest presented by these numbers, it brings to mind U.S. Supreme Court Justice Potter Stewart's famous aphorism. "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography"]; and perhaps I could never succeed in intelligibly doing so. But **I know it when I see it….***[Emphasis added.]*[53] Are these "arms race" coaching salaries indicative of corruption?

An ethics umpire might question whether these athletic directors and coaches might be seen to have a financial conflict of interest. After all, they do get paid far more than their academic faculty counterparts. Conflicts of interest are endemic in every

[52] Steve Berkowitz, *SEC Tops in Coaches' Compensation, too*, USA TODAY, Nov. 8, 2013, at C.11, *available at* http://www.usatoday.com/story/sports/ncaaf/2013/11/07/college-football-coaches-average-conference-salaries/3469293/.

[53] Jacobellis v. Ohio, 378 U.S. 184 (1964) (Stewart, J., concurring) (regarding possible obscenity in THE LOVERS).

profession. Football, with its staggering sums, is no exception. Peter Arnold deduces the dichotomy observing: "What seems clear, as some recent critiques of sport have shown, is that the more the practice view of sport is used and abused by the pursuit of external goals and interests, the more perverted and corrupted it is likely to become. Instead of being personally ennobling and socially enriching there is danger of it becoming a vehicle of degradation and alienation."[54] Corruption—unethical decision-making, unsurprisingly, results. "Put differently institutions are likely to corrupt practices when they demonstrate an undue interest in the promotion and extension of external goods at the expense of the preservation and cultivation of internal ones. What is needed in the use of sport management in society is working out an acceptable arrangement between the twin concerns of internal and external goods."[55]

C. THE BRIDGE OVER VERY TROUBLED WATERS.

Sport is about internal values we can characterize as good ethical ones— Respect, leadership, generosity, courage, compassion, teamwork, self-reliance, self-discipline, perseverance, fair play, sportsmanship, magnanimity, concern for others. External values— power, status, prestige, and money can corrupt internal ones. Money like power corrupts, lots of money like absolute power, corrupts absolutely. Ethical decision-making—ennobling, the good, the correct, is sacrificed on the altar of unethical practices brought about by the insatiable need and greed for money. In order to gain the type of financial resources needed to support the ever growing football kingdom, new opportunities must be sought to feed the pig, or in this case pigskin. One opportunity of choice is football game scheduling between Division I FBS (Football Bowl Subdivision) schools and FCS (Football Championship Subdivision) schools. FBS schools were formerly Division I A,

[54] Arnold, *supra* note 11, at 19.
[55] *Id.*

while FCS schools were a lower competitive division labeled Division I AA.

What is the financial incentive for an FBS school to schedule a football game with a lesser competitive FCS school? It is all about "the money."

1. The Tennessee Tech Story.

Tom Oates sums up the money story best reporting:

> [University of Wisconsin] UW will pay Tennessee Tech a flat fee of $500,000 to show up in Madison, take a loss and go home. It's a mutually beneficial financial arrangement: UW gets a home gate at a bargain rate and Tennessee Tech gets a paycheck that goes a long way in a small athletic department. There were fewer than 60 FBS-FCS matchups in 2005, when FBS schools, tired of paying $750,000 to $1 million for non-conference opponents from mid-major conferences, went looking for a cheaper alternative. FCS teams were happy to fill the void—at half the price. This year [2013], there are 110 such games. Of the 125 FBS teams, 106 will play FCS opponents.[56]

While this sounds inviting, the ethical question of competitive equity is in play. Is it ethical for an FBS school to schedule a game with a lesser competitive FCS school, with both knowing the competitive outcome before the game is played? "…FBS schools have won more than 90 percent of such matchups every year since 2007 and many of last week's upsets were sprung by perennial

[56] Tom Oates, *Hopefully, FCS Foes off the Schedule Soon*, WIS. ST. J., Sept. 7, 2013 at B.1 *available at* http://host.madison.com/sports/college/football/tom-oates-hopefully-for-uw-fans-fcs-opponents-are-on/article_a147fa0c-c6cb-519b-be30-d2f119d51341.html.

FCS powers. …Since 2007, however, the [Tennessee Tech] Golden Eagles are 0-9 against FBS teams, with the closest loss a 27-point setback at Iowa in 2011."[57]

2. The Old Dominion Story.

"Maryland 47, Old Dominion University (ODU) 10." Is this what a competitive football game looks like? "[ODU coach] Bobby Wilder knew what was coming. If he thought his team had a chance to beat East Carolina last week, he entertained no such thoughts going into the game against Maryland…Wilder's post-game demeanor after the 47-10 Terps' rout reflected a quiet resignation that the [ODU] Monarchs were in over their heads."[58] From a football coach's perspective, what does this actually mean? "They outplayed us," he said simply, leaving it for others to add, "in every phase of the game." "Outcoached us, too," he volunteered." "After a total team loss like this, Wilder couldn't bring himself to pretend that anything other than Maryland's clear advantage in size, talent and experience – including coaching experience – had something to do with ODU's worst loss."[59] So why would a coach schedule a game against such a superior opponent sporting a 90+% chance of defeat?

Sports writer Bob Molinaro captures it observing: "While growing pains are one thing, the [ODU] Monarchs' dreary afternoon brings into question the wisdom of scheduling three ACC teams this year [2013]. More than ever – with Pittsburgh and North Carolina still to come – it seems to be an overly ambitious undertaking."[60] Enter the external goal. Why would an athletic

[57] *Id.*
[58] Bob Molinaro, *ODU Players Paying Price of an Ambitious Schedule*, VIRGINIAN - PILOT, Sept. 8, 2013, at C.7.
[59] *Id.*
[60] *Id.*

director and coach do this? "[T]he money is good – ODU will collect nearly $1.2 million from the three games – but the payoffs can come at a price to the fragile young psyches in the locker room."[61] Do the players matter ethically when the external goal of $1.2 million outweighs all others?

3. The Oklahoma State Story.

Why the preoccupation with money? "Oklahoma State Football Coach Mike Gundy says, "Football pays the bills, so games are played for financial reasons…We are trying to build everything," Gundy said, rattling off facility upgrades that are on the [Athletic Director] Holder's to-do list." "So football has to put that on their shoulders. We have to carry the load."[62] Without remorse, athletic directors and coaches own up to the fiscal reality that "…[T]hese decisions may not always be correct, or popular, but they will be made for what we think are the right reasons." The worst kept scheduling secret is "Schools outside the "power" leagues (and at the FCS level) schedule road games against heavyweight competition in exchange for big paychecks that keep their athletic departments running."[63]

4. The UT-Martin Story.

Money buys stuff. Coaches, projects, programs, equipment all require acquisition power, as money hawkers/fundraisers claim. In University of Tennessee at Martin country, "coach Jason Simpson, whose Skyhawks open their season at UTC (Univ. of Tenn. at Chattanooga], on Aug. 29, are playing two FBS teams this season

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[61] *Id.*
[62] Jimmie Tramel, *The Art of College Football Schedule-making: Marquee Foes, Bowl Eligibility are All Factors*, MCCLATCHY-TRIB. BUS. NEWS, Dec. 19, 2012 *available at* http://www.tulsaworld.com/sportsextra/osu/the-art-of-college-football-schedule-making-marquee-foes-bowl/article_4177a07c-0461-5cfd-9bc2-e12ee7b8b6c9.html.
[63] *Id.*

and two next season. UT-Martin is working on redoing part of its stadium, and the guarantee games are helping finance the renovations."[64] Without any reservation this might have a negative effect on his student-athletes, the football coach explains "I can't go and raise the money that those guarantee games can pay, said Simpson, a former UTC offensive coordinator. "You've got to play one to pay the bills and you play the second one if you've got some projects in mind."[65]

5. The Towson State Story.

"When Towson athletic director Mike Waddell broached the idea with [Coach] Rob Ambrose of taking his football team down to play LSU in Baton Rouge for the fourth game of the 2012 season, the [Towson] Tigers' coach was decidedly lukewarm. …At the time, Towson was coming off a 1-10 season in 2010 after going 2-9 in Ambrose's first year at his alma ter."[66] Why would an athletic director and football coach knowingly, intelligently, willingly schedule a game with an opponent with whom they know in advance they cannot compete because of size, weight, talent, experience, and much more? "…The hefty payday--$510,000, according to [Towson athletic director] Waddell—certainly factored into the decision to play the highest profile opponent in the history of Towson football."[67]

While Towson athletic elders sold their team to a contest in which they knew they were not competitive, it was not the first or probably the last time. "…Towson played its first game against an FBS school when it faced Navy in the 2008 season opener, losing 41-13. The Tigers also lost at Northwestern (47-14) in Ambrose's

[64] John Frierson, *Football Championship Subdivision Watchful About Departures, Money Games*, CHATTANOOGA TIMES FREE PRESS, July 10, 2013.
[65] *Id.*
[66] Don Markus, *At LSU, Towson Challenges—and seeks—greatness*, BALT. SUN, Sept. 29, 2013, at D.6
[67] *Id.*

first game in 2009, at Indiana (51-17) to open its 2010 season and at Maryland (28-3) last year. Towson opened this season [2012] with a mistake filled 41-21 loss at Kent State.[68] Nevertheless they see no shame in using and abusing their student-athletes in this manner—for money. "...I know when I took the job, the best we could get around here was the local Comcast affiliate. We weren't very good, and it's all about the money," Ambrose said. "What's at stake: The biggest upset in college football history? Pipe dream aside, Towson will be entering one of the most intimidating venues to play one of the most dominant programs over the past few years."[69]

What did Towson's athletic leaders sell their team to face? "LSU is undefeated in its past 40 games against nonconference opponents, an NCAA record. The program has not lost at Tiger Stadium since the 2009-10 season. Towson, on the other hand, is looking for its first win against an FBS opponent, with a 0-6 all-time record."[70] Is this what ethical behavior looks like in Division I football? It will be argued that the external goal of money makes the scheduling decision ethical. But let's test that theorem further.

6. The Whole Story.

John Feinstein fired a literary salvo in his indicting Washington Post article *College Football: FBS vs. FCS Games Need to be Limited*:

> The following scores from college football games played Saturday [Sep. 21, 2013] may not be suitable for family viewing. Please be certain small children are not allowed to see them: Ohio State 76, Florida A&M 0; Louisville 72, Florida International 0; Washington 56, Idaho State 0; Miami [Hurricanes] 77, Savannah State 7. Games

[68] *Id.*
[69] *Id.*
[70] *Id.*

> like this have to stop. They have to stop because they are unfair—first and foremost—to the overmatched players who are publicly humiliated and beaten up against opponents who are much bigger, much stronger and much faster at every position. Florida A&M and Florida International combined for 100 *yards* of offense on Saturday against teams that totaled 148 *points*. This is competition? Savannah State has played three Football Bowl Subdivision opponents in the past two seasons to pad the athletic department's coffers. The Tigers have lost 84-0 to Oklahoma State, 55-0 to Florida State—in a game that was called off with nearly nine minutes left in the third quarter because God decided he had seen enough and started a thunderstorm—and now 77-7 to Miami. That's 216-7, and it could have been worse.[71]

Unashamedly, Feinstein reports "The excuse given by athletic officials at places like Savannah State is that the payout for allowing their "student-athletes" to get pummeled this way helps sustain the athletic department financially."[72] But does this truly matter because "money" is the undisputed primary reason why such teams are "sold" to the giants for practice? Why is this ethical? Feinstein charges moral and ethical corruption at the highest level maintaining "…[T]here are games that shouldn't be played and should not be allowed…Old Dominion, also a very good FCS program, opened its season by giving up 99 points to East Carolina and Maryland. It is sickening to hear fraud presidents and NCAA executives talk about wanting what is best for the "student-athlete."[73]

D. PLAYING THE ODDS.

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[71] John Feinstein, *College Football: FBS vs. FCS Games Need to be Limited*, WASH. POST, Sept. 23, 2013 [hereinafter Feinstein].
[72] *Id.*
[73] *Id.*

While there are always upsets in football as in all sports, norms can be determined. A study by Caroline E. Faure and Cody Cranor of smaller FCS (Football Champion Subdivision) teams playing larger FBS (Football Bowl Subdivision) schools noted in 2007 that 22 NCAA Division I-AA (FCS level) schools played Division I-A (FBS level) teams. What outcome? 21 of the 22 FBS schools defeated their weaker FCS level opponents. But were they competitive? "In the I-AA [FCS] teams' losses, no team came closer than two touchdowns and the *average* margin of loss was 32.8 points. (emphasis added).[74]

Is this competitive and does it matter? In 2009, 91 FCS `David' teams braved `Goliath' FBS juggernauts. Outcome? Five, that is 5.4%, of the FCS schools emerged victorious. For the five heroic FCS schools, the margin of victory proved only 6 points. Among the five losing FBS schools, only one came away with a season winning record, so the meager five FCS victories may be somewhat hollow in fact.[75]

Also in 2009, seven FCS teams played FBS teams ranked in the Top 25—the chance of a lifetime. The chance proved elusive with none of the FCS teams prevailing/winning their games. The "chance of a lifetime" saw the Goliath FBS teams outscoring their David FCS opponents 335-40 with an average margin of victory at 42 points.[76] Is competitiveness an ethical issue in the Division I sport of football, and does it matter? Some argue competiveness does not matter. They are all athletes, so while top tier FBS schools are better athletes, FCS athletes are inferior athletes, but who cares. One plays the other principally for money. Ethics plays no role. Or does it?

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[74] Caroline E. Faure & Cody Cranor, *Pay for Slay*, J. ISSUES IN INTERCOLLEGIATE ATHLETICS, 2010, at 194.
[75] *Id.* at 195.
[76] *Id.* at 205.

Would an FCS school play an athletically superior FBS school for free or next to it? Most sports commentators would probably say "no". Why? The primary purpose of the game is the external goal of playing for money—lots of it, and the secondary goal is athletic improvement. Comparing a different, but yet almost equally violent sport, can the issue be illuminated? While a boxing coach should be ethically reluctant to match a boxer who has had one match against a competitor who has had far more experience, weighs more, possesses more athletic skill and experience, and is used to competing at a higher boxing level, why would it be ethical to do it in football or any other sport? The ethical point is how should such things be judged? We should all agree "it matters."

Do stronger and bigger opponents present a greater risk of injury (a subject we will turn to later)? With FBS teams having 85 scholarships to 63 for FCS schools, does this have consequences? As confirmed by athletic directors interviewed for Faure and Cranor's study, "FBS players are traditionally bigger and stronger. Typically, FCS schools cannot attract the best football players in the country, so the FCS school goes in as the "decided underdog."[77]

While hope springs eternal from the human breast that an FCS team can compete its way to be among the 5.4% victors in a 2009 type season, reality should ethically play a role. Is it foreseeable that Goliath might hurt David in a *mano on mano* matchup? On the one hand, athletic directors argue "Obviously with 85 scholarships to 63 scholarships and then the quality of the players they have, they probably have a few more playmakers than we do. But we feel that our kids can hang in there. You know, we can play a game like that, at least one or two of them a year. I don't

[77] *Id.* at 201-02.

think we can play eight to ten or twelve games a year like that…but we can play with once or twice."[78]

Then reality or the worst kept secret in football looms. Athletic directors interviewed for the Faure and Cranor study conceded "Because of the physical differences among the players, several FCS athletic directors acknowledged having *significant* fear of their players getting hurt while playing FBS teams…[Other interviewed AD's] also felt the threat of injury to their players was significant."[79] Does this remind you of one of WWII General George Patton's soldiers who observed after one of the General's pre-battle pep talks—"yeah, with our blood and his guts."

E. ROUND UP THE USUAL SUSPECTS.

Athletic directors are fundamentally business managers for their collegiate athletic programs. They focus and salivate like a Pavlovian greyhound when currency flows. They are mesmerized with how much money is actually flowing into the growing Division I football entertainment market.

> The commissioners of the 10 conferences that play Division I football have signed television contracts that will push the value of the college football postseason to $5.5 billion over 12 years, with the five major conferences — the SEC, Big 12, ACC, Big Ten and Pac-12 — expected to receive the bulk of TV revenue… According to USA Today, there is even more money to be had on top of the $5.5 billion. The Rose, Sugar and Orange bowls will spread an additional $187.5 million among the five power conferences. How many zeros will be on these checks written to member schools? No one is quite sure, because the conferences are closely guarding the details of the contract. The SEC, which paid its 14 member schools $20.7 million each in August,

[78] *Id.* at 202.
[79] *Id.* at 203.

> could have another $12 million to $15 million to give them because of the new format. And the SEC will start its own TV network in 2014, which could mean a further $1 million for each of its schools. This means the 14 SEC schools could each be receiving $35 million or more from the conference by 2015, on top of the revenue they generate themselves with licensing, concessions and ticket sales.[80]

But do university presidents also respond to cash flow opportunities? "… Alabama's athletic department gave $6.8 million back to the school's academic side for 2011-12, according to a university spokesperson. Len Elmore, an attorney, a basketball analyst and a member of the Knight Commission, scoffed at that number. "What did Alabama generate in revenue with football — $60 million, $70 million, $80 million?" he asked. "So they gave back less than 10 percent?""[81]

This leads to the question how much money is spent on the student non-athlete vs. the athlete?

> … A new tool released by the Knight Commission on Wednesday compares the amount of money spent on football players with spending on the typical student, school by school. The differences are staggering, especially among schools with Division I football programs. For instance, according to 2011 data, the average spending at the 12 SEC schools per student was $13,229, while the average amount spent per SEC scholarship or nonscholarship football player was $180,626, taking into account total football operating expenses and the cost of the athletic scholarship….[82]

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[80] Ray Glier, *Academics Left out of College Football's Multi-billion Dollar Bonanza,* ALJAZEERA AM. (Dec. 4, 2013, 9:01 AM), http://america.aljazeera.com/articles/2013/12/4/academics-left-outofcollegefootballsmultibilliondollarbonanza.html

[81] *Id.*

[82] *Id.*

1. All the King's men.

A fascinating study conducted by Caroline Faure and Cody Cranor interviewed six athletic directors (AD) inquiring why lesser competitive FCS schools take the bait of playing superior FBS schools. All six AD's owned up to the external goal as being the driving force for their scheduling. "Without question, money was the primary reason FCS athletic directors decided to schedule FBS opponents."[83] The insatiable need to continually upgrade athletic facilities and meet Title IX compliance for women's sports drove them like cattle to make these games.

> "Our holdback was roughly $630,000 from the state appropriated funds and one of those game guarantees was $510,000. [If we didn't play the game] I was going to lose $510,000 from our budget and I just didn't know how we were going to do it. We could have easily picked up another school for $350,000 or $400,000 that was a lesser
> school and we would have competed a little bit better, but still would have had to make up that other number. $500,000 is the budget of a
> small sport at our school and we couldn't afford to drop another sport. We're at our minimums for NCAA sports for Division I already. If
> we dropped another sport we'd have to drop to Division II. Playing the game was one of our only options."[84]

How seductive is scheduling these games once a school has tasted the revenue? "Five of the six AD's contended the payouts are addicting and they need "to count on at least one guarantee game each year to fuel their athletic budgets amidst continuing fiscal crises at their universities."[85] Without remorse or ethical

[83] Faure, *supra* note 74, at 197.
[84] *Id.* at 199.
[85] *Id.*

concern, one AD said "he would also continue to schedule big guarantee games in future years and that with more budget cuts looming, he might even look for more FBS opponents to fill his three-game non-conference schedule."[86] Some argue this is not about ethics. This is about money. The need to support always increasing athletic budgets transforms the ethical issue into an economic one which, as an external goal, corrupts or decimates the internal ones.

2. No Conflict of Interest.

Aside from the data above, are there any apparent reasons why football has such an insatiable appetite for the external goal of money? Why does football need so much money if the players are not getting paid at all? The USA TODAY reports a few reasons, which may give life to a possible conflict of interest allegation:

The coaches' salaries:

Troy Calhoun (more than his CINC)	Air Force Academy	$882,000
Nick Saban	Alabama	5,316,667
Rich Rodriquez	Arizona	1,500,000
Todd Graham	Arizona State	3,000,000
Gene Chizik	Auburn	3,500,000
Art Briles	Baylor	2,232,807[87]

a. The players:

What about the players? What do they actually cost a Division I school to field a team? But they are getting paid, in a manner of accounting-speak. The NCAA's Knight Commission maintains a database tracking what member schools report student-

[86] *Id.*

[87] Steve Berkowitz, et al., *"College,"* USA TODAY, Nov. 7, 2013, *available at* http://usatoday30.usatoday.com/sports/graphics/datatables/2012/NCAAFB-Coach-Salaries/coaches-salaries.

athletes actually cost them. For example, "The University of Minnesota spent $199,826 annually for each scholarship football player, according to the most recent data from 2011, up from $107,636 in 2005."[88]

As football aficionados know, Minnesota does not stand at the higher end of big time pigskin spending. "Alabama, which has won three of the past four national championships, spent $342,020 per scholarship player in 2011, nearly double the $175,010 the university spent six years before. Ohio State spent even more---$456,023 per scholarship football player in 2011."[89]

As the Knight Commission report reveals, the Minnesota Gophers' eye popping football player cost does not even compete at the median of the Big Ten Conference. Would you be surprised to learn that its median was $210,251 in 2011 while the bigger powerhouse Southeastern Conference came in with a median of $259,251?[90] Mike Kazuba's investigative report reveals: what did Minnesota spend on its full-time equivalent academic student? Compared to the footballer's $199,826, Minnesota "invested $20,688 in 2011 in academic spending per full-time equivalent student" reports the Knight Commission.

> What does the bigger picture look like? "While football operating expenses totaled $16.9 million in 2011, total football revenue was $30.5 million. It was even more lucrative in 2012---the Gophers' expenses were $16.2 million, and revenue was twice as much at just under $33 million." If players cannot receive monetary compensation from their schools by NCAA rules, how does Minnesota account for this six figure expenditure? "There was $8,393 for the lodging and meals associated with team

[88] Mike Kaszuba, *Mike Henry: The U's $199, 826 Man*, STAR TRIB. (Dec. 27, 2013, 9:45 AM), http://www.startribune.com/sports/gophers/237259601.html.
[89] *Id.*
[90] *Id.*

> travel; $6,510 for equipment, which includes Henry's maroon helmet; and $12,402 to pay the wages,
> benefits and bonuses for the football program's support staff, including its secretaries and trainers." Not to be left out of the expense tabulation, $22,556 was listed as compensation for the team's head coaches that fiscal year, even though coach Tim Brewster was fired.[91]

Other poor step children Big Ten Conference schools, besides impoverished Minnesota, came in with player medians of $189,118 (Indiana), $132,802 (Purdue), and $128,607 (Illinois). Minnesota's neighboring schools outspent them as well with Wisconsin at $278,387, Iowa at $234,782, and Nebraska at $207,704.[92]

If this matters, what does the future portend? "The pattern that clearly emerges is that athletic spending is rising rapidly, while academic spending is stagnating," said Amy Perko, the executive director of the Knight Commission.[93] And the players received no direct compensation. Does any of this matter? Is this what ethical behavior looks like? Is this what a Division I arms race in football looks like?

3. A Means to an End.

Big Ten Commissioner Jim Delaney has waded into the argument that FBS Big Ten members need to stop scheduling FCS schools, but for reasons related to the external goal, not the internal ones. ""They're not attractive television matchups," he says, and the results are usually lopsided. (See Nebraska 73, Idaho State 7)…106 of 125 FBS teams have at least one FCS opponent on their schedules this season. Clemson and Georgia Tech have two. FCS teams are cheaper to schedule—Nebraska last season paid Idaho

[91] *Id.*
[92] *Id.*
[93] *Id.*

state $600,000, for instance, compared with $1 million to Arkansas State, a lower level FBS program…."[94]

Do scholarships in football matter? FCS has a cap of 63 where FBS schools have 85. Does that matter in college football? If one concedes athletic scholarships are a form of compensation, the Knight Commission has argued that "scholarship athletes are already paid in the most meaningful way possible: with a free education."[95] If it is observed that the norm is for better football athletes to seek scholarships at FBS as opposed to FCS schools, and those superior teams have 22 additional scholarships than inferior FCS schools, what implication is there for increased risk of injury?

Athletic directors (AD) and coaches argue their FCS players do not mind getting beat up, injured, publicly humiliated, or outscored on TV by a zillion points. "Most top programs preyed on lesser competition (see Oklahoma 84, Savannah State 0).[96] "They crave the opportunity to play the Goliaths," say the Davids.[97] "Fact is, FBS schools dominate FCS teams in 90+ percent of all cases. They are bigger, they are better and they win most of the games against FCS teams. That cannot be disputed."[98] Referring back to the NCAA **Commitment to Integrity and Sportsmanship** standard, how does the above relate to "…All individuals

[94] Brian Rosenthal, *FCS Teams Making Their Mark Against the Big Boys*, LINCOLN J. STAR, (Sep. 19, 2013, 7:00 PM), http://journalstar.com/sports/huskers/football/2013/south-dakota-state/fcs-teams-making-their-mark-against-the-big-boys/article_da777e63-f5ce-51d2-b79e-1497ff362af2.html.

[95] Branch, *supra* note 23, at 110.

[96] Andy Staples, *Cupcake Wars*, SPORTS ILLUSTRATED, Sep. 10, 2012, at 117, *available at* http://sportsillustrated.cnn.com/vault/cover/featured/11834/index.htm.

[97] Faure, *supra* note 74, at 199-200.

[98] Mike McFeely, *Given His Own Conference, Big Ten Commissioner's Shot at FCS Is Cheap*, KFGO, (Sep. 5, 2013), http://kfgo.com/blogs/so-many-opinions-so-little-time/953/given-his-own-conference-big-ten-commissioners-shot-at-fcs-is-cheap/

associated with intercollegiate athletics programs and events should adhere to such fundamental values as respect, *fairness,* civility, honesty, responsibility, academic integrity and *ethical conduct* (emphasis added). These values should be manifest not only in athletics participation, but also in the broad spectrum of activities affecting the athletics programs." In particular, is this what "fairness, honesty, responsibility, and ethical conduct" look like? Furthermore how is this behavior consistent with the professed NCAA standard that "Intercollegiate athletics programs shall be conducted in a manner designed to enhance the well-being of student-athletes who choose to participate and to prevent undue commercial or other influences that may interfere with their scholastic, athletics, or related interests."?

4. The Cost of Doing Gladiatorial Business.

While injuries are endemic to all sports, there are norms of coaching and athletic behavior. Player safety should be first and foremost the quintessential ethical duty of everyone connected with intercollegiate sport. Nevertheless, do commercialism and its economic benefits corrupt this duty? What might that look like? "In 2011 allegations were heard accusing the University of Iowa of "informal" football workouts after its bowl game. The workouts were characterized as so grueling that 41 of the 56 amateur student-athletes collapsed. 13 were subsequently hospitalized with rhabdomyolysis—a life threatening kidney condition often caused by excessive exercise."[99] Recalling that "From a beginning where 25 football college players were killed during a single football season, it is without question anything but a gentleman's game."[100] While assumption of risk of injury is a precondition for playing any sport, the assumption is based on the reasonable foreseeability

[99] Branch, *supra* note 23, at 109-10.
[100] *Id.* at 83.

of consequences.[101] Anyone familiar with the sport would verify that it is violent, brutal, and injury prone.

In a highly injurious sport, the NCAA assumes some degree of responsibility for its play and regulation. "From 1988-1989 through 2003-2004, the NCAA reviewed 16 years of injury surveillance data for men's football to identify potential areas for injury prevention initiatives. Approximately 16% of the schools in Division I, II, and III NCAA institutions sponsoring football participated in the study. Surprisingly the results of the study show little variation in the injury rates over time."[102] Note this is an NCAA study. The data reveal evidence of risk and injury incurrence. Fall game, fall practice, and spring football practice injury rates were reviewed. The NCAA's confidence intervals are 95%.[103] Not unsurprisingly, injury in football games was 9 times higher than the practice injury rate (35.90 versus 3.80 injuries per 1000 athlete-exposures).[104]

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[101] *See* Avila v. Citrus Cmty. Coll. Dist., 131 P.3 383 (Cal. 2006) (arguing that a college baseball player struck in the head by an intentionally thrown "beanball" by the opposing pitcher assumed not only the risks inherent in the sport but also some risks created by the other participants' active negligence); *see also* Hacking v. Town of Belmont, 736 A.2d 1229 (N.H. 1999) ("While one participating in a sport might `consent to those commonly appreciated risks which are inherent in and arise out of the nature of the sport and generally flow from such participation,' one does not ordinarily assume an `unreasonably increased or concealed' risk.").

[102] Dick ET AL., *supra* note 32, at 221.

[103] *Id*. at 222-23

[104] *Id.* at 221. The body parts most frequently injured playing football involved knee internal derangements, ankle ligament sprains, and concussions. *Id.* So what is the nature of assumed risk of battle wounds on the playing field? In fall games, knee internal derangements accounted for 17.8%, ankle ligament sprains 15.6%, and concussions were 6.8%. *Id.* In fall practices injuries were less with knee internal derangements being 12.0%, ankle ligament sprains were 11.8%, and concussions totaled 5.5%. *Id*. Spring practice numbers were higher coming in at 16.4%, 13.9%, and 5.6% respectively. *Id*. In the game itself when compared to fall practice, a player was 18 times more likely to sustain upper leg contusion (1.27 per 1000 athlete-exposures (A-E)), 14 times as likely to sustain

What do the numbers reveal? The study revealed that player contact was, not unsurprisingly, the primary source of player injury (game 78%, fall practice 57%, and spring practice 69%). Severe injuries were characterized as those resulting in a total loss of participation of 10+ days. The study indicated 25% of severe injuries came in games, 25% in fall practice, and 34% in spring practice.[105] Not surprising, "Knee and ankle injuries accounted for the most frequent type, while concussions represented 3% in both fall and spring practice, but 4% in games.[106] Which positions in football are more likely than others to suffer injury?

> "The offensive players with the highest number of injuries (by weighted position) were the quarterback (18%) and the running back (20%)… The offensive players with the highest number of concussions (by weighted position) were the running back (17%) and the quarterback (28%). The defensive player with the highest number of concussions was the defensive back (14%). Offensive players appeared to receive a higher number of concussions than defensive players.[107]

The NCAA study revealed data not found in any other NCAA sport.[108] "The study concludes, based on its statistical

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an acromioclavucular joint sprain (.98 per 1000 A-E), 13 times as likely to sustain knee internal derangement (6.17 per 1000 A-E), 12 times more likely to sustain an ankle ligament sprain (5.39 per 1000 A-E), and 11 times as likely to sustain a concussion (2.34 per 1000 A-E). *Id.*

[105] *Id.* at 224.

[106] *Id.* at 224.

[107] *Id.* 226-227.

[108] *Id.* at 227. "The NCAA football injury study also found that approximately 85% of the knee internal derangements were classified as new injuries. In particular, the research disclosed there were three major types of knee injuries experienced during games and practices: ACL, posterior cruciate ligament (PCL), and menisci. These injuries occurred more frequently in games than practices. Are such injuries serious? Using the 10 days of time loss criterion, less than 45% of knee derangements resulted in such loss. But for those with

analysis, that not only is football a high-impact collision sport, but players' characteristics (e.g., age, height, weight) vary widely, both within a team and among NCAA divisions. It also points out that "[T]he intensity level and speed are generally considered higher in games than in practices, increasing the magnitude of collisions and thus, increasing the risk of injury."[109] What impact have improvements in football equipment had on safety of the game? "Despite changes in equipment (e.g., helmets, increased padding, mouthguards), there was little variation in injury rates for games, or fall and spring practices over the 16-year study. The study observes that these results are most likely because the basic characteristics of the game have not changed drastically over the years.[110]

Have improvements in strength and conditioning programs had an impact on injuries? Unfortunately, for the worse. The study argues that its injury rate data remains "largely unchanged" over the 16 year period. A poignant fact known to most football coaches is that "stronger, faster athletes increase the speed and collision forces, causing more injuries."[111]

Does size, weight, height, strength, talent, speed, or experience matter among football players engaged in a sport where speed and collision cause increased injuries? George Orwell's *Animal Farm* quote that "all animals are created equal, but some animals are more equal than others," would seem to frame the ethical argument of smaller, slower, less talented, more inexperienced `David' schools playing stronger, faster, heavier, more athletically gifted `Goliath' teams. But "so what"---they are all football players and if you play the game, you take your chances regardless of competitiveness factors. Injuries are just a cost of doing business. But with the recent attempted NFL settlement with players for

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more than 10 days of loss, in the case of ACL injuries 78% were operative; 39% of PCL injuries underwent surgical procedure." *Id.*

[109] *Id.* at 228.

[110] *Id.* at 228.

[111] *Id.* at 232.

concussion and related injuries, why might the reasons underpinning such player claims, and NFL attempted settlement of them, apply in the NCAA arena?

Concussions, nevertheless, are becoming a subject of increasing concern at both the amateur and professional football levels of play.

> The NCAA's injury study discloses its data reflects the concussion percentage was 5.5% (0.21 per 1000 A-Es), 6% for games (2.34 per 1000 A-Es), and 0.05 for spring practices (0.05 per 1000 A-Es). "The fall game rate was 11 times higher than the fall practice rate… Clearly, the greatest risk of concussion is in games, which have the greatest risk of high-speed collisions." Not surprising, the quarterback and running back received the greatest frequency of game related concussions.[112]

The NCAA study also reports "Games tend to reduce the influence of the coaches over the quantity and nature of body contact, as the game is played at high speed and high intensity and players expect to be involved in contacts.[113] Lest this NCAA report be seen as an orphan, other researchers such as K.M. Guskiewicz, M. McCrea, and S.W. Marshall have reached similar data driven conclusions.[114]

5. Collateral Damage.

If it is all about the external goal of money, what can be collateral costs that damage a student-athlete and violate the purported NCAA standards? Investigative reporter Brent

[112] *Id.* at 231.
[113] *Id.* at 229.
[114] *See generally* Kevin M. Guskiewicz, Michael McCrea, Stephen W. Marshall, ET AL., *Cumulative Effects Associated with Recurrent Concussion in Collegiate Football Players: The NCAA Concussion Study*, 290 JAMA 2549 (2003).

Schrotenboer writes in USA TODAY about the vaunted Division I Miami Hurricanes and USC Trojans:

> In the Miami case, there were 18 allegations with 79 sub-issues involving several student-athletes and spanning more than a decade. Multiple football coaches were found to be aware of the cheating but failed to report it. Some coaches also provided the NCAA with false information. In the end, the NCAA's infractions report on Miami was 102 pages, much of it focused on money and gifts to players from booster Nevin Shapiro. The NCAA's infractions report on USC was 67 pages.[115]

The Penn State story not only brought down the legendary coach Joe Paterno, but an entire University leadership—its president, athletic director, members of the board of trustees, and many more.

> Penn State will pay $59.7 million to 26 sexual abuse victims of former assistant football coach Jerry Sandusky, the school said Monday…. Harrisburg lawyer Ben Andreozzi , who represents nine of the victims, said he was pleased with the settlements. "Obviously no amount of money can compensate for what these young men have gone through, but Penn State has given them the resources—financially and counseling—they need to help them recover…Penn State has spent more than $50 million on other costs related to the Sanduskey scandal, including lawyers' fees, public relations expenses and adoption of new policies…[116]

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[115] Brent Schrotenboer, *Haden: NCAA Decision on Miami 'Bolsters' USC's Gripe*, USA TODAY, Oct. 23, 2013, at 12C, *available at* http://www.usatoday.com/story/sports/ncaaf/2013/10/22/miami-hurricanes-usc-trojans-pat-haden/3151145.

[116] John Bacon, *Penn State to Pay $59.7M to 26 Sandusky Victims*, USA TODAY, Oct. 29, 2013, at 3A.

What is the impact to the 88 players who are affected by this? Charles Huckabee [no relation] writes in The Chronicle of Higher education:

> "We obviously needed to do something to help bridge this difficult period while the sanctions are going on," Joseph J. Doncsecz, the university's associate vice president for finance and corporate controller, said on Thursday during his presentation to the board's Committee on Finance, Business, and Capital Planning. "This borrowing program will help bridge the difficult period for athletics for the next five years." Penn State said last week that as of June 30 its expenses associated with the scandal had reached $49.4-million…."[117]

Imagine what these expenses are now.

F. The Fix.

The case has been made that sport originally and presently is supposed to be about internal values such as respect, leadership, generosity, courage, compassion, teamwork, self-reliance, self-discipline, perseverance, fair play, sportsmanship, magnanimity, concern for others, yet external goals of power, status, prestige, and money have been corroding and corrupting them. The elephant in the room that few want to have a conversation about is "how this is affected by ethical considerations." The University of Chicago model of eliminating intercollegiate athletics in favor of a vibrant collegiate intramural program, involving certainly more participants at far lower cost, is one option.

[117] Charles Huckabee, *Penn State May Borrow $30-Million to Tide Over Its Athletic Department*, THE CHRON. OF HIGHER EDUC. (Sep. 20, 2013), http://chronicle.com/blogs/ticker/penn-state-may-borrow-30-million-to-tide-over-its-beleaguered-athletics-department/66289**.**

Another option posed by sports writer John Feinstein specifically addressing the FBS-FCS scheduling addiction is:

> The fix, suggested by the author is "The question then becomes how do you tell North Dakota State or other quality FCS programs they *can* schedule FBS teams but tell Savannah State, Florida A & M and eastern Kentucky they cannot schedule them….The answer is easy: Pass a rule that allows any FCS school that qualifies for the 20-team [FCS] NCAA tournament to schedule one future game against an FBS school. Each time you make the tournament, you get the right to schedule another game….If you aren't good enough to make the FCS tournament, you aren't good enough to schedule an FBS school."[118]

This certainly addresses the competitiveness ethical issue. But it leaves unaddressed the "money" question. How do FCS schools, not in the top 20 FCS tier, compensate for the loss of revenue received for "being sold to the giants for beating service?" Perhaps that is precisely the discussion faculty senates, student governments, and provost councils should be having to decide how do you ethically justify Division I athletic student-athlete expenditures in comparison to academic student ones. It pits the external value of entertainment vs. athletic core internal values.

Part II of this study will address questions posed to 10 Division I university presidents. In order to obtain access and receive candid response, the answers will be anonymous. Several of the questions are:

1. How do you define ethics?

2. What is meant by sport?

[118] Feinstein, *supra* note 71.

3. What are sports' intrinsic values?

4. The concept of the practice of sport, it has been suggested, is intrinsically concerned with moral value." Is that true? If so, what moral value?

5. Is winning the primary or central criterion of a sport team's success?

6. Rank order your top three criteria for determining success in sport.

7. What have you learned about the Penn state scandal involving football, coaches, and university presidents?

8. With the trajectory of athletics' costs accelerating, like football, where do you see the destiny of this intercollegiate program?

9. How do you justify in your own mind the trajectory of spending more on student-athletes (when factoring in the entire athletic budget) than spent on academic students?

10. Why do you believe the Univ. of Chicago model of investing resources in intramural athletics as opposed to intercollegiate athletics might be misplaced?

11. What is the Univ. of Chicago missing that you value more highly?

12. Do you believe it is ethical for an FCS (formerly Div I-AA) school to schedule a game with a BCS (formerly Div I-A) when it knows, or should know based on data, that it is not competitive?

13. Why is it ethical for an FCS school to schedule a game with a much larger BCS school primarily for money, when they would not play the game without the large payday?

14. In view that football is the most injurious sport in the NCAA, concussions in the NFL resulted in an initial proposed $ 760 million settlement, how do injuries ethically affect the primary consideration of money when scheduling games, especially when there is over a 90% competitive advantage by FBS teams?

Part II is currently undergoing investigation and will be released accordingly.

Growing Pains: Why Major League Soccer's Steady Rise Will Bring Structural Changes in 2015

Joseph Lennarz[1]

Synopsis:

The purpose of this paper is to explain why Major League Soccer's upcoming Collective Bargaining Agreement (CBA) renewal will likely bring structural changes to the league. The paper is divided into four sections. The first section examines the league's founding, with a particular focus on how historical precedent influenced the legal structure chosen by the league's architects. This part explains how the league's unique structure was designed to promote financial stability, potentially shield the league from antitrust liability, and foster the symbiotic relationship between Major League Soccer (MLS) and the United States Soccer Federation (USSF). This section concludes with a discussion of developments in the league's overall structure since the league's founding.

The second section looks at three groups of specific mechanisms the league has in place governing player pay and movement. The first group primarily supports the overarching goal of controlling costs and maintaining competitive balance. The second group is

[1] Joe is a graduate of UCLA School of Law and a managing partner at Ascension Athlete Management, a boutique player agency that specializes in placing young, up-and-coming soccer players with clubs that will help facilitate their continued growth and movement up the American soccer development pyramid. He would like to thank Bill Ordower, Mark Abbott, and Don Garber at the MLS league office, Rich Motzkin and Aaron Maines at Wasserman Media Group, and Rob Zarkos at Real Salt Lake for their invaluable assistance. He would also like to thank Steve Derian at UCLA School of Law for his guidance, encouragement, and ample patience. Joe can be reached via email at joe@ascensionathletes.com.

geared towards boosting the acquisition and development of talent. The third group consists of player-friendly measures that help to balance out some of the league's anticompetitive controls. Together, these mechanisms have allowed MLS to carefully and deliberately build from the ground up without overextending its resources or taking unnecessary risks.

The third section examines a variety of factors stemming from the league's growth, each of which will put pressure on the league to alter some aspects of its structure during the upcoming CBA renewal. The first factor is the financial growth of the league, which has been robust enough to render some of the league's financial stability measures unnecessary. Financial growth has also allowed the league's operator-investor cadre to focus on the individual success of their teams rather than the well-being of the league as a whole, putting pressure on the league to loosen some competitive balance measures and increase team autonomy. The second factor is the increased quality of the on-field product, which puts pressure on the league to increase player friendly measures in order to retain current talent and increase talent interchange with outside leagues in order to allow the level of play to continue to rise. The third factor is the changing antitrust status of the league, and specifically the way the league's growth has rendered "single-entity" structural considerations obsolete. Altogether, these growth-related factors indicate that the league's structure will change in some way during the CBA renewal process.

The final section advocates for two structural changes that would address the issues discussed in section three. The first alteration is a new player salary system based on the "soft" cap and retention funds system used by the National Basketball Association (NBA). This system would pool all player salary funds together, eliminat-

ing some of the salary inequity problems inherent in the current system, and would allow greater autonomy by individual teams without sacrificing competitive balance measures or risking the league's financial stability. The second alteration is a replacement of the current "Bona Fide offer" element of the Re-Entry Draft with an arbitration provision similar to that used by Major League Baseball (MLB). This change would make the Re-Entry Draft a legitimately viable route for MLS players on expiring contracts looking to receive new contracts that accurately reflect their performance value, without destroying the league's single-buyer system. Together these two changes would help the league to adjust its structure to align with its current position in the sports landscape, and accommodate further growth towards its goal of becoming an elite soccer league by 2022.

I. Historical Perspective on MLS' Current Legal Structure

1. MLS Architects Learn From The NASL's Failure

The founding of Major League Soccer is inextricably intertwined with the failure of its forbearer, the North American Soccer League (NASL). The NASL was a heady, ambitious undertaking featuring nationally televised games on network stations and legendary names on the field: Carlos Alberto, Georgio Chenaglia, Franz Beckenbauer, Johan Cruyff. [2] The league formed in 1967, debuted in 1968, and fluctuated from five to twenty four teams over the course of it lifespan, which was sixteen colorful years. The idea

[2] Andy Crossley, *June 1, 1980 – Washington Diplomats vs. New York Cosmos*, FUN WHILE IT LASTED (Jul. 3, 2013, 12:57 AM), www.funwhileitlasted.net/2013/07/03/june-1-1980-washington-diplomats-vs-new-york-cosmos/.

was to make such a splash that the American public couldn't help but get swept up and reward the league with the television ratings and attendance numbers it would need to sustain such a costly production; a 1976 Sports Illustrated article quotes then-commissioner Phil Woosnam as saying "if you give soccer a little television exposure, it will be off and running."[3] And indeed, the very same article trumpets a television audience of ten million Americans tuning in to watch Pele's debut with the New York Cosmos on June 15th of that year.[4]

By the 1980s, the outlook had soured considerably. The biggest problem was with the league's structure. Each team was separately owned and made autonomous decisions regarding player salaries and other expenditures unrestricted by any collectively agreed upon limits. This meant that large market franchises with heavy financial backing like the New York Cosmos and Chicago Sting could splash out cash on marquee signings, forcing their smaller market peers to try to keep up. As San Diego Sockers owner Bob Bell put it, "they (the Cosmos) go into a country and pay, say, $500,000 for a player- I have to go in there next, and I can't afford it."[5] *Fun While It Lasted*, a website dedicated to preserving the archives of sports ventures that no longer exist, has page upon page of news articles, match-day pamphlets, and photographs from the era that together paint a picture of a league in which the glamorous heavyweights, sporting talented rosters and expansive venues

[3] Melissa Ludtke, *Soccer Is Getting a Toehold*, Sports Illustrated, Aug. 30, 1976, at 66, 66, *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1091476/index.htm.
[4] *Id.*
[5] J.D. Reed, *It's Time for Trimming Sails in the NASL*, SPORTS ILLUSTRATED, Dec. 1, 1980, at 22, 23, *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1123998/2/index.htm.

packed with fans, won league titles like clockwork and staged friendlies against international competition while underdogs scraped along in a state of underfunded anonymity.[6] In 1983, player salaries had reached 70% of league revenues, compared with just 40% in the National Football League (NFL) at that time.[7] By the time the league, hemorrhaging money and losing franchises, was able to broker a salary cap of $825,000 per team payroll with its player's union in 1984,[8] the damage was already done. The NASL folded after that season.

Ten years later, the United States hosted the 1994 World Cup, a tremendous success by all indicators. As part of the winning bid that secured the right to host, the United States Soccer Federation (USSF) had promised the sport's international governing body, Federacion Internationale de Football Association (FIFA), that they would establish a bona fide top division professional soccer league in the United States.[9] USSF President Alan Rothenberg headed the committee tasked with fulfilling this promise. Rothenberg, a prominent sports lawyer and former part-owner of the NASL's Los Angeles Aztecs, designed an innovative league structure that clearly drew from both of these aspects of his experience. Assisting Rothenberg was Mark Abbott, then a young associate at Rothenberg's firm and today the Deputy Commissioner and Presi-

[6] *See* generally Andy Crossley, *NASL (1968-1984)*, FUN WHILE IT LASTED (Mar. 25, 2012, 3:12 PM), http://www.funwhileitlasted.net/soccer/nasl-galleries-1968-1984/.
[7] Reed, *supra* note 4, at 23.
[8] Clive Gammon, *The NASL: It's Alive but On Death Row*, SPORTS ILLUSTRATED, May 7, 1984, at 74, 76, *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1122044/1/index.htm.
[9] David Litterer, *An Overview of American Soccer History*, THE AMERICAN SOCCER HISTORY ARCHIVES (last updated May 31, 2010), http://homepages.sover.net/~spectrum/overview.html.

dent of MLS. When the new league formed in 1994, it did so with a construction unlike any other sports league anywhere.

2. A Unique Structure Is Created For The New League

Rothenberg and Abbott's design centered around the concept of a centralized league structure, where a powerful league office exercising a high degree of control over its member teams would be able to avoid both the overextension problems that doomed the NASL and the antitrust challenges that some of the country's other prominent sports leagues were facing around that time. The basic idea according to Abbott is that they realized "sports leagues are business partnerships," and by organizing as a single entity the league structure could reflect that idea.[10] They created MLS as a single limited liability corporation that owns all of its teams. Under this model, players contract directly with the league, and the league owns all broadcast rights, intellectual property rights, stadiums and other facilities, and sources of revenue like concessions and merchandizing deals.[11] While some alterations to the design were necessary in order to attract investors (discussed below), the main concept remained unchanged when MLS began play in 1996. This innovative structure influenced the character of MLS in three main ways: 1) the league's financial stability, 2) the league's vulnerability to antitrust challenges, and 3) the league's relationship with USSF.

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[10] Interview with Mark Abbot, President and Deputy Commissioner, Major League Soccer (Dec. 2013) (regarding the league and the structure he and Mr. Rothenberg had created).

[11] PAUL C. WEILER, GARY R. ROBERTS, ROGER I. ADAMS & STEPHEN F. ROSS, SPORTS AND THE LAW: TEXT, CASES, AND PROBLEMS 551 (Fourth ed. 2011).

a. Single-Entity Structure Fosters Financial Stability

The MLS' single entity structure is first and foremost a way for the league to pool its resources and keep costs under control. With each team simply a function of the league rather than an autonomous business venture, the league can afford to support fledgling and small-market teams with the successes of its marquee teams, rather than allowing a gap to build between the 'haves' and 'have-nots.' Strict control over expenditures like player salaries and advertising keeps these costs at a level affordable for the league as a whole. Presenting a unified corporate front to potential sponsors allows the league to secure lucrative partnerships with companies like Adidas, and packaging television rights as a league makes them more attractive to national broadcasters like ESPN. [12] A news article written during the 1994 unveiling observes that the single entity structure made it easier for the league to expand in a more cautious and purposeful manner, closely scrutinize potential expansion bids even as a fledgling enterprise, because the centralization of resources provided financial stability.[13]

[12] For example, Adidas re-upped its sponsorship deal with MLS in 2010, four years before the previous deal would have expired, extending the terms to $25 million dollars a year (a 66% increase in value) through 2018. The company cited MLS' steady growth and wide reach into all facets of American soccer including youth development. Tripp Mickle, *Adidas Ups MLS Bet with $200M Deal*, SPORTS BUSINESS DAILY (Aug. 30, 2010), http://www.sportsbusinessdaily.com/Journal/Issues/2010/08/20100830/This-Weeks-News/Adidas-Ups-MLS-Bet-With-$200M-Deal.aspx.

[13] Matt White, *World Cup USA '94: A Model Failure: The NASL's Collapse Serves as a Painful Reminder of What a New League Should Not Do*, LOS ANGELES TIMES (July 3, 1994), http://articles.latimes.com/1994-07-03/news/ss-11408_1_world-cup.

b. Single-Entity Structure May Provide Antitrust Immunity

The second key feature of the MLS' single entity structure is its potential to negate the viability of a challenge brought under Section 1 of the Sherman Antitrust Act. In order to succeed, such a claim must show that two or more entities conspired to illegally restrain trade in a relevant market.[14] Theoretically, by organizing the league as a single entity, Rothenberg and Abbott's model would remove any restraints on competition inherent in the MLS model from scrutiny under this statute because there is a unity of entrepreneurial interests among all the teams. If the league is considered a single entity for antitrust purposes, it means that aspects of MLS' structure that prevent competition between the member clubs, such as the draft and other allocation processes, cannot be the "naked restraints" on trade that they would otherwise be because the member clubs are not considered separate competitors. The viability of this design feature was almost immediately tested in a lawsuit brought by MLS players, described below.

c. Single-Entity Structure Allows Increased Cooperation With The USSF

The third key feature of MLS' structure is the relationship it creates between the league and the United States Soccer Federation (USSF), the sport's governing body in the United States. A close relationship between the two entities is inherent in the very origin of the league, an entity created by the USSF's Board of Governors as part of an initiative to bring world class soccer to the United States and raise the game's profile across the country. Just as the league sprung out of the gate as a vessel for the country's enthusi-

[14] *See* WEILER ET AL., *supra* note 10, at 174.

asm for soccer built up by our national team's successes, MLS' popularity inevitably remains tied to that of the team representing the United States on the world stage. Even the always-optimistic NASL was "keenly aware that Americans will not flock to watch soccer until the U.S. field a top flight national team."[15] In his wonderful account of a season spent following a minnow of Italian soccer through a dream season in that country's second highest tier of competition, *The Miracle of Castel di Sangro,* Joe McGinnis references the thrilling spectacle of the 1994 World Cup as the driving force behind his conversion from soccer ignoramus to full-blooded fanatic.[16] Further deepening the ties between the two organizations is the fact that Soccer United Marketing, MLS' promotional arm, handles those duties for the U.S. National Team as well.

A critical aspect of this relationship is that it is mutual and symbiotic- the domestic league is buoyed by the successes of the boys in red white and blue, and the national squad depends on a strong domestic league to develop talent and hone the skills of its players when they are not on national duty. Discussing the relationship, Mark Abbot emphasized MLS' autonomy but agreed that the U.S. National Team's successes have tangible positive benefits for MLS, and that MLS' contribution to development plays a significant role in those successes.[17] Because MLS has such a strong central structure, with strict controls over which players will join the league and where they will play, there is a significant obliga-

[15] *See* Ludtke, *supra* note 2.
[16] McGinnis had never followed the sport before the 1994 World Cup, and he became so enamored of the games and players (particularly Italy's Roberto Baggio) he saw at that tournament that he decided to imbed with an Italian team from a tiny provincial town for an entire season. *See* JOE MCGINNIS, THE MIRACLE OF CASTEL DI SANGRO (2000).
[17] Interview with Mark Abbott, *supra* note 9.

tion on part of the league itself to make sure it is developing young talent eligible to represent the United States and complying with the other various expectations of the USSF in regards to the U.S. men's national team. As detailed below, MLS fulfills this obligation through a handful of mechanisms that ensure talented American players are nurtured by the league and are put in the best position to succeed should they be called upon by the national team.

3. MLS' Structure Evolves Over Time

a. The Operator-Investor Alteration

Before proceeding to the details of the league's player controls, it is important to note some developments to the initial structure. The original model saw one significant practical change before it could even be implemented. While the initial concept called for investors who would simply own a piece of the league itself, there was little demand for the opportunity to bevy up millions of dollars to passively invest in a sports league. Instead, the league decided to offer a special class of stock that gives investors control over team operations such as deciding where games will be played, setting ticket prices, negotiating local broadcast rights and merchandizing deals, hiring a coach, and choosing players through the MLS' player movement controls discussed below.[18] These "operator-investors" split revenues from the sources they control with the league 50-50, while the league directly takes national broadcast rights revenues and merchandizing revenues, which are used to pay player salaries and other expenses before profit is distributed among the shareholders.[19] The league's executives, including

[18] *See* WEILER ET AL., *supra* note 10, at 211 and 212.
[19] *See* WEILER ET AL., *supra* note 10, at 552.

President Abbott and the league's Commissioner, Don Garber, are elected by a Board of Governors. Each operator-investor group is given a seat on this board, making the league "essentially controlled by the individuals who manage each team."[20] The league office also includes a Player Competition Committee that manages player contracts and oversees MLS' various player movement and salary mechanisms.

b. The Players Bring An Antitrust Challenge

The antitrust challenge testing the league's structure manifested in the form of Fraser v. MLS, a case brought by eight of the league's players against the league, its investors, and the USSF in 2002.[21] The players had opted not to form a player's union prior to bringing their claims in Fraser, and had no established collective bargaining relationship with the league. Thus, their claims were not barred by the non-statutory labor exemption to management-labor disputes that courts have fashioned to accommodate the tension between antitrust laws and Federal statutes that protect workers from application of antitrust laws in some circumstances.[22] The

[20] Matthew J. Jakobsze, *Kicking "Single-Entity" to the Sidelines: Reevaluating the Competitive Reality of Major League Soccer after American Needle and the 2010 Collective Bargaining Agreement*, 31 N. ILL. U. L. REV. 131. 147 (2010).
[21] Fraser v. Major League Soccer, 97 F. Supp.2d 130 (D. Mass. 2000), *aff'd*, 284 F.3d 47 (1st Cir. 2002).
[22] The non-statutory labor exemption is a common law concept that removes certain aspects of labor-management collective bargaining agreements from antitrust scrutiny. Courts have applied this exception when the restraint affects primarily the parties to the agreement (Allen Bradley), and when the challenge is brought by an employee or potential employee while a collective bargaining agreement between labor and management is in place (Wood) or when the restraint being challenged was unilaterally imposed by management during an impasse in collective bargaining relations between labor and management (Brown). In this case, by bringing an antitrust challenge before forming a collective bargaining unit, the MLS players could affirmatively avoid the scope of the exemption. *See generally* Allen Bradley Co. v. Local Union No. 3, Int'l

players alleged (among other claims) that MLS' control over player employment - negotiating and executing contracts directly with players before determining which team they would play for - constituted an illegal conspiracy between multiple entities (the various teams who would otherwise compete for their services) to unreasonably restrain trade in the market for top division soccer players in North America under Section 1 of the Sherman Antitrust Act.[23]

At trial, the case centered on the question of whether or not the league constituted a single entity and was thus immune to such a claim. The defendants referenced Copperweld v. Independence Tube Corp., a landmark antitrust case finding that a parent company cannot conspire with a wholly owned subsidiary for purposes of a Sherman Section 1 claim because they are not separate entities.[24] The district court found this argument persuasive, and the plaintiffs appealed. The First Circuit Court of Appeals took a different perspective entirely, focusing instead on the question of relevant market. The court examined whether the plaintiffs had properly defined the market in which the defendants' collaborative efforts were unfairly restraining competition to the detriment of the plaintiffs. The First Circuit found the plaintiffs had not shown that the MLS exercised significant market power in the market they had attempted to define, being the market for top division professional soccer players in the United States.[25]

Bhd. Of Elec. Workers, 325 U.S. 797 (1945); Wood v. NBA, 602 F. Supp. 525 (S.D.N.Y. 1984); Brown v. Pro Football Inc., 518 U.S. 231 (1996).

[23] *See Fraser*, 97 F. Supp.2d at 132.

[24] Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 753 (1984).

[25] Fraser v. Major League Soccer, 284 F.3d 47 (1st Cir. 2002).

In focusing on the market question, the First Circuit declined to make a definitive ruling on the single entity issue, instead declaring that while "MLS is manifestly more than an arrangement for individual operator/investors by which they can cap player salaries…it is hard to treat the corporate integration [of separate teams that would otherwise compete] as conclusive" and that "there are functional differences between this case and Copperweld that are significant for antitrust policy."[26] The court concluded that the league was a sort of hybrid entity serving two roles, "one as an entrepreneur of its own assets and revenues; the other (arguably) as a nominally vertical device for producing horizontal coordination, i.e. limiting competition among operator/investors."[27] Having already dismissed the plaintiff's claims via the relevant market issue, the court left the question of whether this hybrid entity could be liable under an otherwise valid Sherman 1 claim unanswered.

c. A Collective Bargaining Relationship Is Formed

The MLS Players Union formed after Fraser was decided, and reached their first collective bargaining agreement (CBA) with MLS in 2004.[28] A second CBA followed the first in 2010, with a term set to run through the 2014 season.[29] The current CBA is not publicly available (the 2004 CBA is), but the league and union released a joint statement upon its ratification detailing the key updates. Among the developments from iteration to iteration has been a shift towards guaranteed contracts, a steady increase in the salary cap number, and increased consideration paid to the players

[26] *Id.* at 57
[27] *Id.*
[28] MAJOR LEAGUE SOCCER PLAYERS UNION, ABOUT THE MLS UNION (2014), *available at* http://www.mlsplayers.org/about_mlspu.html.
[29] *Id.*

for things like media appearances and mid-season friendlies (exhibition games) against non-MLS opponents.[30] The 2010 agreement came just days before the scheduled start of the season, and the reportedly tense atmosphere of the negotiations was a result of the league's refusal to allow a free agency element that would require teams to compete with each other for players.[31] The Re-Entry Draft (discussed in the next section) that resulted as a compromise will almost certainly be scrutinized and revisited during the upcoming negotiations.

d. Beckham Arrives, Bringing New Structural Element

One of the prominent milestones in MLS history came on July 21, 2007 when English dead ball maestro and international celebrity David Beckham debuted as a member of the Los Angeles Galaxy in front of a sold out crowd at the (then) Home Depot Center, capping a month-long media frenzy over the winger-cum-midfielder's move from Spanish giant Real Madrid.[32] Beckham's arrival seemed designed to increase interest in MLS from casual fans, the type of consumer not yet enamored with the sport or league but willing to tune in with a high profile athlete like Beckham involved. His signing was a collaborative effort between MLS and AEG, Phil Anschutz's massive sports entertainment conglom-

[30] *Collective Bargaining Agreement Released*, SOCCER AMERICA DAILY (Mar. 23, 2010 2:20 PM), http://www.socceramerica.com/article/37359/collective-bargaining-agreement-released.html.

[31] Allegedly, the main goal of the players' union was to secure free agency for veteran players. The league was unwilling to acquiesce, offering instead the Re-Entry Draft compromise along with an increase in guaranteed contracts for players. *MLS Unveils Labor Agreement Details*, AOL NEWS (Mar. 23, 2010), http://www.aolnews.com/2010/03/23/mls-unveils-labor-agreement-details.

[32] GRANT WAHL, THE BECKHAM EXPERIMENT: HOW THE WORLD'S MOST FAMOUS ATHLETE TRIED TO CONQUER AMERICA 61 (2009).

erate that is the operator-investor of the Galaxy. Also involved were MLS equipment sponsor Adidas, and Beckham's various personal sponsors such as Pepsi and Motorola, who saw an opportunity to bring their spokesman's already sizeable brand to the lucrative U.S. market. The deal bore a widely published "value" of $250 million dollars.[33] While this vastly inflated number was a murky combination that included royalties Beckham would earn from merchandizing, endorsement earnings, and other revenue streams relating to the image rights he retained as part of the deal, Beckham's actual player salary was $32.5 million dollars over five years[34] in a league where the team salary cap at the time was about $2.1 million dollars per year.[35] The league rule that facilitated Beckham's signing, introduced in November 2006 and still bearing the nickname "the Beckham rule," is called the Designated Player exception. [36]

The Designated Player (DP) exception in its original form allowed each MLS team to sign one player to its roster with the first $400,000 of the player's salary paid for normally by MLS, and the remainder the responsibility of the operator-investor group of that particular team.[37] Teams could also trade their Designated Player slot if so desired.[38] Only the $400,000 paid by the league counted

[33] *Id.* at 31.
[34] *Id.*
[35] The salary cap would increase in the year following Beckham's arrival, but only by about 4%, to $2.3 million dollars. Tripp Mickle, *Debate highlights MLS salary cap split*, SPORTS BUSINESS DAILY (Nov. 26, 2007), http://www.sportsbusinessdaily.com/Journal/Issues/2007/11/20071126/This-Weeks-News/Debate-Highlights-MLS-Salary-Cap-Split.aspx.
[36] Robert M. Bernhard, *MLS' Designated Player Rule: Has David Beckham Single-Handedly Destroyed Major League Soccer's Single-Entity Antitrust Defense?*, 18 MARQ. SPORTS L. REV. 413, 425-27 (2008).
[37] *See* WAHL, *supra* note 31, at 42.
[38] *See* Berhard, *supra* note 35.

towards that team's salary cap. This means Beckham's actual cost to the league was just $2 million over the five year period, and the Galaxy retained most of their salary cap room to fill the rest of their roster.[39] The rule was clearly created specifically to allow for Beckham's arrival- at the time only three other players in league were making a large enough salary to qualify.[40] By 2009, six teams featured at least one Designated Player on their rosters. In 2010 the league expanded the Designated Player exception to allow each team two Designated Players and lowered the cap-impacting portion of these players' salaries to $335,000 each, per season.[41]

II. The Current League Structure Regarding Its Players

MLS' centralized structure allows it to maintain a high level of control over its players and the spending decisions made by its teams. This control has manifested in a variety of structural instruments that help the league address a variety of considerations like fostering league growth, keeping costs low, protecting the league from open competition on the vast and wealthy international market for players, and allowing teams some autonomy in competitive decision-making. These instruments can be roughly divided into three categories. The first category consists of instruments that help keep costs down and the teams competitively balanced. The second category contains those that promote on-field growth by boosting talent acquisition and the development of

[39] *See* WAHL, *supra* note 31, at 42.
[40] *See* MAJOR LEAGUE SOCCER PLAYERS UNION, 2007 MLS PLAYER SALARIES: AUGUST 31, 2007: ALPHABETICAL, *available at* http://www.mlsplayers.org/files/8_31_07_salary_info_alpha.pdf.
[41] Joshua Meyers, *Major League Soccer adds second DP slot, can purchase a third (league release)*, THE SEATTLE TIMES (Apr. 1, 2010 8:38 AM), http://seattletimes.com/html/soundersfcblog/2011498898_major_league_soccer_adds_secon.html.

young players. The third category is made up of instruments that benefit the players, fostering a good relationship with the player's union and making the league an attractive place to play.

1. Controlling Costs and Maintaining Competitive Balance

a. The Salary Cap

MLS uses a fixed salary cap as the basic control element of their player pay system. Subject to the exceptions detailed below, each team may not exceed the cap number when assembling their player payroll each season. This prevents teams from spending more than their rivals to gain an advantage, which both aids competitive balance and keeps the cost of fielding a competitive team from rising above a set point. The current MLS salary cap is approximately $2.95 million dollars per team, and the cap will have increased 34% from the 2010 number by the time the current CBA expires in 2014.[42] The league refers to this number as a "budget" rather than cap, in part because the funds are paid out by the league and in part because there are numerous exceptions to the number.[43] For example, a club must only count the salaries of its top eighteen to twenty-one players towards the cap number, depending on various factors.[44] This leaves as many as nine players designated as off-budget on the maximum active senior roster of thirty players.

[42] MLS PRESS BOX, ROSTER RULES AND REGULATIONS ¶I (2014), *available at* http://pressbox.mlssoccer.com/content/roster-rules-and-regulations.
[43] *Id.*
[44] *Id.*

b. The Superdraft

Like the National Basketball Association (NBA) and National Football League (NFL), MLS uses a player draft to allocate previously-amateur rookies among its teams. The draft is the foremost example of a competition restraint that gives the buyers (teams) monopsony power in the market for player services. In other words, players can only sell their services to a single team, the team that selected them in the draft, and thus they have much lower bargaining leverage than they would on an open, unrestrained market. This effect is critical to the MLS structure, which creates a similar monopsony power for teams at all facets of player acquisition, as detailed below. Teams draft in reverse order of their finishing spot from the previous season, and may trade draft picks.[45] The majority of draft prospects are NCAA college seniors who have exhausted their college eligibility, a class of players that appears to be losing relevance as more MLS players are acquired via different means.

c. Allocation Ranking

The allocation ranking is the mechanism used to determine which MLS club has first priority to acquire a U.S. National Team player who signs with MLS after playing abroad, or a former MLS player who returns to the league after having gone to a club abroad.[46] The allocation rankings may also be used in the event two or more clubs file a request for the same player on the same day when the Discovery period (discussed below) opens in December.[47] The allocations are ranked in reverse order of finish for the 2012 season, taking playoff performance into account. Once the club uses

[45] *Id.* ¶II(C) and (D).
[46] *Id.* ¶II(A).
[47] *Id.*

its allocation ranking to acquire a player, it drops to the bottom of the list.[48] A ranking can be traded, provided that part of the compensation received in return is the other club's ranking. At all times, each club is assigned one ranking. The rankings reset at the end of each MLS League season.[49]

The allocation ranking serves the same purpose as the Superdraft, to prevent competition among MLS clubs for the services of a single player. It accounts for returning veteran players who have left the league for playing opportunities elsewhere, a smaller pool than those who are assigned to a team via the Superdraft. This is a significant group of players nonetheless since those who have piqued the interest of foreign clubs enough to warrant a signing are often among the most talented in the league, and U.S. National Team players (in addition to their exceptional on field prowess) have accrued valuable experience and public exposure by playing in high stakes international competition while representing a national fan base. By assigning their acquisition rights to a single MLS team, the league ensures that league-wide demand for these players will not be a factor.

d. Allocation Money

Allocation money is a pool of funds separate from the salary cap, made available to teams in a variety of scenarios. Those scenarios are: when a team fails to qualify for the MLS Cup Playoffs, when a team transfers a player outside of MLS for value, when a team is in its expansion year, when a team qualifies for CONCACAF Champions League, and when a team purchases a third Designated Player roster spot.[50] The terms and amounts are determined by the

[48] *Id.*
[49] *Id.*
[50] *Id.*

MLS Competition Committee. This instrument reinforces competitive balance (by allocating extra funds to weaker teams) and incentivizes certain behavior that is beneficial to the league as a whole, such as selling players for value and competing in interleague competition like the CONCACAF Champions league.

Each year the MLS Competition Committee determines the allocation amount to be made available to each club. Allocation money can be traded by clubs. Allocation money does not count against a club's salary cap and can be used: To sign players new to MLS (that is, a player who did not play in MLS during the previous season), to re-sign an existing MLS player, subject to League approval, to "buy-down" a player's salary budget charge below the League maximum of $368,750, or in connection with the exercise of an option to purchase a player's rights or the extension of a player's contract for the second year provided the player was new to MLS in the immediately prior year. [51] The league does not release how much allocation money is available to each club. This prevents players in negotiations from leveraging a club's financial situation (or at least the precise amount of funds available) to earn a larger contract.

e. Discovery Rules

The MLS utilizes a "Discovery Rules" system that, in the same vein as the Superdraft and allocation ranking, allows teams to make autonomous choices about which players they would like to try to acquire without directly competing with each other for a given player's services. MLS teams may make discovery claims on players not yet under MLS contract who are not subject to the allocation ranking or draft mechanisms. This provides teams a way

[51] *Id.*

to sign foreign players with no previous MLS experience. Each team has the opportunity to make six discovery signings per season and expansion teams may make ten discovery signings in their inaugural season.[52] A team may have up to ten discovery claims on unsigned players at any time and may remove or add players at any time. The last day for discovery claims is the roster freeze and trade deadline date, which was September 13, 2013 for the current season. If multiple teams claim the same player using a discovery slot, the team that filed the claim first will have first rights to the player. Discovery claims expire following each season.

Crucially, the league maintains a policy to "protect interests of MLS clubs in scouting and negotiations with prospective players," that it will not publicize the names of players on club discovery lists, nor specify if a discovery claim has been filed on a particular player.[53] Additionally, should a club fail to reach an agreement with a discovery list player during a given season that results in that player signing with MLS, the team retains the right of first refusal in any future negotiation between that player and MLS. This means that teams cannot directly compete between each other for discovery players, since presumably they don't know who is on their rivals' discovery list and even word of a failed negotiation would simply let them know a player's rights have been claimed. For international players interested in playing in MLS, this makes it impossible to leverage value from having multiple teams interested, since they can only negotiate with the one team that holds their discovery rights.

[52] *Id.* ¶II(E).
[53] *Id.*

f. The Movement Clause

The 2004-2010 CBA includes a clause stipulating that the MLS may move players from team to team at the league's discretion.[54] In practice, this effectively means that unless a player can negotiate special terms to be added to their Standard Player Agreement, they have no control over their own movement from MLS team to MLS team. The clause facilitates the various other player movement rules by ensuring that teams can unilaterally shift around their rosters to make discovery signings, use allocation funds, and otherwise benefit from player movement mechanisms. The league and union's official joint press release, which lists the changes to the CBA made in 2010, makes no mention of eliminating this clause or otherwise giving players some input regarding moves,[55] and anecdotal evidence suggests that the vast majority of MLS players find themselves entirely at the whim of their employers in regards to where they will ply their trade.

For example, Argentinian striker Maximiliano Urruti officially signed with Toronto FC on August 16, 2013, after a saga that included a long flirtation with the club and the player voluntarily

[54] Article 8, Section 2 of the MLS Collective Bargaining Agreement, 2004-2010 reads, in part, "a Player's services may be assigned to the central MLS player pool or to any Team (or Reserve Team or Developmental Squad) in the League." COLLECTIVE BARGAINING AGREEMENT BETWEEN MAJOR LEAGUE SOCCER AND MAJOR LEAGUE SOCCER PLAYERS UNION DECEMBER1, 2004 – JANUARY 31, 2010 §8.2, *available at* http://www.mlsplayers.org/files/collective_bargaining_agreement__final.pdf.

[55] The press release discussed salary and overall budget increases, detailed the logistics of the new Re-Entry Draft mechanism, and mentioned various small concessions like increased per diems; a major player movement concession like trade veto power or some other alteration of this clause would have almost certainly warranted mentioning. *MLS Announces CBA Changes*, US NATIONAL SOCCER PLAYERS (Mar. 23, 2010), http://www.ussoccerplayers.com/2010/03/mls-announces-cba-changes.html.

leaving his erstwhile club in Argentina, Newell's Old Boys, without an actual contract offer from MLS.[56] When Maple Leaf Sports and Entertainment, the sports conglomerate that controls Toronto FC as an operator-investor, fired the team's general manager just a few weeks later,[57] the prized new signing found himself as an expendable asset under the new regime. With only thirty seven minutes logged on field with Toronto, the Argentine was sent via trade almost three thousand miles west and across the border to join the Portland Timbers on September 9th, 2013.[58] Ostensibly, this move would not have happened so close on the heels of the laborious move from Argentina if Urruti had a say in the matter. According to Richard Motzkin, Executive Vice President and Managing Executive for Global Soccer at Wasserman Media Group, "only the Landon Donovans" of the MLS world (meaning top tier players with exceptional talent and name recognition value) have enough leverage to protect themselves contractually from sudden trades via special conditions like trade veto clauses.[59]

[56] Dave Rowaan, *Toronto FC's six month relationship with Maximiliano Urruti*, SB NATION WAKING THE RED (Sept. 10, 2013 8:00 AM), http://www.wakingthered.com/2013/9/10/4714066/maxi-urruti-toronto-fc-trade-portland-timbers-newells-old-boys

[57] Jeff Carlisle, *Source: Toronto to name MLS exec GM*, ESPN FC (Sept. 19, 2013), http://espnfc.com/news/story/_/id/1558190/toronto-fc-hire-bezbatchenko-gm?cc=5901.

[58] *Toronto FC deal Argentine striker Maximiliano Urruti to Portland Timbers for Bright Dike, 2015 draft pick*, MLSSOCCER.COM (Sept. 9, 2013), http://www.mlssoccer.com/news/article/2013/09/09/toronto-fc-deal-argentine-striker-maximiliano-urruti-portland-timbers-bright.

[59] The author spoke with Mr. Motzkin about MLS' player movement controls in October, 2013. Mr. Motzkin represents a number of MLS' marquee players, as well as prominent American internationals playing abroad.

2. Boosting Talent Acquisition and Developing Young Players

a. The Designated Player Exception

The Designated Player rule today allows each team to carry up to three Designated Players, adding "star power" to rosters where the salary cap would otherwise be prohibitive. The rule is mainly used to bring high-profile foreign veterans to the league, though it can also be used to retain current players who would otherwise leave internationally.[60] Under the current iteration, Designated Players cost team cap space only as much as follows: $368,550 for players over the age of 23, and $200,000 for players aged 21-23. Players under the age of twenty one are not eligible for Designated Player status. Unlike in the rule's original manifestation, the current Designated Player slots cannot be traded. The third slot must be "bought" for $150,000 in allocations funds to be distributed among the clubs who do not have three Designated Players. Currently, every club has at least one Designated Player, and about a quarter of them have three. The Designated Player salaries range from around $400,000 per year, barely more than the amount counting against the cap, to over $5 million.[61] There is no mention of the Designated Player in the 2004-2010 collective bargaining agreement, owing to the rule's creation in 2006. The only publicly available enumeration of the rule is in the MLS' Roster Rules,[62]

[60] Players like the Galaxy's Omar Gonzalez and San Jose's Chris Wondolowski were given Designated Player contracts after playing on normal ones for their respective teams.
[61] *Player Salary Information: 2013 Salaries - Alphabetical*, MAJOR LEAGUE SOCCER PLAYERS UNION, *available at* http://www.mlsplayers.org/salary_info.html.
[62] *See* MLSSOCCER.COM, *supra* note 41.

meaning it must have been added to the collective bargaining agreement via addendum or created via some separate agreement.

b. The Home Grown Player Exception

The Home Grown Player exception allows MLS clubs to circumvent the MLS Superdraft, signing previously amateur youth players to their squads directly as long as those players have been training in the club's youth development program for at least one year prior to the signing. Each team may sign as many Home Grown players as they wish, and two may be offered contracts "similar" to Generation Adidas players (discussed below) that do not count towards a team's cap number. Additionally, a team selling a Home Grown player under contract to a team outside the league receives a larger percentage of the profit than they would for normal players.[63] While MLS is opaque about how this rule is applied (the Roster Rules simply say that players qualifying must "meet the League's Homegrown Player criteria") thus far in practice it appears that players training as part of the U.S. National Team development program are not eligible, while players that have been training with a club may retain eligibility even when they go off to college to play as an NCAA athlete, so long as they have participated in at least 80 games as part of the MLS club's program.[64] The stated goal of the Home Grown player exception is

[63] Under normal circumstances, a MLS team making an interleague transfer of a player under contract ("selling" him by voiding his current contract and allowing him to agree with the new club) receives sixty-six percent of the proceeds and MLS receives the rest. Conversely, a team that sells a Home Grown player nets seventy-five percent of the proceeds. Andrew Lewellen, *The Future of U.S. Soccer: Home Grown Players*, GRANTLAND.COM (July 20, 2012), http://www.grantland.com/blog/the-triangle/post/_/id/32695/the-future-of-u-s-soccer-homegrown-players.

[64] Kyle McCarthy, *Monday MLS Breakdown: Application of the Home Grown Player Rule Keeps Overarching Goal in Mind*, GOAL.COM, (Jan.

to ensure that promising American-born players begin their professional careers at home rather than overseas, a crucial consideration for the league's ability to stock its rosters with talented players.

The Home Grown designation incentivizes clubs to invest in their youth development programs, behavior that is both good for the league and for the USSF. It also removes these players from other entry mechanisms, while preserving the single-buyer relationship with the club who has designated them as Home Grown. According to Aaron Maines, Director of Global Soccer at Wasserman Media Group, the designation is unilateral on the part of the team.[65] This means that once a team successfully tags a player as Home Grown, they have gained exclusive signing rights, and that player cannot seek nomination for the Superdraft pool or otherwise positions themselves to contract with a different MLS club. This eliminates any potential leverage the player would otherwise gain by knowing that the club with which they qualify as a Home Grown player would not have to count their salary towards the cap and thus could probably pay them more than a club that acquired them via one of the salary-capped means.

c. Generation adidas

Generation adidas is a joint program between MLS and adidas that is dedicated to developing exceptional domestic talent in a more professional environment than that offered by NCAA programs. Each year, a handful of top domestic underclassmen and youth national team players are signed to the league and placed in

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9, 2012), http://www.goal.com/en-us/news/1110/major-league-soccer/2012/01/09/2838136/monday-mls-breakdown-application-of-the-home-grown-player.

[65] The author spoke with Mr. Maines, a FIFA-certified agent with a large MLS clientele, in October of 2013.

the SuperDraft through this program. The players are chosen a year earlier and removed from their college or other amateur program in order to train in a professional environment before entering MLS.[66] The players lose their NCAA eligibility, but are given access to an education fund set up by MLS to help them get a degree within ten years of leaving school to enter the Generation adidas program.[67] Generation adidas contracts do not count against a team's salary cap, and generally last four years although team options can be used to shorten that period.[68] Similar to the Home Grown player exception, this incentivizes MLS teams to contract with domestically-developed players, benefitting the future of the league and the USSF.

d. International Roster Spots

Borrowing from European leagues, MLS has implemented a cap on the number of international players plying their trade in the league at any one time. In 2013, a total of 152 international slots were divided among the 19 clubs.[69] Each club began with eight international slots, which are tradable. There is no limit on the number of international slots on each club's roster. The remaining roster slots must belong to domestic players. For clubs based in the United States, a domestic player is either a U.S. citizen, a permanent resident (green card holder) or the holder of other special

[66] Travis Clark, *A History of Generation Adidas: Part One*, TOPDRAWERSOCCER.COM (Jan. 16, 2013), http://www.topdrawersoccer.com/college-soccer-articles/a-history-of-generation-adidas:-part-one_aid28345.
[67] *See* MLSSOCCER.COM, *supra* note 41.
[68] L.E. Eisenmenger, *McCabe Explains Generation Adidas*, U.S. NATIONAL SOCCER PLAYERS (Jan. 8, 2010), http://www.ussoccerplayers.com/2010/01/mccabe-explains-generation-adidas.html.
[69] *See* MLSSOCCER.COM, *supra* note 41.

status (e.g., refugee or asylum status).The three MLS clubs based in Canada – Montreal Impact, Toronto FC and Vancouver White-caps FC – also have eight international slots, but American players do not require one. MLS clubs based in Canada are required to have a minimum of three Canadian domestic players on their rosters.

The purpose of this restriction is twofold. First, it serves the league on a short-term basis, bolstering fan appeal by filling team rosters with players that are more familiar and relatable, and reducing the costs of scouting and other logistical expenses by (mostly) limiting the pool of potential players to those more easily accessible. It also serves the goal of developing American talent for the international stage, again bolstering the future of the USSF in addition to MLS' own long-term prospects.

e. Retention Funds

The most recently introduced mechanism to incentivize certain behaviors by members clubs is a retention funds system used to retain key players who would otherwise depart for foreign leagues when their contract expires. If the MLS Competition Committee deems a player on an expiring deal to be a "Core Player" (ostensibly one whose talent is an asset to the league and who is likely to receive offers elsewhere), the club will be given extra funding towards a contract extension that would keep that player in the league.[70] Fourteen players, such as MLS lifer and U.S. international Graham Zusi, have been re-signed to contracts bolstered by

[70] Jonah Freedman, *Retention Funds Explained: MLS Reveals List of 14 Players Like Graham Zusi Re-Signed Under Initiative*, MLSSOCCER.COM (Aug. 2, 2013), http://www.mlssoccer.com/news/article/2013/08/02/retention-funds-explained-mls-reveals-list-14-players-graham-zusi-re-signed-.

retention funds since the initiative was introduced in the offseason following the 2012 season.[71]

3. Maintaining Relationship With Players' Union Via Player Friendly Elements

a. Guaranteed Contracts

The main concession to players that has evolved over the course of MLS' collective bargaining relationship with its players' union is the move towards guaranteed contracts. In contact sports, where injuries can instantly and drastically affect a player's ability to perform, the difference between guaranteed contracts and terminable ones is very significant for players. The 2004 CBA defines three tiers of player contracts- fully guaranteed, which cannot be voided other than for off-field conduct issues or other violations of the CBA, semi-guaranteed which can only be voided at the end of a year for injury or performance reasons (and at any time for conduct violations), and non-guaranteed which can be voided whenever but are only available for players on 30-day trial contracts. [72] How players were categorized between these three tiers is unspecified in the publically available portions of the agreement.

According to Commissioner Garber, the current CBA includes fully guaranteed contracts for all players who are at least 24 years old and have at least three years' experience in MLS, which qualified approximately 55% of the league's player pool at the time.[73]

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[71] *Id.*
[72] *MLS Players Union Resources: Collective Bargaining Agreement*, 48-49, MAJOR LEAGUE SOCCER PLAYERS UNION, http://www.mlsplayers.org/resources.html.
[73] *MLS Unveils Labor Agreement Details*, AOL NEWS (Mar. 23, 2010) http://www.aolnews.com/2010/03/23/mls-unveils-labor-agreement-details.

He did not specify how contracts of non-qualified players would be treated. Since the previous CBA only allowed non-guaranteed contracts for trial players,[74] it follows that the portion of the player pool not qualifying for guaranteed contracts probably plays on terms similar to the old "semi-guaranteed" definition.

b. The Re-Entry Draft

The second player-friendly alteration to MLS rules already in place is the Re-Entry Draft. The MLS Re-Entry Draft was created in the 2010 MLS collective bargaining agreement for MLS players whose current contracts have expired or will expire due to their current team declining to exercise an option. Before the introduction of this process, players' rights were simply retained by their current club in perpetuity, forcing the player to either re-sign with that club or negotiate an assignment of the rights to a different club if he wished to continue playing in the league.[75] The creation of the Re-Entry Draft was seen as a concession to the players' union in lieu of free agency for players in this situation.[76]

The Re-Entry Draft consists of two rounds. Teams pick players in the reverse order of the previous season's final standings, and may opt to decline to pick. In the first round, teams may select players whose options have been declined and essentially pick up their option, or extend a "Bona Fide Offer" to a player out of contract. A "Bona Fide Offer" must meet minimum standards, such as a term of three years and a raise of 5% from the player's last base salary

[74] Trial players are players brought in for 30-day test runs with a team, generally not as active roster players.
[75] *See* AOL NEWS, *supra* note 41.
[76] Leander Schaerlaekens, *Players Still Left Without Freedom of Movement*, ESPN FC (Mar. 22, 2010), http://espnfc.com/columns/story?id=760003&cc=5901.

for veteran players or previous base salary for younger players.[77] Teams may not select their own players in the first round of the Re-Entry Draft. In the second round, the same players are available, but clubs need only extend a "genuine offer" to them without the minimum standards imposed in the first round.[78] The Re-Entry Draft offers little opportunity for players to significantly improve on their current contract terms, since teams have no incentive to offer a player more than 105% of their current salary, and a player with an overvalued contract will simply be passed over until the second round. Thus far, it has mainly been a mechanism to reassign veterans who no longer fit their current team's roster and have little interest from international clubs but may still have some value to other MLS teams.[79]

4. Overall, MLS Rules Control Costs And Protect The League From Competition

The roster and payroll rules of the MLS together form a system that favors control over open competition. MLS teams are able to make autonomous personnel decisions and otherwise pursue on-field success independently from the rest of the league, but they are prevented from directly competing with one another for any single player's services. This leaves each player the binary decision of signing with the team that holds his rights, or not signing (or re-

[77] Ridge Mahoney, *Blueprint For New Era of MLS*, SOCCER AMERICA DAILY (Nov. 9, 2010), http://www.socceramerica.com/article/40334/blueprint-for-new-age-of-mls.html.

[78] *See* MLSSOCCER.COM, *supra* note 41.

[79] During an average year, about thirty percent of the eligible players are selected, mostly in the second round when they are offered smaller contracts than their previous ones. *See* Simon Borg, *Califf, Casey Among 14 Picked in Stage 2 Re-Entry Draft*, MLSSOCCER.COM (Dec. 14, 2012), http://www.mlssoccer.com/news/article/2012/12/14/total-14-players-selected-stage-2-mls-re-entry-draft.

signing) with MLS at all. Regardless of whether a player is an amateur entering through the Superdraft or as a Home Grown player, a veteran joining via Discovery or as a Designated Player, or a veteran on an expiring contract whose rights were claimed via the Re-Entry draft, there is only ever a single MLS team who can offer the player a contract which minimizes the impact of potential demand for the player from other MLS teams.

This single-buyer system controls payroll costs, and protects the league's teams from competition on the international transfer market. Collective league ownership of player contracts helps the league increase its leverage and market power when competing with foreign leagues in the market for players. The league as a single bargaining unit has much greater ability to pay transfer fees to acquire key players, negotiate high transfer fee terms that help retain current players, and otherwise compete on the international market than each individual team would. This system has contributed greatly to MLS' ability to slowly and carefully build without overextending resources or taking big risks. MLS will likely continue to prioritize these considerations as it attempts to forge a new collective bargaining agreement with its players' union that better accommodates its current position as well as future growth.

III. Why We Can Expect Changes in 2014

MLS rules, as discussed above, are exceptionally restrictive and reflect the league's complex considerations like competitive balance, cost control, protection from the international transfer market, and contribution to the USSF. However, many of these considerations are changing significantly as the league grows and matures. The factors that shaped MLS' structure when the league was in its infancy related to establishing the league's legitimacy as a professional sports league able to survive in the American sports

market. When league executives sit down with players' union representatives to replace the CBA that expires in 2014, the goal will be pushing an established national league into the top tier of American sports and increased relevancy on the international scene. That will require a re-evaluation of the league's structure in light of the changed circumstances.

First, the league has grown from a financial standpoint. This changes the equation for maintaining stability, and how the league should view competitive balance. It also affects the league's relationship with its players' union, particularly since increased cash flow has highlighted inequity between the salaries of different players and a low correlation between players' performance and how much they are paid. Second, the quality of the players on the field has grown. This puts pressure on the league to alter its player movement restrictions, especially since the goal is to continue this upward trend in quality. Finally, growth has negated any consideration of the single entity classification, allowing the league to make any structural changes it deems necessary without worrying about how those changes would affect a single entity status consideration.

1. Financial Growth of the League

a. Growth Decreases Need for Financial Stability Measures

MLS has been growing at a steady and robust rate for more than a decade by almost every statistical indicator available. Nine new teams have joined MLS since 2005,[80] with the aforementioned

[80] In 2005, Chivas USA and Real Salt Lake joined the league. They were followed by: the Houston Dynamo in 2006; the Toronto FC in 2007; the Seattle Sounders in 2009; the Philadelphia Union in 2010; the Portland Timbers and

New York City FC announced as the tenth[81] and Orlando City as well as three additional yet-unnamed teams set to join them by 2017.[82] Game attendance rates nearly tripled between 2002 and 2012, reaching a record high of just over six million attendees league-wide.[83] Per-game averages over the same span also increased significantly: the league was able to leapfrog the NBA in 2011, becoming America's third most well attended sports league with an average of 17,872 attendees per match.[84] Contributing to these numbers is the fact that all but five of the league's teams now play in soccer-specific stadiums where MLS teams are the owners or primary tenants,[85] rather than playing as secondary tenants in football or general-purpose stadiums as MLS teams did in the league's early years. Twelve of these facilities having been built or heavily renovated within the past decade,[86] with both D.C. United

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Vancouver Whitecaps in 2011; and the Montreal Impact in 2012. *See MLS History: Clubs*, MLSSOCCER.COM, http://www.mlssoccer.com/history/club.

[81] Dan Dickinson, *Major League Soccer Makes It Official: NYC FC To Join League in 2015*, GOTHAMIST.COM (May 21, 2013), http://gothamist.com/2013/05/21/major_league_soccer_makes_it_offici.php.

[82] In addressing Orlando City's (now successful) expansion bid, league officials reiterated Commissioner Garber's earlier comments regarding the scope of expansion, confirming that the league will add three additional teams before 2020, bringing the total number to twenty-four. Jeff Carlisle, *Orlando City Seeks Fast Track to Join MLS*, ESPN FC (Aug. 6, 2013, 1:00 PM), http://espnfc.com/blog/_/name/soccerusa/id/3067?cc=5901.

[83] *Statistics*, MLSSOCCER.COM, *available at* http://www.mlssoccer.com/stats/season.

[84] Fred Dreier, *MLS Passes NBA as Third Best-Attended American Sport*, SPORTING NEWS, http://www.sportingnews.com/soccer/story/2011-11-07/mls-passes-nba-as-third-best-attended-american-sport.

[85] Technically, Chivas USA is not a primary tenant or owner, because it is a tenant in the AEG-owned Stub Hub Center, the primary home of the Los Angeles Galaxy. The only other teams with long-term plans to remain in stadiums that are not soccer-specific with a MLS team as owner or primary tenant are Seattle, New England, and Vancouver. *See Clubs*, MLSSOCCER.COM, http://www.mlssoccer.com/history/club.

[86] *Id.*

[87] and the San Jose Earthquakes[88] set to begin play in their own soccer-specific stadiums within the next three years. Orlando City was able to earn its expansion slot in part by securing a deal to build a new soccer-specific stadium in time for its first MLS season in 2015.[89]

While the league, as a privately held corporation, closely guards most of its financial data, indicators like revenues and team valuations point to steady growth in recent years. A recent Forbes article placed the value of eight MLS teams over $100 million dollars, with Seattle and the LA Galaxy both close to $200 million.[90] The market value of an expansion franchise has increased significantly: In 2005, the price tag on an expansion franchise was $10 million dollars.[91] By 2012 the amount had increased to $40 million dollars, and when NYCFC begins play in 2015 it will have paid $100 million dollars for the right to join MLS.[92] The salary

[87] *Plans for World-Class Soccer Stadium Announced*, DCUNITED.COM (July 25, 2013), http://www.dcunited.com/news/2013/07/plans-for-world-class-soccer-stadium-announced.

[88] *New Stadium Opening in 2015*, SJEARTHQUAKES.COM, http://www.sjearthquakes.com/newstadium.

[89] Simon Veness, *Orlando City's Stadium Plans Boost Major League Soccer Ambitions*, THE GUARDIAN (Aug. 15, 2013), http://www.theguardian.com/football/2013/aug/15/orlando-city-mls-expansion-stadium-deal.

[90] Chris Smith, *Major League Soccer's Most Valuable Teams*, FORBES.COM (Nov. 20, 2013), http://www.forbes.com/sites/chrissmith/2013/11/20/major-league-soccers-most-valuable-teams/.

[91] In 2005, just after MLS' contraction period, the owner of the minor league Rochester Rhinos said he felt "uncomfortable" with the $10 million dollar expansion fee it would cost him to join MLS. Robert Wagman, *Several Cities Vie for Expansion Teams as Complications Delay Decision*, SOCCERTIMES.COM (May 16, 2005), http://www.soccertimes.com/mls/2004/may16.htm.

[92] NYCFC will pay a $100 million dollar expansion fee, more than double the amount paid by the Montreal Impact in 2011. That number may, however, be inflated by factors such as stadium rent (no public announcement has been made as to where the team will play) or sponsorship complications (Manchester City

cap has risen steadily to more than double what it was ten years ago,[93] and the number of players on Designated Player contracts has risen in each year of the rule's existence.[94] In a 2012 interview with the New York Times, Timbers owner Merritt Paulson admitted that his team was "cash-flow positive" and profitable at an operating level, before adding that there "are a lot more teams that are now cash-flow positive," and that the teams that are still losing money "are not losing a lot of money."[95] Forbes would agree with this assessment- in its valuation article, it lists eight teams with negative operating income at an average of -$3.31 million, while the rest of the league averages a positive operating income of $5.54 million.[96]

All of this evidence of financial growth means that the league has less rationale for maintaining its conservative approach to player salaries and movement. While the early MLS needed to keep its teams on a short leash to avoid overextending resources and to buoy small or nascent franchises with the successes of the marquee ones, today the league's foothold is firmly established. The league is not in danger of collapsing if a few franchises struggle (as evi-

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is sponsored by Nike, while MLS has an equipment deal with Adidas). Christopher Savino, *NYCFC More About Major League Soccer Than New York City*, BUSINESS OF SOCCER (May 22, 2013), http://www.businessofsoccer.com/2013/05/22/nycfc-more-about-major-league-soccer-than-new-york/.

[93] *See* Mickle, *supra* note 34.

[94] By the trade deadline of 2013, there were thirty-three Designated Players league-wide. In fact, all but five teams ended their 2013 season with at least two Designated Players. *Designated Players*, MLS PRESSBOX (Aug. 19, 2013), http://pressbox.mlssoccer.com/content/designated-players.

[95] The New York Times, *Q&A With Portland Timbers Owner Merritt Paulson*, GOAL: THE NEW YORK TIMES SOCCER BLOG (Mar. 14, 2012), http://goal.blogs.nytimes.com/2012/03/14/qa-with-portland-timbers-owner-merritt-paulson/?_r=0.

[96] *See* Smith, *supra* note 89.

denced currently by the presence of woeful Chivas USA, firmly last in the league in attendance and revenue), and player salaries are no threat to eat up revenues at an unsustainable rate.[97] Commissioner Garber justified the league's stance against free agency in 2010 by stating that only two franchises turned a profit in 2009, and thus the league needed to "make sure we have some runway" before considering revolutionary changes to the league's structure.[98] Just four years later, the seeds of profitability sown by expansion and stadium ownership seem from an outside perspective to have laid that runway. When it comes to a new CBA in 2014, MLS may have a hard time justifying some of its limitations on a financial stability basis.

b. Growth Alters Competitive Balance Considerations

It is no secret that MLS trumpets its competitive balance as a key selling point for fans. Even during the league's darkest hour, the contraction of 2002, Commissioner Garber spoke of fans needing to believe in the single entity concept because "it ensures competitive balance."[99] In 2011, J. Todd Durbin, Vice President for Player Relations and Competition, spoke of the goal of ensuring that each

[97] In fact, MLS player salaries constitute a smaller percentage of team revenues than in any major foreign league. About twenty-one percent of MLS revenues go to player salaries, while the ratio for European teams ranges from roughly thirty to sixty percent. *See* F. Matthews, *Is Greed Good?, Part II: Hey MLS Corporate, Ante Up!*, THE SHIN GUARDIAN (June 5, 2013), http://theshinguardian.com/2013/06/05/is-greed-good-part-ii-hey-mls-corporate-ante-up/.

[98] Grant Wahl, *Garber: Promotion/Relegation Not Happening Any Time Soon in MLS*, SI.com (Nov. 19, 2010), http://sportsillustrated.cnn.com/2010/writers/grant_wahl/11/19/qa.garber

[99] Jack Bell, *SOCCER; Major League Soccer Eliminates Two Teams*, THE NEW YORK TIMES (Jan. 9, 2002), http://www.nytimes.com/2002/01/09/sports/soccer-major-league-soccer-eliminates-two-teams.html.

year every team would have a legitimate chance to win the league.[100] That this sounds suspiciously similar to the NFL's "Every Given Sunday" mantra is probably not mere coincidence: Commissioner Garber spent sixteen years in the NFL league office before coming to MLS.[101] The strong central structure with its salary cap, allocation order, and other balancing mechanisms has certainly had an effect on the level of parity in the league.

A table published on the MLS website shows that Supporter's Shield winners, the teams finishing the regular season with the best record each year, are significantly less dominant than their counterparts in the top European leagues.[102] Scoring is the same across leagues, three points for a win and one for a tie. In MLS, the Shield winners average less than two points per game, while table-topping teams in each of Europe's five biggest leagues all average close to 2.5 points per game.[103] A study compiling three different metrics that indicate a league's competitive balance- standard deviation in points earned per game, average change from year to year in a team's points earned per game, and goal differential for each team- for the world's top fifteen leagues found that the MLS is the most

[100] Leander Schaerlaekens, *Parity is a Problem for MLS*, ESPN.COM (Feb. 3, 2011), http://espn.go.com/sports/soccer/news/_/id/6076247/parity-problem-mls.
[101] Garber's successful stint as the NFL's Senior Vice President and Managing Director of NFL International caught the eye of Lamar Hunt and Robert Kraft, both NFL owners and major MLS stakeholders, and he left the NFL to join MLS in 1999. Michael Marsh, *The Soccer Don*, CIGAR AFFICIONADO, May-June 2006, *available at* http://www.cigaraficionado.com/webfeatures/show/id/The-Soccer-Don_8749.
[102] Andrew Wiebe, *Supporters' Shield Winners Can't Match Dominance of European Table-Toppers – And That's A Good Thing*, MLSSOCCER.COM (Sept. 27, 2013), http://www.mlssoccer.com/news/article/2013/09/27/supporters-shield-winners-cant-match-european-table-toppers-and-maybe-thats-.
[103] *Id.*

competitively balanced among them.[104] Indeed, this has translated to some thrilling scenarios- for example, with two weeks remaining in the 2013 regular season, only six teams had been mathematically eliminated from playoff contention, and only three had clinched playoff spots.[105]

But is parity really a keystone of fan appeal? If so, how do you explain the perennial four-or-five horse race and world's most popular sports league that is the English Premier League (EPL)? In his paper "Economic Design of Sporting Contests," Stefan Szymanski examines whether or not higher parity among teams in a sports league actually has a positive effect on fan appeal. Otherwise stated, does a high level of uncertainty of outcome actually increase fan interest? First, Szymanski breaks down outcome uncertainty into three levels: the individual match, the "season" (meaning the closeness of the championship race), and the championship (variety amongst the teams that actually win over a period of years.) [106] At the individual match level, there appears to be significant consensus among the studies done that "demand for match tickets peaks at the point where a home team's probability of winning is about twice that of the visiting team," which is of course far less uncertainty than most leagues offer.[107] More ambi-

[104] Alex Olshansky, *The Lalas Proclamation: Is MLS The Most Competitive League In The World?*, THE SHIN GUARDIAN (Nov. 1, 2013), http://theshinguardian.com/2013/11/01/the-lalas-proclamation-is-mls-the-most-competitive-league-in-the-world/.

[105] The New York Red Bulls, Sporting Kansas City, and Portland Timbers had each secured enough points to earn a playoff spot regardless of the results of their final two games. Who would join them and in what seeding remained in doubt due to a large number of the remaining games pitting two playoff contenders against each other. *See Statistics*, MLSSOCCER.COM, http://www.mlssoccer.com/stats/season.

[106] Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. Econ. Lit. 1137, 1155-56 (2003).

[107] *Id.* at 1156

guity exists at the other levels, in part because of the difficulty of controlling for other relevant factors. However, of 22 studies across all three levels, Szymanski finds that ten offer strong support for the hypothesis that higher uncertainty means more fan interest, seven offer weak support, and five contradict it.[108] At the very least, this should give pause to the idea that high levels of competitive balance are a holy grail for attracting fans. As another study on the subject concluded "the evidence suggests that uncertainty of outcome has been an overworked hypothesis in explaining the demand for professional sports."[109]

If a high level of competitive balance is not necessarily the optimum level of competitive balance in terms of fan appeal, then it seems reasonable to ask whether preserving this high level is really a compelling argument for maintaining the restrictive league structures that fosters it. Adding legitimacy to such a question is the fact that league management may face internal pressure to sacrifice some competitive balance measures in the name of team autonomy. According to Wasserman's Aaron Maines, the most compelling source of pressure to reduce some of the league's centralized control will likely come from the operator-investors themselves.[110]

c. Growth Allows Operator-Investors to Prioritize Team Control and Success

In the early days of MLS, when investments were a gamble on future returns and ownership was consolidated, the well-being of the league as a whole was paramount. In an MLS landscape where most teams are on solid financial footing, and each team has a

[108] *Id.*
[109] PAUL DOWNWARD ET AL., SPORTS ECONOMICS THEORY, EVIDENCE AND POLICY 206 (Butterworth-Heinemann, 2009).
[110] *See* Maines, *supra* note 64.

separate operator-investor group behind it, teams are likely to prioritize their own individual success. Tim Leiweke, formerly CEO of Galaxy owners AEG and currently general manager of Toronto FC's ownership group Maple Leaf Sports Enterprises, has often urged the league to lower restrictions enough to allow him to build a dominant side.[111] To Leiweke, the "dynasty" model is simply good business for the league at the expense of the minnows, but even smaller market owners in a financially strong MLS may want to see a loosening of some control elements.

Sports ownership is "as much or more a consumer good as it is an economic investment," and owners are often more concerned with the personal satisfaction of bringing acclaim and championships to their hometowns than they are in seeing a profitable return.[112] This reality forced MLS to alter its approach from the outset in order to attract investment. The financiers sinking millions of dollars into the new league wanted some individuated, visible stake in specific teams beyond just stock shares. Today, as more of the operator-investor cadre likely feels the league has grown to a point of stability, they have less reason to prioritize the collective interest of the league over the success of their team. These operator-investors, who control the league via its Board of Governors, may opt for increased autonomy and decreased restrictions which will allow them to take a bigger role in orchestrating their team's successes

[111] The author was present to hear Tim Leiweke speak to a class at UCLA in 2012, where he addressed competitive balance issues in MLS. Leiweke advocated his position that MLS should loosen spending restrictions to allow larger market teams like the Galaxy and Red Bulls to build more expensive teams than their smaller market competitors, which he asserted would boost overall fan interest in MLS. His comments were a reiteration of previous public statements such as one in 2008 to the same effect. Grant Wahl, *Galaxy Wants Another Rules Rewrite*, SI.COM (Sep. 23, 2008), http://www.theoffside.com/world-football/aeg-wants-to-tilt-the-mls-rules-a-little-more-in-the-galaxys-favor.html.
[112] *See* WEILER ET. AL., *supra* note 10, at 551.

even if the cost is a dent in profitability. Consider the Twitter response by Merritt Paulson, owner of the small-market but profitable Portland Timbers, to rival Seattle's signing of Clint Dempsey: "if it is possible, this just makes me want to beat Seattle more."[113]

d. Growth Adds Urgency to Collective Bargaining Salary Issues and Television Contracts

Another important consideration stemming from growth is the effect it has on the league's relationship with its players' union. Historical precedent indicates that changes in labor-management relations in the sports league context occur during periods of growth. Landmark sports law cases challenging restrictions that ultimately affect how much of the revenue a league is bringing in will go to the players, like Flood v. Kuhn (challenging baseball's Reserve Clause that prevented players from leaving as free agents unless their original team declined to re-sign them) and Mackey v. NFL (challenging football's "Rozelle Rule" that required compensation from new team to old when a player left in free agency) were brought during periods of growth for MLB and the NFL, respectively.

For a specific example, consider events that led to loosening of restrictions on player movement in the NFL. The AFL-NFL merger of 1970 resulted in the first Superbowl, which grossed $3.8 million dollars, the most ever for a single-day sporting event. [114] ABC's *Monday Night Football* debut that year expanded the league's live broadcast presence across all three major providers of the time, the Superbowl repeatedly broke its own television ratings

[113] To be fair, he did also laud the move as good for MLS as a whole. Merritt Paulson, TWITTER.COM (Aug. 6, 2013), https://twitter.com/MerrittPaulson.
[114] B. Duane Cross, *The AFL: A Football Legacy*, CNNSI.COM (Jan. 22, 2001), http://sportsillustrated.cnn.com/football/news/2001/01/22/afl_history_2/.

record four times over the next decade, and five new franchises were introduced to the league between 1966 and 1976.[115] This growth was a significant factor in the four-year-old NFL Player's Union decision to challenge the league in Mackey in 1972. The union's successful challenge to the Rozelle Rule eventually gave the players a new CBA and "a substantial increase in collective bargaining leverage" which they were able to use to secure a larger portion of the huge revenues the league was enjoying.[116]

Simply put, when the size of the revenue pie increases, there is incentive for the parties divvying it up to reconsider the apportionment. A recent *Guardian* article includes a chart comparing 2013 MLS payrolls for each team as a percentage of that team's revenue as compared with EPL teams and other prominent international clubs. The difference is stark; MLS clubs average about 20.7% of revenues spent on player salaries, while the EPL averages about 70%, and the top international clubs average about 42% of revenue.[117] With all signs pointing to an increasing revenue flow for the league and its teams, and potential new owners writing hundred million dollar checks to get a piece of the action, it seems only natural that the MLS Players' union may want to re-examine the league structure and how it governs where that money goes.

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[115] *History: 1971-80*, NFL.COM, http://www.nfl.com/history/chronology/1971-1980.

[116] Erick V. Passer, *Brady v. NFL: How the Eighth Circuit Saved the 2011 Season by Supporting Negotiation, Not Litigation,* 19 Vill. Sports & Ent. L. J. 603, 618-19 (2012), *available at* http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1015&context=mslj.

[117] *2013 Hypothetical MLS Team Wages*, The Shin Guardian, http://shinguardian.files.wordpress.com/2013/06/mls_wage.png.

e. Growth Highlights Inequity in Player Salaries

One specific reason the players' union may seek changes to MLS' structure in the upcoming CBA negotiations is that the current structure creates an exceptionally high level of inequity in player salaries. Athletic talent exists on a bell curve, and as rare as professional-caliber athletes are, great professional athletes are exponentially rarer. Since the difference between a good and great player can be the difference between an average team and a championship team, the earning gap in sports between the best and the very good is proportionately far greater than difference between their respective skill levels. This phenomenon occurs across sports, and is reinforced in collective bargaining by players' unions who (unlike, say, steelworkers' unions) generally focus on pushing the compensation ceiling higher for star players rather than ensuring that marginal players earn closer to what their more talented colleagues do.

However, pay inequity is particularly high in the payrolls of MLS rosters. The league's top earners, mostly aging European superstars like Marco DiVaio and Thierry Henry, are paid 100 times more than what their lowest paid colleagues make and ten to thirty times the league average of about $140,000.[118] When Clint Dempsey took the field in his home debut for Seattle in September, he faced a Portland squad which, in its entirety, made less in guaranteed compensation in 2013 than he alone did.[119] Tom Brady does not

[118] Liviu Bird, *MLS player salaries: Analysis, charts and tables*, Sounder at Heart (May 6, 2013, 4:15 PM), http://www.sounderatheart.com/2013/5/6/4306550/mls-player-salaries-analysis-charts-and-tables.

[119] *Player Salary Information*, Major League Soccer Player's Union, http://www.mlsplayers.org/salary_info.html (follow 2013 Salaries, Surveys through 9/15/13 "Player Salaries - Alphabetical" hyperlink); *see also* Bird, *supra* note 117, MLS Table by Salary.

earn a hundred times what his long snapper makes, and LeBron James does not earn more than the entire roster of the Milwaukee Bucks. A recent article on Galaxy rookie Kofi Apare, who is playing on a league minimum contract worth $35,000 a year, highlights this inequity with anecdotes about Apare's lifestyle as compared with his Designated Player teammate Landon Donovan. The article elaborates on the phenomenon with a handful of comparisons, most memorably a graph showing that Donovan and fellow Designated Player Robbie Keane account for 70% of the Galaxy's payroll, before tying the phenomenon to the league's structure which is deemed "byzantine."[120]

Negative press aside, this remarkable inequity is almost certainly of concern to the players' union. A players' union relies on the solidarity of its members to have any power; players must feel like they are "all in the same boat" in order for a union to be able take actions that may detriment some for the good of all. Focusing on top salaries may be the accepted industry norm, but structurally enforced inequity well beyond typical levels warrants a different approach in this particular scenario. Apare's description of practicing with Donovan and Keane, and being hesitant to commit a hard tackle on them knowing that they are hundreds of times more "valuable" than he is, is indicative that this inequity affects player solidarity. [121] This gives the players' union, whose cooperation during the upcoming CBA negotiations is critical to the league's future success, significant motivation to see the salary structure changed to increase paycheck equality and collective interest amongst its members.

[120] David Peisner, *The Low-Budget, High-Pressure Life Of An MLS Rookie*, Buzzfeed Sports, (Nov. 1, 2013), http://www.buzzfeed.com/djpeisner/the-low-budget-high-pressure-life-of-an-mls-rookie.
[121] *Id.*

Preserving this inequity is probably not in the best interests of the league itself, either. As Chris Anderson and David Sally explain in their new soccer analytics book *The Numbers Game*, assembling a team of "*Galácticos* and galoots" will produce a much weaker side then will spreading talent more evenly across the roster. While inserting a few *Galácticos* (borrowing the nickname given to Real Madrid's star-studded cast assembled under Florentino Peréz) into an otherwise average lineup will have a tangible impact on a team's long-term success, the impact will be greater if instead the weakest players, or "galoots," are replaced by players that are closer to the team average. This means better overall teams can be assembled via a salary structure that incentivizes teams to purchase a handful of solid players at positions of need rather than investing in one or two star players. For MLS, incentivizing this would mean altering their structure to eliminate the Designated Player exception and finding a way to allow teams discretionary spending that isn't tied to a few specific players.

f. Growth Highlights Low Pay to Performance Correlation

In addition to exceptionally high salary inequity, the current MLS system also produces an exceptionally low correlation between player pay and performance. Conventional wisdom holds that soccer does not lend itself easily to statistical analysis. The open, flowing nature of the game, the variety of playing styles and coaching philosophies, and disparate roles in each starting lineup make it difficult to quantify a team or individual player's performance. However, technology is rapidly improving our ability to record and analyze an increasingly enormous number of performance metrics. As Chris Anderson and David Sally write in their new soccer analytics book *The Numbers Game,* "The days of

relying on pure gut instinct, conjecture, and tradition to judge what constitutes good and bad soccer are over; instead, we can turn to objective proof." [122] The OPTA sports data company tracks and calculates a hefty set of metrics (termed "match events") which are then used to do an admirably consistent job of rating a player's performance in a given shift on a scale of one to ten. The "events" recorded range from defensive (passes broken up, tackles attempted/completed, shots blocked, corners conceded), to offensive (shots attempted, chances created, dribbles attempted/completed), to general (fouls conceded, ground covered).[123] All told, the OPTA statisticians quantify between 1,600 and 2,000 individual events per match, which are then used to come up with individual player scores using formulae not available to the public.[124]

Applying average ratings of MLS players as compiled by the OPTA engine to payroll breakdowns, MLS player salaries are significantly skewed from perfect correlation to performance. While variance occurs in virtually every team sport, the salaries of MLS players seem to be particularly detached from correlation with their performance. To illustrate this disparity, the attached exhibit contains a list of 39 MLS players, along with their age, 2013 guaranteed compensation, salary classification, number of

[122] CHRIS ANDERSON & DAVID SALLY, THE NUMBERS GAME: WHY EVERYTHING YOU KNOW ABOUT SOCCER IS WRONG 13 (Penguin Books, 2013).
[123] Whoscored.com provide publically available OPTA match statistics for about a dozen of the world's most popular leagues and competitions, including MLS league play. Coverage of each match includes approximately thirty types of match events, recorded for all players, and overall ratings calculated using OPTA's formulas. *See* generally, *Football Statistics*, WhoScored.com, http://www.whoscored.com/Statistics.
[124] *The Data Collection Process*, OPTASports.com, http://www.optasports.com/about/how-we-do-it/the-data-collection-process.aspx.

starts on the season, and 2013 season OPTA rating.[125] Each one usually plays a common role which could loosely be described as an attacking midfielder or winger. They are all speedy, offensive-minded players who like to cut in from the touchline, dribble frequently, and mix chance creation for teammates with shot attempts of their own. None are middle-of-the-park creative distributors, and none are target strikers who sit on the defense's back line.

Comparing various players listed in the exhibit, it is hard to find much correlation between rating and pay check, even accounting for age. Teammates Chad Barrett and Saer Sene are remarkably similar across the board, except that the former made half as much this season as the latter. Soony Saad scored an above-average OPTA rating yet brought home less than 20% of what many in his peer group earned. Mike Magee was one of the league's best players this year, and earned the least out of Chicago's four primary attacking weapons. The list is littered with examples of such discrepancy.

So what causes MLS salaries to stray so far from correlation with performance? The salary cap exceptions combined with a lack of player mobility. Players that come into the league on Designated Player, Generation adidas, or Home Grown contracts make more money initially because teams can pay them without eating up salary cap space. Where open competition for players would correct for this discrepancy over time, the buyers (teams) on the market for MLS players have little incentive to renegotiate with underpaid players because there is little risk of losing the players to other teams. In other words, the issue is not as much that Mike Magee greatly outperformed his contract this year, it is that the Chicago Fire have no reason to pay him significantly more next

[125] *See infra* Exhibit A.

year. As the overall amount of money involved grows, the pressure to adjust MLS' rules to account for this issue will grow as well.

g. Broadcast Rights Contracts Increase Importance of Collective Bargaining Relationship

The one area where MLS has been unable to improve is television viewership. This past season, MLS games on ESPN drew a paltry average of less than 300,000 viewers, while games on NBC Sports averaged a woeful 100,000 viewers.[126] That highly-anticipated David Beckham debut, a star-studded affair in which the Galaxy took on no less than English behemoth Chelsea? It earned a television rating of 1, meaning slightly less than a million viewers, and as Grant Wahl pointed out in his book on Beckham, only a tad more than half the viewership that the final game of the Women's College World Series of softball had earned the month prior.[127] While many theories have been posited as to why the league struggles to attract television viewers even with robust attendance figures, almost everyone can agree that the league's current broadcast deals do it no favors. MLS has nationwide television contracts that place games on ESPN, NBC, its subsidiary NBC Sports, Spanish-language Univision, and Univision's alternate channel UniMas. While the league uses the game-a-week schedule that is common for soccer across the globe, the regularity of its scheduling seems to end there. There is no standardized start time (like the NFL's 1:00 and 4:15 EST schedule), games are often switched from one channel to another just days before the date, and no "marquee game" slot has been fixed.[128]

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[126] Peisner, *supra* note 119.
[127] *See* Wahl, *supra* note 31, at 64.
[128] *See* Jason Davis*, MLS Faces Tough Questions on TV versus Tickets,* US National Soccer Players.com, (Aug. 21, 2013),

Much of this has to do with the low leverage with which MLS entered this last set of contracts. Broadcast partners do not have exclusive windows set for MLS games, and appear to cherry pick games depending on the rest of their programming and the sports programming of rival broadcasters.[129] Fixing these issues would go a long way towards increasing the league's television audience. A recent article in *The Guardian* conglomerates four of the most common suggestions to help MLS establish a foothold in the live sports programming marketplace: 1) build consistent scheduling by picking a time slot and sticking with it, 2) institute flexible programming that allows the league to pick enticing matchups to put in its nationally televised slots, 3) claim a holiday as its own the way the NFL has done with Thanksgiving and the NBA with Christmas, and 4) fill in the gaps in the sports world's scheduling by finding a way to be relevant when the competition is at its slowest points.[130] Whether it is by these methods or others, MLS certainly knows the television deals it makes in 2014 must include some significant changes from the current ones in order to jumpstart this lagging aspect of its growth.

Current ratings will certainly not give the league much more leverage in its upcoming negotiations, but the industry-wide timing could not be better. Live sports programming- because of its "DVR-proof" nature, the high level of ancillary programming (such as highlight shows and sports debate shows) it enables, and its appeal to lucrative 18-35 male demographics- has been sky-

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http://www.ussoccerplayers.com/2013/08/mls-faces-tough-questions-on-tv-versus-tickets.html.

[129] *Id*.

[130] Jay Bell, *How Can MLS Attract TV Viewers?*, The Shin Guardian, (Oct. 24, 2013), http://www.theguardian.com/football/the-shin-guardian-blog/2013/oct/24/mls-four-ways-attract-viewers.

rocketing in value.[131] Most of the country's major sports programming has already been locked in to long-term deals: the NFL, MLB, NASCAR, PGA Tour, and NCAA Men's Basketball tournament have all signed television deals lasting until at least 2021, while the NBA's current deal extends until 2016.[132] The new broadcasters looking to compete with ESPN as 24-hour sports networks (such as beIN Sport and Fox Sports 1) are hungry for content to fill their schedules. The time to make the jump to a mainstay of American sports on TV is now; FC Dallas operator Dan Hunt called the upcoming negotiations "the most important in league history."[133] MLS has a very good chance to boost its television ratings to levels more commensurate with its attendance numbers (and booming online traffic)[134] if it can capitalize on these

[131] *See* Todd Spangler, *Sports Fans: Get Ready to Spend More Money to Watch your Favorite Teams,* Variety, (Aug. 13,2013, 3:00 PM), http://variety.com/2013/tv/news/sports-fans-to-spend-more-money-to-watch-favorite-teams-1200577215/ (discussing how the average cost of live sports programming increased by 12% in 2013, double that of non-sports programming, and on-trend with growth patterns of the past decade. Because sports are often packaged into basic programming bundles, the cost is spread out among consumers regardless of their individual interest. For example, ESPN and ESPN2 together cost an average of $5.71 per subscriber, while most channels cost less than $1.).

[132] *Id.*

[133] Matt Barbour, *FC Dallas' Dan Hunt: "Life-changing" MLS TV contract could be closer than it seems*, MLSsoccer.com, (Sept. 5, 2013), http://www.mlssoccer.com/news/article/2013/09/05/fc-dallas-dan-hunt-life-changing-mls-tv-contract-could-be-closer-it-seems.

[134] *See* Christopher Botta, *Playoff Races, U.S. Team help MLS Web Numbers Surge*, Sports Business Journal, (Oct. 28. 2013), http://www.sportsbusinessdaily.com/Journal/Issues/2013/10/28/Leagues-and-Governing-Bodies/MLS-web.aspx (discussing how MLS revamped its website operations in 2010, and has been steadily building its online presence since then. For example, web traffic numbers for the league and its team sites exceeded five million users in September 2013, a 113% increase from a year earlier. The league's collective online properties were the most-frequented digital soccer properties for 22 of the past 24 months, beating out competitors like ESPN.).

factors by securing a better set of broadcast deals in 2014. Recognizing the critical nature of their next broadcast deal, the league brought on Gary Stevenson, a sports marketing and media rights expert who most recently helped the PAC-12 Network land a $3 billion dollar broadcast deal, to make the most of the opportunity.[135]

The television deal is significant for the league's collective bargaining relationship with its players, because the league will almost certainly need to reach a new CBA with the union without suffering a protracted legal dispute in order to secure the new broadcast deal it needs. Knowing this, the union will likely see the 2014 CBA renewal as a golden opportunity to press the issue on gaining some leverage for its members, while remaining cognizant of the fact that any serious labor dispute would be disastrous for both sides by killing the league's upward momentum. This delicate balance will play out behind closed doors, but there is plenty of reason to believe some kind of significant change will result.

2. Growth in Quality of the On-Field Product

a. Talented Players Require More Player-Friendly Rules

MLS has shown significant growth in recent years in the quality of soccer being played on the field. Like financial growth, this increase in talent has highlighted problem areas of the current league structure and increased pressure for change. In the league's first

[135] Christopher Botta, *Garber, MLS set for TV Talks*, Sports Business Journal, (Aug. 5, 2013), http://www.sportsbusinessdaily.com/Journal/Issues/2013/08/05/Leagues-and-Governing-Bodies/Garber-MLS-TV.aspx (discussing how Stevenson will serve as President and Managing Director of MLS Business Ventures).

decade or so of existence, MLS play could euphemistically be described as "scrappy" or "staccato," as matches seemed to trend towards frenetic skirmishes that bounced around the pitch with little sense of rhythm or natural flow to the game. Goals seemed to result as frequently from random opportunities or defensive errors as from deliberate offensive build-ups. Teams that were capable of playing in a coherent style trended towards the direct, long ball approach of the Tony Pulis-era Stoke City teams that leaned more on physical strength and endurance than technical skill, creativity, or vision. This kick-and-run style game is often derided as the crutch of an untalented squad, while the "right way" to play- as Thierry Henry put it in a 2011 interview[136]- requires the ability to retain possession and pick apart a defensive scheme rather than forcing a way through it. While there are limited statistics available for early MLS games, match report sheets would probably show comparatively low percentages of passes completed, high numbers of long aerial passes attempted, and few touches involved in each chance creation.

Many of today's MLS teams play much more purposeful, individuated styles. The league maintains a reputation for scrappy play, but there are coherent tactical philosophies manifested on the field. The free-flowing, aggressive teams deployed by Caleb Porter and Jason Kreis (of Portland and Kansas City, respectively) deploy mainly in a 4-3-3 or 4-4-2 diamond formation, press high up the field when not in possession, complete a high number of short passes and overlapping runs, and almost always win the possession

[136] Simon Evans, *Thierry Henry Interview*, Reuters Soccer Blog, (February 28, 2011), http://blogs.reuters.com/soccer/2011/02/28/thierry-henry-interview/, (discussing having a club identity, and how passing the ball on the ground is the way football should be played.)

battle by a significant margin.[137] Bruce Arena's Galaxy is proficient as a counterattacking squad that sits back in its own half in a 4-4-2 formation, luring the opposition into stretching the space between its players before counterattacking quickly down the wings. When using this strategy, they consistently attempt a high number of "through passes" (meaning a pass into space behind defenders that a teammate will run on to) and crosses in to the opponent's goal area per game.[138] The first style requires attacking players who are comfortable with the ball at their feet in traffic and a pair of holding (defensive) midfielders with exceptionally good field vision and a high work rate, while the second style requires very disciplined defensive players with long passing ability and attacking players with both great speed and the ability to beat a defender one-on-one. Unsurprisingly, all three teams are among the league's best. This evolution is only possible because rosters are now filled with talented players who have specific, developed skillsets.

It is difficult to find objective measures by which to measure the growing talent level in the league because meaningful inter-league competition is rare. Offseason friendlies with European giants feature neither first-team squad choices nor meaningful outcomes, but two good indicators do exist. The first is CONCACAF Champions League, a season-long tournament featuring the top teams from each league in FIFA's North-and-Central-America confederation. Four MLS teams compete each year, with qualification earned the season prior by achieving the best regular-season record, winning the U.S. Open Cup (a similar season-long tournament

[137] Major League Soccer 2013, WhoScored.com, http://www.whoscored.com/Regions/233/Tournaments/85/USA-Major-League-Soccer

[138] OPTA League Comparative Statistics, Whoscored.com

featuring American teams from MLS and lower level leagues), or making the MLS Cup finals.[139] The tournament tests not just a team's talent but depth as well, since the farther a team advances, the more mid-week games it will have to play in addition to the regular league games each weekend. While no MLS team has yet won CONCACAF Champions League in its modern form (from 2008 until present), in each year the overall record of MLS teams in the competition has improved, Real Salt Lake reached the finals in 2011, and there are three MLS teams currently competing in this year's eight-team quarterfinal.[140]

The second indicator is the number of MLS players selected to compete in U.S. Men's National Team games. The national team squad is assembled on a game-by-game basis (with rosters locked for the duration of major competitions) by its coaching staff who selects, depending on the nature of the contest, the best eighteen players available or a mix of current top players with promising young players who have the potential to one day represent their country on the biggest stage. Four years ago, Bob Bradley took only four MLS players with him to South Africa in his roster of twenty-three. Of the fifty-five players that earned call-ups in the past twelve months, twenty-five ply their trade in MLS.[141] An

[139] Pablo Maurer, *CCL: How North American Teams Qualify for CONCACAF Champions League*, Sounders FC, (Mar. 31, 2013, 4:24 PM), http://www.soundersfc.com/news/articles/2013/03-march/how-teams-qualify-for-the-concacaf-champions-league.aspx.

[140] *See* Scott French, *Galaxy: Champions league Opener*, ESPN LA (July 27, 2010 6:52 PM), http://espn.go.com/blog/los-angeles/soccer/post/_/id/2301/galaxy-champions-league-opener; *see also*, *Commentary: MLS teams must plan for CONCACAF Champions League success by starting at home*, MLS Soccer.com (Mar. 21, 2014, 5:43 AM), http://sports.yahoo.com/news/commentary-mls-teams-must-plan-181454951--mls.html.

[141] This number includes Clint Dempsey (re-entered MLS mid-season) but does not include exported former MLS players such as Geoff Cameron and Brek

MLS-dominated U.S. National Team cruised to victory in this past summer's Gold Cup (the CONCACAF quadrennial national team tournament) with impressive showings by MLS lifers such as Chris Wondolowski, Kyle Beckerman, and Omar Gonzalez.[142] Projected 2014 World Cup rosters include as many as ten or eleven MLS players, with at least seven almost certain to earn a ticket.[143] Making this more impressive is the fact that the man making these selections, German legend Jürgen Klinsmann, has shown a preference for German-American players developed in his home country who play there or elsewhere in Europe.[144]

An increase in the talent level of the MLS is significant for structural purposes because it puts pressure on the league to distribute payroll dollars more evenly and increase interchange with other soccer leagues. MLS players will likely be increasingly uncomfortable with earning wages that are small fractions of those earned by high-priced Designated Player imports as more and more of

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Shea. *See All USA National Football Team Players (2013-2014 statistics),* 11v11.com*, http://www.11v11.com/teams/usa/tab/players; compared with* a Roster of all MLS Players, MLS Soccer.com, http://www.mlssoccer.com/players.

[142] *USA National football Team players: CONCACAF Gold Cup 2013*, 11v11.com, http://www.11v11.com/teams/usa/tab/players/season/2013/comp/425.

[143] Ives Galarcep, *A look at the projected U.S. World Cup squad*, Goal.com, (Oct. 17, 2013, 1:27 AM), http://www.goal.com/en-us/news/1679/us-national-team/2013/10/17/4338887/ives-galarcep-a-look-at-the-projected-us-world-cup-squad.

[144] German-born players such as Fabian Johnson, Timothy Chandler, and Terrence Boyd have joined Jermaine Jones as U.S. national team regulars, and Klinsmann has expressed a keen interest in the future national team allegiance of young dual-citizenship players like John Anthony Brooks and Julian Green. *See generally* Mathew Wagner, *The Ten Best German-American Soccer Players*, American Soccer Now.com, (Mar. 8, 2013, 10:31 AM), http://americansoccernow.com/articles/who-are-the-10-best-german-american-soccer-players.

them find their worth validated by national team call-ups. As front office personnel from outside the league see more and more MLS players competing at the international level, the demand for their services will increase, pressuring the league to facilitate more equitable contracts or risk losing quality players from the outset of their careers or after their first contracts expire. Blue chip youngsters like Darlington Nagbe and Diego Fagundez may think twice about re-signing with MLS when the time comes if offers from overseas are available and the comforts of home soil come with the unpalatable qualifiers of inequitably low salaries and strictly controlled movement from team to team. Their peers in the next generation may even hesitate to commit to beginning their careers in MLS at all. This issue is sure to be highlighted next summer in Brazil, when the World Cup brings together the entire international soccer community.

By increasing a player's ability to control their own movement within the league and secure a salary in-line with their performance, MLS could keep its position as an attractive option for up and coming American players both in MLS and abroad, and further its standing among potential international signings. While MLS already boasts a 45% foreign-born player pool, many of these internationals were actually developed as soccer players in the U.S., and another significant number arrived in MLS already in the twilight of their careers.[145] An increased player interchange with other leagues would raise the quality and quantity of foreign playing styles, tactics, and philosophies that American players are exposed to. Experiencing different playing styles is an extremely valuable asset for a player as an individual, particularly one on

[145] Kevin Baxter, *Is MLS Failing to Develop U.S. Players?*, LA Times, (June 2, 2013), http://articles.latimes.com/2013/jun/02/sports/la-sp-baxter-soccer-20130602.

whom the hopes of a nation may one day rest as he takes the field at a World Cup.

For the likes of Omar Gonzalez and Matt Besler, American defenders playing in MLS and likely to earn spots in Brazil, regularly marking opponents like Panamanian Blas Perez and Italian Marco DiVaio (MLS players developed in Latin countries, where a much more cerebral and Machiavellian style of play predominates) is an invaluable learning experience that will serve them well next summer. This same type of multicultural development applies for MLS exports like Geoff Cameron, an American now playing for Stoke City in England. A high level of cross-pollination improves the quality of individual players and of a league as a whole. Legendary Italian Serie A striker and EPL manager Gianluca Vialli sums up this phenomenon when he writes "one thing I've learned in my two and a half years of research is that diversity- of playing styles, training, techniques, tactical systems- is at the heart of footballing success."[146] As MLS players take the stage next summer to showcase just how far the league has come, the focus on how the league can alter its structure to better develop, gain, and retain talented players in MLS and on the U.S. National Team will surely increase.

3. Single Entity Status Is Irrelevant And Should Not Hinder Change

Going back to the league's founding, we know that a significant consideration in choosing the restrictive single entity structure was the possibility that such a structure would protect the league from a potential antitrust challenge brought by the players under Section 1

[146] Gianluca Vialli, & Gabriele Marcotti, THE ITALIAN JOB: A JOURNEY TO THE HEART OF TWO GREAT FOOTBALLING CULTURES 90 (London: Bantam, Print. 90. 2007).

of the Sherman Antitrust Act. When such a challenge was brought, the appellate court declined to answer the single entity question, but indicated that they had some doubts as to the validity of the league's position. Since Fraser, there are three developments stemming from league growth that weaken the alleged single entity status further: the increased diversity of MLS' operator-investor cadre, the Designated Player exception, and the proliferation of soccer-specific stadiums. Each of these developments serves in some way to separate the interests of each MLS club from the others, thus increasing their identities as separate entities and weakening their legal claim to "a complete unity of interest" that would allow the league's structure to fall under the Copperweld precedent.

a. The Designated Player Exception Increases Entity Separation

The Designated Player exception furthers the divergent economic interests of the league's clubs because it allows teams to contract with an employee (the player) separately from the league. While the league still pays a portion of the player's salary, the majority is paid by a given club which increases that operator-investor's independent expenses and divests some control over players from the league itself. Before the exception was introduced, every club technically had an equal interest in all of the league's players. Now, because teams are paying out of pocket for Designated Players, the unity of interest is diminished and will continue to diminish as the value of these contracts rises.[147] Allowing teams to sign up to three players on their own terms, or choose not to, gives them

[147] *See* Robert M. Bernhard, *MLS' Designated Player Rule: Has David Beckham Single-Handedly Destroyed Major League Soccer's Single-Entity Antitrust Defense?,* 18 Marq. Sports L. Rev. 413, 421 (2008).

interests separate from each other. This does not necessarily destroy the "hybrid entity" concept that the First Circuit vaguely referenced in Fraser because "the league is likely still much closer to a 'unity of interests' than other U.S. professional sports leagues, and may be treated accordingly in the eyes of the law."[148] However, there is no question that the introduction of the exception fundamentally alters the analysis of the league's structure should any future legal inquiry into its entity status occur.

b. Team Ownership of Stadiums Increases Entity Separation

The proliferation of soccer specific stadiums does more than just contribute to the overall picture of growth for the league. It also increases the separation of interests between operator-investors and the league as a whole. When the league began play, none of the teams played in soccer-specific stadiums. Rather, they were second tenants to established franchises in other sports leagues, and the operator-investors split the stadium rental costs 50/50 with the league itself.[149]

Today, almost all the league's teams play in soccer-specific stadiums owned by the operator-investor groups who control each team. Like Designated Player contracts, stadium ownership constitutes an investment made by a specific team's operator-investor in which the rest of the league has no stake. Stadium ownership is both an assumption of liability and a source of revenue for an individual team that further separates the unity of interest between that team and the rest of the league. The impact of this trend was predicted by Thomas Stuck in 2004, when he warned that "the

[148] *Id.* at 429.
[149] *See* Weiler, *supra* note 10.

more autonomy operator-investors wield, or the more their actions display entrepreneurial interests separate from those of MLS, the less effective the single entity-defense will be in protecting the league from Section 1 scrutiny."[150] Stuck was particularly concerned with expansion teams building stadiums as part of their MLS bid (as we see currently in Orlando), and existing teams building soccer-specific stadiums in part via public financing (such as D.C. United's new stadium plan.)[151] In the first scenario, an MLS investor-hopeful is acting purely as an entrepreneur in building a new stadium, and will likely need to negotiate with the league over the terms of the stadium's use.[152] In the second scenario, an operator-investor is negotiating with the public individually and may push for terms that are not completely in line with the league's wishes, which "smack(s) of entrepreneurial interests."[153]

c. Diversified Operator-Investor Cadre Increases Entity Separation

The nascent MLS opened its doors carrying just a small cadre of operator-investors,[154] with heavyweight financiers such as Phil Anschutz, Lamar Hunt, and Robert Kraft owning stakes that stretched across multiple teams. This reinforced the single-entity concept, with ownership interests closely aligned with the league rather than any individual team. Currently, there are nineteen

[150] Thomas D. Stuck, *Facility Issues in Major League Soccer: What Do Soccer Stadium Have to Do with Antitrust Liability?*, 14 Marq. Sports L. Rev. 55, 563
[151] *Id.*
[152] *Id.* at 566.
[153] *Id.* at 565.
[154] *Id.* at 554 n.33 (naming nine-operator investor in the suit. At least three were tied to Phil Anschutz and at least two to Lamar Hunt, meaning a maximum of six separate operator-investor groups).

separate operator-investor groups, one behind each team.[155] Almost all of these groups, at least publicly, are controlled by investors that have no stake in the other teams. With recent sale of the Columbus Crew's operator-investor rights to Precourt Sports Ventures by Hunt Sports Group,[156] leaving FC Dallas as the Hunts' remaining MLS property, only Houston and Los Angeles now share a common investor in AEG, Phil Anschutz's massive sports conglomerate.[157] This effects the single entity designation in a way similar to the effect of the Designated Player and team-owned stadiums- it reduces the commonality of interest between the operator-investors and the league. Certainly Anthony Precourt (the proud new operator-investor of the Columbus Crew) still shares some unity of interest with the league that pays his players, pays out his share of collective revenue, and makes his investment worth something. However, he will need to attract crowds to his Columbus Crew Stadium, perhaps by investing in some Designated Players with his own money, and beat other MLS teams whose particular successes and failures he has no direct interest in so long as they don't fail entirely. It seems an easy argument to make that he, like eighteen others, have developed some entrepreneurial interests of their own.

[155] *See* MLS Club History, *supra* note 84. (Each individual club page lists the owner behind their respective operator-investor groups, with Phil Anschutz only appearing twice; Houston Dynamo and Los Angeles Galaxy.).
[156] *Precourt Sports Ventures acquires Columbus Crew*, Thecrew.com, (July 30, 2013), http://www.thecrew.com/news/2013/07/precourt-sports-ventures-acquires-columbus-crew.
[157] *See supra* text accompanying note 154.

d. Brady v. NFL May Negate MLS Players' Union's Ability To Bring Antitrust Claims

One additional factor that renders the single entity consideration irrelevant is the fact that recent precedent indicates the MLS Players' union may not be capable of bringing an antitrust claim against the league as a bargaining tactic at all. In 2011, an unsuccessful CBA renegotiation between the NFL and its players' union resulted in union decertification and a lawsuit in which the players claimed violation of the Sherman Antitrust Act. On appeal, the Circuit Court found that the injunction issued against the NFL's lockout of its players was prohibited by the Norris-LaGuardia Act, because the union's decertification did not automatically remove it from protections regarding parties in an ongoing labor dispute.[158] In doing so, the court left open whether or not members of a decertified union can bring antitrust challenges in an ongoing labor dispute, and if not at what point the "dispute" effectively ends for purposes of the non-statutory labor exemption to antitrust liability. The fact that such a strategy may be precluded makes it unlikely that MLS players would see league structure changes as an opportunity to re-open the issues in Fraser, even in the case of a serious collective bargaining dispute.

e. Single Entity Status Is Irrelevant And Should Not Hinder Change

Together these four factors should mitigate any consideration of the league's legal classification as "single entity" going forward. While there are certainly important elements of the league's structure that both support the single entity classification and have separate justifications relating to the business aspects of the league,

[158] *See* Passer, *supra* note 115, at 638.

the "single entity" structure itself has no value outside of antitrust law. Because of the diversification of the operator-owner cadre, the introduction of the Designated Player exception, and the proliferation of soccer-specific stadiums, MLS probably no longer qualifies as "single entity" from an antitrust standpoint. Regardless, even a decertified players' union is likely barred from bringing a claim - at least for some significant time after decertification - under the non-statutory labor exemption. As MLS leadership enters this critical period of collective bargaining with the player's union, both sides should be well aware that the preservation of some semblance of single entity from a legal perspective is no longer a relevant factor in the decisions they make about the league's future.

IV. Predicting Changes In 2014

Growth of the MLS since its last collective bargaining agreement has changed the landscape of the league in a variety of ways. The steady revenue streams that operator-investors enjoy have helped the league expand, and lessened the need for restrictions in the name of financial stability. The increasingly large amounts of money spent on bringing in star players has highlighted the inequity between those players and their low-salaried peers, and brought increased scrutiny to the skewed payroll numbers that result from players being unable to leverage new contracts when they play well. The league is filled with more talented players playing attractive, stylized soccer, increasing the pressure to lower the structural barrier between MLS and international leagues. Growth has ended the single entity debate, and allowed operator-investors to worry less about the league as a whole and more about how they can bring championships to their respective fan bases. The 2014 collective bargaining agreement will reflect this new landscape, by

altering the league's approach to player salaries and player movement. If we can learn anything from the league's past, it is that MLS will approach these changes carefully and deliberately, altering the structure in ways that address new realities without jeopardizing the progress it has made towards becoming one of the world's great soccer leagues.

a. Streamlining Player Salary Mechanisms

The 2014 collective bargaining agreement will almost certainly change the way MLS players are paid. Limitless contracts allowed for a select group of players and a strict cap for others is not an optimal method for allowing discretionary spending when the players all belong to the same collective bargaining unit. Since the overall goal is to keep player salaries at a percentage of revenues that is safe for the league's future while allowing operator-investors to invest more in their team's success if they so choose, the league would be wise to look to a source that currently operates a successful model with the same goals in mind: the NBA.

The National Basketball Association (NBA) uses a "soft" salary cap system designed to balance the interests of deep pocketed franchises with their thriftier competitors. The league has an annual per-team salary cap, currently a little over $58 million dollars. The salaries of all players on a team's active roster count towards each team's salary cap, with a complex system accounting for mid-season trades, injury reserves, and other contingencies. Teams may exceed the salary cap in certain specific situations, primarily by executing contracts that will allow them to keep players whose increased value would otherwise prohibit their current teams from offering them what competing teams could on the open market. Teams that end up with payrolls exceeding a given amount, called the tax level, must pay a "luxury tax" on the amount in excess of

the tax level at a current rate of 100% (1$ for every 1$ above the tax level) that will change to an incremental rate in later years according to the league's current CBA.[159] The tax level is calculated using the average amount of "Basketball Related Income" (BRI) that each team has generated that year, and the funds collected via tax are split between the league's non-taxed teams or used for "league purposes." [160]

In addition to these salary cap provisions, the NBA also places 10% of each player's salary into an escrow fund where it is held until the total BRI and total player payroll information can be calculated. The funds held in escrow are used as a buffer to help ensure the players get the share of BRI they agreed upon, but not more: If player salaries are at or below the CBA-mandated percentage of total BRI, the funds held in escrow are returned to players (along with any additional funds needed to reach the stipulated percentage), but if they are over the BRI percentage set then the money is returned to the owners. The league also implements a minimum payroll requirement, and any team that fails to meet this minimum must distribute the amount of the shortfall amongst its players at the end of the year.[161]

As with the team's payroll as a whole, individual player salaries are capped at a maximum amount, based on the number of years the player has been in the league. Currently, a player in his first six years may only be offered a maximum of 25% of the team salary cap, a player in his seventh to ninth year may be offered 30%, and a player with more than nine years' experience can make 35% of the cap, or about $19 million dollars for the 2012-2013

[159] Larry Coon, *NBA Salary Cap FAQ*, Cbafaq.com, (last updated Jan. 15, 2014), http://www.cbafaq.com/salarycap.htm#Q21.
[160] *Id.* at Question 22
[161] *Id.* at Question 15

season.[162] However, the maximum amount is only applicable in the first year of a multi-year contract, subject then to a complex set of limits on how much a player's salary can increase from year to year.[163] These limits, depending on a player's classification, a team's status as a tax payer or non-tax payer, and other such variables, range between 4.5% and 7.5% raise per year.[164]

The overall effect of these various restraints is a fairly tight control of how much teams are spending overall and on individual players, without handicapping a team's ability to fill a roster on their own terms. Competitive balance is preserved by preventing the wealthiest teams from buying up all the best players and dis-incentivizing teams from spending too much overall, but also forcing "welfare" recipient teams to spend enough to actually field a competitive roster. Financial stability is achieved by capping the overall percentage of revenue that is spent on players each year, and by redistributing some of the largesse spent by the wealthier teams to the less wealthy teams. The model also allows the league to incentivize certain types of behavior- in the NBA's case, that means keeping star players on their current teams, but cap exceptions could also be crafted towards other goals like developing young talent.

For MLS, a similar model would look something like this: a cap number set each year via collective bargaining the way it is now, with exceptions for the types of behaviors the league would like to incentivize, such as retaining current players that are eligible to play for the U.S. national team or signing homegrown players. The salary cap number, rather than being essentially an amount paid to players by the league on behalf of a given team, could be distribut-

[162] *Id.* at Question16
[163] *Id.* at Question 17
[164] *Id.* at Question 25

ed as a payment from the league to each team, becoming a true salary "budget." All players on a team's roster would be paid from this sum, including the players that are currently classified as off-budget. Teams would need to be required to spend the entirety (or a high percentage) of the lump sum on player salaries, or face the same penalty that lows-spending NBA teams do of owing the missing amount to their current roster of players.

A luxury tax could be assessed by the league for teams using their own funds on top of the "budget," though rates needn't be as high as they are for NBA teams since the extra funds expended would already be direct from a team's pocket in addition to the amounts contributed to the league through team revenues and then redistributed via salary budget. The tax could be put towards operating expenses, which would ostensibly help to raise the next year's salary budget sum. In order to keep player salaries tied to revenues, a retention fund system could be used that would act as a buffer, keeping player salaries from exceeding a certain percentage of revenues. Because the league is understandably guarded about its financial data relating to revenues, this could be calculated internally and published simply as an overall number rather than a percentage of revenues.

By adopting this system, the MLS league structure would sacrifice some control over costs and competitive balance measures in the name of team autonomy and concession to players' interests.[165] players on a team's roster would be paid from the same source, regardless of whether they were contracted under a certain exception. Even if teams were given a Designated Player-type excep-

[165] These measures would shift the balance between these interests in the opposite direction from how they affected the NBA, which was coming from a position of higher team autonomy and a higher share of revenues directed to player salaries.

tion, there would be less incentive to sign that player to a contract inequitably larger than his teammates' because all salaries would be coming out of the same pool of funds. This would incentivize teams to spread available funds across their rosters, increasing the overall quality, rather than investing heavily in a select few players. Operator-investors could look abroad more frequently, with the ability to sign more players to mid-level wages instead of a few large contracts and many paltry ones. The league would still be protected from overextension of resources by a combination of the cap and the retention fund system, while owners would have increased autonomy over which players to sign and how much to spend on them.

b. Bolstering the Re-Entry Draft

MLS' system for handling player movement is almost sure to see some liberalizing changes in the upcoming collective bargaining agreement. Unlike with payroll structure, no major American sports league offers a helpful direct analogy because every one of these leagues is operating in essentially a closed universe of talent. The NFL, NBA, and MLB are the de facto destination for the best players in each respective sport, and thus retention of talent in the face of international competition is a non-factor. As a young and relatively small league in a global sport, MLS must protect itself from talent drain in addition to juggling financial stability and competitive balance issues. Therefore, simply opening up player movement by eliminating the re-entry draft, discovery rules, allocation order, and similar functions is not a feasible way to accommodate the league's growth. Instead, the current rules are likely to be modified to accommodate the need for higher player input in movement and increased cross-pollination with international

leagues, without jeopardizing MLS' ability to protect itself from the open market.

One alteration that would work in conjunction with a restructured salary cap to increase compensation and leverage for MLS veterans without jeopardizing the league's competitive balance and financial security would be to include an arbitration element in the Re-Entry Draft. The current Re-Entry Draft rules offer little opportunity for a player to secure a more lucrative and favorable contract. Players 25 and younger are guaranteed only a continuation of the terms they would have been playing under should their team have picked up their option, while veteran players are only guaranteed at least a 5% increase in their salary. As such, the Re-Entry Draft is not currently a viable option for a player who has played beyond expectations and would like a contract that reflects his performance. Currently, these players must either negotiate an extension before their contract expires, or leave MLS for opportunities elsewhere.

A glance at recent Re-Entry Draft results confirms that the pool of players in the current model is mostly a boneyard of veterans who no longer fit the rosters of their old teams but did not command enough interest to facilitate a trade. An attached exhibit lists the fourteen players selected in the 2012 Re-Entry Draft along with their guaranteed compensation for 2012 and 2013, respectively.[166] Of the ten who played in MLS in 2013, nine received a lower guaranteed compensation than the year before and the tenth received the same.[167] The mechanism is simply a last resort for players who would like to continue playing in MLS, but were

[166] *See infra* Exhibit B.
[167] *Id.*

unable to broker a new deal with their current team and were not deemed valuable enough for a sign-and-trade deal.

Contract arbitration as used in Major League Baseball is a clever method for attaching an appropriately valued contract to a player at or near the end of a current deal. MLB's specific eligibility and procedural rules for arbitration are complex but the concept itself is simple: after negotiation, the player and team each simultaneously submit a final offer of contract terms to a neutral arbitrator. The arbitrator picks whichever offer they believe to be the most equitable, based on the player's past performance, indicators of future performance, salaries of comparable players, and related factors.[168] The arbitrator may not split the difference, and must pick one of the two offers.[169] Thus, both sides are forced to make a realistic determination of the player's worth and submit an offer they believe closely reflects the player's "true" value. Most of the time, arbitration-eligible players are able to come to terms with the team before submitting offers because it is preferable to both sides to avoid risk. [170] For the MLS Re-Entry Draft, this could be accommodated by simply allowing the team to make an offer before the arbitration process is used.

The obvious criticism of using arbitration in soccer is that the sport is traditionally far less statistics-driven than baseball, making objective analogies to comparable players more difficult. However, as Chris Anderson and David Sally show in *The Numbers Game*, the past decade or so has seen a massive increase in the proliferation of soccer analytics. OPTA and Prozone are now just two of dozens of companies tracking, conglomerating, and analyzing data

[168] Thomas Gorman, *The Arbitration Process, Baseball Prospectus*, (Jan. 31, 2005), http://www.baseballprospectus.com/article.php?articleid=3732.
[169] *Id.*
[170] *See id.*

points from soccer games, some for public consumption and others in the direct employ of teams.[171] Tracking a player's touches, movement, and even heart rate during a game are all very feasible and together offer more than enough data to make informed decisions about a player's value relative to his peers. In fact, MLS itself has already entered the "stat revolution," partnering with Adidas to harvest statistical data through chips implanted in player's cleats.[172]

Another hurdle to overcome would be the pay inequity and pay-to-performance correlation problems inherent in the current MLS system. Because the arbitration method relies on statistical comparisons to similar players as a way to argue that the player in question deserves similar pay, it would only be effective if coupled with a player pay system that at least loosely correlates pay with performance. The payroll restructuring suggested above would assist in correcting this issue, as would any other player pay alteration that helps the league eliminate its problems with inequity and low pay-to-performance correlation.

Replacing the "Bona Fide Offer" aspect of the Re-Entry Draft with an arbitration provision would convert the process into a method for veteran MLS players to receive new contracts that actually reflect the player's value, without the open competition of free agency that MLS so clearly wants to avoid. Depending on how significantly the league would want to alter its player movement restrictions, the "genuine offer" provision of the Re-Entry Draft second round could also be replaced with an arbitration element, or the "Bona Fide Offer" element currently used in the first round. This would increase leverage for young players nearing the end of

[171] *See* Anderson & Sally, *supra* note 121, at 1.
[172] *Id.* at 17.

their rookie deals and mid-level veteran players with some years of solid contribution left to give, because they would no longer be forced to choose between renegotiating with a team that has no incentive to better their current contract, leaving MLS, or being re-assigned to a new team on contract similar to their current one. Increased leverage for this type of player would most likely lead to considerations like trade veto options becoming more commonplace, making the league a more attractive destination for foreign talent with a desire to play somewhere specific in the U.S. but lacking the top-tier clout to sign a Designated Player contract. Most importantly, it would constitute a concession to the player's union desire to increase player leverage without introducing free agency and destroying the league's closed system.

V. Conclusion

David Peisner's article on Galaxy rookie Kofi Opare accurately captures the sentiment that seems to pervade most of the discussion around MLS's structure and relationship with its players. Yes, it is problematic to have most players making so little money while a small group makes so much. Yes, it is stifling to the league's growth and integration with the soccer world to exercise centralized control over which players can play where. But these issues can be solved, and they are only relevant because the league has carefully and sustainably built its way up to the point where it is prominent enough for people to take notice of things like player salary inequality and how players move from team to team. In other words, for this dialogue to exist at all is exciting for American soccer fans, and evidence of significant accomplishment.

Tied directly to this optimistic quality of the MLs structure debate is the fact that everyone involved, from fans to players and agents to team and league officials, seems to believe that all parties have

the best interests of American soccer at heart. Hundreds of opinions regarding MLS' structure have been articulated in writing, most of them advocating for change of some sort, and yet virtually none of them conclude that MLS leadership has been motivated thus far by anything other than to better American soccer's place in the sporting world. A cynical take would emphasize the way the MLS' structure funnels revenue to the league's coffers by keeping the players' share so low, but even the harshest of informed critics seem to concede that the main rationales for this aspect are survival and growth, not profiteering. For example, Peisner's criticism is weighted by ample discussion of the NASL's failures, and how this influenced the understanding of MLS' architects that keeping costs low was a matter of life and death for the young league.

MLS enters its 18th year as the longest running professional soccer league in U.S. history, a significant landmark directly attributable to its centralized, highly-controlled structure. The debate is not whether MLS' structure was appropriate to accomplish the league's early objectives- a decade of sustained growth has proven Mr. Abbott and Mr. Rothenberg's blueprint to be a wise one. The question now is whether the league has matured enough to sustain the liberalizing changes to its structure that are necessary for it to take the next step. We know that there will be significant pressure for MLS to loosen its grip on its teams and players in the next few years, and we can be cautiously confident that the league is robust enough to survive any ensuing growing pains. What remains to be seen is whether and how the league will adjust its model in a way that allows the growth and maturation to continue towards the ultimate goal of becoming an elite soccer league by 2022.

Exhibit A: Player Pay and Performance Correlation Among Attacking Midfielders

Player Name	**Age, Season Appearances**	**OPTA Rating, 2013 Guaranteed Compensation**
Lloyd Sam, NYR	29, 24	6.56, $130,000
Peguy Luyindula, NYR	34, 24	6.38, $80,000
Soony Saad, SKC	21, 25	6.74, $46,500
C.J. Sapong, SKC	24, 29	6.86, $92,00
Oscar Boniek Garcia, HST	29, 27	7.39, $161,250
Diego Fagundez, NER	18, 33 (Home Grown)	6.85, $127,196
Chad Barrett, NER	28, 21	6.41, $110,709
Saer Sene, NER	27, 24	6.45, $211,537
Justin Mapp, MON	29, 28	7.02, $135,500
Andres Romero, MON	23, 31	6.55, $48,000
Sanna Nyassi, MON	24, 22	6.48, $147,625
Rodney Wallace, PRT	25, 31	7.17, $150,000
Darlington Nagbe, PRT	23, 38 (Generation adidas)	7.13, $266,000
Khalif Alhassan, PRT	23, 34	6.51, $89,250
Luis Gil, RSL	20, 34 (Generation adidas)	6.60, $213,833
Lamar Neagle, SEA	26, 32	7.08, $48,400
Gyasi Zardes, LAG	22, 29 (Home Grown)	6.84, $173,000
Landon Donovan, LAG	31, 24 (Designated)	7.45, $2,500,000
Hector Jimenez, LAG	25, 27	6.57, $46,500

Attiba Harris, COL	28, 30	6.95, $173,275
Deshorn Brown, COL	22, 32 (Generation adidas)	6.77, $113,000
Nick LaBrocca, COL	28, 24	6.39, $138,333
Mike Magee, CHI	29, 22	7.57, $191,666
Patrick Nyarko, CHI	27, 30	7.27, $249,500
Dilly Duka, CHI	23, 31	6.75, $273,000
Joel Lindpere, CHI	32, 25	6.60, $205,000
Domonic Oduro, CLC	28, 34	7.02, $122,015
Bernardo Anor, CLC	25, 20	6.98, $46,500
Sebastien Le Toux, PHI	29, 32	6.90, $212,812
Danny Cruz, PHI	23, 32	6.57, $126,500
Bobby Convey, TOR	30, 21	6.69, $215,000
Chris Pontius, DCU	26, 22	6.95, $361,000
Nick DeLeon, DCU	23, 25	6.68, $105,400
Kyle Porter, DCU	23, 27	6.59, $54,992
Camilo Sanvezzo, VAN	25, 32	7.33, $247,500
Russell Tiebert, VAN	20, 24 (Home Grown)	6.82, $65,600
Shea Salinas, SJQ	27, 28	7.03, $100,219
Fabian Castillo, FCD	21, 33	6.62, $66,250
Tristan Bowen, CHV	21, 22 (Home Grown)	6.31, $156,363

Exhibit B: 2012 Re-Entry Draft Players Selected

Player, Team	**Age, 2013 Games Played**	**Salary, 2012 to 2013**
Danny Califf, None	Retired	NA
Colin Clark, Los Angeles Galaxy	29, 11	$110,000 to $80,000
Chad Barrett, New England Revolution	28, 21	$253,333 to $105,000
Connor Casey, Philadelphia Union	32, 31	$400,000 to $175,000
Eric Avila, Chivas USA	26, 28	$158,000 to $120,000
Stephen Keel, FC Dallas	30, 8	$65,000 to $46,5000
Paulo Araujo Jr., Vancouver White-caps	Played in NASL	$65,000 to $60,000
Lovell Palmer, Real Salt Lake	29, 19	$96,250 to $71,500
Dan Gargan, San Jose Earthquakes	30, 8	$88,000 to $88,000
John Thorrington, DC United	34, 14	$170,000 to $150,000
Will Hesmer, NONE	Retired	NA
Hunter Freeman, New York Cosmos	Left MLS	NA
Ty Harden, San Jose Earthquakes	29, 7	$98,666 to $68,415
Brian Jorden, BSV Schwarz-Weiß Rehden	Left MLS	NA

THE FAILURE OF THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

Matthew D Mills*

ABSTRACT

For the last fifty years, the federal government has been aggressively battling illegal gambling by enacting legislation. The most recent act, The Professional and Amateur Sports Protection Act (PASPA), prohibits states from authorizing and licensing sports gambling. New Jersey recently challenged the constitutionality of PASPA, in *NCAA v. Governor of N.J.,* where the Third Circuit held that nothing in PASPA offends the United States Constitution. Though New Jersey has appealed the Third Circuit's ruling to the United States Supreme Court, there has been no indication whether the Supreme Court will grant a writ of certiorari.

This Comment will explore the likelihood of the United States Supreme Court granting New Jersey a writ of certiorari. It will take a detailed look into the flawed legal reasoning relied upon by the Third Circuit in *NCAA v. Governor of N.J.*, while explaining how PASPA is unconstitutional. After exposing PASPA's inefficiencies and the harms it poses, this Comment will conclude with a suggested beneficial structure to control and capitalize on sports gambling.

INTRODUCTION

The Professional and Amateur Sports Protection Act ("PASPA") [1] is unconstitutional, ineffective, and counter-

*The author is a December 2014 Juris Doctor candidate at the University of Mississippi School of Law. He received his Bachelors degree from Western Michigan University in 2012. He wishes to thank his family and friends for their constant love in support in all that he does. The author wishes to note that the arguments made here are not meant to persuade individuals to gamble, but rather expose the constitutional issues raised by, and the repercussions of PASPA.

productive. Enacted in 1992, PASPA makes it a federal crime for states to license sports gambling.[2] Congress passed PASPA with the intent of prohibiting state authorized sports gambling.[3] Rather than being concerned with the moral issues of gambling or the potential detriment gambling poses to society, Congress' concern was "the integrity of, and public confidence in, amateur and professional sports."[4] Congress believed that the legalization of sports gambling would increase the number of people who engage in sports betting and, in turn, lead to suspicion over controversial plays causing fans to believe games were being influenced by outside sources.[5] While PASPA may have been passed with admirable intentions, it nevertheless offends the Constitution, is redundant, and is detrimental to state economies, while being economically beneficial to criminals.

Part I of this Comment will examine how PASPA violates the Constitution by analyzing commandeering and equal sovereignty principles. Part II focuses on the inefficiency of PASPA through inspecting both the lack of impact the act has had on sports betting, as well as identifying the devices already preserving the integrity of sports. Part III highlights the harms caused as a result of PASPA. Finally, Part IV suggests a viable alternative to PASPA.

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[1] 28 U.S.C. § 3701 et seq. (1992). The main provision in PASPA essentially states neither a state nor an individual may "sponsor, operate, advertise, or promote . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." NCAA v. Governor of N.J., 730 F.3d 208, 215-16 (3d Cir. 2013) (citing 28 U.S.C. § 3702).

[2] *Governor of N.J.*, 730 F.3d at 214-15.

[3] *Id*. at 216 (citing S. REP. NO. 102-286, at 4 (1991) *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555).

[4] *Id*.

[5] *Id*.

I. PASPA IS UNCONSTITUTIONAL

A. Background

The case, *NCAA v. Governor of N.J.*,[6] was recently brought before the Third Circuit of the United States. Here, New Jersey passed its own sports wagering law.[7] The major professional sports leagues immediately brought a lawsuit, claiming New Jersey is prohibited, by PASPA, from allowing legal sports wagers.[8] In the suit, New Jersey attacked the constitutionality of PASPA.[9] Specifically, New Jersey contended that PASPA's ban on the authorization of sports betting commandeers states, and that "equal sovereignty" is violated by PASPA's allowance of four states to license sports gambling while banning forty-six from doing so.[10]

The Third Circuit found PASPA does not commandeer state legislatures because it does not affirmatively force states to enact a law.[11] While emphasizing the "choices" PASPA offers, the court explained PASPA simply forces states to choose between

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[6] *Id*. at 214

[7] Jordan Hollander, Recent Development, *Ball's in the Supreme Court's Court: Update of New Jersey's Sports Betting Lawsuit*, RUTGERS J.L.& PUB. POL'Y., Mar. 20, 2014, http://www.rutgerspolicyjournal.org/balls-supreme-courts-court-update-new-jersey's-sports-betting-lawsuit (citing *New Jersey Election Results - Other*, STAR-LEDGER (Nov. 9, 2011, 3:55 PM), http://www.nj.com/starledger/results-ballot/). Like many states, New Jersey was looking to enhance state revenue. Prior to New Jersey's attempt to legalize sports gambling, the New Jersey Legislature heard testimony that sports gambling would not only suppress the illegal sports-wagering market but also greatly enhance state revenue. *Governor of N.J.*, 730 F.3d at 217.

[8] *Governor of New Jersey,* 730 F.3d at 214.

[9] *Id.* New Jersey also challenged the League's standing and injury. *Id.* To establish standing, a plaintiff must show (1) "injury in fact," (2) causation, and (3) redressability of the injury. Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009). The Third Circuit unanimously found the Leagues have standing because the legalization of sports betting will cause the Leagues reputational harm, which may be remedied in court. 730 F.3d at 220.

[10] *Id.* at 214.

[11] *Id.* at 227.

having unauthorized sports gambling or banning sports gambling.[12] The court stated that "equal sovereignty" is not offended because the Commerce Clause is aimed at finding national solutions that may affect states differently.[13] It held in a 2-1 ruling that, "nothing in PASPA violates the U.S. Constitution."[14]

On February 12, 2014, New Jersey filed a petition for certiorari to the United States Supreme Court.[15] To date, there has been no indication whether the Supreme Court will hear the case. However, only four of nine Supreme Court Justices votes are needed to grant certiorari, [16] and the Court's recent anti-commandeering rulings in *New York v. United States*,[17] coupled with Justice Ginsberg's recent dissent in *Shelby County v. Holder*,[18] suggest there may be an increased likelihood in the United States Supreme Court hearing the case.[19] If the Supreme Court does decide to hear *NCAA v. Governor of N.J.*,[20] it will likely find PASPA unconstitutional.

[12] *Id.* at 233.
[13] *Id.* at 238.
[14] *Id.* at 240-41. The court expanded explaining PASPA "neither exceeds Congress' enumerated powers nor violates any principle of federalism implicit in the Tenth Amendment." *Id.* at 240.
[15] Hollander, *supra* note 7 (citing Ryan Hutchins, *NJ Appeals Sports Betting Case to U.S. Supreme Court*, STAR-LEDGER (Feb. 18, 2014, 1:17 PM), http://www.nj.com/politics/index.ssf/2014/02/nj_appeals_sports_betting_case_to_us_supreme_court.html; *see also* Petition for a Writ of Certiorari, *Governor of N.J.*, F.3d 208 (No. 13-967)).
[16] *Id.* (citing Donnelly v. DeChristoforo, 416 U.S. 637, 648 (1974) (Stewart, J., concurring) ("We are bound here, however, by the 'rule of four.' That rule ordains that the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits.").
[17] *Id.* (citing New York v. United States, 505 U.S. 144 (1992)).
[18] 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J. dissenting).
[19] *See* Hollander, *supra* note 7 (citing Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (Ginsburg, J. dissenting)).
[20] 730 F.3d 208, 214 (3rd Cir. 2013).

B. Congress is Not Authorized to Regulate How States Regulate Sports Gambling

When the Third Circuit heard *Governor of N.J.*, Judge Vanaskie stated in his dissent that PASPA is an "unconstitutional exercise of congressional authority."[21] Rather than being a federal statute that directly regulates interstate commerce, as permitted by the Commerce Clause, PASPA does not allow states to authorize sports gambling.[22] Not allowing a state to authorize an activity is the equivalent of controlling how a state treats that activity.[23]

In *New York v. United States,* the United States Supreme Court held a federal law unconstitutional because "the Act commandeer[ed] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program."[24] The Framers of the Constitution gave "Congress the power to regulate individuals, not States."[25] This does not mean Congress cannot encourage a state to regulate in a certain way, but the Commerce Clause only authorizes Congress to regulate interstate commerce directly, it does not authorize Congress to regulate the "state governments' regulation of interstate commerce."[26] Further, nothing in *New York* limited federalist principles to instances where Congress required an affirmative act to be done by the states.[27] Rather, the Court in *New York* stated "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel

[21] *Id.* at 241 (Vanaskie, J., dissenting).
[22] *Id.*
[23] *Id.*
[24] *New York*, 505 U.S. 144, 176 (1992) (citing Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288) (1981) (emphasis original)).
[25] *Id.* at 166.
[26] *Id.*
[27] *Governor of New Jersey*, 730 F.3d at 245 (Vanaskie, J., dissenting) (citing *New York*, 505 U.S. at 166).

the States to require or prohibit those acts."[28] Acts are commandeering when it directly compel states to enforce a federal regulatory program.[29]

PASPA controls how states are forced to regulate interstate commerce,[30] which goes against the finding in *New York* that the federal government cannot regulate the state governments' regulation of the state's interstate commerce.[31] The fact that PASPA does not affirmatively direct states to regulate, technically the prohibited states can continue to have unregulated gambling,[32] is not fatal to New Jersey's "commandeering" argument. PASPA "dictates how [states] must regulate sports gambling"[33] by requiring "federal policy . . . telling the states that they may not regulate an otherwise unregulated activity"[34] and that is enough to be unconstitutional when analyzed under the proper authority.

There is no distinction between the federal government compelling state governments to create or enforce laws, and the federal government restricting state governments from creating or enforcing laws,[35] as the federal government is doing with PASPA. In both instances, the federal government is overstepping its boundaries and violating states' rights. Allowing the federal government to force states to decide between allowing unregulated sports gambling and prohibiting all sports gambling is in violation of the Constitution.[36]

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[28] *New York*, 505 U.S. at 166 (citing FERC v. Mississippi, 456 U.S. 742-66 (1982); Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288-89 (1981); Lane County v. Oregon, 74 U.S. 71, 76 (1868)).
[29] *Hodel*, 452 U.S. at 288 (1981) (internal citations omitted).
[30] *Governor of New Jersey*, 730 F.3d at 245 (Vanaskie, J., dissenting) (citing *New York*, 505 U.S. at 166).
[31] *New York*, 505 U.S. at 166.
[32] *Governor of New Jersey*, 730 F.3d at 233.
[33] *Id.* at 249 (Vanaskie, J., dissenting) (emphasis original).
[34] *Id*.
[35] *Id*. at 251.
[36] *Id*.

C. "Equal Sovereignty" is Offended When Four States are Permitted to License Sports Gambling While Forty-Six are Not

Shelby County v. Holder[37] was heard before the United States Supreme Court just months prior to the Third Circuit hearing *Governor of N.J.*[38] In *Shelby County*, the Supreme Court held a key part of the United States Voting Rights Act of 1965 unconstitutional because it forced some, but not all, states to obtain federal permission before enacting or changing any voting law.[39] The Court made their ruling on the grounds that the 1965 law offended well-established principles of equal sovereignty.[40] One factor mentioned in the opinion, was that there was much more parity in both voter turnout and minorities in state offices in the South.[41] Further, there was considerable federal legislation already protecting the same issue; therefore, the United States Supreme Court found federal legislation easier to overturn.[42] Essentially, the federal voting requirement in question was redundant and outdated. The Supreme Court noted, "If Congress had started from scratch [presently], it plainly could not have enacted the present [federal law]."[43] The Court continued to emphasize this point by stating there is no reason to preserve legislation merely because it was previously necessary.[44]

In *Governor of N.J.,*[45] the Third Circuit utilized the equal sovereignty analysis from *Shelby County*.[46] It's interpretation of the

[37] 133 S.Ct. 2612 (2013).
[38] 730 F.3d. 208 (2013).
[39] 133 S.Ct. at 2630, 2631.
[40] *Id*. at 2630.
[41] *Id*. at 2618, 2626.
[42] *See id*. (Thomas, J., concurring).
[43] *Id.* at 2630 (alteration in original). Evidenced by the actions of the New Jersey Legislature, if Congress were to attempt to enact PASPA now, it is not likely they would be as successful.
[44] *Id*. PASPA is not only unnecessary, it is unwanted. I believe that if PASPA were to be held unconstitutional, New Jersey would be one of many states to legalize sports gambling.
[45] *Governor of N.J.*, 730 F.3d 208.

voting rights in *Shelby County*[47] is crucial to New Jersey's argument that PASPA analogously violates states' right to equal sovereignty.[48] The Third Circuit distinguished the two cases, finding the regulation of gambling through the Commerce Clause distinguishable from the regulation of elections under the Reconstruction Amendments, stating, voting rights are "fundamentally different from PASPA,"[49] in that, "the Framers of the Constitution intended the States to keep from themselves . . . the power to regulate elections."[50] The Third Circuit continued their broad interpretation of the Commerce Clause, by explaining that there are multiple scenarios outside of correcting local evils where departure from equal sovereignty is allowed.[51]

The Court, in *Governor of N.J.*,[52] misinterpreted the reasoning behind the holding of *Shelby County*.[53] In *Shelby County*, the legislation in question forced some, *but not all*, states to enforce a federal law[54] similar to the requirements of PASPA.[55] Gambling may have been prohibited in forty-six states at the time of the enactment of PASPA,[56] but much has since changed regarding the amount of money wagered each year,[57] as well as the economic situations of most states. As in *Shelby County*,[58] there is already

[46] 133 S.Ct. 2612 (2013).
[47] *Id*.
[48] *Governor of N.J.*, 730 F.3d at 237 (citing Shelby County v. Holder, 133 S. Ct. 2612 (2013)).
[49] *Id*. at 238.
[50] *Id*. (citing *Shelby Cnty.* 133 S.Ct. at 2623, 2624).
[51] *Id.* at 239.
[52] NCAA v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013)
[53] Shelby County v. Holder, 133 S. Ct. 2612 (2013).
[54] *Id.* at 2618 (emphasis added).
[55] *Governor of N.J.* 730 F.3d at 214-16.
[56] *Id*. at 215.
[57] *Sports Wagering*, AM. GAMING ASS'N, http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering (last visited Apr. 9, 2014). The American Gaming Association is the leading voice in the casino industry. *Id.* (follow hyperlink "About" and then "Membership").
[58] Shelby County v. Holder, 133 S. Ct. 2612 (2013).

federal legislation that accomplishes the purpose of PASPA. "Section 1084 of Title 18 of the United States Code makes it a federal crime to use wire communications to transmit sports bets in interstate commerce unless the transmission is form and to a state where sports betting is legal."[59] Additionally, there is a federal law that makes it a crime to influence or attempt to influence any sporting contest.[60] As such, it is not necessary to continue to enforce PASPA.

Justice Ginsburg, in her *Shelby County* dissent, has essentially explained the holding means PASPA is a law that discriminates between states.[61] If the Supreme Court were to hear *NCAA v. Governor of N.J.*,[62] it would likely analyze equal sovereignty principles differently than the Third Circuit, as it did in *Shelby County*, and rule that PASPA violates both equal sovereignty and commandeering principles.

II. PASPA IS INEFFECTIVE

The Judiciary Committee's report supporting PASPA states that the Act's purpose is to prohibit sports gambling and to maintain the integrity of sports.[63] The PASPA legislation has been futile in accomplishing Congress' goal.[64] If the United States Supreme Court does not rule PASPA unconstitutional, Congress should enact legislation repealing PASPA because it is inefficient and redundant.

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[59] *Governor of N.J.*, 730 F.3d at 247 (Vanaskie, J., dissenting).
[60] *Id*.
[61] Hollander, *supra* note 7 (citing *Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J. dissenting).
[62] 730 F.3d 208 (2013)
[63] *Id.* at 216 (citing S. REP. NO. 102-248, at 4 (1991) *reprinted in* 1992 U.S.C.C.A.N. 3553).
[64] *Sports Wagering*, AM. GAMING ASS'N, http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering (last visited Nov. 15, 2014). The sports bets placed legally in Nevada represent less than one-percent of all sports bets nationwide. *Id.*

A. PASPA Has Not Significantly Reduced Sports Gambling

Despite the widespread ban on sports gambling, the overwhelming majority of sports bets are illegal.[65] In a study conducted in 2012 by the American Gaming Association, it was found that "Nevada's legal sport wagering represents less than one percent of all sports betting nationwide."[66] The same study found that $3.5 billion dollars were legally wagered in Nevada, while the "National Gambling Impact Study Commission estimated illegal sport wagers amount to as much as $380 billion annually."[67] About twenty years after the enactment of PASPA, there still remains a large number of bets and an incredible amount of money being wagered illegally. This is conclusive evidence that PASPA has not proved to be a useful deterrent in Congress' war against sports gambling.

B. PASPA is Redundant

PASPA does not provide sports leagues with any meaningful protection that was not already in place when it was enacted.[68] During the 1950's, organized crime became the major operator of sports gambling.[69] The mob was able to connect bookies from the East Coast to the West Coast, which greatly expanded the organized crimes' monopoly on sports gambling.[70] After intense pressure from the Justice Department in the early 1960's, Congress began to pass legislation with the intent to hinder sports gambling.[71] Prior to PASPA, the federal government enacted the Wire

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[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *See* Brian Tuohy, *Why Sports Gambling Should be Legal*, SPORTS ON EARTH, http://www.sportsonearth.com/article/62954908/ (last visited Apr. 21, 2014).
[69] *Id*.
[70] *Id.* ("The mob set up a national lay-off system in the 1950s, connecting bookies in major cities. It smoothed out the process, while maximizing the financial return."). *Id*. This system continues today, allowing organized crime to maximize gambling profits. *Id*.
[71] *Id*.

Act[72] in 1961, which outlawed the use of wire communications in gambling, unless the transmission was between states where sports betting was legal, and the Sports Bribery Act[73] in 1964, which made it a federal crime to bribe a player, coach, or referee to influence a game.[74] In 1970 during the Nixon Administration, Congress enacted the Organized Crime Control Act[75], making a violation of state gambling law a federal crime, while adding gambling to the crimes that could authorize a wiretap.[76] These are a few of the many federal acts that provide the same essential protections in preserving the integrity of sports as PASPA.

Even without legislation, individual sports leagues have an enormous incentive to prevent outside influence of games.[77] Leagues stay in business because they capture the interest of fans and fans are interested because their desire to see competitive gamesmanship. If a league had a game fixed, the harm would be extremely detrimental.[78] If a league consistently had games fixed, the harm may be fatal. If leagues were unable to provide untarnished, pure games, the league would lose its legitimacy and in turn, lose its fans. Leagues recognize this and utilize their resources to self-regulate without direction from the federal government.[79]

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[72] 18 U.S.C.A. §§ 1081-1084 (West 2014).
[73] 18 U.S.C.A. § 224 (West 2014).
[74] Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 247 (3d Cir. 2013).
[75] 18 U.S.C.A. § 1961 *et seq.* (West 2013).
[76] Nelson Rose, *Anti-Sports Betting Law*, GAMBLING AND THE LAW, http://www.gamblingandthelaw.com/index.php/columns/57-146antisportsbettinglaw (last visited Apr. 9, 2014). Professor Nelson I. Rose is a Distinguished Senior Professor at Whittier Law School. He is a leading authority on gambling law with more than 1,500 published works. *Id.*
[77] BRIAN TUOHY, LARCENY GAMES: SPORTS GAMBLING, GAME FIXING AND THE FBI 68 (2013).
[78] *Id*. at 70.
[79] Tuohy, *supra* note 68.

Every player in Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League is required to sign a Collective Bargaining Agreement, which prevents the members of each respective league from gambling on their own sport.[80] The language and punishment utilized in each league vary but they all aim at deterring players from gambling.[81] Also, the above named leagues all employ a Security Division to monitor individuals and teams to ensure the players and coaches do not partake in conduct that is detrimental to the league.[82] These Security Divisions have been more than effective, as they are often staffed with former members of the FBI, CIA, DEA, and Secrete Service.[83] Major League Baseball has not admitted a fixed game since 1919, no National Hockey League player is known to have thrown a game since the 1940s, the National Basketball Association states it has not had points shaved since 1954, and the National Football League claims not a single game has been influenced.[84]

There is a direct correlation between the legalization of sports gambling and the level of integrity within sports. If more states were to legalize gambling, there would causally be more integrity in sports.[85] The legalization of sports gambling would also result in an increase of oversight on the sports leagues.[86] Not only would the leagues be under more scrutiny, but they would also have an increase in the reliability of one of their most useful

[80] *Id*.
[81] *Id*.
[82] TUOHY, LARCENY GAMES: SPORTS GAMBLING, GAME FIXING AND THE FBI, *supra* note 77, at 62.
[83] *Id*.
[84] Tuohy, *supra* note 68. Tuohy reminds his readers that infamous basketball referee, Donaghy, "was not arrested or convicted of fixing a game" referring to the National Basketball Association's claim about points shaving. *Id*.
[85] *Id*.
[86] *Id*.

instruments in detecting outside influence within a game, the Las Vegas odds.[87]

The Security Division of each league monitors the odds set, legally, in Las Vegas.[88] They look for unnatural changes in the odds, as these changes often indicate the presence of an outside influence.[89] The problem the league Security Divisions face is that the Las Vegas odds are solely influenced by money that is bet legally, which is minimal compared to the money that is being bet illegally.[90] If the odds were a representation of all the bets placed on a given event, rather than just the small fraction of legal bets that they are based off, the Security Divisions would be more effective identifying an influenced game. That being said, it is indisputable that increasing the amount of wagers placed legally would only aid the leagues in detecting a potential outside influence.[91]

III. PASPA IS COUNTERPRODUCTIVE

PASPA forbids states from authorizing and licensing sports gambling.[92] This reduces potential state revenue[93] and allows criminals to capitalize on the same revenue opportunity.[94] If the

[87] Tuohy, *supra* note 77 at 58.
[88] *Id*. at 62.
[89] *Id*. at 58-62.
[90] *Sports Wagering*, AMERICAN GAMING ASSOCIATION, http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering. Brian Tuohy has spoken to Las Vegas sports book employees, all of which agreed that the last place a fixer would be betting is Las Vegas considering they can easily hide their bet among the hundreds of billions of dollars being bet illegally, Tuohy, *supra* note 78 at 60. The result is monitoring the Las Vegas odds are not nearly as beneficial to a given league as it would be if gambling were legal. *Id.*
[91] Tuohy, *supra* note 68.
[92] NCAA v. Governor of N.J. 730 F.3d. 208, 214 (3d Cir. 2013) (citing 28 U.S.C. §3701).
[93] Michael Levinson, Comment, *A Sure Bet: Why New Jersey Would Benefit from Legalized Sports Wagering*, 13 MARQ. SPORTS L. REV. 143, 152 (2006).
[94] Tuohy, *supra* note 77 at 42-45.

United States Supreme Court does not rule PASPA unconstitutional, Congress should enact legislation repealing PASPA because it is counter productive.

A. The Elimination of PASPA Would Give States the Opportunity to Enhance Their Revenue

States would benefit if they were able to tax the money wagered on sports games. For example, New Jersey has an eight percent tax on all gross casino revenue.[95] A recent study shows that legalizing sports wagering in Atlantic City casinos would enhance tax revenue by five to eight million dollars annually.[96] The numbers, related to New Jersey here, are not limited to New Jersey. States without casinos could capitalize on the revenue, by allowing and taxing legal gambling at other gambling establishments. It is difficult, if not impossible, to argue against the fact that the legalization of gambling in any given state would greatly enhance state revenue.

States would also generate income indirectly.[97] Gambling establishments not only profit from traditional casino games, they often include restaurants, shops, and hotels.[98] The legalization of sports gambling would attract an entirely new consumer group to casinos. The increase in customers would likely result in the creation of jobs within the casinos. Casinos along with their in-house, ancillary services would undoubtedly benefit economically from the increase in consumers, which would indirectly benefit the state.

[95] Levinson, *supra* note 93 at 152 (citing N.J STAT. ANN. 5:12-144 (West 2005)).
[96] *Id*. (citing N.J. Assembly 3493, 211th Leg., 2004-2005 Leg. Sess. (Jan. 10, 2005)).
[97] *Id.* at 152-53.
[98] *Id*.

B. PASPA Promotes Criminal's Interests

Evidenced by the evolution in federal gambling legislation,[99] gambling is a giant, underground industry that is incredibly difficult to detect and prosecute. The total revenue of Nevada's sports books in 2012 was $170 million, which was generated by $3.45 billion in wagers.[100] The remaining 2012 wagers, an estimated $380 billion, provide criminals revenue at a similar ratio.[101] History shows that the prohibition of victimless vices lead to underground markets where criminals, who are willing to break the law, are able to capitalize. By outlawing sports gambling, the federal government is giving money to criminals.[102] The increase in criminal revenue gives criminals better leverage to convince coaches, players, and referees to influence games.

IV. SOLUTION: LEGALIZE AND PRIVATIZE

If the Supreme Court or Congress determines that sports gambling should be legalized at the discretion of individual states, the next question would be whether the public or private sector should control it.

A. The Public Sector Should Not Risk It

When taking bets, the bookie's job is to set the odds so that an equal amount of money is bet on each team.[103] When the money is even, the bookie benefits because the winners are paid the losers' money and the bookie profits from taking their percentage called

[99] Nelson Rose, *Anti-Sports Betting Laws*, GAMBLING AND THE LAW, http://www.gamblingandthelaw.com/index.php/columns/57-146antisportsbettinglaw. (last visited Apr. 9, 2014).
[100] *Sports Wagering*, AMERICAN GAMING ASSOCIATION, http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering
[101] If the illegal wagers placed in Nevada were placed legally, Nevada would have generated an additional $18.72 billion in revenue. *Sports Wagering*, *supra* note 57.
[102] *See generally* Touhy, *supra* note 77, at 42-45.
[103] Touhy, *supra* note 77, at 26.

the "vig."[104] However, when the money is unbalanced, the bookies are at risk.[105] They may get lucky and have the team with the lesser amount of money wagered on them win, giving them a surplus of money to distribute amongst few winners. Yet, they could just as easily find themselves in the opposite scenario, without enough money to distribute amongst a large amount of winners. When the money is unbalanced the bookies are unable to transfer the bettor's money amongst the bettors, which results in the bookie being responsible for paying off the debts with their own funds.

If a state were to take the place of the bookie the state would then be susceptible to losing a large amount of money on a continual basis.[106] A potential headline in the Wall Street Journal could read, "The State of New York Loses 200 Million Dollars on the Jets Game."[107] This danger would be present during every sporting event and the public sector should not take that risk.

B. The Private Sector is Equipped to Control Sports Gambling

If a state were able to legalize gambling, private companies should be allowed to risk their own money in the gambling market. After all, it is much less detrimental to society to have a private company go bankrupt compared to a state. Despite the potential risks, it is likely that many private entrepreneurs would be willing to enter this industry, as they have been in Las Vegas for quite some time.

Allowing privatized sports betting and enhancing the public sector's revenue are not mutually exclusive. No state would legalize gambling without being able to increase its revenue. States

[104] The "vig" or "juice" is the fee bookies charge on every wager. Originally the fee was around twenty percent of the total bet (a $6 wager has a chance to win $5). Today, the standard is ten percent (an $11 wager has a chance to win $10). Touhy, *supra* note 77, at 26.
[105] Touhy, *supra* note 77, at 26.
[106] Touhy, *supra* note 77, at 351 (quoting Schettler).
[107] Touhy, *supra* note 77, at 351 (quoting Schettler).

would likely tax each and every bet and do so at a high rate.[108] A high state tax rate on sports gambling would be a viable concession made in the process of legalizing sports gambling. Also, as discussed, the states would benefit indirectly as well.[109]

CONCLUSION

PASPA is unconstitutional as it violates commandeering and equal sovereignty principles. Despite recent case law[110] and Justice Ginsberg's mention of the potential demise of the Act,[111] there is no guarantee that the United States Supreme Court will grant a writ of certiorari to *Governor of N.J.* And even if the Supreme Court does decide to hear the case, it may uphold the Third Circuit's ruling. If this happens, Congress should pass legislation repealing PASPA.

PASPA has yet to prove itself effective. The purpose of PASPA is to limit gambling and protect the integrity of sports.[112] However, it has been twenty years since PASPA's enactment and legal gambling is still dwarfed by illegal gambling.[113] Prior to PASPA, there was already federal legislation[114] and league Security Divisions, each have been successful in preventing the outside influence of games.[115]

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[108] Levinson, *supra* note 93, at 152 (citing N.J. Stat. Ann. 5:12-144 (West 2005)).
[109] Levinson, *supra* note 93, at 152-153.
[110] *See generally* New York v. United States, 505 U.S. 144 (1992); *See generally* Shelby Cnty. v. Holder, 133 S.Ct. 2612 (2013).
[111] *See generally Shelby Cnty.*, at 2632 (Ginsburg, J., dissent).
[112] Nat'l Collegiate Athletic Assoc. v. Governor of N.J., 703 F.3d 208, 216 (2013) (citing S. REP. NO. 102-286, at 4 (1991)) (*reprinted in* 1992 U.S.C.C.A.N. 3553).
[113] *Sports Wagering*, *supra* note 57.
[114] Nelson Rose, *Anti-Sports Betting Laws*, GAMBLING AND THE LAW, http://www.gamblingandthelaw.com/index.php/columns/57-146antisportsbettinglaw (last visited Apr. 9, 2014).
[115] Touhy, *supra* note 77, at 62.

PASPA is counter-productive. It prevents states from enhancing revenue,[116] while enabling criminals.[117] Under PASPA, organized crime has a monopoly on the highly lucrative sports gambling trade. The increase in criminal revenue allows criminals to gain greater leverage to motivate coaches, players, and referees to influence a game.

Deciding whether or not to legalize gambling is a decision best left to each individual state. And where gambling is legalized, it is a business best run by the private sector. By legalizing and privatizing sports gambling both the integrity in sports, and the revenue of the public sector will increase directly and indirectly.

[116] *See* Levinson, *supra* note 93, at 152.
[117] Touhy, *supra* note 77, at 42-25.

TRANSFORMATIVE USE TEST CANNOT KEEP PACE WITH EVOLVING ARTS

The Failings of the Third and Ninth Circuit "Transformative Use" Tests at the Intersection of the Right of Publicity and the First Amendment

Geoffrey F. Palachuk*

I. FIRST DOWN: Introductions

A. The Virtual World at Risk

Today, human beings choose to escape reality in diverse, entertaining, and visually stunning ways. Films, music, and television have been immersive vehicles for reality-escaping experiences for decades.[1] In addition to these forms of media, video games have grown from a relatively niche market into a household staple. The video game market has grown into a multi-billion dollar indus-

* Intellectual Property and Corporate Litigation Associate at Paine Hamblen, LLP in the Pacific Northwest. University of Oregon, B.S. 2009; University of Notre Dame Law School, J.D. 2014. I would like to thank Professor Mark McKenna for his guidance and feedback throughout the drafting of this Note. You have always provided direct and realistic advice, in this and many other endeavors. Without you, this Note would not have been possible. I would also like to thank my mother, who has been a constant source of support and love. Your confidence and courage will guide me throughout my legal career. I can only hope to meet and exceed your expectations.

[1] *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952)); Southeastern Promotions, Ltd. v. Conrad 420 U.S. 546, 547-48 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205, 206 (1975); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)); Jenkins v. Georgia, 418 U.S. 153, 161 (1974); Schacht v. United States, 398 U.S. 58, 63 (1970).

try, exceeding twenty-one billion in revenue in 2013.[2] Fifty-nine percent of American households play video games,[3] and the average game-player is thirty-one years old and has been playing video games for approximately thirteen years.[4] The top video game companies include the likes of Sega (Sonic), Nintendo (Mario), Ubisoft (Assassin's Creed), Konami (Dance Dance Revolution), Square Enix (Final Fantasy), Electronic Arts (Madden Football), Blizzard (Warcraft), and Microsoft (Halo).[5] To be sure, video games are no longer "child's play," with enormous industry shares at stake, and companies with massive intellectual property portfolios.

Just as in films, music, and television, video games allow users to experience alternate realities and temporarily exist in other worlds. Intuitively, all those mediums constitute expressions protected by the First Amendment.[6] The Supreme Court has held that video games are entitled to the full protections of the First

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[2] Malathi Nayak, *FACTBOX - A Look at the $66 Billion Video-games Industry*, REUTERS, (June 10, 2013), *available at* http://in.reuters.com/article/2013/06/10/gameshow-e-idINDEE9590DW20130610.

[3] ENTM'T SOFTWARE ASS'N, INDUSTRY FACTS (2013), *available at* http://www.theesa.com/about-esa/industry-facts/.

[4] *Id.*

[5] Dan Wilson, *The World's Most Successful Video Game Companies*, THERICHEST.COM, (December 10, 2013), *available at* http://www.therichest.com/business/the-worlds-most-successful-video-game-companies/.

[6] U.S. CONST. amend. I; The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*; s*ee also* Winters v. New York, 333 U.S. 507, 510 (1948). In *Winters*, the Supreme Court held that so long as entertainment media is capable of expression, then it is protected under the First Amendment of the United States. In that case, the Court also ruled that no clear line exists between information and entertainment ("The line between the informing and the entertaining is too elusive for the protection of that basic right . . . Though we can see nothing of any possible value to society in [these forms of media], they are as much entitled to the protection of free speech as the best of literature."). *Id.*

Amendment.[7] Those rights are not absolute, and states may recognize the right of publicity to a degree consistent with the First Amendment.[8] The right of publicity, in short, is one's right to protect his or her identity, "image and likeness," and representations in a commercial setting.[9] (That definition is an obvious oversimplification, and will be discussed in more detail below.)

It is plain to see, then, iconic role-playing fantasy games like *The Elder Scrolls V: Skyrim* do not implicate right of publicity issues, but games such as the worldwide hits *Guitar Hero* and *Rock Band*, which have arguably attempted to imitate real bands or musicians, might create a cause of action for certain band's rights of publicity. Similarly, Cloud Strife from the legendary *Final Fantasy VII* may not run afoul of the right of publicity, where games based on actual college or university athletes might. The looming policy questions remains: whether slightly fanciful depictions of real people, or *intentionally* realistic depictions of real people, should receive protection from the First Amendment at all. Conversely, should the First Amendment trump a person's right of publicity? When, and under what circumstances?

Recent Third and Ninth Circuit jurisprudence[10] has muddied the waters in extremely nuanced ways for those trying to determine where, in First Amendment defenses that implicate the right of publicity, the "line between informing and entertaining is too elusive."[11] The recent case law further complicates the question whether First Amendment protection should or should not be

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[7] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733, 180 L. Ed. 2d 708 (2011) ("Like protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world."); *see* U.S. CONST., amend. I.

[8] Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 574-75 (1977).

[9] For a thorough explanation of the "right of publicity," *see* Section II.A.1, *infra*.

[10] *See* Hart v. Elec. Arts, Inc., 808 F. Supp. 2d 757, 762 (D.N.J. 2011), *rev'd,* 717 F.3d 141 (3d Cir. 2013); In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013) [Hereinafter "*In re NCAA*"].

[11] *Winters*, 333 U.S. at 510.

afforded to a particular artistic medium in a particular instance.[12] The decisions render a myriad of possible outcomes for future cases in determining what test courts should apply for right of publicity claims, and how those tests will be applied.[13]

One issue raised above exists at the intersection of the First Amendment and the right of publicity tort. The right of publicity affords an economic right in one's name and likeness, so that one may "profit from the full commercial value of their identit[y]."[14] Some commentators question the validity of the justifications for a "right of publicity" altogether.[15] Nevertheless, right of publicity

[12] In *In re NCAA*, *supra* note 10, Judge Sidney Thomas acknowledged the balance broken by the majority in the opinion. He argued "the right to compensation for the misappropriation for commercial use of one's image or celebrity is far from absolute. In every jurisdiction, *any right of publicity must be balanced against the Constitutional protection afforded by the First Amendment*." *Id*. at 1284 (Sidney, J., dissenting) (emphasis added). He also argued that the majority failed to examine the "transformative and creative elements in the video game as a whole . . . [which] contradicts the holistic analysis required by the transformative use test." *Id.* at 1284-85 (citations omitted).

[13] On July 31, 2013, the Ninth Circuit issued two different decisions rendered by the same panel. In one, a former college football player filed putative class action lawsuit against a video game manufacturer, which allowed users to control avatars representing college football and basketball players as those avatars participated in simulated games, alleging violations of class members' rights of publicity. The court held that the First Amendment did not protect the video game developer's use of the likenesses of college athletes in its video games. *In re NCAA*, *supra* note 10. In the other case, a former professional football player sued video game manufacturer, alleging, *inter alia*, that the manufacturer violated Lanham Act by using his likeness in series of football video games. The court affirmed the lower court in dismissing the action, and applied a different test to the Lanham Act claim. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1239 (9th Cir. 2013). For further discussion, *see* Section II.B and C, *infra*.

[14] Cardtoons L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 968 (10th Cir. 1996).

[15] *See, e.g.*, Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1188 (2006); Michael Madow, *Private Ownership of Public Image: Popular Culture & Publicity Rights*, 81 CAL. L. REV. 127, 238 (1993); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903, 911 (2003).

lawsuits have proliferated in recent decades. Musicians, filmmakers, authors, artists, and video game manufacturers have all been subjects of right of publicity actions for depicting celebrities in their respective mediums.[16] Courts have struggled to reconcile the right of publicity with the protections afforded by the First Amendment.[17]

The right of publicity, by its own terms, implicates video games among other forms of media. But to what extent do video games require the protections afforded by the First Amendment? The current lawsuits "ha[ve] the potential to reform collegiate athletics and the relationship between the NCAA and student-athletes for better or worse."[18] Indeed, applications of the "transformative use" test in First Amendment defenses of right of publicity claims has fractured a delicate balance between expression and exploitation.

Note, however, that the current NCAA lawsuits simply serve as red herrings to the larger issue at the intersection of First

[16] *See, e.g.*, Parks v. LaFace Records, 329 F.3d 437 (6th Cir. 2003) (OutKast song lyrics); Valentine v. C.B.S., Inc., 698 F.2d 430 (11th Cir. 1983) (Bob Dylan song lyrics); Seale v. Gramercy Pictures, 949 F. Supp. 331 (E.D. Pa. 1996) (feature movie and book about the Black Panther Party); Ruffin-Steinback v. dePasse, 82 F. Supp. 2d 723 (E.D. Mich. 2000), *aff'd,* 267 F.3d 457 (6th Cir. 2001) (television miniseries about the Temptations); Tyne v. Time Warner Entm't Co., L.P., 901 So. 2d 802 (Fla. 2005) (movie about a shipwreck); Matthews v. Wozencraft, 15 F.3d 432 (5th Cir. 1994) (fictionalized, but accurate, book about a police officer); Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001) (magazine using image of Dustin Hoffman); Hilton v. Hallmark Cards, 599 F.3d 894 (9th Cir. 2010) (Paris Hilton image in greeting card); Kirby v. Sega of Am., Inc., 144 Cal. App. 4th 47 (2006) (video game); No Doubt v. Activision Publ'g, Inc., 192 Cal. App. 4th 1018 (2011) (video game); Martin Luther King, Jr. Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc., 296 S.E.2d 697 (Ga. 1982) (bust of Martin Luther King, Jr.); ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915 (6th Cir. 2003) (painting of Tiger Woods); John Broder, *Schwarzenegger Files Suit Against Bobblehead Maker*, N.Y. TIMES (May 18, 2004), *available at* http://www.nytimes.com/2004/05/18/national/18arnold.html.

[17] *See, e.g.*, *supra* note 16 and cases cited therein.

[18] Tristan Griffin, Note, *Payment of College Student-Athletes at Center of Legal Battles*, 75 TEX. B. J. 850, 851 (2012).

Amendment protection and right of publicity claims. Consider the portrayal of Mark Zuckerberg's "image and likeness" in the recent film *The Social Network*, or the portrayal of real World War II veterans in the HBO miniseries *Band of Brothers*. Can film, documentaries, and artistic works depicting real people be subject to the "transformative use" test described by the Ninth and Third Circuits? The issue has been considered in brief, and future outcomes are unpredictable. Thus, the issue appears ripe for Supreme Court clarification.

This Note will briefly examine the *Hart* and *Keller* decisions, not only because those cases may soon provide Supreme Court guidance in balancing First Amendment defenses in right of publicity actions, but also because those cases will affect the future of colleges and universities as sports franchises. If the Supreme Court takes up the right of publicity issue decided by the Third[19] and Ninth[20] Circuits, the Court will probably reverse the holdings enumerated by those courts, and will refuse to apply the "transformative use" test. The Supreme Court would likely reason that the First Amendment defenses raised by the NCAA shield it from liability for rights of publicity claims raised by college and university student-athletes, and that strong public policy considerations and NCAA self-governance controls should not permit the NCAA to compensate former college and university student-athletes. The claims involving the Sherman Act and possible antitrust violations, and the plaintiffs' unjust enrichment arguments will not be addressed in this Note.

The chief concern of this Note will be to (1) analyze the Third and Ninth Circuit decisions that could render college and university student-athletes compensable for their image and likeness in video games, (2) evaluate the tests for First Amendment defenses in right of publicity claims, and (3) determine the best test for evaluating right of publicity claims in a diverse, rapidly-evolving technological world. The transformative use test (dis-

[19] Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013).
[20] *In re NCAA*, *supra* note 10.

cussed in Section III.C, *infra*), as fashioned by the Third and Ninth Circuits, is not the correct test. That test will result in incoherent and inconsistent application, and chill First Amendment protections granted by the United States Constitution. This Note stands for the proposition that the *Rogers*[21] test (discussed in Section III.A, *infra*) is the best way for the courts to backstop state right of publicity claims with First Amendment protection, and provide a bright-line rule that can be applied coherently and predictably.

Throughout the next two subsections, I will provide a brief background of the "players" involved in the NCAA litigation, as well as the EA Sports video game franchise. My analysis of the cases above begins at Section II. Each of the relevant tests fashioned by the courts will be examined in Section III. Finally, Section IV will conclude this Note.

B. The Players: EA Sports No Longer "In The Game"

Any male with a pulse and a penchant for study-breaks or lazy days off should be able to explain the basics of the Electronic Arts' ("EA") *NCAA Football* video game. As the game system powers on, the famous EA Sports tagline rings out: "EA Sports… It's in the game." But, is it? Not in this lawsuit. Not anymore.

On September 26, 2013, EA Sports and Collegiate Licensing Company ("CLC") settled with a class of athletes ranging from two hundred thousand to three hundred thousand for forty million dollars.[22] Further, EA Sports announced that it would not publish its *NCAA Football* video game in 2014.[23] While speculation exists as to whether EA Sports had a preference to escape litigation by

[21] Rogers v. Grimaldi, 875 F.2d 994 (2d Cir.1989).
[22] Patrick Rishe, *E.A. Sports & C.L.C. Settle With College Athletes… Will NCAA Follow Suit?,* FORBES.COM (Sept. 27, 2013) *available at* www.forbes.com/sites/prishe/2013/09/27/ea-sports-clc-settle-with-college-athletes-will-ncaa-follow-suit.
[23] *Id.* The game would have been titled "NCAA Football 2015" because "NCAA Football 2014" was released for the 2013-14 NCAA college football season.

paying a sum of forty million dollars (which amounts to about one hundred-fifty, per plaintiff, before fees), one fact appears certain: the NCAA has no intention to settle.[24] The NCAA now faces a class action lawsuit from a growing class (certified in the late winter of 2013) for, *inter alia*, right of publicity, antitrust, and unjust enrichment claims. The NCAA filed to intervene on behalf of EA, and may take up the right of publicity litigation (and others), if the Supreme Court grants certiorari.

Two Circuit Court decisions, *Hart* and *Keller*, (discussed in Section II, *infra*) are on petition for writ of certiorari to the Supreme Court. The settlement by EA Sports would seemingly leave the right of publicity petitions for certiorari moot, but the NCAA may litigate the issue should the Supreme Court take the petition. At the date of this Note, the District Court for the Northern District of California has denied the motion to dismiss the class action lawsuit, permitted the class certification, and set a trial date for early 2014. The Supreme Court has not ruled on either petition for certiorari.

C. The *NCAA Football* Video Game Franchise

EA's enormously popular *NCAA Football* video game series, first unveiled in 1993, artistically creates a fictional interactive college football gaming experience.[25] In each annual edition of *NCAA Football,* users can play individual games or entire seasons, selecting from among thousands of unnamed virtual players and over one hundred virtual college teams.[26] The virtual football games occur in virtual stadiums filled with virtual fans, coaches, cheerleaders, mascots, and referees, all meticulously crafted by EA's video game designers.[27]

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[24] Steve Eder, *E.A. Sports Settles Lawsuit With College Athletes*, NYTIMES.COM (Sept. 26, 2013), *available at* www.nytimes.com/2013/09/27/sports/ncaafootball/ea-sports-wont-make-college-video-game-in-2014.html?_r=0.
[25] *Hart*, *supra* note 19 at 146.
[26] *Id.*
[27] *Id.*

The virtual players ("avatars") are clothed in their teams' uniforms and logos. The unnamed avatars are identified only by position and jersey number (e.g., QB #7) but are meant to evoke real players.[28] Thus, for example, an avatar may have an appearance (e.g., height, weight, skin-tone, and throwing arm) and biographical information (e.g., class year) that match those of a real player.[29] "In no small part, the *NCAA Football* franchise's success owes to its focus on realism and detail—from realistic sounds, to game mechanics, to team mascots. This focus on realism also ensures . . . [all the] teams in the game are populated by digital avatars that resemble their real-life counterparts and share their vital and biographical information."[30]

Moreover, while users can change the digital avatar's appearance and most of the vital statistics (height, weight, throwing distance, etc.), certain details remain immutable: the player's home state, home town, team, and class year.[31] The *NCAA Football* games do not include athlete names to abide by the NCAA Bylaws and maintain student-athlete amateurism.[32]

In the *Hart* case (discussed in Section II.B, *infra*), a former student-athlete claimed that two aspects of the game violated his right of publicity. First, the game included an animated avatar of a quarterback wearing a Rutgers uniform with Hart's physical and biographical attributes and career statistics, though not his name or photographic image.[33] Second, in the 2009 *NCAA Football* game, a photograph of Hart appeared in a montage when users selected Rutgers as their team.[34] Similarly, in *Keller* (Section II.C, *infra*), a former student-athlete sued the NCAA, EA, and CLC under, *inter*

[28] *Id.*
[29] *See id.*
[30] *Id.* (quotation marks omitted).
[31] *Id.*
[32] For the general principles regarding student-athlete amateurism, *see* NCAA Bylaw 12.01.
[33] *Hart*, *supra* note 19.
[34] *Id.*

alia, federal Lanham Act claims, the right of publicity tort, and the Sherman Act.

II. SECOND DOWN: *Keller* and *Hart*

Two nearly identical lawsuits have been filed and appealed to the Supreme Court: *Hart*,[35] out of the Third Circuit, and *Keller*,[36] out of the Ninth Circuit. Both circuit courts applied the "transformative use" test (analyzed in Section III), and created a foundation for legal analyses in video games that lacks coherence and reliability. In this Section, I will explain the claims brought by the plaintiffs in the cases, as well as the facts and holdings of each case. In Section III, I will discuss the legal tests available for the courts and how each test has been applied, analyzing the strengths and weaknesses of each test. Section IV will conclude this Note, and discuss the best test for courts to apply in future cases where the First Amendment and right of publicity intersect.

A. The Legal Claims of the Student-Athletes

1. The Right of Publicity

The right of publicity is a state common law doctrine, even though it is often supported by legislation.[37] The doctrine is closely associated with the right to privacy because it extends the privacy right that people have in protecting their identity and controlling its use in a commercial setting. Specifically, the right of publicity protects individual rights, especially those associated with public figures or celebrities, to control the commercial value and exploitation of their name or likeness and prevent others from unfairly

[35] *Hart*, *supra* note 19 at 147.
[36] *In re NCAA*, *supra* note 10.
[37] *See, e.g.*, Matzkin, M.G., *Gettin' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity by Not Paying for Their Likeness*, 21 LOY. L.A. ENT. L. REV. 227 (2001).

appropriating this commercial value.[38] The right was first recognized in 1953:

> [I]n addition to and independent of [the] right of publicity. . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . .This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likeness, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses [sic], trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.[39]

Haelan Labs "essentially propertized the right" by stating that the right of publicity could be "licensed or assigned and enforced against third parties by the licensee or assignee," thus enumerating a limited grant of commercial rights.[40] That same year, Joseph Grodin, a future California Supreme Court Justice, recognized the broader implications of the decision.[41] He noted, "where

[38] Beth A. Cianfrone & Thomas A. Baker III, *The Use of Student-Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity*, 20 J. LEGAL ASPECTS SPORT 35, 38 (2010) (citing McFarland v. Miller, 14 F.3d 912 (3d Cir. 1994)).

[39] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

[40] *See id.*; *see also* Gloria Franke, Note, *The Right of Publicity vs. the First Amendment: Will One Test Ever Capture the Starring Role?*, 79 S. CAL. L. REV. 945, 952 (2006) (citing *Healan Labs.*, 202 F.2d at 868).

[41] Joseph Grodin, Note, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L. J. 1123, 1127-30 (1953).

courts have sometimes held that plaintiff's privacy interest was out-weighed by the public's interest in news or information, the balance may now swing in plaintiff's favor if both his privacy and publicity interests are considered."[42]

At first, courts appeared reluctant to embrace the right of publicity.[43] Gradually, however, the right of publicity "gained widespread judicial and scholarly acceptance."[44] The Supreme Court recognized the right of publicity in 1977, and finally codified the right of publicity tort in *Zacchini v. Scripps-Howard Broad. Co.*[45]

The right of publicity, as applied, is "fundamentally constrained by the public and constitutional interests in freedom of expression."[46] Accordingly, the First Amendment should provide a broad defense against a right of publicity claim unless someone's name or likeness "is used solely to attract attention to a work that is not related to the identified person."[47] Specifically, the First Amendment should shield artistic works from liability unless a celebrity or athlete's (e.g.) image or likeness is used in a commercially exploitative manner.[48]

Nevertheless, the intersection of the First Amendment and the right of publicity remains the subject of much debate and litiga-

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[42] *Id.* at 1128-29.
[43] *See* Madow, *supra* note 15 at 176.
[44] Michael "Bubba" Schoeneberger, Note, *Unnecessary Roughness: Reconciling Hart and Keller with a Fair Use Standard Befitting the Right of Publicity*, 45 CONN. L. REV. 1875, 1883-84 (2013) (citing Cepeda v. Swift & Co., 415 F.2d 1205, 1207 (8th Cir. 1969)) (recognizing that a professional baseball star could grant an exclusive right to use an imprint of his name to a baseball manufacturer); Uhlaender v. Henricksen 316 F. Supp. 1277, 1281 (D. Minn. 1970) (holding that major league baseball players had a proprietary interest in their names, sporting activities, and accomplishments sufficient to enjoin unauthorized use for commercial purposes)).
[45] *Zacchini* 433 U.S. at 565-66.
[46] RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 47, cmt. C (1995).
[47] *Id.*
[48] For example, if a consumer would be confused whether that celebrity or athlete (e.g.) had endorsed a specific product or service.

tion. A Supreme Court ruling would hopefully provide guidance on balancing the competing interests of free expression and the protection against exploitation of a limited commercial right.

2. The Lanham Act

Another claim brought by the college and university student-athletes falls within the purview of the Lanham Act.[49] The Lanham Act § 43(a)[50] indicates that any person using a false or misleading designation or representation that uses another's goods, services, image, or likeness can be held liable.[51] For the purposes of this Note, the Lanham Act claims will be separated from the right of publicity tort claims for purposes of analyzing the Third and Ninth Circuit's treatment of the claims in their respective legal determinations.

3. Other Claims

The Sherman Antitrust Act[52] makes illegal any contract, conspiracy, or combination in restraint of trade.[53] The Sherman

[49] 15 U.S.C. § 1051, *et seq*. (1984).
[50] 15 U.S.C. § 1125 (1984) states:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which – (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

[51] *Id.*
[52] 15 U.S.C. § 1 (1890) states: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce … is declared to be illegal."
[53] *Id.*

Act also prohibits monopolization or attempts to monopolize.[54] The antitrust claims in this case are moving forward in a class action lawsuit against the NCAA. The antitrust implications of the *Hart* and *Keller* cases will not be addressed in this Note as they are still being resolved in the Northern District of California. The unjust

B. The *Hart* Case

Ryan Hart played quarterback for Rutgers University from 2002 to 2005.[55] In June 2009, Hart filed a putative class action lawsuit against Electronic Arts ("EA") in New Jersey state court, alleging a violation of the right of publicity and other claims.[56] He sought hundreds of millions of dollars in damages on behalf of the putative class, and an injunction prohibiting the use of players' identities in the future and mandating the destruction of all copies of *NCAA Football* in EA's possession.[57] Hart based his right of publicity claim on the alleged use of his biographical information and likeness in the 2004, 2005, 2006, and 2009 editions of *NCAA Football*.[58] Specifically, he claimed that two aspects of the game were tortious: first, the game included an animated avatar of a quarterback wearing a Rutgers uniform with Hart's physical and biographical attributes and career statistics, though not his name or photographic image.[59] Second, in the 2009 edition, a photograph of Hart appeared in a montage when users selected Rutgers as their team.[60]

In September 2011, the District Court granted summary judgment for Electronic Arts, holding that the First Amendment barred Hart's right of publicity claim.[61] In May 2013, the Third

[54] *See* 15 U.S.C. § 2 (1890).
[55] Hart v. Elec. Arts, Inc., 808 F. Supp. 2d 757, 762 (D.N.J. 2011), *rev'd,* 717 F.3d 141, 145 (3d Cir. 2013).
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id. at 763.*
[60] *Id.*
[61] *Id.* at 787.

Circuit reversed and remanded.[62] Nevertheless, the court rejected Petitioner's First Amendment defense.[63] The Third Circuit surveyed the myriad legal standards that courts have applied in different jurisdictions to determine whether the First Amendment bars a right of publicity claim. The Third Circuit rejected other possible tests in favor of the "transformative use" test.[64] Applying this test, the Third Circuit held that the First Amendment did not protect *NCAA Football* against Hart's right of publicity claim because the game did not sufficiently "transform" his likeness.[65]

The court noted that the avatar matched Hart "in terms of hair color, hair style, and skin tone," and that the avatar's "accessories mimic those worn by [Hart] during his time as a Rutgers player."[66] The court also emphasized the biographical information associated with the avatar, which "accurately tracks [Hart's] vital and biographical details."[67] The court summarized: "The digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game."

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[62] At the same time, the court concluded that the First Amendment *did protect* the use of an actual photo of Hart as part of a montage within the video game because the image appeared fleetingly and because the context of the photograph imbued the image with additional meaning beyond simply being a representation of the player. *Hart*, 717 F.3d at 168. On June 25, 2013, the Third Circuit denied EA's petition for rehearing and rehearing *en banc*, with two judges dissenting. The petition for writ of certiorari was filed on September 23, 2013. For further analysis on the majority and dissenting opinions, see the petition for a writ of certiorari. Elec. Arts Inc. v. Hart, 2013 WL 5324719 at *6-12 (2013).

[63] *See Hart*, 717 F.3d at 172 (Ambro, J., dissenting) (warning that the majority-fashioned test could be misapplied or inconsistent in case-by-case determinations, and should not have been applied based on the specific facts of the case at bar); *See also Hart*, 2013 WL 5324719, at *11. Judge Ambro issued a forceful dissent, arguing that the majority misapplied the transformative use test.

[64] *Hart*, 717 F.3d at 165-66. The court specifically rejected the *Rogers* and "predominant use" tests in favor of the "transformative use" test. *See infra* Section III for explanation of these tests.

[65] *Id.* at 168.

[66] *Id.* at 166.

[67] *Id.*

[68] The court went on, "This is not transformative; the various digitized sights and sounds in the video game do not alter or transform [Hart's] identity in a significant way.[69]

C. The *Keller* Case

Samuel Keller played quarterback for Arizona State University in 2005, after which he transferred to the University of Nebraska, where he played football during the 2007 season.[70] In May 2009, Keller filed a putative class action lawsuit in the District Court for the Northern District of California against EA, the NCAA, and CLC.[71] Keller alleged that the defendants had violated his California statutory and common law right of publicity, *inter alia*, and sought damages on behalf of the putative class, as well as an injunction prohibiting the use of players' identities in the future and mandating the seizure and destruction of all copies of *NCAA Football* in Electronic Arts' possession.[72] The district court granted motions to consolidate Keller's case with those of eight other college athletes.[73]

Keller's right of publicity claim was based on the alleged use of his biographical information and likeness in the 2005 and 2008 editions of *NCAA Football*.[74] He claimed the game included an animated avatar of a quarterback wearing Arizona State University and University of Nebraska uniforms with his physical and biographical attributes and career statistics, though not his name or photographic image.[75] The Ninth Circuit rejected the other possible tests, and reasoned that the tests developed to accommodate

[68] *Id.*
[69] *Id.*
[70] *In re NCAA*, *supra* note 10 at 1271.
[71] *Id.* at 1272.
[72] *See id.*
[73] *See id.*
[74] *Id.* at 1272.
[75] *Id.*

First Amendment interests in the context of trademark law, focused on the risk of consumer confusion, should not apply.[76]

The Ninth Circuit concluded that EA had no First Amendment defense to Keller's right of publicity claim.[77] In reaching that conclusion, the Ninth Circuit adopted a version of the "transformative use" test, derived from the California Supreme Court decision *Comedy III*.[78] Again, that test will be analyzed in Section III.C, *infra*.

The test the Ninth Circuit adopted is essentially identical to the one adopted by the Third Circuit in *Hart*.[79] Here, similarly, the Ninth Circuit held EA's alleged use of Keller's likeness "[did] not qualify for First Amendment protection as a matter of law because it literally recreate[d] Keller in the very setting in which he has achieved renown."[80]

Notably, the same Ninth Circuit panel, in an opinion ("*Brown*") released the same day as *Keller*, held that the First Amendment provided EA with a defense to a Lanham Act claim brought by a former National Football League ("NFL") player in connection with another of its video games, *Madden NFL Foot-*

[76] *See id.* at 1280.
[77] *Id.* at 1274. Judge Thomas forcefully dissented, warning that the Court had engaged in a "potentially dangerous and out-of-context interpretation of the transformative use test." *Id.* at 1284 (Thomas, J. dissenting). The majority rejected Judge Thomas' warning that its opinion jeopardized a broad range of valuable expression on the theory that later courts could examine the "primary motivation" of those who were likely to *purchase* (rather than create) the work. The majority asserted that First Amendment protection would turn on whether the primary motivation of the buyer was to acquire the "expressive work of [an] artist" or to acquire a "reproduction of the celebrity." *Id.* at 1274.
[78] Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001).
[79] *In re NCAA*, 724 F.3d at 1271 (holding that the video game did not sufficiently transform Keller's likeness because it portrayed Keller as what he was: the starting quarterback for Arizona State and Nebraska, and the game's setting was identical to where the public found Keller during his collegiate career: on the football field.) (quotation marks and alteration omitted).
[80] *Id.* at 1271.

ball.[81] In *Brown*, rather than applying the "transformative use" test, the same panel applied the so-called *Rogers* test,[82] and concluded that the video game was "entitled to the same First Amendment protection as great literature, plays, or books."[83] The *Brown* court went on, "in this case, the public interest in free expression outweighs the public interest in avoiding consumer confusion."[84] The *Keller* court cited the decision in *Brown*,[85] and acknowledged that the Keller class would have been "hard-pressed" to succeed on its right of publicity claim if the court had applied the same test to that claim.[86] Note that only two Ninth Circuit judges voted in the *Keller* case, and they split on the result. A Senior District Judge from the Western District of Michigan, sitting by designation, cast the deciding vote in *Keller*.[87]

III. THIRD DOWN: Various Tests Applied in Right of Publicity Claims

A. The *Rogers* Test

Rogers v. Grimaldi[88] is a landmark Second Circuit case that balanced First Amendment protections against claims of misappropriation and exploitation. Ginger Rogers brought a state right of publicity claim and a federal Lanham Act claim against the makers of a Federico Fellini film entitled "Ginger and Fred."[89] The film was not about Ginger Rogers and Fred Astaire, but about a fictional Italian duo that imitated them and become known in Italy as "Ginger and Fred."[90]

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[81] *See* Brown v. Elec. Arts Inc., 724 F.3d 1235 (9th Cir. 2013).
[82] Analyzed in Section III.A, *infra*.
[83] *Brown*, 724 F.3d at 1248.
[84] *Id.*
[85] *In re NCAA*, 724 F.3d at 1281.
[86] *See id.*
[87] *See In re NCAA*, 724 F.3d 1270.
[88] Rogers v. Grimaldi, 875 F.2d 994 (2d Cir.1989).
[89] *Id.* at 996-97.
[90] *Id.*

The *Rogers* court recognized that "[m]ovies, plays, books, and songs are all indisputably works of artistic expression and deserve protection," but that "[t]he purchaser of a book, like the purchaser of a can of peas, has a right not to be misled as to the source of the product."[91] The *Rogers* court determined that titles of artistic or literary works were less likely to be misleading than "the names of ordinary commercial products," and that Lanham Act protections applied with less rigor when considering titles of artistic or literary works than when considering ordinary products.[92] The court concluded, "[i]n general the [Lanham] Act should be construed to apply to artistic works *only where the public interest in avoiding consumer confusion outweighs the public interest in free expression*."[93] Accordingly, the *Rogers* court held:

> In the context of allegedly misleading titles using a celebrity's name, that balance will normally not support application of the [Lanham] Act unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title *explicitly misleads as to the source or the content of the work*.[94]

Under the *Rogers* test, an expressive work enjoys First Amendment protection against a right of publicity claim unless the use of the individual's likeness is unrelated to the work, or merely serves to create a false impression that the individual has "endorsed" a product or expressive work.[95] The two prongs of the *Rogers* test include: (1) the use an individual's image or likeness, and (2) an intent to mislead, or explicitly misleading a consumer as to the source or content of the work.[96] Thus, the artistic work cannot merely "confuse" a consumer—trademarks, for example, should not be captured by the *Rogers* test—but must actually

[91] *In re NCAA*, 724 F.3d at 1279 (citing *Rogers*, 875 F.2d at 997).
[92] *Id.* (citing *Rogers*, 875 F.2d at 999-1000).
[93] *Rogers*, 875 F.2d at 999 (emphasis added).
[94] *Id.* (emphasis added).
[95] *Id.* at 1003-04.
[96] *See id*. at 1004.

mislead a consumer as to the individual's endorsement. Some examples might include falsely claiming a celebrity endorsement, including a celebrity image gratuitously, or attracting commercial attention through the individual's image or likeness. As the *Rogers* court stated, "[c]onsumers of artistic works have a dual interest: they have an interest in not being misled and they also have an interest in enjoying the results of the author's freedom of expression."[97]

The *Rogers* court explained that the First Amendment protects the use of a person's name in a film title from a Lanham Act claim unless the use was "wholly unrelated to the movie or was simply a disguised commercial advertisement for the sale of goods or services."[98] In applying its newly developed framework, the court found that the title was artistically relevant to the film because the nicknames "Ginger" and "Fred" were not arbitrarily chosen to exploit the publicity of the real-life Ginger Rogers and Fred Astaire, but rather because of a genuine relevance to the story and message of the film.[99] The court also found that the title was not explicitly misleading because "Ginger and Fred" contained no overt indication that Ginger Rogers "endorsed the film or had a role in producing it."[100] Further, the court held that any risk of misunderstanding by the public as to Ginger Rogers's involvement with the film was "outweighed by the interests [of] artistic expression."[101] Accordingly, the First Amendment precluded liability under the Lanham Act.[102]

In subsequent decisions, and in other circuits, the *Rogers* test gained acceptance beyond the mere "title" of an expressive work. Starting the analysis with the Ninth Circuit, and moving through the Fifth, Sixth, and Eleventh Circuits, many courts have

[97] *Id.* at 998.
[98] *Id.* at 1004 (internal quotation marks omitted).
[99] *Id.* at 1001.
[100] *Id.*
[101] *Id.*
[102] *Id.*

applied the *Rogers* test to image and likeness misappropriation or exploitation claims.

The Ninth Circuit first endorsed the *Rogers* test for Lanham Act claims involving artistic or expressive works in *Mattel v. MCA*.[103] The Ninth Circuit adopted the *Rogers* standard when it found that, in the context of artistic and literary titles, "[c]onsumers expect a title to communicate a message about the book or movie, but they do not expect it to identify the publisher or producer."[104]

Six years later, the Ninth Circuit held that Rock Star's use of a logo and "trade dress" found protection under the First Amendment, and that it therefore could not be held liable under the Lanham Act.[105] In that case, a strip club owner claimed that the video game manufacturer "Rock Star" incorporated its strip club logo into the *Grand Theft Auto* series video game's virtual depiction of Los Angeles, thus violating the club's trademark right to that logo.[106] There, the court extended the *Rogers* test slightly, noting that "[a]lthough this test traditionally applies to uses . . . in the *title* of an artistic work, *there is no principled reason why it ought not also apply . . . in the body of the work*."[107] Here, again, the analysis turned on the commercial and exploitative aspects of the expressive work. Namely, whether a consumer would be misled about an individual's endorsement of a particular work.[108]

In *Keller*, EA argued that the Keller court should extend the test to apply to right of publicity claims because the test is less prone to misinterpretation and more protective of free expression than the transformative use defense.[109] The Ninth Circuit dismissed that argument, and followed the jurisprudence of the Third

[103] Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 902 (9th Cir. 2002).
[104] *In re NCAA*, 724 F.3d at 1280 (citing *Mattel*, 296 F.3d at 902).
[105] E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095, 1096–98 (9th Cir. 2008).
[106] *Id.* at 1099-1101.
[107] *Id.* at 1099 (emphasis added).
[108] *See id.* at 1099-01.
[109] *In re NCAA*, *supra* note 10 at 1280.

Circuit *Hart* decision.[110] The court reasoned that the right of publicity is not intended to protect consumer confusion.[111] "As the history and development of the *Rogers* test makes clear, it was designed to protect consumers from the risk of consumer confusion—the hallmark element of a Lanham Act claim."[112]

The *Keller* court declined to use the *Rogers*, or any other commercial-based test. The *Keller* court stated "[t]he right of publicity protects the *celebrity*,[113] not the *consumer*. Keller's publicity claim is not founded on an allegation that consumers are being illegally misled into believing that he is endorsing EA or its products."[114]

State-law right of publicity claims reach commercial uses for movies and video games, but a backstop must exist where the court can say that a State has overstepped its right of publicity protection. That backstop is First Amendment protection. Many other courts have applied the *Rogers* test, or a similar standard, to delineate First Amendment limits in right of publicity claims.[115] Among these are the Fifth,[116] Sixth,[117] and Eleventh[118] Circuits, along with the Supreme Courts of Florida[119] and Kentucky.[120]

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[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 1281. While the issue of "celebrity status" of college or university student athletes could be worthwhile legal question, that issue will not be addressed in this Note.
[114] *Id* (emphasis in original).
[115] *See, e.g.*, Matthews v. Wozencraft, 15 F.3d 432, 440 (5th Cir. 1994); Parks v. LaFace Records, 329 F.3d 437, 461 (6th Cir. 2003); Valentine v. C.B.S., Inc. 698 F.2d 430, 430 (11th Cir. 1983); Montgomery v. Montgomery, 60 S.W.3d 524, 529 (Ky. 2001); Tyne v. Time Warner Entm't Co. L.P., 901 So. 2d 802, 810 (Fla. 2005).
[116] In *Wozencraft*, *supra*, the Fifth Circuit cited *Rogers*, and concluded that the First amendment barred a right of publicity claim based on a fictionalized, but accurate, account of an undercover police officer's experiences.
[117] In *Parks*, *supra*, the Sixth Circuit adopted the *Rogers* test and remanded to determine whether the use of plaintiff's name in the musical group OutKast's

The Fifth Circuit applied a test similar to *Rogers*, and concluded that the First Amendment barred a right of publicity claim based on a novel's (and future movie's) fictionalized, but accurate, account of an undercover police officer's experiences.[121] The Fifth Circuit cited Posner, and reasoned that "[t]he tort of misappropriation of name or likeness . . . creates property rights only where the failure to do so would result in the *excessive exploitation of its value*."[122] Thus, the exploitation of commercial value was the central feature of Posner's analysis. Public misperceptions of commercial exploitation leave little room for subjective judgments. Similarly, questions of celebrity endorsement would require little subjective analysis.

Randall Coyne reached a parallel inference, proposing that "to the extent [the] plaintiff's acquisition of fame is unrelated to his creative or intellectual efforts, his assertion of publicity rights is undermined."[123] Thus, the courts can incentivize celebrities to create and protect their "image" while also disallowing celebrity monopolies over rights that the public is largely responsible for creating.[124]

"Rosa Parks" song title was "disguised commercial advertisement" that would remove it from First Amendment protection.

[118] In *Valentine*, *supra*, the Eleventh Circuit construed the Florida right of publicity statute to allow the use of a person's name except to directly promote a product or service.

[119] The Florida Supreme Court in *Tyne*, *supra*, stated that, in light of First Amendment Constraints, the state's right of publicity does not bar the use of a name or likeness except to "directly promote a product or service."

[120] In *Montgomery*, *supra*, the Kentucky Supreme Court held that a right of publicity claim may only proceed if the use of a person's name or likeness is not sufficiently related to the underlying work, or if the work is simply disguised as a commercial advertisement for the sale of goods or services.

[121] *Wozencraft*, *supra* note 115.

[122] *Id.* at 438.

[123] *See* Randall T.E. Coyne, *Toward a Modified Fair Use Defense in Right of Publicity Cases*, 29 WM. & MARY L. REV. 781, 819 (1988).

[124] *See* Schoeneberger, *supra* note 44, at 1911-12 (citing Randall Coyne, *supra* note 125 at 819; Madow, *supra* note 15, at 179, 196).

The public could, in effect, "enjoy the benefits of [celebrity status] by enlarging the public domain and First Amendment protections."[125] News media, advertisers, and artists should not feel a chilling of First Amendment protection because of a broad right of publicity, when a publicly-created the celebrity status is made into a fictionalized, but accurate account (through documentary, painting, or advertisement). "Unlike the goodwill associated with one's name or likeness, the facts of an individual's life possess no intrinsic value that will deteriorate with repeated use."[126] Notwithstanding the juxtaposition of advertising (commercial use) and newspaper (informational use), the Fifth Circuit was reserved whether to engage in a qualitative analysis; to distinguish mediums where the court would have to determine the degree of commercial value or the sufficiency of the "artistic" quality of a particular work.[127] This application of the *Rogers* test stands in direct opposition to the transformative use test, as will be discussed in Subsection C.

The Sixth Circuit also implemented the *Rogers* test in order to determine whether the rap duo OutKast's song "Rosa Parks" misappropriated Parks' name, image, or likeness.[128] The court remanded the case based on the *Rogers* analysis.[129] There, the court observed:

> The *Rogers* court made an important point . . . '[p]oetic license is not without limits. The purchaser of a book, like the purchaser of a can of peas, has a right not to be misled as to the source of the product.' The same is also true regarding the content of a song. The purchaser of a song titled *Rosa Parks* has a right not to be misled regarding the content of that song. . . . 'A misleading title with no artistic relevance cannot be sufficiently justified by a free

[125] *Id.*
[126] *Wozencraft*, *supra* note 115 at 438-39.
[127] *See id.*
[128] *Parks*, *supra* note 115.
[129] *Id.* at 463.

> expression interest,' and the use of such a title, as in the present case, could be found to constitute a violation of the Lanham Act. Including the phrase 'move to the back of the bus' in the lyrics of this song, in our opinion, does not justify, as a matter of law, the appropriation of Rosa Parks' name for the title to the song, and the fact that the phrase is repeated ten times or fifty times does not affect the question of the relevancy of the title to the lyrics.[130]

The court continued, "The same is no less true today and applies with equal force to musical compositions . . . . [W]e, as judges, do not presume to determine the artistic quality of the [work] in question . . ."[131] Where subjective analysis stands at the center of the transformative use test, commercial exploitation stands at the center of the *Rogers* test. Broad freedom of expression should be granted unless the public would be confused about a celebrity's possible endorsement of a particular product or service. Where no confusion exists, the First Amendment should prevail.

The Sixth Circuit went on to cite Justice Holmes: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[132] Again, subjective judgments should not stand at the center of artistic valuations, especially when balancing the right of publicity against the freedom of expression. Mirroring the Fifth Circuit, the Sixth Circuit was reticent to engage in qualitative valuations of an artistic work, or to engage in determinations of an individual's enigmatic "value" and the degree of possible exploitation of that value. Where the Third and Ninth Circuits adopted a test based on purely qualitative valuations and enigmatic "degrees," the *Rogers* test leaves a bright-line standard where a work either falls into a category of First Amendment protection, or not.

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[130] *Id.* at 453 (quoting *Rogers, supra* note 88 at 997, 999).
[131] *See id*.
[132] *Id.* at 463 (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903)).

The common theme in *Rogers*-based tests is the legal standard that the "First Amendment protects the depiction of an individual within an expressive work, unless the depiction amounts to an unauthorized commercial endorsement or is *unrelated to any other expression* . . . ."[133] Many courts have engaged in balancing tests that weigh First Amendment protections against the economic interests protected by the right of publicity, without considering the "transformation" of an image or likeness.[134] Indeed, the right of publicity must be "narrowly tailored to support a right that protects the pecuniary value of a celebrity's identity, encourages the growth of that value to protect the individuals who hold it, and protects the consuming population, *but does not overstep the boundaries of free speech*."[135]

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[133] *See, e.g.*, Elec. Arts Inc. v. Hart, 2013 WL 5324719 at *16 (2013); Elec. Arts Inc. v. Keller, 2013 WL 5324721 at *17 (2013) (emphasis added).

[134] *See, e.g.*, C.B.C. Distrib. & Mktg, Inc. v. Major League Baseball Advanced Media, LP, 505 F.3d 818 (8th Cir. 2007) (holding that the First Amendment protected fantasy baseball products that used the names of real players, biographical data, and performance statistics); *Cardtoons*, *supra* note 14 at 968-70 (holding that the creator of parody baseball cards featuring recognizable caricatures of real baseball players were expressive speech "subject to full First Amendment protection."). The "predominant use" test, analyzed in Section III.B, below, also serves as a balancing test that examines the "predominant exploitation" of the "commercial value of an individual's identity." *See* Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003).

[135] Susannah M. Rooney, Note, *Just Another Brow-Eyed Girl: Toward a Limited Federal Right of Publicity Under the Lanham Act in a Digital Age of Celebrity Dominance*, 86 S. CAL. L. REV. 921, 928-29 (2013) (emphasis added); *see also* Schoeneberger, *supra* note 44 at 1900 ("The myriad tests fail to give courts a principled and consistent method of resolving the frequent interaction of the right of publicity and the First Amendment . . . [furthering] the need to create a uniform, unambiguous standard to protect the right of publicity while maintaining a robust public domain."); *but see* Neil G. Hood, Note, *The First Amendment and New Media: Video Games as Protected Speech and the Implications of the Right of Publicity*, 52 B.C. L. REV. 617, 649 (2011) ("Prescribing categorical protection to an overly broad definition of video games inappropriately forces right of publicity claims involving all games into the balancing test meant to weigh constitutionally protected expression against an individual's ability to control his own identity").

After an examination of the various tests created by our Circuit courts, it appears that the Rogers test applies the most robust First Amendment protection of any test fashioned to date. The *Rogers* test should be applied, not just in cases involving the Lanham Act, but in cases involving the right of publicity as well. Unless and until the Supreme Court fashions a test more fitting to balance the delicate rights afforded by the First Amendment for free expression against the growing abuse of "image and likeness" claims in all artistic mediums, the *Rogers* test is also the most predictable. Further, the *Rogers* test is advantageous to courts because "image and likeness" claims would automatically fall into the category of *Rogers* scrutiny, followed by the two prong analysis: (1) *whether the individual's image and likeness is actually used*; and (2) whether the artistic work *intentionally or explicitly misleads* a consumer as to the source of the work. As we will see, without such a bright-line rule, courts will not only have to engage in qualitative analyses of artistic works, but would also have to determine whether the works, if "sufficiently transformative" *should* get First Amendment protection.

A broadly applied *Rogers* test would protect artistic works such as documentaries, music, and certain television programming, social commentary, advertisements, and video games, without qualitative valuations into the artistic sufficiency of the works. Such a consistent, bright-line test is the best way for courts to evaluate the intersection of the right of publicity with the First Amendment.

The next subsections will evaluate the other commonly applied tests in right of publicity and Lanham Act § 43(a) claims. First, I will explain the "predominant use" test origins and applications in Subsection B. The transformative use test will be explained in Subsection C. Finally, in Subsection D, I will address the application of the transformative use test, paying special attention to the gaps, redundancies, and inconsistencies in the test.

B. The Predominant Use Test

In 2003, the Missouri Supreme Court established the "predominant use" test, which balances whether a product being sold "predominantly" exploits the commercial value of an individual's identity.

The test was first explained in *TCI Cablevision*.[136] In *TCI Cablevision*, Anthony "Tony" Twist, a former professional hockey player, sued Todd McFarlane, the creator of the Spawn comic series, for the improper use of his name and likeness for a character in the comic named "Tony Twist."[137] During Twist's hockey career, he garnered fame for his aggressive play, and was known as the league's preeminent "enforcer" (a player whose chief responsibility is to protect teammates from physical assaults by opponents).[138] Todd McFarlane, a well-known hockey fan, used the moniker "Anthony 'Tony Twist' Twisteli" to a New York mafia boss in his comic series.[139]

The Missouri Supreme Court recognized that the real and fictional Tony Twists bore no physical resemblance to each other.[140] The court also determined that, aside from the common nickname, the two "Tonys" were similar only insofar as each could be characterized as having an enforcer or tough guy persona.[141] Notwithstanding the lack of similarities, the court held for the plaintiff, stating "the use and identity of Twist's name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression . . . [thus,] free speech must give way to the right of publicity."[142]

Ultimately, the court determined that speech received First Amendment protection against a right of publicity claim only if its

[136] Doe v. TCI Cablevision, 110 S.W.3d 363, 374 (Mo. 2003).
[137] *Id.* at 365
[138] *See id.* at 366.
[139] *Id.*
[140] *Id.*
[141] *See id*.
[142] *Id.* at 374.

predominant purpose was to make an expressive comment on, or about, a celebrity.[143] If, on the other hand, the speech "predominantly exploit[ed] the commercial value of an individual's identity," the expressive work would be subject to liability under the right of publicity, "even if there [wa]s some expressive content in it."[144] In devising its test, the Missouri Supreme Court specifically rejected the transformative use test.[145]

Some have argued that the "predominant use" test may be the only avenue to overcome over-inclusive, categorical video game protection.[146] "As opposed to the other tests, the predominant use test gives greater weight to the fact that 'many uses of a person's name and identity have both expressive and commercial components.'"[147] Notwithstanding the inherent failing in deter-

[143] *See id.* (emphasis added); *see also* Hood, *supra* note 135 at 648.
[144] *TCI Cablevision*, *supra* note 136 at 374 (quotation marks omitted).
[145] *Id.*
[146] Hood, *supra* note 135 at 648. Hood evaluates the various tests applied by the courts in his Note, and determines that over-inclusive, categorical protection for video games would "inappropriately force[] right of publicity claims involving all games into the balancing test meant to weigh constitutionally protected expression against an individual's ability to control his own identity . . . extend[ing] the constitutional protection too far." *Id.* at 649. With that point, I agree. Hood goes on to conclude that the predominant use test best weighs the person's identity in light of "both expressive and commercial components." *Id.* In this Note, I refute his conclusion, because the *Rogers* test should apply broadly to categories of misappropriation that include both Lanham Act § 43(a) and right of publicity claims in order to provide robust First Amendment protection while not chilling rights achieved by "celebrities" and others looking to protect their publicity rights. I also conclude that the predominant use test, if applied to facts and issues that arise in *Keller* and *Hart* would run roughshod over the NCAA regulations that promote amateurism and prohibit NCAA student-athletes from obtaining compensation while in college. *See* NCAA Bylaws § 12.01. Further, if Hood's test were applied in the *Hart* and *Keller* cases, the courts would be faced with the task of balancing "commercial exploitation" in the virtual (indeed, artificial) world of video games on a case-by-case, fact-specific basis. The test would essentially work upside-down, through a fact specific inquiry into the degree of exploitation versus the degree of artistry – a test that would inundate the courts and chill the broad expressive protections granted by the First Amendment.
[147] *Id.* at 641 (quoting *TCI Cablevision*, *supra* note 136 at 374).

mining what "predominantly exploits" might mean in a given instance or with a specific artistic medium, the analysis itself would also have to determine the "commercial value" of an individual's identity. Such an analysis would likely expose litigants to unsafe and unpredictable judicial scrutiny. For example, if the court determined that amateur athletes in the *NCAA Football* video games have a commercial value of zero, would that determination stand for all college and university student-athletes? Would the analysis under trademark or unfair competition claims differ, as it does in many courts today?[148] The same Ninth Circuit panel, on the same day, concluded that an athlete *could not receive compensation* for his image and likeness in a video game under Lanham Act § 43(a), but that another former student-athlete *might be able to receive compensation* for his image and likeness in a video game under the state-law right of publicity. Surely, the distinction cannot be so clear. Application of the predominant use test in either example might create even more opaque results.

Simply put, the predominant use test cannot sufficiently protect the First Amendment rights of artists. The test would inefficiently impose a duty on the courts to determine "commercial value," "predominant exploitation," and "sufficiency" of expressive content, much the same way the transformative use test tries to determine the "significance of transformative elements." As will be seen, the two tests are in many ways mirror images. Both tests require top-down, fact-specific inquiries in order to determine

[148] Further, intellectual property rights are designed to encourage creativity through financial incentives, as opposed to inherent natural or moral rights. *Compare* Amy M. Adler, *Against Moral Rights*, 97 CAL. L. REV. 263, 266-71 (2009) (discussing the theory of moral rights, and the United States' general rejection of moral rights), *with* Rooney, *supra* note 135 at 955 (2013) (arguing that a requirement of a trademark-based distinctiveness test, including secondary meaning and a showing of commercial value, and implementing the consumer confusion test to further protect free speech and allow for creativity, comment, and parody, would allow the right of publicity to maintain its integrity and protect the "brands" built by celebrities' unique assets). A person's commercial value could theoretically cede to the limited monopoly offered by the intellectual property right if the courts reached the conclusion described above. Thus, some balancing test appears to be the only solution.

qualitative valuations (e.g. "transformative elements," or "commercial value"). The next Subsection discusses the origins and applications of the transformative use test.

C. The Transformative Use Test

Under the "transformative use" test developed by the California Supreme Court, a defendant's use of a plaintiff's likeness does not qualify for First Amendment protection as a matter of law if it literally "recreates [the plaintiff] in the very setting in which he has achieved renown."[149] At its core, the test relies on qualitative judgments as to the "sufficiency" of transformative elements, in order to determine if the work departs "far enough" from a plaintiff's image and likeness to render the work protectable under the First Amendment.

The defense is a "balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."[150] When a work "contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it also less likely to interfere with the economic interest protected by the right of publicity."[151] Thus, the legal question turns on the "significance" of the "transformative" elements. As will become clear, this test results in incoherent and unpredictable results that

[149] *Comedy III*, *supra* note 78 at 799. In *Comedy III*, the plaintiff owned the rights associated with the comedy act known as "The Three Stooges," and sought damages and injunctive relief for the reproduction and sale of charcoal drawings and lithographs using a likeness of The Three Stooges. *Id.* at 800. There, the court fashioned a test that applied a portion of "fair use" doctrine from copyright law to determine whether the First Amendment protected the drawings and lithographs. *Id.* at 807-08. The court avoided a "wholesale importation of the fair use doctrine," because it stated at least two of the factors employed in the fair use test were not especially helpful in resolving the question presented, although it recognized that some aspects of the fair use defense are "particularly pertinent" to the test. *Id.* at 808.

[150] *Comedy III*, *supra* note 78 at 799.

[151] *Id.* at 808.

favor a broad right of publicity over broad First Amendment protection for free expression.

The failings of this test include: (1) subjective judgments regarding artistic expression,[152] (2) unpredictability due to those subjective judgments, (3) incoherence in judicial application of the standard due to the subjectivity of the analysis, and (4) substantial favoritism for individual privacy rights over the promotion of the useful arts[153] and the freedom of expression,[154] both of which are Constitutional guarantees.

1. Origins of "Transformative-ness"

The Supreme Court of California established the transformative use test in *Comedy III*.[155] That case concerned an artist's production and sale of t-shirts and prints bearing a charcoal drawing of the Three Stooges.[156] The California court determined that

[152] *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) (Holmes, J.) ("It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."). Judge Learned Hand famously expressed his views on subjective judgments in the copyright context: "[t]he test for infringement of a copyright is of necessity vague. . . . Obviously, no principle can be stated as to *when an imitator has gone beyond copying the idea, and has borrowed its expression*. Decisions must therefore inevitably be ad hoc." *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960) (emphasis added). This view, shared by Hand, Holmes, and Cardozo has been viewed as critique against imposing subjective judgments into expressive works, which is precisely the *foundation* of the transformative use test.

[153] U.S. CONST., art. 1, § 8, cl. 8. The Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

[154] U.S. CONST., amend. I.

[155] *Comedy III*, *supra* note 78 at 799. Applying this test, the court concluded that the works violated the plaintiffs' rights of publicity, and held that the court could "discern no significant transformative or creative contribution . . . the marketability and economic value of [the work] derives primarily from the fame of the celebrities depicted." *Id.* at 810.

[156] *Id.*

while "[t]he right of publicity is often invoked in the context of commercial speech," it could also apply in instances where the speech is merely expressive, but also noted that, when addressing expressive speech, "the very importance of celebrities in society means that the right of publicity has the potential of censoring significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irreverent or otherwise attempt to redefine the celebrity's meaning."[157] Thus, while the "the right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity's image by censoring disagreeable portrayals," the right, like copyright, nonetheless offers protection to a form of intellectual property that society deems to have social utility.[158]

After briefly considering whether to import the "fair use" analysis from copyright law, the *Comedy III* court decided that only the first fair use factor, "the purpose and character of the use," was appropriate.[159] Specifically, the *Comedy III* court found persuasive a Supreme Court holding[160] as to "whether and to what extent the new work is '*transformative*.'"[161]

The *Comedy III* court also explained that works containing "significant transformative elements" are less likely to interfere with the economic interests implicated by the right of publicity.[162] The court was also careful to emphasize that "[t]he inquiry is in a sense more quantitative than qualitative, asking whether the literal and imitative or the creative elements predominate in the work."[163] The court ultimately held that the balancing test between the right of publicity and First Amendment turned on whether the celebrity likeness was "one of the raw materials from which an original work is synthesized, or whether the depiction or imitation of the

[157] *Hart*, *supra* note 19 at 159 (citing *Comedy III*, *supra* note 78 at 802-03).
[158] *Id.* (citing *Comedy III*, *supra* note 78 at 804).
[159] *Id.* (citing *Comedy III*, *supra* note 78 at 808).
[160] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
[161] *Comedy III*, *supra* note 78 at 808 (citing *Campbell*, *supra* (emphasis added)).
[162] *Id.*
[163] *Id.* at 809.

celebrity is the very sum and substance of the work in question."[164] In other words, "whether the product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."[165]

Few courts have applied the transformative use test and, consequently, there is not a significant body of case law related to its application. For example, in *Winter v. DC Comics*,[166] the Supreme Court of California revisited the transformative use test when two musicians, Johnny and Edgar Winter, who both possessed long white hair and albino features, brought suit against a comic book company over images of two villainous half-man, half-worm creatures, both with long white hair and albino features, named Johnny and Edgar Autumn.[167] As the brothers' right of publicity claims necessarily implicated DC Comics' First Amendment rights, the *Winter* court looked to the transformative use test.[168]

In summarizing the test, the court explained that "[a]n artist depicting a celebrity must contribute something more than a merely trivial variation, [but must create] something recognizably his own, in order to qualify for legal protection."[169] Thus, in applying the test, the *Winter* court held that, notwithstanding the apparent portrayals of Johnny and Edgar Winters, the books did not depict the brothers literally.[170] Instead, the plaintiffs were merely part of the "raw materials from which the comic books were synthesized. To the extent the drawings of the Autumn brothers resemble plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature . . . . half-human and half-worm [characters] in a

[164] *Id.* (internal quotation marks omitted).
[165] *Id.*
[166] Winter v. DC Comics, 69 P.3d 473, 476 (Cal. 2003).
[167] *Id.*
[168] *Id.* at 478.
[169] *Id*. (alteration in original) (quotation marks omitted).
[170] *Id.* at 479.

larger story, which is itself quite expressive."[171] Ultimately, the court rejected the brothers' right of publicity claims.

Also in 2003, the Sixth Circuit decided *ETW*, a case focusing on a painting of Tiger Woods set among a collage of other, golf-related images.[172] Rick Rush created paintings of famous figures in sports and famous sports events. A few examples included Michael Jordan, Mark McGuire, Coach Paul "Bear" Bryant, the Pebble Beach Golf Tournament, and the America's Cup Yacht Race.[173] The defendant produced and successfully marketed limited edition art prints made from Rush's paintings. The painting at issue, *Masters of Augusta*, included three views of Tiger Woods in different poses at the Masters Tournament in Augusta, Georgia, in 1997 (where Woods became the youngest player to win the Masters Tournament).[174] The painting included Woods's caddy to the left, and his final round partner's caddy to the right, as well as the Augusta National Clubhouse in the background and images of golfers Arnold Palmer, Sam Snead, Ben Hogan, Walter Hagen, Bobby Jones, and Jack Nicklaus.[175]

The prints distributed by the defendant consisted of an image of Rush's painting, which included Rush's signature at the bottom right hand corner, as well as the title "Masters of Augusta."[176] Beneath the title, in block letters of equal height, the defendant included the artist's name, "Rick Rush," as well as a legend, "Painting America Through Sports."[177]

When the defendant sold his prints, he enclosed a white envelope with literature including a large photograph of Rush, a description of his art, and a narrative description of the subject painting.[178] On the front of the envelope, Rush's name appeared in

[171] *Id.*
[172] ETW Corp. v. Jireh Publ'g, Inc., 332 F.3d 915, 918 (6th Cir. 2003).
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*

block letters inside a rectangle, which included the legend "Painting America Through Sports," as well as a large reproduction of Rush's signature.[179] The back of the envelope included the words "Masters of Augusta," and "Tiger Woods."[180] Woods's name appeared in the narrative description of the painting twice in twenty-eight lines of text.[181] The defendant published and marketed two hundred and fifty serigraphs and five thousand lithographs of *The Masters of Augusta* at an issuing price of $700 for the serigraphs and $100 for the lithographs.[182]

The plaintiff filed suit in the United States District Court for the Northern District of Ohio, alleging myriad trademark infringement and unfair competition claims, as well as a right of publicity claim for Woods (under Ohio common law).[183] The defendant counterclaimed, seeking a declaratory judgment that the First Amendment protected Rush's art prints. The district court granted the defendant's motion for summary judgment and dismissed the case, and the Sixth Circuit affirmed.[184]

The Sixth Circuit applied a combination of an ad-hoc approach and the transformative use test.[185] In holding that the collage "contain[ed] significant transformative elements," the court compared it to the Three Stooges portraits from *Comedy III*, and noted that the collage "does not capitalize solely on a *literal depiction* of Woods."[186] Instead, the "work consist[ed] of a collage of images in addition to Woods's image which are combined to describe, in artistic form, a historic event in sports history and to convey a message about the significance of Woods's achievement in that event."[187] Thus, *ETW* fell somewhere within the transform-

[179] *Id.* at 918-19.
[180] *Id.* at 919.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *See id.* at 920-38.
[186] *Id*. at 938 (emphasis added).
[187] *Id*.

ative use test, where the collage of painted images with added transformative aspects may or may not have "altered" the celebrity's actual likeness.

As a result of the relative uncertainty surrounding the "sufficiency" of "transformative" elements, commentators have argued that the litany of different tests that each circuit has employed to resolve the right of publicity-First Amendment tension makes the issue ripe for Supreme Court review.[188] That conclusion appears undeniable when viewed in light of the multitude of possible results in any artistic medium (documentaries, for example) depicting an actual person, and the relevant inconsistency in determining whether a particular artistic work contains "sufficient transformative elements" to earn First Amendment protection.

The sufficiency of artistic transformative-ness is a qualitative valuation that is unfit for judicial scrutiny. The only result will be incoherence and inconsistence, resulting in a wide misapplication of the test.

2. The [Mis]Application of the Transformative Use Test

As stated earlier, a relative dearth of case law exists where the courts have chosen to use the transformative use test. In those cases, the determination usually turns first (implicitly) on the artistic medium being evaluated, evaluating the whole artistic work in question. The "transformative elements" portion of the test has varied from a difference in appearance and movement[189] to difference in setting and context.[190] No exhaustive list of factors or elements of "transformativeness" exists.

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[188] *See, e.g.*, Schoeneberger, *supra* note 44 at 1879 (citing Katie Thomas, *Image Rights v. Free Speech in Video Games Suit*, N.Y. TIMES, Nov. 16, 2010, at A1).
[189] *See, e.g.*, *Kirby*, *infra*.
[190] *See, e.g.*, No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d. 397 (Cal. Ct. App. 2011).

In 2006, the California Court of Appeal decided *Kirby*,[191] which addressed a musician's right of publicity claim against a video game company; the musician (Kirby) claimed that Sega misappropriated her likeness and signature phrases for purposes of creating a futuristic reporter.[192] The court found similarities in appearance between Kirby and the futuristic reporter based on hairstyle, common phraseology, and clothing choice.[193] At the same time, the court held that differences between the two did exist—both in appearance and movement—and that the video game character was not a mere digital recreation of by.[194] Thus, the court concluded that the video game character passed the transformative use test.[195]

Again, in 2011, the California courts confronted the right of publicity in a video game setting. *No Doubt*[196] centered on *Band Hero*, a game that allowed players to simulate performing popular songs within a rock band in time by selecting digital avatars to represent the player in an in-game band.[197] Some of the avatars were digital recreations of real-life musicians, including members of the band No Doubt.[198] After a contract dispute broke off relations between the band and the company, No Doubt sued, claiming a violation of their right of publicity; the California Court of Appeal applied the transformative use test.[199]

The *No Doubt* court noted that "in stark contrast to the fanciful creative characters in *Winter* and *Kirby*," the No Doubt (band) avatars could not be altered by players and thus remained

[191] Kirby, 144 Cal. Rptr at 607.
[192] *Id.* at 608.
[193] *Id.* at 613.
[194] *Id.*
[195] *Id.* at 616-17.
[196] No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011).
[197] Hart v. Elec. Arts, Inc., 717 F.3d 141, 162 (3d Cir. 2013) (citing No Doubt, 122 Cal. Rptr. 3d. at 401).
[198] *Id.*
[199] *Id.*

"at all times immutable images of the real celebrity musicians."[200] Yet, "even literal reproductions of celebrities can be 'transformed' into expressive works based on the context into which the celebrity image is placed."[201] Looking to the setting and context of the *Band Hero* game, the court explained:

> [T]he avatars perform [rock] songs as literal recreations of the band members. That the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a videogame that contains many other creative elements, does not transform the avatars into anything other than the exact depictions of No Doubt's members doing exactly what they do as celebrities.[202]

The court also noted that Activision's use of highly realistic digital depictions of No Doubt was *motivated by a desire to capitalize on the band's fan base*, "because it encourage[d fans] to purchase the game so as to perform as, or alongside, the members of No Doubt."[203] Thus, the court concluded that the video game's use of No Doubt's likenesses infringed the band's right of publicity.[204] Notice that the *No Doubt* court discussed the motivation or intent to capitalize on the source or endorsement of the image and likeness of the plaintiffs. That intersection falls squarely within the *Rogers* analysis.

In its application of the transformative use test, the *Keller* court outlined at least five factors found in *Comedy III* to be considered when determining whether a work is sufficiently trans-

[200] *See No Doubt*, *supra* note 196 at 410.
[201] *Id.* (citing *Comedy III*, *supra* note 78 at 811).
[202] *Id.* at 411.
[203] *Id.* (emphasis added).
[204] *Id.* at 411-12.

formative so as to obtain First Amendment protection.[205] First if the "celebrity likeness is one of the 'raw materials' from which an original work is synthesized," it is more likely to be transformative than if "the depiction or imitation of the celebrity is the very sum and substance of the work in question."[206] Second, the work is protected if it is "primarily the defendant's own expression," as long as that expression is "something other than the likeness of the celebrity."[207] Third, "to avoid making judgments concerning the quality of the artistic contribution, a court should conduct an inquiry more quantitative than qualitative and ask whether the literal and imitative or creative elements predominate in the work."[208] Fourth, a subsidiary inquiry should be used in close cases: whether the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted.[209] Lastly, when an artist's skill and talent is subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the work is not transformative.[210] Again, the motivation or intent to capitalize on the source or endorsement of the image and likeness of the plaintiff falls squarely within the *Rogers* analysis as well, but with more coherent and consistent application.

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[205] *See In re* NCAA, 724 F.3d at 1270; J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 8:72 (2d ed. 2012); *but see In re* NCAA, 724 F.3d at 1285 ("Although these considerations are often distilled as analytical factors, Justice Mosk was careful in *Comedy III* not to label them as such. Indeed, the focus of *Comedy III* is a more *holistic examination* of whether the transformative and creative elements of a particular work *predominate over commercially based literal or imitative depictions*. The distinction is critical, because excessive deconstruction of *Comedy III* can lead to misapplication of the test. And it is at this juncture that I must respectfully part ways with my colleagues in the majority.") (Sidney, J., dissenting) (emphasis added).

[206] *Comedy III*, *supra* note 78 at 809.

[207] *Id.* The Ninth Circuit recently stated that this factor asks whether a likely purchaser's primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of the artist. *In re NCAA*, *supra* note 10 at 1274 (citing McCarthy, *supra* note 205).

[208] *In re* NCAA, 724 F.3d at 1274 (citing Comedy III, 21 P.3d at 809) (internal quotation marks omitted).

[209] *Id.*

[210] *Comedy III*, supra note 78 at 810.

Like the "predominant use" and *Rogers* tests, the transformative use test aims to balance the interest protected by the right of publicity against those interests preserved by the First Amendment.[211] In *Hart*, the Ninth Circuit found that the transformative use test struck the best balance for analysis of right of publicity claims involving video games.[212] The court declared that the test served as a "flexible," yet "uniformly applicable analytical framework."[213] The *Hart* court further reasoned that the test "excel[led] precisely where the other two tests falter[ed]," and stated that the "singular focus" on "whether the work sufficiently transforms the celebrity's image or likeness" would allow the courts to "account for the fact that misappropriation can occur in any market segment, including those related to the celebrity."[214]

That evaluation seems misplaced, in light of the precedent. It is unclear what counts as "significant" under the transformative use test, it is unclear what satisfactorily "transforms" an image or likeness, and it is unclear whether artistic mediums categorically fall outside the bounds of right of publicity and into Lanham Act § 43. The *lack* of a singular focus, and *inconsistent* applicability of the "transformative" framework make this test effectively unpredictable. If a right of publicity claim does not sufficiently overcome the First Amendment right to free expression, then a Consti- Constitutional guarantee is chilled by common law tort. The Third and Ninth Circuits clearly cannot have intended to accept such a position. Yet, the analysis interpreted by those circuits has, in effect, affirmed that position.

The *Hart* court acknowledged the inquiry focuses on the "specific aspects of a work that speak to whether it was merely created to exploit a celebrity's likeness." If the court had used this conclusion as the basis for its analysis (the point where "court must *begin*"[215]), then the court would have assuredly reached the same

[211] *Hart*, *supra* note 19 at 163.
[212] *See id.*
[213] *Id.*
[214] *Id.*
[215] *See id.* (emphasis added).

conclusion as in *Rogers* – that the protections afforded by the First Amendment outweigh the claims to personal right of publicity.

The *Rogers* conclusion does not necessarily negate the claim that "where no additional transformative elements are present—i.e., the work contains 'merely a copy or imitation of the celebrity's identity—then there can be no First Amendment impediment to a right of publicity claim."[216] It does, however, achieve more than the simple lip service paid by the court to the, *inter alia*, video game industry.[217] In light of video games, documentaries, musical works, and all artistic mediums, the *Rogers* test achieves more robust First Amendment protection without sacrificing the right of publicity, and better serves as a coherent and stable test for the courts.

The negative inference from the Third and Ninth Circuit formulations is that a documentary or docudrama, for example, cannot find First Amendment protection *unless* the work contains sufficient expressive content or significant transformative elements. That conclusion would almost certainly not stand in those circuits. The court would essentially have to carve away at its video game analysis using a transformative use test that does not accurately define the scope of "sufficiency," or what counts as "expressive content," and provides over-flexibility to the right of publicity over First Amendment guarantees.

The court may not have initially realized that it was inviting a wide variety of results, yet future cases will inevitably show a lack of coherency. Applied most broadly, the transformative use test is volatile, inconsistent, and unpredictable. In applying this test, courts must place themselves in the role of critics, and make

[216] *Id.* at 164.
[217] *Id.* at 165. The *Hart* court quoted the dissenting opinion and noted that "adopting the [Transformative Use] Test ensures that already-existing First Amendment protections in right of publicity cases apply to video games *with the same force as to biographies, documentaries, docudramas, and other expressive works depicting real-life figures*." *Id.* (quotation marks and citation omitted) (emphasis added).

subjective judgments into artistic matter, which is a foreseeably "dangerous undertaking."[218]

Ultimately, courts have balanced First Amendment protection with the right of publicity by recognizing that "when artistic expression takes the form of a literal depiction . . . for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond the trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist."[219] Further, when a work contains "significant transformative elements" it *should* be both protected by the First Amendment and fall outside the realm of protection under right of publicity.[220] Yet, the question remains which right should yield when "the line between informing and entertaining is too elusive . . . ."[221]

The only clear answer is that the same test should apply to Lanham Act § 43(a) misappropriation and right of publicity torts. The bright line rule developed in *Rogers* may be the proper analysis for the courts, because it provides robust First Amendment protection while granting celebrities broad rights to establish and create their own expressive works for the limited monopoly over their image and likeness. Nevertheless, it seems clear the transformative use test is the incorrect test evaluating right of publicity claims in light of First Amendment protections moving forward.

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[218] *Compare* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only in the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits"), *and* Rogers v. Grimaldi, 875 F.2d 994, 1004 (2d Cir.1989) (where the film's title was protected unless "wholly unrelated to the movie or . . . simply a disguised commercial advertisement for the sale of goods or services"), *with* Comedy III, 21 P.3d at 881 (where an Andy Warhol portrait of Marilyn Monroe presented "a form of ironic social comment on the dehumanization of celebrity itself.").

[219] *Hart*, *supra* note 19 at 807-08.

[220] *See id.*

[221] *See* Winters v. New York, 333 U.S. 507, 510 (1948).

IV. FOURTH DOWN: Conclusion

On the one hand, the fact that both the Third Circuit and the Ninth Circuit reached the same result in applying the transformative use test, and used almost the same reasoning, significantly decreases the likelihood that the U.S. Supreme Court will grant review. On the other hand, the Fifth, Sixth, Eighth, and Eleventh Circuits have all used tests besides the transformative use test in order to determine the reach of First Amendment protection in right of publicity claims. If taken literally, the transformative use test would allow states to subject biographers, filmmakers, singers, photographers, and other artists to tort liability if their realistic images of, or references to, famous people are not "sufficiently transformative." Either a new test should be fashioned by the Supreme Court, or the *Rogers* test should be applied to all misappropriation claims involving an individual's image and likeness. That test grants broad First Amendment protection without chilling the right of publicity. The *Rogers* test also serves as a bright-line rule by which the courts do not have to engage in the factual or aesthetic analyses of the "artistic elements" or the sufficiency of expression in any artistic work.

The *Rogers* test would protect artistic works such as documentaries, music, and certain television, social commentary, certain advertisements, [222] and video games, *without qualitative*

[222] Rogers v. Grimaldi, 875 F.2d 994 (2d Cir.1989). Some might argue that the *Rogers* test would not operate effectively at the margins where an advertisement implicitly, or seemingly, incorporates someone's image or likeness. *See, e.g.*, Mannion v. Coors Brewing Company, 377 F. Supp. 2d 444 (S.D.N.Y 2006) (where plaintiff's copyrighted image of Kevin Garnett was altered by defendant to be used in an "urban" advertisement; the court held that the work did not infringe the copyright-holder's right to produce derivative works because the two works were not substantially similar). In similar cases, a Lanham Act action would effectively mirror a right of publicity action for the use of a celebrity's image and likeness. The question would turn on consumer confusion (i.e. whether the ordinary consumer would think that the celebrity endorsed the product or service). The distinction is not stark, but the *Rogers* test simply imposes a more stringent, consistent, and predictable set of rules than the trans-

valuations into the artistic sufficiency of the works. Conversely, where other advertisements, endorsements, certain video games, or commercially exploitative artistic works might still violate the right of publicity without First Amendment protection, the *Rogers* test would serve as a bright-line test at the intersection of the right of publicity and the First Amendment. Such a bright-line rule is sorely needed where Constitutional guarantees meet rapidly evolving arts.

The *Rogers* test is the best way for courts to guarantee First Amendment rights while also providing a safety net for commercially exploitative uses of an individual's likeness. On certiorari, the Supreme Court should do away with the unpredictable, qualitative transformative use test and adopt the bright-line *Rogers* test, because, as exhibited by the disparity between the *Brown* and *Keller* opinions, the transformative use test cannot keep pace with today's evolving technology.

We return now, lastly, to the implications of a Supreme Court judgment on the NCAA as a highly profitable sports franchise. Strong arguments can be made that the NCAA exploits its student-athletes in order to bring in hundreds of millions of dollars in advertisements, endorsements, and donations. Those arguments are not misplaced. But the answer is not to simply pay student-athletes, nor to provide a royalty payment after graduation. The exploitation of student-athletes is unavoidable: the market is extremely profitable, and college and university sports are amateur sporting endeavors. The athletes compete for a limited time, while enrolled at a college or university. The NCAA will also likely continue its stranglehold on television licensing agreements. It appears that if the plaintiffs have any hope in this litigation, that hope may exist in the antitrust portion of the litigation.

Although the outcome of this pending case will rectify the circuit split at the intersection of First Amendment protection in right of publicity claims, it will also likely anger many student-

formative use test, with less subjective judgments on artistry and more concern for progressive arts and free expression.

athletes. While the world of arts and technology will continue to rapidly evolve, it seems the world of NCAA student-athletics will not.