



Volume 5, Number 1  
Winter 2014

Contents

---

ARTICLES

Sports-League Player Restraints, Section 1 of the Sherman Act, and Federal Labor Law in the Context of the National Football League <i>Russell T. Gorkin</i> .....	1
Ignorance, Harm, and the Regulation of Performance-Enhancing Substances <i>Lisa Milot</i> .....	91
Smooth Sailing: Why the Indian Film Industry Remains Extremely Successful in the Face of Massive Piracy <i>Brandon Hammer</i> .....	147

**Harvard Journal of Sports & Entertainment Law**

Student Journals Office, Harvard Law School

1541 Massachusetts Avenue

Cambridge, MA 02138

(617) 495-3146; jsel@law.harvard.edu

www.harvardjsel.com

U.S. ISSN 2153-1323

The *Harvard Journal of Sports & Entertainment Law* is published semiannually by Harvard Law School students.

**Submissions:** The *Harvard Journal of Sports and Entertainment Law* welcomes articles from professors, practitioners, and students of the sports and entertainment industries, as well as other related disciplines. Submissions should not exceed 25,000 words, including footnotes. All manuscripts should be submitted in English with both text and footnotes typed and double-spaced. Footnotes must conform with *The Bluebook: A Uniform System of Citation* (18th ed.), and authors should be prepared to supply any cited sources upon request. All manuscripts submitted become the property of the JSEL and will not be returned to the author. The JSEL strongly prefers electronic submissions through the ExpressO online submission system at <http://www.law.bepress.com/expresso>. Submissions may also be sent via email to [jselsubmissions@gmail.com](mailto:jselsubmissions@gmail.com) or in hard copy to the address above. In addition to the manuscript, authors must include an abstract of not more than 250 words, as well as a cover letter and resume or CV. Authors also must ensure that their submissions include a direct e-mail address and phone number at which they can be reached throughout the review period.

**Permission to Copy:** The articles in this issue may be reproduced and distributed, in whole or in part, by nonprofit institutions for educational purposes including distribution to students, provided that the copies are distributed at or below cost and identify the author, the *Harvard Journal of Sports & Entertainment Law*, the volume, the number of the first page, and the year of the article's publication.



Volume 5, Number 1  
Winter 2014

EDITORIAL BOARD

*Editor in Chief*  
Kelly Donnelly

*Executive Editor*  
Kim Miner

*Executive Editor*  
Kyle Schneider

*Executive Editor*  
Albert Zhu

*Online Chair*  
Jaimie McFarlin

*Technical Chairs*  
Daniel Ain  
Joo-Young Rognlie

*Submissions Chair*  
Jay Cohen

Michael Brandon  
Sam Cortina  
Jonathan Diaz  
Laura Escalona  
Tim Fleming  
Patrick Gutierrez  
Rob Hickman  
Jeffrey Huberman

*Submissions Committee*  
Keith James  
Natalie Jay  
Jason Joffe  
Tilak Koilvaram  
Marissa Lambert  
Cody Lawrence  
Matthew Lee  
Megan Michaels  
Daniel Nessim

Hillary Preston  
Nick Purcell  
Adam Rosenfeld  
Harry Rudo  
Sam Strauss  
Courtney Svoboda  
Shuangju Wang  
Carson Wheat

Tim Fleming

*Article Editors*  
Eitan Ulmer

Jeremy Winter

Simon Heimowitz  
Ryan Issa  
Keith James

*Line Editors*  
Cody Lawrence  
Jaimie McFarlin

Kristen Spitaletta  
Sam Straus  
Alison Tong

Roxane Best  
Samuel Block  
Efren Bonner  
Michael Brandon  
Willimina Bromer  
Jay Cohen  
Jonathan Diaz  
Michelle Elsner  
Laura Escalona  
Jason Fixelle  
Jonathan Gartner  
Paige Griffiths  
Patrick Gutierrez

*Editors*  
Asher Herzog  
Jeffrey Huberman  
Jason Joffe  
Jocelyn Keider  
Mary Kubiuk  
Marissa Lambert  
Kat Lanigan  
Joshua Lee  
Matthew Lee  
Jamie Levine  
Allie Maron  
Daniel Nessim  
Leonard Powell

Nick Purcell  
Adam Rosenfeld  
Harry Rudo  
Robert Seitz  
Zachary Shapiro  
Sam Stuckey  
Courtney Svoboda  
David Victorson  
Zhikai Wang  
Marisa Weisbaum  
Carl Werner  
Scott Winston  
Sharon Wu

*Online Content Committee*

Matthew Lee

Allie Maron





Sports-League Player Restraints, Section 1 of the  
Sherman Act, and Federal Labor Law  
in the Context of the National Football League

Russell T. Gorkin<sup>1,2</sup>

TABLE OF CONTENTS

INTRODUCTION .....	2
I. BACKGROUND .....	10
A. <i>Player-Restraint Section 1 Cases: The Nature of the Claim</i> .....	10
B. <i>Player-Restraint Section 1 Cases: The Stakes</i> .....	13
II. ANTITRUST DEFENSES .....	15
A. <i>The “Single Entity” Defense</i> .....	17
1. The “Single-Entity” Test .....	19
2. The NFL’s Member Clubs are not Economic Competitors .....	21
3. The Single-Entity Test, Player Restraints, and <i>American Needle</i> .....	27

<sup>1</sup> Attorney, Paul Hastings LLP, Litigation Department, New York City. J.D., *magna cum laude*, Duke University School of Law. B.S., Industrial & Labor Relations, Cornell University. There are several people without whom this Article would not have been written. I would like to recognize and thank them here: to Professor Paul H. Haagen for driving home the notion that “sports are different”; to Professor Doriane L. Coleman for her incredible mentorship; to my friend Nicholas C. Hailey for setting the bar; and most of all, to my parents, Eileen and Steve, and sister, Andrea, for their love, support and encouragement. I am so grateful to you all.

<sup>2</sup> This Article was produced by the Author solely in an individual capacity, and nothing contained herein shall be attributed or imputed to any other person or entity with which the Author may be affiliated.

B.	<i>The Rule of Reason</i> .....	29
1.	What Are “Procompetitive” and “Anticompetitive” Effects? .....	31
2.	Monopsony Usually Leads to Anticompetitive Effects .....	33
3.	Evaluating the Effects of Sports-League Player Restraints .....	35
C.	<i>Ancillary Restraints</i> .....	47
1.	Section 1 Only Outlaws “Naked” Restraints ....	48
2.	Player Restraints Are Ancillary and “Reasonably Necessary” Restraints .....	50
3.	Misinterpreting “Reasonably Necessary” to Mean the “Least-Restrictive Alternative” .....	53
4.	Sports and “Least-Restrictive Alternatives” (or Lack Thereof).....	54
III.	<b>LABOR DEFENSES</b> .....	62
A.	<i>The Statutory Exemption</i> .....	62
B.	<i>The Nonstatutory Exemption</i> .....	66
C.	<i>The “Single Employer” Defense</i> .....	68
1.	The Current “Single Employer” Test .....	70
2.	Evaluating Whether NFL Member Clubs Are a “Single Employer”.....	71
3.	Multiemployer Bargaining Units and Unit Appropriateness .....	75
4.	An Alternative to Determine “Single Employer” Status: the “Smallest Appropriate Unit” Test ...	77
5.	The “Smallest Appropriate Unit” Test Applied to the NFL .....	79
IV.	<b>CONCLUSION</b> .....	83
A.	<i>Lessons Learned in the Aftermath of Brady v. National Football League</i> .....	84

## INTRODUCTION

America loves the National Football League (“NFL” or “League”).<sup>3,4</sup> And that love is worth a lot of money: in 2010, the NFL brought in an

<sup>3</sup> Although the subject matter and concepts contained herein are applicable to all sports leagues, this Article focuses on antitrust claims against labor restraints in the National Football League for two reasons. First, the fact that the labor restraints imposed by the NFL have historically been viewed as the most restrictive compared to those imposed by any of the other major American professional sports leagues

estimated \$8.3 billion in revenue and \$979 million in operating income.<sup>5</sup> The average team was valued at \$1.04 billion.<sup>6</sup> To put these numbers in perspective, Major League Baseball (“MLB”), America’s second most successful league sport,<sup>7</sup> generated only 73% of the revenue and 50% of the operating income of the NFL.<sup>8</sup> The average MLB club was worth half as much as its NFL counterpart.<sup>9</sup> These comparisons are even more surprising

---

means that the analysis presented herein should survive scrutiny when applied to the less restrictive restraints imposed by other leagues. Second, many sports commentators have attributed the NFL’s overwhelming popularity at least in part to these comparatively restrictive player restraints (most notably the NFL’s “hard” salary cap). See, e.g., Keith Wagstaff, *How Revenue Sharing Helped NFL to Dominate Pro Sports*, THE UTOPIANIST (Feb. 3, 2011), <http://utopianist.com/2011/02/how-revenue-sharing-helped-the-nfl-dominate-pro-sports/>, archived at <http://perma.law.harvard.edu/08NDymxpbhM>; Michael Fitzpatrick, *Why the NFL is the Most Popular Sport in America*, BLEACHER REPORT (Feb. 29, 2008), <http://bleacherreport.com/articles/11481-why-the-nfl-is-the-most-popular-sport-in-america>, archived at <http://perma.law.harvard.edu/0YJRxMy14As>.

<sup>4</sup> The NFL is an association of independently owned American professional football clubs. Currently, thirty-two clubs are members. CONST. & BYLAWS OF THE NAT’L FOOTBALL LEAGUE art. III, § 3.1 (Effective February 1, 1970, Revised 2006), archived at <http://perma.law.harvard.edu/B4U2-TJ9P>. Functions constitutionally vested in the NFL include: defining League membership eligibility requirements (art. III), setting playing rules (art. XI), setting the season schedule (art. XIII), and setting rules governing the acquisition and distribution of players (art. XII, XIV, XV, XVI, XVII, XVIII). The League Commissioner, often viewed as the custodian of the League, is vested with significant powers to make decisions affecting the League. These powers range from chief TV and labor negotiator to discipline czar for on-field misconduct. *Id.* art. VIII.

<sup>5</sup> Kurt Badenhausen, Michael K. Ozanian, and Christina Settini (Eds.), *The Business of Football*, FORBES (Sep. 7, 2011), [http://www.forbes.com/lists/2011/30/nfl-valuations-11\\_rank.html](http://www.forbes.com/lists/2011/30/nfl-valuations-11_rank.html), archived at <http://perma.law.harvard.edu/0r3zgBYPshJ> (providing financial metrics for 2010 league season).

<sup>6</sup> See *id.*

<sup>7</sup> MLB is the second most “successful” league sport based on both financial metrics (i.e., revenue, operating income, and team value), see *infra* note 6, and on opinion polls measuring sport popularity. See Regina A. Corso, *Football is America’s Favorite Sport as Lead Over Baseball Continues to Grow*, HARRIS INTERACTIVE (Jan. 25, 2012), archived at <http://perma.law.harvard.edu/0EtEVgPT4gS>.

<sup>8</sup> Kurt Badenhausen, Michael K. Ozanian, and Christina Settini (Eds.), *The Business of Baseball*, FORBES (Mar. 22, 2011), [http://www.forbes.com/lists/2011/33/baseball-valuations-11\\_land.html](http://www.forbes.com/lists/2011/33/baseball-valuations-11_land.html), archived at <http://perma.law.harvard.edu/0A6HnJQT2Vk> (providing financial metrics for 2010 league season). MLB revenue totaled \$6.1 billion, and operating income totaled \$494 million.

<sup>9</sup> See *id.* The average MLB club value was \$523 million. See *id.* For reference, in 2010, the NBA generated \$3.8 billion in revenue, \$183 million in operating income, and the average team value was \$369 million. Kurt Badenhausen, Michael

considering that the NFL season lasts only six months — two months fewer than the MLB season.<sup>10</sup>

Fueling the NFL's financial dominance, of course, is unbridled consumer demand. In 2006, *The Economist* wrote that “[the NFL] remains the most popular of the four big American sports on almost every measure, from opinion polls to television ratings.”<sup>11</sup> This statement is no less true today. In a recent poll, thirty-six percent of adults who reportedly follow more than one sport chose the NFL as their favorite, while only thirteen percent of respondents chose Major League Baseball.<sup>12</sup> In 2011, the NFL produced a staggering nine of the top-ten single telecasts<sup>13</sup> and four of the top-ten regularly scheduled primetime television programs.<sup>14</sup>

Continuing to cash in on its popularity, the NFL recently signed multi-year national television contract extensions with CBS, FOX, NBC, and ESPN, which will add over \$2 billion annually to the NFL's member

---

K. Ozanian, and Christina Settini (Eds.), *The Business of Basketball*, FORBES (Jan. 26, 2011), [http://www.forbes.com/lists/2011/32/basketball-valuations-11\\_rank.html](http://www.forbes.com/lists/2011/32/basketball-valuations-11_rank.html), archived at <http://perma.law.harvard.edu/0A6HnJQT2Vk>. Additionally, in 2010, the NHL generated \$3.1 billion in revenue, \$127 million in operating income, and the average team value was \$240 million. Kurt Badenhansen, Michael K. Ozanian, and Christina Settini (Eds.), *The Business of Hockey*, FORBES (Nov. 30, 2011), <http://www.forbes.com/nhl-valuations/list/>, archived at <http://perma.law.harvard.edu/0uWBNDRUaUH>.

<sup>10</sup> The 2011–12 NFL season began with the first major slate of pre-season games played on August 11, 2011, and ended with the Super Bowl played on February 5, 2012. See *Schedules: Preseason Week 1*, NFL, <http://www.nfl.com/schedules/2011/PRE1>, archived at <http://www.nfl.com/schedules/2011/PRE1>; *Schedules: Post Season 2011*, NFL, <http://www.nfl.com/schedules/2011/POST>, archived at <http://perma.cc/4S3N-WZKK>. The 2011 MLB season began with the first major slate of spring training games played on February 26, 2011, and ended with Game 7 of the World Series played on October 28, 2011. See *MLB Schedule – Feb 26, 2011 – Mar 4, 2011*, ESPN, <http://espn.go.com/mlb/schedule?date=20110226>, archived at <http://perma.cc/43BB-LT6Z>; *MLB Schedule – Oct 25, 2011 – Oct 31, 2011*, ESPN, <http://espn.go.com/mlb/schedule?date=20111025>, archived at <http://perma.cc/9W7Y-D7NZ>.

<sup>11</sup> *In a league of its own: America's National Football League offers a business lesson to other sports*, THE ECONOMIST, Apr. 27, 2006, archived at <http://perma.law.harvard.edu/09AZvGrCzpW>.

<sup>12</sup> Corso, *supra* note 7 (referring to a poll conducted by Harris Interactive). “Pro football” and “Baseball” are the actual response choices used in the poll, as opposed to the “NFL” and “MLB,” but given the monopoly status that these leagues enjoy in their respective sports, it is safe to assume that the adults polled were referring to these leagues when responding to the survey.

<sup>13</sup> *Nielsen's Tops of 2011: Television*, NIELSEN (Dec. 21, 2011), archived at <http://perma.law.harvard.edu/0RBDz2Gkbmt>. Seven of the nine telecasts were actual NFL games, while the other two telecasts were Super Bowl pre-game shows. See *id.*

<sup>14</sup> *Id.*



clubs' coffers.<sup>15</sup> No less significant, corporate sponsors are readily paying beaucoup bucks to bask in the glow of the NFL's halo.<sup>16</sup> For instance, Anheuser-Busch InBev has reportedly agreed to pay \$1.2 billion over six years for the right to call its Bud Light brand "The Official Beer of the NFL," even though MillerCoors and other competitors likely will continue to purchase advertising during NFL games.<sup>17</sup> In short, America's businesses and consumers appear to be screaming at the top of their lungs, "Hey NFL, keep up the good work!"

Fortunately for football fans, the NFL has been afforded the opportunity to do just that . . . at least through the end of the 2020 season.<sup>18</sup> On August 4, 2011, the NFL and the National Football League Players Association ("NFLPA")<sup>19</sup> memorialized their latest Collective Bargaining Agreement ("CBA").<sup>20</sup> The accord brought labor peace to the League and ensured that the hard-fought gridiron battles waged on Sunday afternoons would continue uninterrupted every autumn for the next ten years. The deal was struck, though, only in the aftermath of another battle waged not on the playing field, but in the courtroom.<sup>21</sup>

---

<sup>15</sup> Dex McLuskey & Aaron Kuriloff, *NFL Signs Nine-Year Extensions of Television Contracts With CBS, FOX, NBC*, BLOOMBERG (Dec. 15, 2011), <http://www.bloomberg.com/news/2011-12-14/nfl-renews-television-contracts-with-cbs-fox-nbc-networks-through-2022.html> (last visited Jan. 12, 2014), *archived at* <http://perma.law.harvard.edu/0GddYc8yggg>. The deals will increase NFL revenue from these sources from \$4 billion to, on average, \$6 billion during each year of the deals. *See id.* The CBS, FOX, and NBC contracts were extended for nine years, while the ESPN contract was extended for eight years. *Id.*

<sup>16</sup> The halo effect is a marketing term used to describe the bias shown by customers towards products that are affiliated with other products with which the customer has already had a positive experience.

<sup>17</sup> Anthony Crupi, *Anheuser-Busch Goes Long With NFL Pact: \$1.2 billion deal will drive fans to Bud Light*, ADWEEK (Aug. 12, 2011), <http://www.adweek.com/news/advertising-branding/anheuser-busch-goes-long-nfl-pact-134113>, *archived at* <http://perma.law.harvard.edu/0NNMhddRmk1>.

<sup>18</sup> *See* 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 69.1 (Aug. 4, 2011), *archived at* <http://perma.law.harvard.edu/0UcXeAWR7o8>.

<sup>19</sup> The National Football League Players Association ("NFLPA") is the union for professional football players in the National Football League. The primary role of the NFLPA is to represent all players in matters concerning the wages, hours and working conditions of their employment, ensuring that the terms of the CBA are met, and negotiating and monitoring retirement and insurance benefits. *See* NAT'L FOOTBALL LEAGUE PLAYERS ASS'N CONST. (Mar. 2007), *archived at* <http://perma.law.harvard.edu/0XRJezxuNRU>.

<sup>20</sup> *See* 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT (Aug. 4, 2011), *archived at* <http://perma.law.harvard.edu/0UcXeAWR7o8>.

<sup>21</sup> *See* Brady v. Nat'l Football League (Brady II), 644 F.3d 661 (8th Cir. 2011).

A class-action lawsuit filed by ten representative plaintiffs and headlined by all-pro quarterback Tom Brady<sup>22</sup> was merely the latest skirmish in a complicated and confusing decades-long war fought between NFL labor and the NFL member clubs. The gravamen of the dispute has hinged on the proper application of Section 1 of the Sherman Act<sup>23</sup> to League-imposed player restraints.<sup>24</sup> Unfortunately but unsurprisingly, the suit did nothing to reconcile how antitrust law and federal labor law should apply to these restraints.<sup>25</sup> And although a settlement<sup>26</sup> and the latest CBA have provided

---

<sup>22</sup> *Id.* The nine other named plaintiffs, suing both individually and on behalf of all others similarly situated, were Drew Brees, Vincent Jackson, Ben Leber, Logan Mankins, Peyton Manning, Von Miller, Brian Robison, Osi Umenyiora, Mike Vrabel. *Id.* A class of five former players also filed suit against the NFL and its member clubs, and the two classes were consolidated into one class. *See id.* Those five former players were: Carl Eller, Priest Holmes, Obafemi Ayanbadejo, Ryan Collins, and Antawan Walker. *Id.*

<sup>23</sup> 15 U.S.C. § 1 (2012). Section 1 of the Sherman Act provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” *Id.*

<sup>24</sup> Examples of past player-restraint antitrust challenges have included *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996) (holding that a standard salary for practice-squad players does not constitute a Sherman Act Section 1 antitrust violation); *Radovich v. Nat’l Football League*, 352 U.S. 445, 454 (1957) (holding that blacklisting and threat of penalties for signing blacklisted player against team in affiliated league by NFL and member clubs potentially constitutes Sherman Act Section 1 antitrust violation); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1189 (D.C. Cir. 1978) (holding that the NFL annual player college draft as it existed in 1968 constituted Sherman Act Section 1 antitrust violation); *Kapp v. Nat’l Football League*, 586 F.2d 644, 646–47 (9th Cir. 1978) (alleging that the annual player college draft, tampering rule, standard player contract, option rule, and Rozelle rule constitute Sherman Act Section 1 antitrust violations); *Mackey v. Nat’l Football League*, 543 F.2d 606, 623 (8th Cir. 1976) (holding that the Rozelle rule requiring the team signing a free agent to compensate the player’s former team constitutes a Sherman Act Section 1 antitrust violation); *McNeil v. Nat’l Football League*, 790 F.Supp. 871, 875–76 (D. Minn. 1992) (alleging that proposed “Plan B,” in which NFL member clubs would substitute standardized wage scale for individualized contracts constitutes Sherman Act Section 1 antitrust violation); *Powell v. Nat’l Football League*, 678 F. Supp. 777, 778 (D. Minn. 1988), *rev’d*, 930 F.2d 1293, 1295 (8th Cir. 1989) (alleging Right of First Refusal/Compensation system and standard player contract constitute Sherman Act Section 1 antitrust violations).

<sup>25</sup> *See Brady v. Nat’l Football League (Brady I)*, 779 F.Supp.2d 992, 1043 (D. Minn. 2011), *vacated*, 644 F.3d 661 (8th Cir. 2011). Although the complaint alleged violations of Section 1 of the Sherman Act against the NFL and its member clubs for the imposition of the salary cap, the franchise tag, and the annual draft, the court’s decision only reached the preliminary issue of whether the NFL “lockout” was likely an illegal “group boycott” because the players had decertified their

a temporary reprieve from this issue, there is little doubt that it will resurface as the expiration date of the latest CBA draws near. Scholarly debate about the merits of such claims, then, is as relevant now as ever.

Also important is providing at least a basic understanding of these issues to the public. The fervent football fan is unquestionably affected by any work stoppages and/or changes to League-wide player allocation rules that could result from such litigation. And, arguably, the football fan's interests are just as significant as the League's and players' when one considers that consumer welfare was the primary purpose for enacting the Sherman Act in the first place.<sup>27</sup> To date, however, almost all work in this area has delved deep on discrete aspects of the issue,<sup>28</sup> and it is nearly impossible for

---

union. Because the district court determined that the players were likely to succeed on this claim, it issued an injunction against the implementation of the lockout. *See Brady v. Nat'l Football League (Brady II)*, 644 F.3d 661, 661 (8th Cir. 2011). The subsequent appeals focused on whether the district court had the authority to issue such an injunction under the Norris-LaGuardia Act ("NLGA"). The Eighth Circuit eventually decided that the NLGA precluded the issuance of such an injunction imposed against current employees, but that an injunction could potentially be issued to prevent the implementation of a lockout against "non-employees" (i.e., free agents and prospective players). *Brady I*, 779 F.Supp.2d at 1039. Thus, in this litigation no court ever reached the questions pertaining to the legality of the player allocation rules being challenged under Section 1. *See Brady I*, 779 F.Supp.2d at 1039 ("This Court is not presently addressing the merits of the antitrust claims regarding [p]layer restrictions and is not ruling on whether the non-statutory labor exemption shields the League from such claims.").

<sup>26</sup> *See* 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 1 (Aug. 4, 2011), *archived at* <http://perma.law.harvard.edu/0UcXeAWR7o8>.

<sup>27</sup> *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)) (providing general rationale for implementation of Sherman Act); *see also* John B. Kirkwood and Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191 (2008) (arguing that consumer welfare, as opposed to business efficiency, is the main purpose of the Sherman Act); Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 ANTI-TRUST L.J. 707 (2007) (exploring how monopsony affects consumer welfare); Alan Devlin, *Questioning the Per Se Standard in Cases of Concerted Monopsony*, 3 HASTINGS BUS. L.J. 223 (2007) (arguing that monopsony often does not deserve per se treatment because its negative effects on consumers are not as clear as monopoly's negative effects).

<sup>28</sup> For information pertaining to the proper scope of the nonstatutory labor exemption, *see* Michael C. Harper, *Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption*, 38 WM & MARY L. REV. 1663, 1666 (1997) (discussing how *Brown's* holding regarding the scope of the nonstatutory labor exemption failed "to provide a proper clarification of how antitrust law

anyone to quickly develop a sound understanding of all the relevant economic and legal concepts.

---

should accommodate federal labor law”); Michael S. Jacobs and Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971) (demonstrating the impact that the labor exemption has on antitrust challenges); Jeffrey L. Kessler & David G. Feher, *What Justice Breyer Could Not Know At His Mother's Knee: The Adverse Effects of Brown v. Pro Football on Labor Relations in Professional Sports*, 14-SPG ANTITRUST 41 (2000) (arguing that the scope of the nonstatutory labor exemption established in *Brown* would lead to more, rather than less, labor strife); Derek D. Yu, *The Reconciliation of Antitrust Laws and Labour Laws in Professional Sports*, 6 SPORTS LAW J. 159 (1999) (recommending two alternatives to the scope of the nonstatutory labor exemption articulated in *Brown*); Note, *An Examination of the Nonstatutory Labor Exemption from the Antitrust Laws, In the Context of Professional Sports*, 23 FORDHAM URB. L.J. 955 (1996) (providing a history of the development of the nonstatutory labor exemption). For arguments regarding whether sports leagues should be treated as single entities and be exempt from Section 1 of the Sherman Act, see Lee Goldman, *Sports, Antitrust, And The Single Entity Theory*, 63 TUL. L. REV. 751 (1989) (arguing that each league member team is an independent firm for Section 1 purposes); Myron Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications for the Consumer Welfare Model*, 82 MICH. L. REV. 1 (1983) (analogizing professional sports-leagues to law firm partnerships and explaining that section 1 antitrust lawsuits against the leagues should fail under the intraenterprise conspiracy doctrine); Gary R. Roberts, *The Antitrust Status of Sports Leagues Revisited*, 64 TUL. L. REV. 117 (1989) (explaining why Goldman's view that each league member team is an independent firm for Section 1 purposes is incorrect); Gary R. Roberts, *The Single Entity Status of Sports Leagues Under Section 1 of the Sherman Act: An Alternative View*, 60 TUL. L. REV. 562 (1986) (arguing that league member teams should be viewed as a single entity for Section 1 purposes with respect to team location restrictions); John Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013 (1984) (arguing that greater weight should be given to the corporate nature of leagues' enterprises, and such emphasis would lead to doctrine supporting the antitrust policy of enhancing consumer welfare). For historical arguments proving that labor restraints are statutorily exempted from the Sherman Act by Section 6 of the Clayton Act, see Robert H. Jerry, II and Donald E. Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. REL. L.J. 173 (1984) (arguing that all labor restraints, regardless of the industry, are exempted by the statutory labor exemption); Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19 (1986) (arguing that player restraints should be exempt from Sherman Act scrutiny under both the statutory and nonstatutory labor exemptions). For arguments pertaining to the joint venture status of sports league's member teams, see Alan Devlin and Michael Jacobs, *Joint-Venture Analysis After American Needle*, 7 J. COMP. L. & ECON. 543 (2011). For arguments pertaining to the ancillary restraint doctrine, see Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, The Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943 (1988) [hereinafter Roberts, *Evolving Confusion*].

Thus, in this Article I attempt to provide a primer on the antitrust and labor law principles generally considered applicable to sports league player-restraint cases, and to explain why player restraints should be placed beyond the purview of antitrust courts despite the prevailing belief to the contrary. Throughout the Article I attempt to show that the unique structure of sports leagues (in which member clubs must simultaneously collaborate and compete) and the fact that member clubs are monopsonists<sup>29</sup> (not monopolists<sup>30</sup>) with respect to labor, have been largely responsible for the confusion and disagreement in this area of the law.

Specifically, Part I explains the general nature of player-restraint antitrust claims, and the stakes involved in such litigation. Part II explains and expounds on the principal antitrust defenses against holding league-wide player restraints illegal under Section 1 of the Sherman Act: (A) the NFL's member clubs are not — nor could they ever be — economic competitors because they are a single entity incapable of conspiring according to Supreme Court precedent; (B) proper rule of reason analysis reveals that player restraints' procompetitive effects outweigh their anticompetitive effects and therefore should be held lawful; and (C) labor restraints are ancillary restraints necessary to the production of any athletic competition, and thus should always be exempted from scrutiny under Section 1 of the Sherman Act.

Part III presents the traditional defenses available when an antitrust lawsuit challenges conduct that specifically restrains labor: (A) the Clayton Act statutorily exempts labor restraints from the ambit of the Sherman Act; and (B) the nonstatutory labor exemption exempts employers from antitrust attack while they are engaged in a collective-bargaining relationship with a union.

Additionally, Part III.C introduces a novel argument for why player-restraint antitrust challenges should fail. Approaching the issue from the vantage point of federal labor law, I show that the NFL is a "single employer" under established National Labor Relations Board ("NLRB") and Supreme Court precedent,<sup>31</sup> and as such, that its member clubs are incapable

---

<sup>29</sup> "Monopsony" is the term used to describe a market situation in which there is only one buyer for the product or services offered by several sellers. Monopsony is sometimes referred to as a "buyer's monopoly." See BARRON'S DICTIONARY OF FINANCE AND INVESTMENT TERMS 368 (JOHN DOWNES & JORDAN ELLIOT GOODMAN eds., 5th ed. 1998).

<sup>30</sup> "Monopoly" is the term used to describe a market situation in which only one firm sells a particular product or service. See *id.* at 367–68.

<sup>31</sup> See *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (adopting the National Labor Relations

of “combining” or “conspiring” when it comes to player restraints. I further argue that it would be impractical (if not impossible) to maintain anything other than a league-wide bargaining unit when the NFL and players engage in collective bargaining. Because this league-wide unit represents the “smallest appropriate bargaining unit,” it is fallacious to claim that league-wide player restraints are the product of “multiemployer” collaboration. I make the case that courts should adopt this “smallest appropriate bargaining unit” standard as an alternative to the NLRB’s and Supreme Court’s test when determining whether multiple entities should, in fact, be classified as a “single employer.” Finally, I reason that member clubs — as a single employer — should be permitted to act collectively with respect to labor regardless of whether a collective bargaining relationship exists.

Part IV briefly analyzes the latest player-initiated antitrust lawsuit, *Brady v. National Football League*.<sup>32</sup> I show that, notwithstanding the District Court’s dicta, the Players’<sup>33</sup> attempt to circumvent the nonstatutory labor exemption by decertifying the NFLPA constituted a sham — and that permitting players to perpetrate such shams frustrates the federal labor policy of encouraging management and labor to set the terms and conditions of employment free from judicial interference.

## I. BACKGROUND

### A. *Player-Restraint Section 1 Cases: The Nature of the Claim*

Section 1 of the Sherman Act proclaims that “[e]very contract, combination . . . or conspiracy in restraint of trade . . . is declared to be illegal.”<sup>34</sup> Virtually all “intraleague”<sup>35</sup> player-restraint lawsuits alleging that the NFL

---

Board (“NLRB”) definition for “single employer”) (“In determining the relevant employer, the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise. The controlling criteria . . . are interrelation of operations, common management, centralized control of labor relations and common ownership.” (internal citations omitted)); *see also infra* Section III.C.1.

<sup>32</sup> 779 F.Supp.2d 992 (D. Minn. 2011).

<sup>33</sup> The capital “P” is used when referring to the plaintiffs in *Brady*.

<sup>34</sup> 15 U.S.C. § 1 (2012).

<sup>35</sup> The parties that are affected by the player-restraint in question determine whether the restraint is an “intraleague” or “interleague” labor restraint. When the player restraint merely affects parties within the NFL — that is, the League, the member clubs, and NFL players — then it is an “intraleague” player restraint. *See infra* Section II.C. On the other hand, if a third-party, such as a rival league, is also affected by the restraint, then the restraint is best classified as an “interleague”

and its member clubs have violated this statute are based on one of two theories: that one of the League's rules constitutes a "contract, combination or conspiracy" that restrains trade by either (1) artificially lowering the compensation that a player would have received absent the rule — that is, in a free market for player services;<sup>36</sup> or (2) excluding a particular player or class of players from League employment (otherwise known as a "group boycott").<sup>37</sup>

The first theory is perhaps best exemplified by antitrust lawsuits challenging the legality of a league-wide salary cap.<sup>38</sup> The salary cap can be

---

labor restraint. This distinction is vitally important because interleague player restraints inherently reduce competition to the detriment of consumers, or at the very least, do not provide consumers with any benefits. *See infra* Section II.B.

<sup>36</sup> Generally, these types of restraints are referred to as "allocation rules." Allocation rules can be defined as those rules "that assign to a single league member the exclusive 'rights' to each player, thereby restricting his ability to negotiate freely with any team of his choice." Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. PITT. L. REV. 337, 338 (1986) [hereinafter Roberts, *Sports League Restraints*]. Although the salary cap does not technically fall within this definition, its effects are similar to those that other allocation rules bring about since it potentially decreases the compensation level that a player would receive absent the rule (albeit to a lesser degree). It can therefore be properly grouped together with traditional allocation rules.

<sup>37</sup> *Id.* Generally, these types of restraints are referred to as "exclusionary rules." Exclusionary rules can be defined as those rules "that bar the plaintiff athlete(s) from league play, either permanently or temporarily."

<sup>38</sup> *See, e.g.,* *Brady v. Nat'l Football League (Brady I)*, 799 F.Supp.2d 992, 1004 (D. Minn. 2011) (also challenging the annual college player draft, and the franchise tag). Two other rules that have been targets of player antitrust attacks may also help elucidate the theory underlying allocation player-restraint antitrust challenges. First, in the 1970s, players brought a series of suits alleging that the Rozelle Rule, and subsequent variations thereof, violated Section 1 of the Sherman Act. *See Mackey v. Nat'l Football League*, 543 F.2d 606, 609 (8th Cir. 1976); *Powell v. Nat'l Football League*, 678 F. Supp. 777, 779–80 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989). "The Rozelle Rule essentially provide[d] that when a player's contractual obligation to a team expire[d] and he sign[ed] with a different club, the signing club [had to] provide compensation to the player's former team." *Mackey*, 543 F.2d at 609 n.1. The players argued that, because of this rule, signing clubs reduced the amount of money they otherwise would have been willing to spend to sign a free agent player had the clubs not also been forced to provide compensation to the player's former team. In effect, the rule transferred some of the value paid for the player's services from the player to the player's former club. Accordingly, the players claimed that the Rozelle Rule constituted an illegal "contract" or "combination" in "restraint of trade." *Mackey*, 543 F.2d at 616.

Another League rule that has been the frequent target of player-initiated antitrust attacks is the annual player selection draft. *See Brady I*, 799 F.Supp.2d 992; *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 (D.C. Cir. 1978). The draft is the

defined as the maximum amount of money that any one club is permitted to spend on player services during a given season.<sup>39</sup> Without the salary cap, players argue, clubs with greater financial means would capitalize on that advantage by spending more than the salary cap limit to acquire the best players in an attempt to increase their chances of winning.<sup>40</sup> Accordingly,

---

procedure in which college football players' exclusive negotiating rights are allocated to specific teams. The team with the worst record during the preceding season selects the college football player to which it would like exclusive rights, then the team with the next-worst record selects another player to which it would like exclusive rights, and so on until all teams in the league have selected. At this point, a "round" is complete, and the teams repeat the process. In 2011, there were 7 rounds. See generally 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 6 (Aug. 4, 2011), archived at <http://perma.law.harvard.edu/0UcXeAWR7o8>. The players argue that the draft "restrains trade" because the drafted player is prohibited from selling his services to any other club besides the club that selected him. Absent the draft, the argument goes, clubs would compete with one another to obtain the player's services. That is, the player would be afforded the opportunity to auction his services, allowing him to achieve more favorable compensation than he would otherwise be able to extract through negotiations with a single team. See generally *Smith*, 593 F.2d at 1183–84.

<sup>39</sup> 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 1 (Aug. 4, 2011), archived at <http://perma.law.harvard.edu/0UcXeAWR7o8>. The NFL enforces the salary cap by imposing a variety of penalties on those clubs that exceed its limit. *Id.* art. 14. It is important to note that the NFL also enforces a salary floor, or "minimum team cash spending" — that is, it requires each club to spend at least a certain amount of money on players' services. *Id.* art. 12.9. For the 2013–20 seasons, minimum team cash spending is set at 89% of the salary cap. See *id.*

<sup>40</sup> In fact, the Dallas Cowboys and Washington Redskins appeared to engage in this practice during the uncapped 2010 season. That is, the 2006 CBA stipulated that there would be no salary cap during the 2010 season if the NFL opted out of that agreement, which is in fact what happened. Without a salary cap, then, the Cowboys and Redskins front-loaded player contracts signed before the 2010 season so that their payrolls were significantly higher than most other clubs' during that season. Presumably, however, the Cowboys and Redskins did this because they anticipated the return of the salary cap in future seasons. Accordingly, because these front-loaded contracts distributed a significant portion of the total value of the contracts during the 2010 season, the Cowboys and Redskins sought to artificially increase the amount of cap room they would have to sign other players in future seasons once the cap returned. The NFL, however, caught onto this scheme and reduced the amount of money that both the Cowboys and Redskins could spend on players during the 2012 and 2013 seasons, with the reduction being allocated to the salary cap of every other team in the League (save the Oakland Raiders) to maintain League-wide player compensation. Whether the value of the contracts signed before the uncapped 2010 season was higher than it otherwise would have been is debata-



the salary cap artificially depresses player salaries and constitutes an illegal “restraint of trade.”<sup>41</sup>

The second theory is best illustrated by the NFL’s rule that a player must be three full college football seasons removed from high school graduation before being allowed to play in the NFL.<sup>42</sup> The argument here is that, absent punishment in the form of fines and loss of draft picks, clubs would employ the best players regardless of age.<sup>43</sup> Accordingly, the rule precludes talented young players from earning an NFL salary for all of the years that NFL member clubs legitimately desire their services.<sup>44</sup>

### B. *Player-Restraint Section 1 Cases: The Stakes*

A court decision holding that a League-imposed player restraint has violated Section 1 of the Sherman Act would bring with it severe economic consequences. Damages, generally calculated as the difference between what the player actually earned and what he would have earned absent the illegal restraint, would be awarded to every similarly situated player affected by the restraint.<sup>45</sup> Section 4 of the Clayton Act stiffens the penalty by trebling the amount of damages awarded.<sup>46</sup> If the players could prove that NFL member clubs would have spent on average just two percent more on player salaries than they actually spent because of the cap, single-season damages would amount to approximately \$229 million,<sup>47</sup> or 23% of League operating

---

ble. See Judy Battista, *N.F.L. Strips Cowboys and Redskins of Salary Cap Room*, N.Y. TIMES (Mar. 13, 2012), archived at <http://perma.law.harvard.edu/0YZXuvP7QT2>.

<sup>41</sup> First Amended Class Action Complaint at ¶¶134–39, *Brady I*, 779 F.Supp.2d 992, (No. 11 Civ. 639).

<sup>42</sup> See 2011 NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 6.2 (Aug. 4, 2011), archived at <http://perma.law.harvard.edu/0UcXeAWR7o8a>.

<sup>43</sup> See generally *Clarett v. Nat’l Football League*, 369 F.3d 124 (2d Cir. 2004).

<sup>44</sup> See generally *id.*

<sup>45</sup> See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1189 (D.C. Cir. 1978).

<sup>46</sup> Section 4 of the Clayton Act provides: “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 15 U.S.C. § 15 (1997).

<sup>47</sup> The figures used here are merely illustrative and do not purport to mirror evidence that would be presented at an actual damages hearing. These calculations assume that every NFL team spent 100% of the salary cap, which for the 2011 season totaled \$120 million per club. ESPN.com news services, *Sources: Sides Agree to Rookie Wages*, ESPN (Jul. 15, 2011), archived at <http://perma.law.harvard.edu/0ycxnB2sdBa>. Club roster size is currently capped at 53 players. 2011 NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 25.4 (Aug. 4, 2011), archived at <http://perma.law.harvard.edu/0UcXeAWR7o8>. Accordingly, in 2011,

income.<sup>48</sup>

The financial penalty imposed for violating Section 1 is therefore harsh. But the money that would be forfeited pales in comparison to the power the League and its member clubs forfeit when they lose a player-restraint anti-trust lawsuit: that is, the power to set the rules governing the *strategic* competition inherent in all league sports. The rules governing strategic competition<sup>49</sup> — those that pertain to the acquisition and distribution of talent throughout the League — have arguably been as important to the NFL's rise to sports and entertainment domination as the rules governing *on-field* competition.<sup>50</sup> Specifically, much of the NFL's success and popularity over the past two decades<sup>51</sup> can be attributed to the fact that the hard

---

the average NFL player earned approximately \$2,264,000 (\$120 million / 53 players). There are currently 32 member clubs. See NAT'L FOOTBALL LEAGUE PLAYERS ASS'N CONST. art III.1 (Mar. 2007), *archived at* <http://perma.law.harvard.edu/OXRJezx-uNRU>. If the players can prove that clubs would have spent on average just 2% more in player salaries if not for the salary cap, teams would have spent approximately \$45,000 more per player (2,264,000 x 0.02). Approximately 1,696 players (53 players per club x 32 clubs) would be eligible to receive, on average, this amount. Consequently, compensatory damages would total \$76,320,000 (\$45,000 per player x 1,696 players). After trebling this amount pursuant to Section 4 of the Clayton Act, damage awards would total \$228,960,000. See *supra* note 46.

<sup>48</sup> See *The Business of Football*, *supra* note 5, and accompanying text (\$229 million / \$979 million = 0.23).

<sup>49</sup> "Strategic competition," as I have defined it, does not include rules that *exclude* certain players or classes of players. Thus, while the definition does include rules governing the acquisition of players, the acquisition relates to the *process* by which players may be acquired, not the *players eligible* to be acquired. This distinction has important consequences in any rule of reason analysis, which weighs the procompetitive and anticompetitive effects of a given player restraint to the end consumer. See Roberts, *Sports League Restraints*, *supra* note 36.

<sup>50</sup> Bill Parcells, a Professional Football Hall of Famer, longtime front office executive and two-time Super Bowl-winning head coach has noted how important the acquisition of talent can be to success when he stated, "The business of professional football is the talent acquisition business." *SportsCenter Special: Bill Parcells Draft Confidential* (ESPN television broadcast Apr. 26, 2011).

<sup>51</sup> Consider that NFL and MLB league revenues were virtually identical — NFL revenue totaled ~\$1.82B while MLB revenue totaled ~\$1.87B — when the NFL decided to institute a "hard" salary cap in 1994. John Vrooman, *The Football Players' Labor Market*, ECONOMICS OF THE NATIONAL FOOTBALL LEAGUE (2011) at 12; Associated Press, *1994 Strike Was a Low Point for Baseball*, ESPN (Aug. 10, 2004), *archived at* <http://perma.law.harvard.edu/OZtPb3PSske> (1993 MLB revenue is used because 1994 revenue was curtailed due to the MLB players' strike). Since then, total NFL revenue has increased by approximately 361% to \$8.3B, while MLB revenue has increased by only 242% to \$6.5B. See *supra* notes 5–8 and accompanying text. Additionally, during that timeframe, the NFL has successfully added four franchises

salary cap has provided every NFL club with an equal opportunity for on-field success, regardless of the size of the market in which the club is located.<sup>52</sup> A League in which the Dallas Cowboys could spend millions more than the Green Bay Packers to acquire the best players would be a very different League indeed.<sup>53</sup> And such a League likely would result from a court decision determining that the salary cap violates Section 1. Accordingly, the stakes for the NFL — and its fans — could not be higher.

## II. ANTITRUST DEFENSES

Sports-league player-restraint antitrust lawsuits have varied in their outcomes. More often than not, though, leagues and their member clubs have failed when making arguments similar to those presented below.<sup>54</sup> But

---

to its League (i.e., Carolina Panthers and Jacksonville Jaguars in 1995, Cleveland Browns in 1999 [the original Cleveland Browns relocated to Baltimore and became the Ravens in 1996], and the Houston Texans in 2002) while MLB has only added two (Arizona Diamondbacks and Tampa Bay Devil Rays in 1998). *Expansion Team*, WIKIPEDIA, archived at <http://perma.law.harvard.edu/0oAevYJ86vf>. And, in 1993, Harris Interactive reported that only 24% of adults who follow more than one sport chose the NFL as their favorite, while 18% selected MLB, compared to 36% and 13%, respectively, today. See *supra* note 7 and accompanying text.

It has been suggested that eliminating the salary cap would not decrease the ability of small-market clubs to compete, pointing to the uncapped 2010 season as proof. *Brady v. Nat'l Football League*, 779 F.Supp.2d 1043, 1049 (D. Minn. 2011), *rev'd*, 640 F.3d 785 (8th Cir. 2011). This argument is weak however, since the clubs most likely anticipated that the salary cap would return as soon as the labor dispute was settled. Indeed, those clubs that did not respect a *de facto* cap were subject to penalties *ex post facto* after the cap returned. See Andrew Brandt, *Cowboys, Redskins Salary Cap Penalties Approved by NFL Owners But Still Raise Questions*, HUFFINGTON POST (Mar. 30, 2012), archived at <http://perma.law.harvard.edu/0PejbfRvp3c>.

<sup>52</sup> See, e.g., Wagstaff, *supra* note 3, at 2; Fitzpatrick, *supra* note 3, at 2. “The result [of the salary cap] is a financially engineered equality that allows a small town team in Green Bay, Wisconsin, to compete with a metropolis like New York.” 60 Minutes, *The NFL Commissioner: Roger Goodell*, (CBS television broadcast Jan. 29, 2012), transcript archived at: <http://perma.law.harvard.edu/0JAvorPGN7D>. Of course, a number of other factors may have also contributed to these results (for example, the MLB players’ strike in 1994, and the performance enhancing drug scandal of 2004-05).

<sup>53</sup> The fact that small-market clubs are often unable to resign their best players because they do not have the same financial resources as large-market clubs is a principal difference between the MLB and the NFL.

<sup>54</sup> See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183–90 (finding that annual draft’s anticompetitive effects substantially outweigh its procompetitive effects and affirming the district court’s ruling that the draft violates Section 1) (D.C.

as Oliver Wendell Holmes, Jr. once wrote, “[t]he life of the law has not been logic: it has been experience.”<sup>55</sup> This statement’s validity is evidenced by the continuously evolving manner in which the Sherman Act has been applied to various types of business conduct throughout the twentieth and twenty-first centuries.<sup>56</sup> Thus, despite the fact that courts previously have

---

Cir. 1978); *Mackey v. Nat’l Football League*, 543 F.2d 606, 620–23 (8th Cir. 1976) (finding that Rozelle’s Rule’s anticompetitive effects outweigh any procompetitive effects and that it therefore violates Section 1). *But see, e.g., Neeld v. Nat’l Hockey League*, 594 F.2d 1297, 1299–1300 (9th Cir. 1979) (holding that rule excluding one-eyed hockey player from competition was not per se illegal group boycott under Section 1, and that summary judgment in favor of NHL was appropriate under rule of reason because anticompetitive effects were de minimis).

<sup>55</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

<sup>56</sup> Presumably the reason for this phenomenon can be traced to the fact that the Sherman Act, passed in 1890, regulates economic activity, while neo-classical economic thought was not even fully developed until 1910. Thus, while judges at the turn of the twentieth century were no doubt very bright men, they lacked the theoretical knowledge necessary to apply the Sherman Act properly. Although it would be unfair to blame them for the confused state of antitrust law that exists today which resulted from the decisions they authored, it is entirely fair — and in fact critical to developing a coherent understanding of antitrust law — to catalogue major missteps.

The first critical error was made when Justice White abandoned the ancillary restraints doctrine in *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911), and fashioned the “Rule of Reason” from whole cloth. *See infra* note 111 and Section II.C.3. Numerous courts then compounded his mistake by misunderstanding from whose perspective procompetitive and anticompetitive effects of a restraint are to be weighed when attempting to apply the Rule. *See infra* Section II.B. The last major error was made when the doctrine of ancillary restraints made a comeback and modern-day judges erroneously interpreted then-Judge Taft’s opinion in *Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) *aff’d as modified*, 175 U.S. 211 (1899). *See infra* Section II.C.3.

Fortunately, as the field of economics has developed and been embraced by the law, antitrust jurisprudence has for the most part adapted to incorporate economic principles. *See Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (holding companies’ joint venture to sell separately branded gasoline to service station owners at same price was not per se an illegal horizontal price fixing agreement); *State Oil v. Khan*, 522 U.S. 3 (1997) (holding vertical maximum price fixing is not a per se violation of the Sherman Act); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (holding that a parent corporation and its wholly owned subsidiary were not legally capable of conspiring with each other under Section 1 of the Sherman Act); *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (holding that issuance of a blanket license did not constitute price fixing when that license was more efficient to issue and enforce than individual licenses); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (holding that location restriction was not per se illegal because it did not eliminate intrabrand competition). Unfortunately,

failed to grasp the merits of many of the arguments put forth by sports leagues, *stare decisis* does not appear to pose as high a hurdle in this arena as it might in other areas of the law.<sup>57</sup> The leagues, therefore, should not lose hope; nor should they stop making these very same arguments.<sup>58</sup>

#### A. The “Single Entity” Defense

One defense that the NFL and its member clubs can proffer against players’ allegations is that they are not — nor could they ever be — economic competitors, and that they are consequently incapable of “conspiring” within the meaning of Section 1 of the Sherman Act. Because Section 1 applies only to “contract[s], combination[s] . . . or conspirac[ies],”<sup>59</sup> the “question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it . . . restrains trade.”<sup>60</sup> Stated another way, only *concerted* action may form the basis of a Section 1 violation, while both *concerted* and *independent* action may form the basis of a Section 2 violation.<sup>61</sup> Thus, if the NFL and its member clubs are incapable of engaging in a “contract, combination . . . or conspiracy” such

---

because of the principle of *stare decisis*, very few of the cases that failed to incorporate more modern economic understanding were ever explicitly overruled. Thus, lawyers and judges have been left with an extensive, complex, contorted, and often contradictory set of precedents.

<sup>57</sup> See Roberts, *Sports League Restraints*, *supra* note 36, for an illustration of the way courts have ignored precedent and antitrust policy in evaluating Section 1 of the Sherman Act sports league antitrust lawsuits.

<sup>58</sup> Especially since the Supreme Court has never definitively ruled on the legality of a league-imposed player restraint.

<sup>59</sup> 15 U.S.C. § 1.

<sup>60</sup> *Am. Needle, Inc. v. Nat’l Football League*, 130 S.Ct. 2201, 2206 (2010).

<sup>61</sup> *Compare* 15 U.S.C. § 1 (1976) (“Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”), *with* 15 U.S.C. § 2 (1976) (“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .”). “The meaning of the term “contract, combination . . . or conspiracy” is informed by the basic distinction in the Sherman Act between concerted and independent action that distinguishes Section 1 of the Sherman Act from Section 2. Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action “monopolizes,” or “threatens actual monopolization,” a category that is narrower than restraint of trade.” *American Needle*, 130 S.Ct. at 2208 (internal quotation marks and citations omitted).

that they “must be viewed as . . . a single enterprise for purposes of § 1,”<sup>62</sup> then any claim alleging that their conduct has violated Section 1 necessarily must fail.<sup>63</sup>

Courts and commentators have struggled to determine when, if ever, sports leagues and their member teams should be viewed as a single entity as opposed to separate entities<sup>64</sup> whose joint conduct is subject to full Section 1 scrutiny.<sup>65</sup> On the one hand, teams appear to be separate entities because “each [team] is independently owned[,] . . . competes against the others on the field, and seemingly competes against them for fans and other sources of revenue.”<sup>66</sup> On the other hand, “each team by itself is a meaningless en-

---

<sup>62</sup> *Copperweld Corp., v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984).

<sup>63</sup> This distinction is important because “[c]oncerted activity inherently is fraught with anticompetitive risk,” *Copperweld*, 467 U.S. at 768–69, and thus such activity is “judged more sternly than unilateral activity under § 2.” *Id.* at 768. Without delving into what plaintiffs need to prove to show that a defendant has violated Section 2 of the Sherman Act, it is sufficient at this time to recognize that players face additional hurdles in any player-restraint antitrust challenge if they must prove a Section 2 violation as opposed to a Section 1 violation.

<sup>64</sup> See *Nat’l Football League v. N. Am. Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of *certiorari*) (analogizing professional sports leagues to law firm partnerships); *Am. Needle, Inc. v. Nat’l Football League*, 538 F.3d 736, 741 (7th Cir. 2008) (observing that “in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between independently owned teams that is subject to review under § 1”).

<sup>65</sup> In a Section 1 lawsuit, courts weigh and eventually decide the legality of the concerted activity being challenged according to the “Rule of Reason.” See *infra* notes 109–11 and Section II.B for a full explanation of this test. It is important to note that one such joint activity, league-wide television broadcasting, has been statutorily exempted from Section 1 scrutiny. In 1961, Congress passed the Sports Broadcasting Act, allowing a sports league and its member clubs to evade antitrust scrutiny when member clubs pool their television broadcasting rights for “sponsored telecasting.” See 15 U.S.C. § 1291 (1982). The same Act authorized the AFL-NFL merger. See *id.* It is possible, if not probable, that absent this congressional exemption, the pooling of television rights by member clubs would be held to violate Section 1 of the Sherman Act. *Cf.* *United States v. Nat’l Football League*, 116 F.Supp. 319, 330 (E.D. Pa. 1953) (holding that NFL rules prohibiting member clubs from selling telecasting rights to their games to stations operating in the home territories of other member clubs were lawful when the other member club was playing at home on the day of the restricted telecast, but violated Section 1 when the other member club was not playing at home); *Telecasting of Professional Sports Contests: Hearings on H.R. 8757 Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 87th Cong., 1st Sess. 24–6 (1961) (reprinting the previously unpublished decree made by Judge Grim in *United States v. Nat’l Football League*).

<sup>66</sup> Devlin and Jacobs, *supra* note 28, at 544.

tity—a person without a purpose—for its existence and profitability depend upon the success of the league”<sup>67</sup> as a whole. Perhaps because of these difficulties, the Supreme Court has held that the determination of whether a sports league and its members should in fact be deemed a single entity — and therefore immune to Section 1 of the Sherman Act — turns on “the alleged activity” being challenged in each particular lawsuit.<sup>68</sup>

### 1. The “Single-Entity” Test

Although intuition might suggest that collaboration between entities with distinct legal statuses should fall within the ambit of Section 1, the Supreme Court has announced that this is not always the case.<sup>69</sup> Rather, when considering the “single-entity” inquiry,<sup>70</sup> “substance, not form . . . determine[s] whether . . . entit[ies are] capable of conspiring under § 1.”<sup>71</sup> That the alleged conspirators in player-restraint lawsuits — the football clubs — are separately owned and operated therefore is not determinative.<sup>72</sup> Instead, Section 1 liability attaches when “a ‘contract, combina-

---

<sup>67</sup> *Id.*

<sup>68</sup> *Am. Needle, Inc. v. Nat’l Football League*, 130 S.Ct. 2201, 2208 (2010) (internal quotation marks and citations omitted) (emphasis supplied) (“As the case comes to us, we have only a narrow issue to decide: . . . whether the *alleged activity* by the NFL respondents must be viewed as that of a single enterprise for purposes of § 1.”). *Id.* at 2217 (stating that “While [the interest in maintaining a competitive balance among athletic teams] applies to the teams in the NFL, it does not justify treating them as a single entity for § 1 purposes *when it comes to the marketing of the teams’ individually owned intellectual property.*”) (emphasis supplied).

<sup>69</sup> *See id.* at 2212 (“[I]t is not determinative that two parties to an alleged § 1 violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture.”).

<sup>70</sup> *Id.* at 2211–12 (pointing out that the term “single entity” used to describe this defense” is a bit misleading: “[t]his inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved ‘seem’ like one firm or multiple firms in any metaphysical sense.”).

<sup>71</sup> *Id.* at 2211 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 n.21 (1984) (internal punctuation omitted)).

<sup>72</sup> *Id.* at 2212 (“Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged § 1 violation are legally distinct entities.”); *id.* at 2211 (“To hold otherwise . . . would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect insofar as use of separate corporations ha[s] no economic significance.” (quoting *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962))

tion . . . or conspiracy' [exists] amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition."<sup>73</sup>

The reason the Supreme Court's test focuses on the maintenance of independent centers of decisionmaking and actual or potential competition is that both yield benefits to consumers in the form of lower prices and better quality goods and services:

The Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.' The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.<sup>74</sup>

In sum, the single-entity test attempts to ensure that the downstream marketplace benefits that flow from robust competition will continue to flow.<sup>75</sup> Appropriately, this inquiry focuses on whether the entities are "separate *economic* actors pursuing separate *economic* interests"<sup>76</sup> — i.e., whether they are "actual or potential"<sup>77</sup> *economic* competitors — since other forms of competition, such as on-field or strategic which are prevalent in sports, only indirectly affect marketplace outcomes.

---

(internal quotation marks omitted). *But see id.* at 2212 (Court, immediately after announcing that legal status has no bearing on the single entity determination, seems to have based its determination that the 32 clubs are not a single entity at least in part on the fact that each club is independently owned).

<sup>73</sup> *Id.* at 2211 (internal quotation marks and citations omitted).

<sup>74</sup> Nat'l Soc'y of Prof'l Engineers v. United States, 435 U.S. 679, 695 (1978) (quoting Standard Oil v. Federal Trade Commission, 340 U.S. 231, 248 (1951)).

<sup>75</sup> The fact that the Court has interpreted the Sherman Act to protect consumers and down-market value chain participants is reflected in the oft-quoted statement that the Act protects "competition, not competitors." *See infra* text accompanying notes 175–78. Hence, the Act does not outlaw conduct that benefits consumers despite the fact that it might also injure specific competitors. *See, e.g.*, Atl. Richfield Co. v. U.S. Petroleum Co., 495 U.S. 328, 340 (1990) (stating, for instance, "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.").

<sup>76</sup> *Am. Needle*, 130 S.Ct. at 2211.

<sup>77</sup> *Id.*



What exactly is the nature of economic competition and how are economic competitors identified? What is meant by “potential” competition? These are not easy questions, but they are questions that must be answered before determining whether more than one legal entity should be treated as a single entity for Section 1 purposes. Careful and systematic reasoning is necessary to develop sound answers, while the short-shrift that most courts heretofore have given them have led to the half-baked and often incorrect conclusions that currently comprise the jurisprudence in this area of the law.<sup>78</sup>

## 2. The NFL’s Member Clubs are not Economic Competitors

“Competition” is defined as “[t]he action of endeavoring to gain what another endeavors to gain at the same time.”<sup>79</sup> And, of course, the competition ends when one party has attained that which at least one other party had also endeavored to gain. If one competitor were able to eliminate all others, such that it could then attain what it seeks unencumbered, it would do so. The competition would be over, and the remaining competitor would no longer be referred to as a competitor, but instead would be declared the victor.

The ability to declare a sole winner is therefore the defining characteristic for determining whether separate entities are in fact properly classified as competitors. When it comes to economic competition, the winner is the person or organization that captures all of the dollars spent on a particular good or service. For instance, PepsiCo endeavors to gain every dollar spent on beverages. If all other beverage manufacturers were to become defunct, PepsiCo would attain that which it seeks. The relationship between PepsiCo and all other beverage manufacturers is called horizontal competition.<sup>80</sup>

Firms that operate at different stages of a given value chain<sup>81</sup> are not actual but potential competitors because they do not currently endeavor to gain the exact same thing. For instance, in the automobile value chain, Bose

<sup>78</sup> See *infra* Section II.A.2.

<sup>79</sup> THE OXFORD ENGLISH DICTIONARY 604, (J.A. Simpson and E.S.C. Weiner, eds., Clarendon Press, vol. 3, 2d ed. 1989).

<sup>80</sup> See *Dictionary*, AMERICAN MARKETING ASSOCIATION, [http://www.marketingpower.com/\\_layouts/dictionary.aspx?dLetter=H](http://www.marketingpower.com/_layouts/dictionary.aspx?dLetter=H) (last visited Jan. 12, 2014), archived at <http://perma.cc/XVS7-FZR7> (defining horizontal competition as “[t]he rivalry to gain customer preference among entities at the same level, such as competition among competing wholesalers or competing retailers”).

<sup>81</sup> “A value chain first classifies the activities of a business into the discrete steps performed to design, produce, market, deliver, and service a product.” *Dictionary*, AMERICAN MARKETING ASSOCIATION, [http://www.marketingpower.com/\\_layouts/](http://www.marketingpower.com/_layouts/)

endeavors to gain every dollar spent on the audio speakers that will be installed in cars, while Ford endeavors to gain every dollar that will be spent on a fully assembled car. If a firm operating at one stage of the value chain had the ability to produce as efficiently as the firms at the other levels, it would perform those steps itself so that it would no longer have to forfeit the rents that those other firms extract from the value chain.<sup>82</sup> That is, if Ford were able to efficiently produce speakers, it would no longer purchase them from Bose, and would instead produce them itself. Ford would also sell the speakers it produced to other manufacturers (if it were unsuccessful in eliminating its horizontal competitors such as Toyota). In such a case, these firms would no longer be potential competitors, but would have become actual competitors. But because at present Ford and Bose only potentially endeavor to gain the same thing (dollars spent on car audio speakers), they are merely potential economic competitors.

What exactly, then, do the NFL member clubs seek? One might argue that they seek to attain all of the dollars generated from the staging of NFL games. If that were true, however, the elimination of all other clubs should benefit the lone remaining club, just as the elimination of all other beverage manufacturers would benefit PepsiCo. But this is not the case; the elimination of all other clubs would prevent the remaining club from attaining any dollars spent on the staging of NFL games, since no NFL games could be staged. The interdependence of clubs in the same sports league is axiomatic.<sup>83</sup> Indeed, the product delivered by a sports league — unlike the products and services delivered in almost all other industries — requires the existence of and agreements between multiple firms:

The product [sold by the member clubs belonging to the NFL] is the league's annual series of [256] regular season games leading to a post-season playoff-tournament and ultimately a Super Bowl champion. It is only because each game is an integral part of this mosaic that it has substantial value . . . . A league's product is thus jointly produced, and no individual game is solely the product of one or even two teams; the value of every game is largely generated by the trademark and imprimatur of the league and the participation of all league members, each of which must

---

dictionary.aspx?dLetter=V (last visited Jan. 12, 2014), *archived at* <http://perma.cc/6E9Y-TNF6>.

<sup>82</sup> This would be an example of vertical integration, defined as “[t]he expansion of a business by acquiring or developing businesses engaged in earlier or later stages of marketing a product.” *Id.*

<sup>83</sup> *E.g.*, *Am. Needle, Inc. v. Nat'l Football League*, 538 F.3d 736, 743 (7th Cir. 2008) (“Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?”).

recognize and accept the results of every game. Each team's fortunes, no matter how the league elects to divide total league expenses and revenues, are to a greater or lesser extent inherently affected by the success or failure of every single league game. . . . [E]ach league member is incapable of independent competitive activity [because] [e]ach team's economic existence depends entirely on, and its profits derive solely from, its being an integral part of the league.<sup>84</sup>

The idea that NFL member clubs are not actual or potential economic competitors because they must jointly produce the product being sold might be difficult to accept, particularly because the member clubs seemingly compete to generate revenues through ticket sales and merchandising.<sup>85</sup> But the fact that “the financial performance of each team . . . does not . . . necessarily rise and fall with that of the others”<sup>86</sup> does not mean that the clubs are in fact actual or potential economic competitors.

An analogy might help elucidate this point. The rivalry to attract fans and increase gate receipts that exists between NFL member clubs is akin to the rivalry that law firm partners engage in for origination credits within a law firm partnership.<sup>87</sup> The fact that the “financial performance” of each law firm partner (often located in various markets with differing profit potential) “does not necessarily rise and fall with that of the others,” does not mean that these folks are true economic competitors. Nor does it mean that the agreements governing how they decide to split the revenues and profits that they generate — or the agreements governing the hiring, firing, and compensation of those they employ — should be subject to Section 1 scrutiny (which, of course, they are not). Rather, “[t]he law treats the partners, officers, and employees of such structures as constituent elements of a whole,”<sup>88</sup> and thus immunizes agreements between them from scrutiny under Section 1 of the Sherman Act. This type of “competition” is not really competition at all, but rather is defined by economists as “coopeti-

---

<sup>84</sup> Roberts, *Evolving Confusion*, *supra* note 28, at 985–86.

<sup>85</sup> See *Am. Needle, Inc. v. Nat'l Football League*, 130 S.Ct. 2201, 2212 (2010). The Court in *American Needle* also states that the “teams compete . . . for contracts with managerial and playing personnel.” *Id.* at 2212–13. This competition is distinct from economic competition, and merely reflects the *strategic competition* that clubs engage in, the results of which play out in the *on-field competition*, the ultimate product that the league sells. See *supra* note 51 and accompanying text for further explanation of the nature and consumer benefits of strategic competition.

<sup>86</sup> *Am. Needle*, 130 S.Ct. at 2212 (quoting *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1252 (2d Cir. 1982)).

<sup>87</sup> See Devlin and Jacobs, *supra* note 28, at 5–6.

<sup>88</sup> *Id.* at 5.

tion,” an internal rivalry that produces benefits for the larger organization or association.<sup>89</sup>

Because leagues sell entertainment in the form of athletic competition, they also “openly advertise and publicly promote this internal rivalry in order to increase customer enthusiasm for the product.”<sup>90</sup> Indeed, “it would look suspicious to many fans and diminish local fan enthusiasm if teams were largely controlled from league headquarters and there appeared to be little economic incentive for each team to perform well on the field or to operate efficiently in the front office.”<sup>91</sup> Despite outward appearances, then, the economic relationship between NFL member clubs is similar to that which exists between law firm partners. Indeed, even the Internal Revenue Code treats sport leagues and partnerships identically.<sup>92</sup>

So it appears that member clubs do not endeavor to gain every dollar generated from the staging of NFL games. Rather, they endeavor to gain all dollars spent on spectator sports, or on entertainment generally, and they pursue this goal collectively through “coopetition.” They seek the elimina-

---

<sup>89</sup> See Wenpin Tsai, *Social Structure of “Coopetition” within a Multiunit Organization: Coordination, Competition, and Interorganizational Knowledge Sharing*, 13 ORGANIZATION SCIENCE NO. 2, 179, 181 (2002).

<sup>90</sup> Roberts, *Evolving Confusion*, *supra* note 28, at 989–90.

<sup>91</sup> *Id.* at 989. See *infra* text accompanying note 134 for an overview of a potential player allocation system where a central league administrator distributes playing talent throughout the league after each season. This would presumably increase “outcome uncertainty,” but it would decrease “strategic competition,” an important feature of the league sport product. See *infra* pp. 160–61.

<sup>92</sup> Roberts, *Evolving Confusion*, *supra* note 28, at 988 n.164 (“Neither a partnership (as defined by the IRS) nor a sports league pays any federal income tax as an entity. Partnerships are exempt under 26 U.S.C. § 701 (1982), and sports leagues are exempt under 26 U.S.C. § 501(c)(3) (1982). 26 U.S.C. § 501(c)(6) expressly exempts football leagues alone, and not other sports leagues, only because Congress amended the law to allow the NFL to manage the players’ pension fund without risking loss of the exemption. Partnerships are required to file a form each year with the IRS indicating what share of the partnership profit (or loss) is attributable to each individual partner. Sports leagues are also required to file the same information in IRS Form 990, which concerns league profit (or loss) distribution among the member clubs. See 26 U.S.C. § 6033 (1982). Just as league member clubs may earn different amounts each year—indeed some may earn a profit while others incur a loss—26 U.S.C. § 704 (1982) allows partners to divide profits and losses unequally.”).

tion of, among others, the MLB, NHL, NBA, and Hollywood studios.<sup>93</sup> These entities are the NFL member clubs' true economic competitors.<sup>94</sup>

Another sports league phenomenon — member club expansion — also lends support to the notion that NFL member clubs are not truly economic competitors. One must ask whether genuine economic competitors would voluntarily invite outsiders to join their cartel — one that has already successfully monopolized the market — if there were no readily apparent competitive threat. Yet this is precisely what sports leagues' member clubs do when they decide to add clubs through expansion.<sup>95</sup> The reason, of course, is that the nature of live sports entertainment limits the ability of producers to expand the quantity and geographic distribution of their product unilaterally. Producers in all other industries, whether product- or service-oriented, can increase production by merely building another plant, increasing their distribution networks, or hiring more people. The NFL, on the other hand, with thirty-two clubs, is limited to producing a maximum of sixteen games at any one time. If it wishes to add a seventeenth game, it must expand by two teams. Similarly, in a thirty-two-team league, the live league product can only be offered in sixteen markets at any one time. Thus, if the NFL wants to bring its live product offering to new geographic markets, it needs to expand. The quantity and geographic constraints on current producers force them to add “competitors” to their monopolistic cartel if they wish to expand the scope of their business, proving that the term “economic competitors” does not precisely capture the relationship that exists between sports leagues' member clubs.

I therefore propose a two-part test to determine whether two or more entities that jointly produce a given good or deliver a particular service are actual or potential economic competitors. First, could any of the entities that are currently working together to produce a given product or deliver a particular service unilaterally produce that exact same product or deliver that exact same service? Second, are these entities, as part of a cartel that has successfully monopolized the market, able to expand the quantity and geo-

---

<sup>93</sup> See *Nat'l Football League v. N. Am. Soccer League*, 459 U.S. 1074, 1077 (1982) (Rehnquist, J., dissenting from denial of *certiorari*) (“The NFL owners . . . produce a product, professional football, which competes with other sports and other forms of entertainment in the entertainment market.”).

<sup>94</sup> See *id.*

<sup>95</sup> See NAT'L FOOTBALL LEAGUE PLAYERS ASS'N CONST. art. III.1.C (Mar. 2007), archived at <http://perma.law.harvard.edu/0XRJezxuNRU>, which specifies that new clubs member clubs may be admitted to the League with an affirmative vote of three-fourths of all existing League members. The Houston Texans, joining the League in 2002, were the most recent addition to the NFL.

graphic scope of production without allowing other parties to join their cartel? If the answer to either of these questions is “yes,” then the entities currently working together are — or have the potential to become — economic competitors, and agreements between them should be subject to Section 1 scrutiny. If the answer to both questions is “no,” however, then these entities are not, nor could they ever be, economic competitors in that market. They are better described as economic “partners” since they each endeavor to achieve the same end, but must pursue that end collectively.

Having established that the NFL member clubs are not economic competitors but rather economic partners in the production of football games, it is now possible to evaluate whether they are economic competitors in the acquisition of player services. This is the critical inquiry in resolving whether member-club agreements related to the acquisition of player services (e.g., annual draft) should be subject to Section 1 scrutiny since “single-entity” status does not attach absolutely, but is instead evaluated on a case-by-case basis in light of the specific activity being challenged.<sup>96</sup>

When applying the single-entity test to player-restraint agreements, it is important to recognize that labor constitutes an *input* that clubs use to produce their product (i.e., football games) for the *output* market. That is, but for the staging of football games that generate revenue through ticket sales and television contracts, the clubs would have no need for players. This, of course, is true of any industry: an input is only necessary to the extent it is used to produce an output that has some value to a downstream market. In most industries, the demand for an input is unaffected by the number of firms purchasing any given input; rather, the demand for an input is a function of the demand for all of the output products for which that input could be used. But unlike industries in which one firm could theoretically produce any product independently, in the sports-league industry, a single firm acting alone is incapable of producing or selling anything in the output market.<sup>97</sup> Consequently, the demand for players in the sports-league industry depends entirely on the existence of multiple firms. That is, if there were only one sports club, demand for the input — player services — would be nonexistent, since that club would be incapable of selling anything in the output market. Similarly, if the number of firms producing NFL football games increases through expansion, the demand for NFL players would increase proportionately. Because the clubs in league sports are necessarily economic *partners* in the delivery of a product for the *output* market, it would be improper to conclude that they could simultaneously be eco-

---

<sup>96</sup> See *supra* note 68 and accompanying text.

<sup>97</sup> See *supra* Section II.A.2.

conomic *competitors* in the input market used to source the components necessary to deliver their joint product to the output market.<sup>98</sup>

### 3. The Single-Entity Test, Player Restraints, and *American Needle*

That NFL member clubs are not economic competitors in the production of football games — and should therefore be immune from Section 1 scrutiny when making agreements pertaining to the production of football games — squares firmly with the Supreme Court’s recent decision that agreements pertaining to the joint licensing of individual team logos and trademarks should in fact be subject to scrutiny under Section 1 of the Sherman Act.<sup>99</sup> There are two portions of dicta within the *American Needle* decision that may appear to undermine the conclusion that NFL member clubs are in fact a single entity when it comes to player restraints and therefore should not be subject to Section 1 scrutiny. Each excerpt is addressed in turn.

First, the opinion states:

The justification for cooperation is not relevant to whether that cooperation is concerted or independent action. . . . Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is *necessary*. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to § 1 analysis.<sup>100</sup>

Here, the Supreme Court misuses the word “necessary.” In very few joint ventures will the participation of others actually be “necessary.” It may be economically advantageous for the joint venturers to collaborate (indeed, this is most likely why they chose to collaborate in the first place), but that does not mean the collaboration was “necessary” in any absolute sense, as is the collaboration between two sports clubs staging an athletic competition. The Court is no doubt correct when it asserts that a “nut and bolt can only operate together,” but “an agreement between nut and bolt manufacturers

---

<sup>98</sup> Because monetary compensation is often the way in which clubs attempt to attract players, it is tempting to view these clubs as economic competitors, but decisions regarding how much to pay players individually are really just a manifestation of the strategic competition in which clubs engage. This concept is further explored in Section II.C.4.

<sup>99</sup> See *Am. Needle, Inc. v. Nat’l Football League*, 130 S.Ct. 2201 (2010).

<sup>100</sup> *Id.* at 2214 (emphasis added).

is still subject to § 1 analysis.”<sup>101</sup> But it confuses the issue since the compatibility or complementariness of the products produced by multiple firms has no bearing on the Section 1 inquiry. Rather, agreements between nut and bolt manufacturers are subject to Section 1 scrutiny because there is theoretically no reason why the nut manufacturer could not also manufacture bolts, and the bolt manufacturer nuts; because both of these entities could unilaterally produce the exact same product that the other produces, they are potential economic competitors.<sup>102</sup>

Second, the Court opines:

If the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from § 1, then any cartel could evade the antitrust law simply by creating a joint venture to serve as the exclusive seller of their competing products. . . . However, competitors cannot simply get around antitrust liability by acting through a third-party intermediary or joint venture.<sup>103</sup>

Again, this language does not refute or contradict the notion that the NFL member clubs should not be subject to Section 1 scrutiny in player-restraint lawsuits. The fact that NFL clubs decide to partially share profits and losses has no bearing on whether they should be entitled to Section 1 immunity. Nor should the simple fact that they have created a “joint venture.” Under the two-part test proposed in the prior subsection, the member clubs’ immunity would derive from situations in which the product produced by the venture would not exist but for their collaboration, demonstrating that in such an instance they are economic partners, rather than economic competitors. Consequently, “[a]ny cartel,” could not “evade the antitrust law simply by creating a joint venture”<sup>104</sup> because the individual members of those cartels could unilaterally produce the exact same product that they currently produce jointly. Indeed, apparel manufacturers could still attain the product jointly delivered and at issue in *American Needle* (the license to produce apparel with the logo of each NFL club) even if the clubs were precluded from collectively negotiating the rights to all club logos. The Supreme Court was on point when it reasoned that “even if leaguwide [sic] agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce foot-

---

<sup>101</sup> *Id.*

<sup>102</sup> In other words, they fail the first part of the two-part test proposed in Section II.A.2.

<sup>103</sup> *Am. Needle*, 130 S.Ct. at 2215-16 (internal quotation marks and citations omitted).

<sup>104</sup> *Id.* at 2215.



ball.”<sup>105</sup> That is, “[t]o a firm making hats, the [clubs] are . . . potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the common interests of the whole league but is instead pursuing interests of each corporation itself . . . .”<sup>106</sup> In contrast, when clubs make agreements pertaining to the production of football games (including agreements related to the allocation and distribution of playing talent throughout the League), which no single club could independently produce, they necessarily pursue the common interests of the whole League.

In sum, NFL member clubs are not economic competitors, but economic partners in the production of NFL football games. This fact is concealed by the “athletically competitive nature of the product itself, and the need to maintain public confidence in the athletic separateness of the teams engaging in sporting competition.”<sup>107</sup> However, careful analysis reveals that this “competition” is not really competition at all, but “cooperation,” similar to that which takes place internally within many organizations, such as law firm partnerships. Because the clubs are not economic competitors in the production of football games, it would be improper to conclude that they are economic competitors in the input market from which they necessarily must draw to produce their joint product for the output market. And, because the clubs are not economic competitors in the production of football games, agreements between them pertaining to the production of football games do not deprive the marketplace of independent centers of decision-making, nor the benefits that accrue from actual or potential competition. Accordingly, when it comes to player-restraint agreements, the NFL member clubs should fit within the Supreme Court’s definition of a “single entity” and rest beyond the purview of Section 1.

### B. *The Rule of Reason*

Assuming, *arguendo*, however, that Section 1 applies,<sup>108</sup> the legality of any league-wide player restraint will most likely be judged according to the “rule of reason.”<sup>109</sup> That is, notwithstanding specific language outlawing

<sup>105</sup> *Am. Needle*, 130 S.Ct. at 2214 n.7.

<sup>106</sup> *Id.* at 2213 (internal quotation marks and citation omitted).

<sup>107</sup> Roberts, *Evolving Confusion*, *supra* note 28, at 989.

<sup>108</sup> See *supra* Section II.A.

<sup>109</sup> The Rule of Reason (capital R’s) should be distinguished from a rule of reason (small r’s) inquiry. The Rule of Reason encompasses both *per se* categories of illegality, as well as the more searching rule of reason inquiry, which attempts to weigh

“every contract, combination . . . or conspiracy,”<sup>110</sup> Section 1 only prohibits conduct that “unreasonably” restrains trade.<sup>111</sup> And that determination turns on “whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”<sup>112</sup> More simply stated, the question is

---

the procompetitive effects of a given restraint against its anticompetitive effects. *See infra* note 111 and accompanying text.

<sup>110</sup> 15 U.S.C. § 1 (2012).

<sup>111</sup> Because every private contract in some way restrains trade, the Supreme Court has held that the Act cannot be applied literally, lest the abilities of parties to contract with one another be destroyed. *See Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911) (“[A]s the contracts or acts embraced in the provision were not expressly defined . . . [the] classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce . . . and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment . . . . Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason . . . was intended to be the measure . . .”).

<sup>112</sup> *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918). Certain categories of restraints are so pernicious that their anticompetitive consequences almost always outweigh any procompetitive effects. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (horizontal price fixing); *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102–03 (1980) (vertical price fixing); *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972) (horizontal market allocation); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 293–94 (1985) (noting group boycotts deserve *per se* treatment, but holding that concerted refusals to deal do not). As a result, restraints belonging to these categories have been deemed *per se* illegal, meaning that the perpetrator is precluded from providing an explanation for his conduct and judgment is immediately rendered against him.

Experience has also proven, however, that the joint productive nature of certain industries makes a presumption of illegality inappropriate in those industries regardless of whether the challenged restraint would otherwise fit into a *per se* illegal category. *See Mackey v. Nat’l Football League*, 543 F.2d 606, 619 (8th Cir. 1976) (“[W]hen faced with a unique or novel business situation, courts have eschewed a *per se* analysis in favor of an inquiry into the reasonableness of the restraint under the circumstances.”). Most courts confronting a sports league Section 1 antitrust lawsuit have recognized to various extents that the very existence of sports leagues requires a certain degree of collaboration and cooperation. *See, e.g., Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1389 (9th Cir. 1977) (“It is true the NFL clubs must cooperate to a large extent in their endeavor in producing a “product” — the NFL season culminating in the Super Bowl.”). Thus, every time the Supreme Court or a circuit court has presided over player restraint antitrust litigation, they have rightly declined to hold any conduct by

whether the challenged conduct's procompetitive effects outweigh its anticompetitive effects.<sup>113</sup>

### 1. What Are "Procompetitive" and "Anticompetitive" Effects?

Before the effects of challenged conduct on competition can be measured, a normative standard must be established to identify from whose perspective any such effects are to be evaluated; failure to do so would make any attempt at classification futile.<sup>114</sup>

More than a century's worth of antitrust jurisprudence has firmly established that any restraint's effects must be evaluated from the consumer's perspective.<sup>115</sup> Consequently, the impact that a given restraint has on a product's price, output and/or quality determines the conduct's procompeti-

---

sports leagues or their member clubs *per se* illegal under Section 1, choosing instead to judge the challenged conduct according to the rule of reason. *See id.*; *see also* N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1259 (2d Cir.1982); Smith v. Pro Football, Inc., 593 F.2d 1173, 1177–82 (D.C. Cir. 1978); *Mackey*, 543 F.2d at 618–20. It should be noted, however, that a few district courts have declared sports league conduct to be *per se* illegal. *See* Boris v. U.S. Football League, No. CV 83-4980 LEW (Kx), 1984 WL 2864 (C.D. Cal. Jan. 30, 1984); *see also* Linesman v. World Hockey Ass'n, 439 F.Supp. 1315, 1323 (D. Conn. 1977); Smith v. Pro Football, Inc., 420 F. Supp. 738, 745 (D.D.C. 1976), *rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. Nat'l Football League*, 407 F.Supp. 1000, 1007 (D. Minn. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976); *Robertson v. Nat'l Basketball Ass'n*, 389 F.Supp. 867, 890–91 (S.D.N.Y. 1975); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1066 (C.D. Cal. 1971).

<sup>113</sup> *See e.g.*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 898–99 (2007) (explaining that the rule of reason should be applied in "a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones").

<sup>114</sup> *Devlin*, *supra* note 27, at 226–27. For example, if Party A contracts to sell 500 widgets to Party B, exhausting Party A's remaining supply, Party C, also wanting to purchase the widgets, is aggrieved by this "contract in restraint of trade." From Party C's perspective, the contract appears to be "anticompetitive," while it appears to be "procompetitive" from the perspectives of Parties A and B. *See infra* text accompanying notes 173–77.

<sup>115</sup> This is because consumer welfare is the overriding purpose of the Sherman Act. Associate Justice Breyer, while still sitting on the First Circuit, wrote: "[T]he law assesses both harms and benefits in light of the Act's basic objectives . . . [to] bring[ ] . . . consumers the benefits of lower prices, better products, and more efficient production methods." *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 486 (1st Cir. 1988) (Breyer, J.). "Some scholars maintain that there are social and political goals which should play a role in antitrust enforcement policy, but even these dissenters recognize that the economic interests of the consumer should be the primary goal." *Roberts, Evolving Confusion*, *supra* note 28, at 984–85 (1988).

tive or anticompetitive nature. That is, a decrease in price, or increase in output and/or quality is considered “procompetitive,” while the opposite effects are considered “anticompetitive.”

Keeping this standard in mind, it is obvious that seller-side (i.e., monopolistic) cartels banding together to *raise* prices in an *output* market leads to anticompetitive effects, and thus, such conduct is usually held illegal under Section 1. But it is not readily apparent that buyer-side (i.e., monopsonistic) cartels banding together to *lower* prices in the *input* market leads to anticompetitive effects.<sup>116</sup> After all, if buyers were to leverage their collective buying power to reduce the costs of their inputs, they could then theoretically pass on those savings to consumers in the output market.<sup>117</sup> It thus appears that, unlike monopolistic conduct, monopsonistic conduct may actually lead to procompetitive effects.

But the Supreme Court has declared monopsonistic conduct illegal on numerous occasions,<sup>118</sup> and its harmful nature is implied by those who call

---

It is imperative not to confuse the fact that a challenged restraint’s procompetitive and anticompetitive effects must always be evaluated from the consumer’s perspective with the proposition that the application of that standard — and thus the Sherman Act itself — protects not only consumers, but also many constituencies. See *infra* text accompanying notes 173–77.

<sup>116</sup> For purposes of this discussion, “buyers” are businesses that will purchase materials from other sellers, transform those materials into something of value, and then sell that transformed good to another business or an end-user (i.e., consumer).

<sup>117</sup> Research has indicated, however, that monopsonists rarely, if ever, pass these savings onto consumers, preferring instead to keep these rents for themselves. For instance, speaking on behalf of the U.S. Department of Justice Antitrust Division, R. Hewitt Pate explained: “A casual observer might believe that, if a merger lowers the price the merged firm pays for its inputs, consumers will necessarily benefit. The logic seems to be that because the input purchaser is paying less, the input purchaser’s customers should expect to pay less also. But that is not necessarily the case. Input prices can fall for two entirely different reasons, one of which arises from a true economic efficiency that will tend to result in lower prices for final consumers. The other, in contrast, represents an efficiency-reducing exercise of market power that will reduce economic welfare, lower prices for suppliers, and may well result in higher prices charged to final consumers.” *Antitrust Enforcement in the Agricultural Marketplace: Statement Before the Senate Comm. on the Judiciary 4* (Oct. 30, 2003) (statement of R. Hewitt Pate, Assistant Att’y Gen., Antitrust Div., U.S. Dept. of Justice), archived at <http://perma.cc/0351BqMmHD7>.

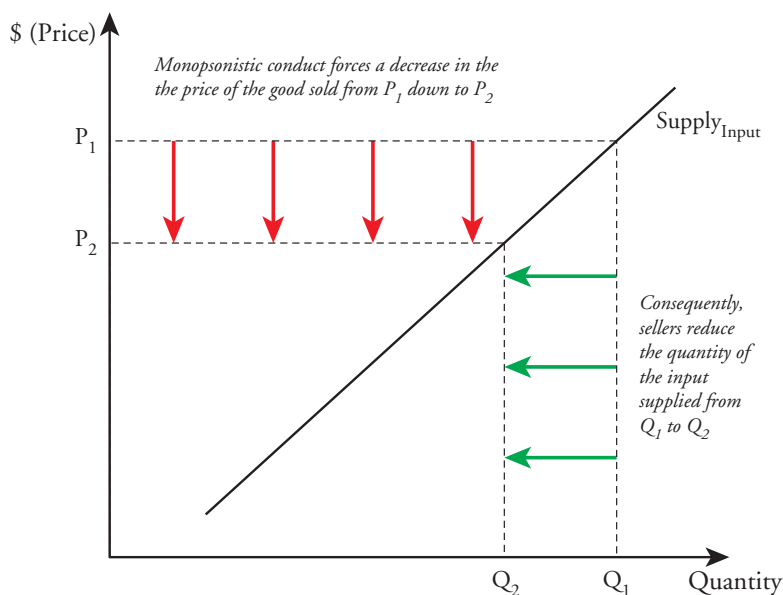
<sup>118</sup> See *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co., Inc.*, 549 U.S. 312, 320–25 (2007) (holding that the test for judging whether predatory bidding is illegal should be the logical equivalent of the test for predatory pricing); see also *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 246 (1948) (holding that an allegation that a group of sugar beet refiners illegally conspired to

monopsony “the mirror image of monopoly.”<sup>119</sup> Considering that NFL member clubs act as monopsonists with respect to labor — i.e., clubs purchase player labor, and reduced labor costs could be used to lower ticket prices or build better stadiums — more than just a surface-level understanding of monopsonistic conduct is necessary to determine when such conduct does in fact lead to anticompetitive effects. Only then will it be possible to properly evaluate whether player restraints are “unreasonable” restraints of trade, and thus illegal.

## 2. Monopsony Usually Leads to Anticompetitive Effects

In most industries, monopsonistic conduct leads to decreases in output, and consequently to increases in price. This results from sellers’ responses to monopsonistic conduct. Assuming the input targeted by monopsonists has an upward-sloping supply curve, a forced decrease in the price paid for that input would cause sellers of the input to cumulatively decrease the quantity that they will sell.

FIGURE 1

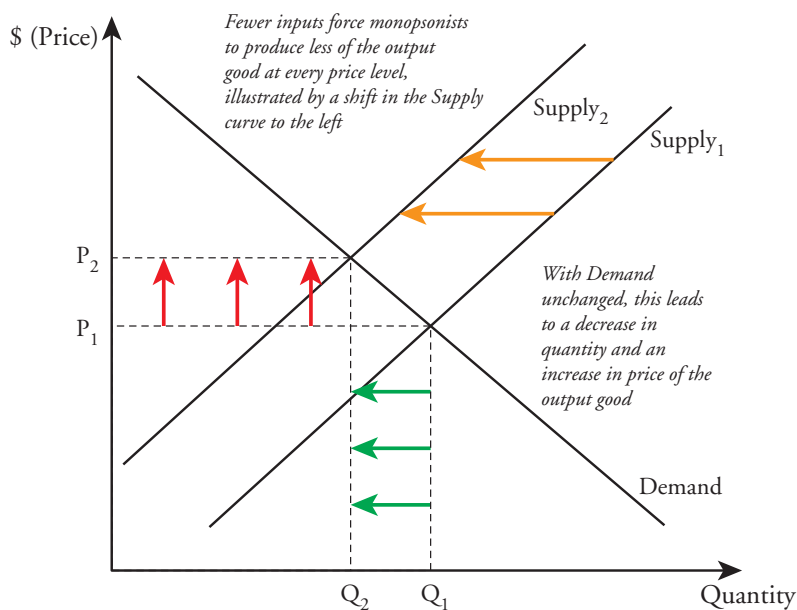


fix the prices of the beets they purchased from the growers clearly states a cause of action under the Sherman Act).

<sup>119</sup> Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1502, 1514 (2013).

With fewer inputs, the buyers/monopsonists will not be able to produce as much of the finished product for the output market as they could before. Their inability to produce the same quantity of the finished product is represented by a shift in the monopsonists' output-market supply curve to the left. As a result, this shift leads to a decrease in quantity and an increase in price, clear anticompetitive effects for consumers.

FIGURE 2



Because demand in the output or product market remains unchanged, however, monopsonists may attempt to substitute another input for the input targeted by their monopsonistic conduct. This would allow them to produce the same quantity of the finished product for the output market as they had before they engaged in the monopsonistic conduct.<sup>120</sup> Besides any effect that substitution might have on product quality, the substitution will be inefficient,<sup>121</sup> resulting in an overall increase in the monopsonistic firms' marginal costs.<sup>122</sup> "As profit-maximizing entities sell their goods at the

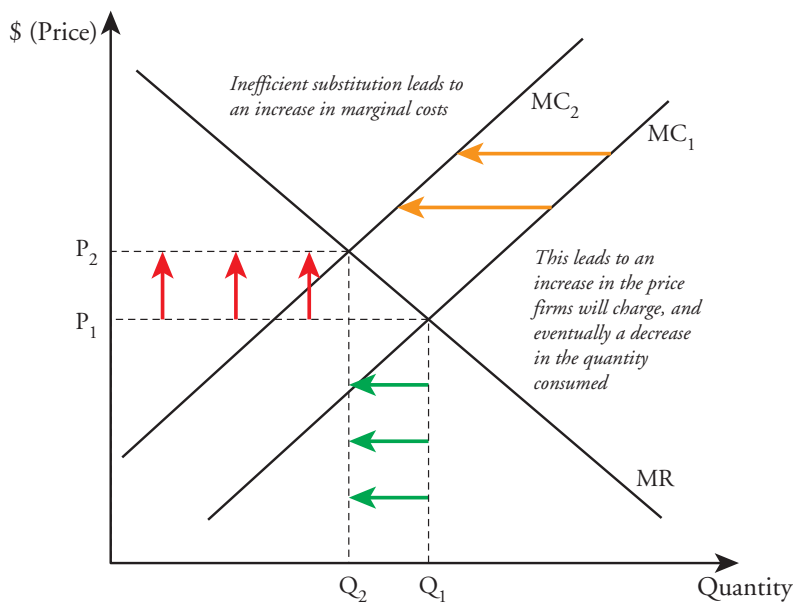
<sup>120</sup> Devlin, *supra* note 27, at 231.

<sup>121</sup> *Id.* at 231 n.39 ("Given the assumption of profit maximization, we can be confident of the resulting inefficiency, for were the substitution efficient, it would already have taken place prior to the exercise of upstream monopsony power.").

<sup>122</sup> *Id.* at 231.

point where marginal revenue equals marginal cost, a higher marginal cost will lead to higher prices.”<sup>123</sup>

FIGURE 3



Whereas in the prior example a decrease in quantity produced led to an increase in price, here an increase in price leads to a decrease in quantity consumed.<sup>124</sup> Either way, the anticompetitive effects of monopsonistic conduct are clear. Armed now with at least a basic understanding of what is meant by “procompetitive” and “anticompetitive” effects, as well as why monopsonistic conduct is usually anticompetitive, a determination can be made regarding whether sports-league player restraints are “unreasonable,” and thus illegal under Section 1.

### 3. Evaluating the Effects of Sports-League Player Restraints

It is usually true in the world of sports that the more evenly matched the competitors or teams, the more exciting and enjoyable the competition

<sup>123</sup> *Id.*

<sup>124</sup> *See id.*

is to the spectator.<sup>125</sup> In short, increased on-field competitiveness — or increased outcome uncertainty — enhances product quality, and thus consumer welfare.<sup>126</sup>

The salary cap, along with the salary floor, increases outcome uncertainty by establishing a tight dollar range that player salaries must stay within, and therefore creates a league in which the quality of playing talent is spread relatively evenly across all member clubs.<sup>127</sup> Yet despite starting a season with similar payrolls — and presumably a relatively equal amount of talent — clubs end the season with vastly different win-loss records. Players get injured, talent develops or erodes more quickly than anticipated, the particular players on a given club fit together better or worse than expected, and sometimes the talent evaluators that decide how much a player is worth are just plain wrong. The playing season illustrates that the clubs are not as evenly matched as their payrolls had indicated they were at the beginning of the season. At this point, the annual college player draft steps in.<sup>128</sup> By

---

<sup>125</sup> See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1176 (D.C. Cir. 1978) (“Evenly-matched teams make for closer games, tighter [playoff] races, and better player morale, thus maximizing fan interest, broadcast revenues, and overall health of the sport.”); *Mackey v. Nat’l Football League*, 543 F.2d 606, 621 (8th Cir. 1976) (“We do recognize . . . that the NFL has a strong and unique interest in maintaining competitive balance among its teams.”).

<sup>126</sup> See generally Jake I. Fisher, *The NFL’s Current Business Model and the Potential 2011 Lockout* 10 (May 4, 2010) (unpublished economics paper), *archived at* <http://perma.law.harvard.edu/0ZF6oPfutoT> (“By giving all teams and fans hope for a playoff appearance and Super Bowl Championship, the NFL maintains demand in the sport. Weekly regular season games become more interesting when the victor is unknown.”). Perhaps NFLPA Executive Director DeMaurice Smith put it best when, asked at an NFL game why the league has been so successful, he responded, “You know who’s gonna win this game? Neither do I. And you know what? It’s fantastic.” *60 Minutes: The Commissioner*, *supra* note 52.

<sup>127</sup> In fact, a huge difference between the NFL and MLB is that the NFL implements a “hard” salary cap and MLB does not. Compare 2011 NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 12.9 (Aug. 4, 2011), *archived at* <http://perma.law.harvard.edu/0UcXeAWR7o8> with 2012–2016; with 2012–2016 BASIC AGREEMENT art. 23, *archived at* <http://perma.cc/AKF9-9CBV>. MLB does limit spending on player salaries to increase the competitiveness of the League, but in a much less restrictive — and therefore much less effective — manner through the imposition of a “competitive balance tax.” See 2012–2016 BASIC AGREEMENT art. 23, *archived at* <http://perma.cc/AKF9-9CBV>. The competitive balance tax is a surcharge put on the aggregate payroll of a team to the extent it exceeds a predetermined level. See generally *id.* A team is thus dissuaded, although not prohibited, from having a payroll exceeding this threshold because doing so would result in paying more for the playing talent than it is objectively worth.

<sup>128</sup> See *supra* note 38 for a description of how the draft operates.



allowing the least competitive club a better opportunity to acquire the best new talent, the draft attempts to create a more competitive league and increase outcome uncertainty for the following season.<sup>129</sup>

In fact, almost all player restraints increase outcome uncertainty (albeit to various extents).<sup>130</sup> For instance, restraining the number of players that any one team can employ limits the ability of a particularly wealthy club to stockpile all the best talent.<sup>131</sup> There also appears to be a direct correlation between the restrictiveness<sup>132</sup> of a given player restraint and outcome uncertainty.<sup>133</sup> For instance, a more restrictive system than the combination of the salary cap and annual college player draft would be to pay all players the same amount and have a central league administrator reassign players to each club at the end of each season to balance playing talent throughout the league as evenly as possible. Theoretically, employing this system would increase outcome uncertainty.<sup>134</sup> And the restraints that do not appear to enhance outcome uncertainty provide other benefits, such as increased team

---

<sup>129</sup> See *Smith*, 593 F.2d at 1194-1205 (MacKinnon, J., concurring in part and dissenting in part) for an informative description of the early failings of the NFL and how the annual college player draft increased the competitiveness of the League and led to success.

<sup>130</sup> Again, the restraints referenced here are those that primarily affect the *process* by which talent is acquired and the *distribution* of playing talent throughout a league. This statement does not encompass player restraints that *exclude* particular players or classes of players, though some exclusionary player restraints also increase outcome uncertainty. See *infra* note 131 and accompanying text.

<sup>131</sup> Although some of the talent stockpiled by a club would not be utilized, that talent would not be able to compete against the club either.

<sup>132</sup> The “restrictiveness” of a player restraint is based upon the level of autonomy that players have in choosing for which club they will play, and the level of autonomy that club general managers have to sign the players they desire the most. Thus, the hard salary cap is more restrictive than a competitive balance tax because the competitive balance tax merely imposes a financial hardship that club general managers and owners can choose to endure to sign whichever players they want, while the hard salary cap actually bars clubs from exceeding a certain threshold. See *supra* note 39 and accompanying text for a description of the salary cap; see *supra* note 127 and accompanying text for a description of the competitive balance tax.

<sup>133</sup> See *infra* figure 4 and text accompanying notes 217–18.

<sup>134</sup> On the other hand, playing quality would most likely decrease because of the lack of continuity. Whether the net outcome of these countervailing effects would enhance or diminish product quality and consumer interest is debatable. Additionally, such a system might diminish fan enthusiasm. See *supra* note 91 and accompanying text.

continuity and/or strategic competition,<sup>135</sup> which also enhance product quality and consumer welfare.<sup>136</sup>

Conversely, player restraints governing strategic competition<sup>137</sup> do not lead to anticompetitive effects. Recall that monopsonistic conduct usually leads to an increase in price and/or decrease in the quantity or quality of the finished product because sellers of the targeted input will decrease the quantity that they would otherwise supply absent the monopsonistic conduct.<sup>138</sup> In most industries, monopsonistic conduct targeting the labor market also leads to these anticompetitive effects.<sup>139</sup> A brief hypothetical shows why: if competing manufacturers previously paying factory workers \$15/hour were able to band together to drive down the cost of labor to \$10/hour, it is possible that some workers would decide to quit (i.e., a decrease in sup-

---

<sup>135</sup> See *infra* figure 5 and text accompanying notes 222–31 for further description regarding the benefits of enhanced strategic competition.

<sup>136</sup> The “franchise tag” may fall into this category. It arguably enhances product quality, though, by allowing clubs an additional opportunity to maintain team chemistry, which leads to higher-quality play. Additionally, it allows clubs to keep players they might otherwise lose. This arguably enhances consumer welfare because club fans are generally more attached to players they already have than to players they might get in the future. This psychological concept is referred to as “loss aversion.” See generally Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39(4) AM. PSYCHOL. 342-50 (1984) (first explaining the theory of loss aversion). See *infra* notes 219–31 for further description of how the franchise tag operates and its procompetitive benefits.

<sup>137</sup> Again, this statement and the arguments that follow in this section only concern player restraints that govern the *process* of player acquisition, and the *distribution* of player talent throughout the League. It does not encompass player restraints that *exclude* players or classes of players from the League. Such restraints do have an anticompetitive effect by depriving the consumer of the enjoyment of watching the most talented athletes compete — athletes that would be competing if not for the player restraint. These player restraints, however, may have other procompetitive benefits, such as protecting the integrity of the League or enhancing the safety of its players. These benefits increase the stability of the League and may outweigh these anticompetitive effects, making the exclusion of certain players or players who engage in certain practices legal under Section 1. See generally, *e.g.*, *Clarett v. Nat’l Football League*, 369 F.3d 124 (2d Cir. 2004); *Neeld v. Nat’l Hockey League*, 594 F. 2d. 1297 (9th Cir. 1979); *Molinas v. Nat’l Basketball Ass’n*, 190 F.Supp. 241 (S.D.N.Y. 1961); see also *supra* notes 36-37.

<sup>138</sup> See *supra* figures 1–2 and text accompanying notes 120–24.

<sup>139</sup> This is particularly true when that labor is engaged in relatively unrewarding, menial, low-paying jobs, because other alternatives to employment become immediately attractive.

ply).<sup>140</sup> The workers might decide to drive a taxi, wait tables, stay at home to raise their children or do any number of other things with their time. As a result, the monopsonistic manufacturers would no longer be able to produce the same quantity of goods as they could before they conspired to lower employee wages.<sup>141</sup> This decrease in the production of finished goods will cause the price of these goods to increase.<sup>142</sup> Alternatively, the monopsonistic manufacturers may decide to inefficiently substitute capital for the lost labor, which will increase the marginal cost of producing the good, leading to a corresponding increase in the price of the good in the output market, culminating in a decrease in quantity consumed.<sup>143</sup>

But sports leagues are not like most industries, and being a professional athlete is nothing like being a factory worker. Playing sports is fun.<sup>144</sup> There are currently 1,696 players in the NFL.<sup>145</sup> Considering that millions of Americans play sports recreationally on a regular basis, there is a good chance that NFL member clubs would still be able to fill their rosters even if they all agreed to not pay their players a single penny.<sup>146</sup> Because the sup-

---

<sup>140</sup> Assuming, of course, that they do not instead choose to form a union and collectively bargain, Congress's preferred method for labor and management to set the wages, terms and conditions of employment. *See infra* Section III.

<sup>141</sup> This assumes that the workers that quit were necessary for producing a certain quantity of goods. This is a safe assumption since a profit-maximizing firm would have already laid-off unnecessary workers.

<sup>142</sup> *See supra* figures 1–2 and text accompanying notes 120–24.

<sup>143</sup> *See supra* figures 1–2 and text accompanying notes 120–24.

<sup>144</sup> In fact, a few professional athletes have even indicated their willingness to play sports for free. For instance, star soccer player Luca Toni recently stated that he would play for former club Bayern Munich for free. *Toni: I Would Play for Bayern for Free*, ESPNSTAR (Jan. 24, 2012), <http://www.espnstar.com/home/news/detail/item740803/> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0A1ZRi4HiCS>. Additionally, Chad Ochocinco indicated that he would be willing to play Major League Soccer (“MLS”) for free. *Chad Ochocinco Begins MLS Tryout*, ESPN (Mar. 24, 2011), <http://sports.espn.go.com/nfl/news/story?id=6250413> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0vQ3UQg7fwf>. Tangentially, it is somewhat surprising that star athletes who have already earned exorbitant sums of money do not volunteer to play for the league minimum so that their club can use the money saved to sign other quality players, thereby increasing the club's chances of winning a championship. Presumably the reason why this hasn't happened is that if a player did this, it would set precedent that would put significant pressure on all athletes to accept less money, creating a race to the bottom, and diminish overall player welfare. Union leaders have most likely advised star players of the detrimental effects that would result from making such a seemingly honorable and gracious gesture.

<sup>145</sup> *See supra* note 47.

<sup>146</sup> *See supra* note 144.

ply of labor in sports leagues is inelastic, monopsonistic conduct by NFL clubs has absolutely no impact on the price or quantity of NFL games produced.<sup>147</sup> But, of course, a game played between a bunch of “Regular Joes” — as opposed to squads composed of finely-tuned athletes like Adrian Peterson and J.J. Watt — would not be as enjoyable to watch.<sup>148</sup> Thus, the real anticompetitive threat that exists when sports leagues’ member clubs engage in monopsonistic conduct is not an increase in price or decrease in output, but a decrease in player quality, leading to a decrease in product quality.

The argument that clubs’ monopsonistic conduct would reduce player quality — and therefore consumer welfare — goes as follows:

Depressing wages below the competitive level would discourage some potential players from becoming professionals. Even if few potential players have alternative opportunities outside their sport, a reduction in salary levels at the least reduces the incentive for some young people to invest the human capital necessary to become a skilled professional and thereby subtracts from maximum potential consumer satisfaction.<sup>149</sup>

This argument, though, is weak.

First, college athletics ensure that any diminution in human capital investment created by league-wide monopsonistic conduct is rendered virtually nil. Most young people enrolled in middle and high school are still not fully developed (physically or skill-wise) such that they can predict with absolute certainty whether their dream of playing a professional sport will be fulfilled. In most cases, college athletics provide a training and proving ground for the athlete. So long as college scholarships (not to mention the “celebrity” that goes along with playing a varsity sport) are provided to athletes, there should not be a significant decrease in the incentive for young people to invest the human capital necessary to become a professional ath-

---

<sup>147</sup> “Where the input elasticity of supply is perfectly inelastic, there will be no reduction in the quantity of input, no increase in marginal cost, and no consumer harm.” Devlin, *supra* note 27, at 232; see also Jay M. Zitter, *What Constitutes Monopsony Within Meaning of § 2 of the Sherman Act* (15 U.S.C.A. § 2), 49 A.L.R. Fed. 2d 515, § 2 (2010) (“[F]or monopsony power to exist: . . . (2) the supply curve for the input in question must be upward sloping.”). Furthermore, NFL clubs, unlike the manufacturers, could not substitute another input for a shortage of player labor even if they wanted to. Such a shortage would result, however, in contraction, or a reduction in output, although it is doubtful that this would lead to an increase in price as it would for normal goods.

<sup>148</sup> Adrian Peterson is an all-pro running back, playing for the Minnesota Vikings, and J.J. Watt is an all-pro defensive end, playing for the Houston Texans.

<sup>149</sup> Harper, *supra* note 28, at 1665 n.12.

lete. This is driven home by the fact that only one percent of college athletes become professional athletes.<sup>150</sup> Although the overwhelming majority of college athletes will never receive financial remuneration for their athletic achievements, reality has demonstrated that they are still willing to invest incredible amounts of time and energy to participate in athletics.<sup>151</sup>

Second, few children begin playing sports to ensure that they will earn a particular income fifteen or twenty years later.<sup>152</sup> Rather, in most circumstances, children begin playing sports because their parents believe it will teach them the value of hard work, discipline, and teamwork, and because exercising is good for health and physical development.<sup>153</sup> As children grow older, they play sports because they enjoy playing.<sup>154</sup> They gravitate toward the most popular sports and those in which they have the most natural talent.<sup>155</sup> While natural talent cannot be influenced, the popularity of a sport can be. Since more restrictive player restraints lead to an increase in out-

---

<sup>150</sup> Stephanie Stark, *College Athletes Suffer the Greatest Injustice from NCAA*, USA TODAY (Aug. 28, 2011), <http://www.usatodayeducate.com/staging/index.php/blog/college-athletes-suffer-the-greatest-injustice-from-ncaa> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0HBr2Dw6Yvg>. Indeed, the NCAA's advertising slogan — “there are nearly 400,000 NCAA student-athletes, and almost all of us will be going pro in something other than sports” — has praised and popularized this statistic.

<sup>151</sup> *See id.* (“One would think, with the staggering statistics and the depressing lingering of past prestige of college athleticism that only remains on dusty shelves and Facebook photos, these former student athletes would regret it. However, as for the people interviewed, not one said they wish they would have had a college career without athletics.”).

<sup>152</sup> The author acknowledges that some parents may push their children towards certain activities because of the potential to eventually extract a lucrative financial reward. This effect, though, is most likely completely overshadowed by the increase in the number of children who want to become a particular type of athlete because the sport is extremely popular. *See infra* notes 153–57 and accompanying text.

<sup>153</sup> *See, e.g.*, Mark Hyman, *A Survey of Youth Sports Finds Winning Isn't the Only Thing*, N.Y. TIMES (Jan. 30, 2010), <http://www.nytimes.com/2010/01/31/sports/31youth.html> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0fc95ezZBY>; Emily J. Crandall, *Why Children Play Sports: A Parent's, Coach's, and Athlete's Perspective* (2007) (unpublished Ed.M. thesis), *archived at* <http://www.perma.cc/0h1bryKV4eE>; Carleton Kendrick, *Why Most Kids Quit Sports*, FAMILY-EDUCATION.COM, <http://life.familyeducation.com/sports/behavior/29512.html> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/05EhXFgejEx>.

<sup>154</sup> *See* Vern Seefeldt, Martha Ewing and Stephan Walk, *Overview of Youth Sports in the United States 55*, *archived at* <http://www.perma.cc/N92M-HATG> (listing “to have fun” as the most common reason both boys and girls play sports).

<sup>155</sup> *See id.* (listing “to do something I'm good at” as the second most common reason boys play sports).

come uncertainty,<sup>156</sup> and outcome uncertainty leads to an increase in consumer interest,<sup>157</sup> it stands to reason that the more restrictive the monopsonistic conduct by a league's member clubs, the greater the number of children that will want to invest the human capital necessary to play that particular sport at the highest level.

In fact, this is precisely what has happened. Despite average yearly salaries for baseball players increasing sixty-five percent between 2000 and 2009,<sup>158</sup> the number of kids playing youth baseball declined by twenty-four percent during this timeframe.<sup>159</sup> Meanwhile, the number of kids participating in youth tackle football increased by twenty-one percent<sup>160</sup> and NFL salaries more than doubled during this same timeframe.<sup>161</sup> The fact that

<sup>156</sup> See *supra* text accompanying notes 132–33.

<sup>157</sup> See *supra* notes 125–26 and accompanying text.

<sup>158</sup> The average salary earned by MLB players in 2000 was \$2.0 million. See *2000 MLB Salaries by Team*, USA TODAY, <http://content.usatoday.com/sportsdata/baseball/mlb/salaries/team/2000> (last visited Jan. 12, 2014), *archived at* <http://perma.cc/6WHK-KXG4>. The average salary earned by MLB players in 2009 was \$3.3 million. See *2009 MLB Salaries by Team*, USA TODAY, <http://content.usatoday.com/sportsdata/baseball/mlb/salaries/team/2009> (last visited Jan. 12, 2014), *archived at* <http://perma.cc/P7QW-SQLW>.

<sup>159</sup> See Matthew Futterman, *Has Baseball's Moment Passed?: On Opening Day, Gloomy Studies Suggest Kids Are Losing Interest; Hank Crone Laces 'Em Up*, THE WALL STREET JOURNAL (Mar. 31, 2011), <http://online.wsj.com/article/SB10001424052748703712504576232753156582750.html> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/Orvs9u369Pr>.

<sup>160</sup> *Id.* It is worth noting, however, that since 2009, youth participation in Pop Warner, the nation's largest youth football program, has dropped amid growing concerns regarding the long-term effects of concussions. See Steve Fainaru and Mark Fainaru-Wada, *Youth Football Participation Drops*, ESPN (Nov. 14, 2013), [http://espn.go.com/espn/otl/story/\\_/page/popwarner/pop-warner-youth-football-participation-drops-nfl-concussion-crisis-seen-causal-factor](http://espn.go.com/espn/otl/story/_/page/popwarner/pop-warner-youth-football-participation-drops-nfl-concussion-crisis-seen-causal-factor) (last visited Jan. 12, 2014), *archived at* <http://perma.cc/D2F8-NCNM> (noting a 9.5% drop between 2010 and 2012).

<sup>161</sup> The average salary earned by NFL players in 2000 was \$930,000. See *2000–01 NFL Salaries by Team*, USA TODAY, <http://content.usatoday.com/sportsdata/football/nfl/salaries/team/2000> (last visited Jan. 12, 2014), *archived at* <http://perma.cc/YBX9-XZVU>. The average salary earned by NFL players in 2009 was \$1.9 million. See *2009–10 NFL Salaries by Team*, USA TODAY, <http://content.usatoday.com/sportsdata/football/nfl/salaries/team/2009> (last visited Jan. 12, 2014), *archived at* <http://perma.cc/47V7-S7KK>.

It is also interesting to note that the average MLB career lasts approximately 5.6 years, meaning that average lifetime earnings for an MLB player using 2009 salaries would be approximately \$18.48 million. See Sam Roberts, *Just How Long Does a Baseball Career Last?*, N.Y. TIMES (Jul. 15, 2007), [http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html?\\_r=0](http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html?_r=0) (last visited Jan. 12, 2014),

youth baseball participation has declined even though MLB salaries have increased is unsurprising considering that, of the four major American sports leagues, MLB is the league with the least restrictive player restraints, and thus the smallest degree of outcome uncertainty, while the opposite is true of the NFL.<sup>162</sup> It is also unsurprising that youth football participation has increased at a slower pace than NFL player salaries have increased, because the compensation to professional athletes is not the primary driver inducing young people to invest the human capital necessary to become a professional athlete. Rather, children start playing sports for the love of the game, which is influenced by the sport's popularity, which is increased by a greater degree of outcome uncertainty, which is increased by employing restrictive player restraints.

Third, the argument that monopsonistic conduct will discourage some child athletes from becoming professional athletes concedes that any such effect will be tempered by the athlete's next best occupational alternative. Today, in the United States, the average annual income for a college-educated individual is about \$45,000.<sup>163</sup> Though becoming a professional athlete requires a great deal of time and energy, it is hard to imagine that a significant premium over this figure is necessary to induce young people to develop their athletic gifts, especially when doing so might yield a free college education. The risk of clubs' monopsonistic conduct discouraging students from becoming professional athletes would be real if clubs were able to drive professional player salaries below \$45,000, but the chance of that actually happening in today's environment is remote.

First, driving compensation down to the point that the league's pool of athletic talent becomes noticeably shallower will cause the league itself to

---

*archived at* <http://perma.cc/3LBU-6SF2>. Meanwhile, the average NFL career lasts approximately 3.5 years, meaning that the average lifetime earnings for an NFL player using 2009 salaries would be approximately \$6.55 million. See *The Average NFL Player*, BLOOMBERG BUSINESS WEEK (Jan. 27, 2011), [http://www.businessweek.com/magazine/content/11\\_06/b4214058615722.htm](http://www.businessweek.com/magazine/content/11_06/b4214058615722.htm) (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0zCD7o7uGcX>. Thus, kids hoping to be professional athletes could expect to earn 182% more money by playing baseball instead of football.

<sup>162</sup> Regression analysis demonstrates that there is a weak correlation between club revenue and on-field success in the NFL, but a strong correlation between these variables in MLB. Fisher, *supra* note 126, at 11-12. Additionally, in every season since 2003, the NFL has had at least one club go from last place in one season to first place in the following season. See *60 Minutes: The Commissioner*, *supra* note 52.

<sup>163</sup> *Fast Facts: Income of Young Adults*, NATIONAL CENTER FOR EDUCATION STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=77> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0sLTjM6D2Gn>.

suffer, since it is likely that fewer people would want to watch a bunch of “Regular Joes” as opposed to world-class athletes.<sup>164</sup> If the drain on talent due to monopsonistic conduct reduces consumer welfare to the point that consumers reduce their willingness to pay for the product, clubs will no doubt respond to the market by tempering such conduct and return compensation to the level requisite to bring consumer demand back to its former level.

Second, monopsonistic conduct that drives compensation down to such depressed levels actually leads to an *increase* in marketplace competition, which further insulates consumer welfare from any anticompetitive effects that might result. This is because the greater the players’ dissatisfaction with the current league, the more attractive starting a rival league becomes to outside investors. Although there are significant entry barriers to establishing a rival league, the biggest barrier is luring enough premier athletic talent away from the established league to engender consumer interest.<sup>165</sup> The threat of a rival league provides an important check on the current league by incentivizing the current league to maintain compensation levels at least high enough to discourage outside investment. This check yields compensation levels that are high enough to induce young people to invest the human capital necessary to become a professional athlete in that sport.

Most importantly, even if courts unequivocally declared that league-wide player restraints could never violate the Sherman Act, it is doubtful that player compensation levels would ever be depressed to the point that it would cause a reduction in the number of young people willing to invest the human capital necessary to become a professional athlete. The reason is encoded in the National Labor Relations Act, which grants players the right to form a union<sup>166</sup> — i.e., to establish a legal monopoly over the supply of labor. Although such a holding might tilt the bargaining power that each side currently possesses, it is unlikely that the players — utilizing the weapons available to them under federal labor law, including the strike — would be unable to procure compensation levels sufficient to make playing a pro-

---

<sup>164</sup> See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1195-99 (D.C. Cir. 1978) (J. MacKinnon, concurring in part and dissenting in part) (describing the troubles that the NFL had in its early days because it could not generate enough revenues to attract the best athletes to continue playing football after college).

<sup>165</sup> See *id.* Furthermore, the USFL at one time seemed like a legitimate challenger to the NFL because it was able to bring marquee athletes, like Hershel Walker, into its league. *ABOUT THE USFL*, USFL.INFO, <http://www.usfl.info/about.html> (last visited Jan. 12, 2014), *archived at* <http://perma.cc/0bEqFxfASj5>. Poor management decisions, however, led to its premature demise. *SMALL POTATOES: WHO KILLED THE USFL?* (Triple Threat Television 2009).

<sup>166</sup> See 29 U.S.C. § 151 (2006).



fessional sport more desirable than pursuing a career in virtually any other profession. In fact, so long as even a handful of players could earn supra-competitive wages, an overall reduction in average player salaries would be unlikely to affect the investment that young athletes make to develop their skills.<sup>167</sup> That is, kids do not dream of becoming an average professional player; they dream of becoming superstars. So long as superstars earn incredible sums of money and have off-field endorsement opportunities, young athletes will invest in their talents, believing that they too can one day become superstars and earn these supra-competitive wages.

Each of these counter-arguments, when considered in isolation, could be considered strong enough to refute the notion that league-wide monopsonistic conduct reduces player quality by reducing the incentive to invest in becoming a professional athlete. Considered collectively, it is apparent this notion is wholly without merit.

In sum, player restraints do not yield any noticeable anticompetitive effects — i.e., increases in price, or decreases in output or product quality.<sup>168</sup> In contrast, they have procompetitive effects on product quality, in the form of increased outcome uncertainty, on-field product quality, and enhanced strategic competition. And even if one were to concede that the talent pool might drain slightly when clubs engage in monopsonistic conduct, it appears that when one also considers player-restraints' procompetitive effects, on balance any given restraint's effects could at worst be deemed "competitively neutral." A holistic understanding of the purpose of the Sherman Act and the meaning of procompetitive and anticompetitive effects thus reveals that all player restraints<sup>169</sup> are inherently "reasonable," and should be presumptively lawful under Section 1.

But players may still make one last-ditch effort to challenge this conclusion. The only way to do so, of course, is to challenge the premise upon

---

<sup>167</sup> This labor economic concept is generally known as "tournament theory." See Brian L. Connelly, Laszlo Tihanyi, T. Russell Crook & K. Ashley Gangloff, *Tournament Theory: Thirty Years of Contests and Competitions*, 40 J. MGMT. 16, 16–17 (2014). Tournament theory posits that in certain situations it is more efficient to compensate individuals not based on marginal productivity, but instead based upon relative differences in performance. Edward P. Lazear & Sherwin Rosen, *Rank Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841, 841 (1981). "For example, the large salaries of executives may provide incentives for all individuals in the firm who, with hard labor, may win one of the coveted top positions." *Id.* Thus, relatively small differentials in playing talent or contributions to a team's success may result in disproportionately large compensation differentials.

<sup>168</sup> *But see supra* note 49.

<sup>169</sup> Referring only to "allocation" restraints, not "exclusionary" restraints. See generally *supra* notes 36–37; *supra* note 49.

which it ultimately stands: that the purpose of the Sherman Act is consumer welfare. The players will claim that “[the Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.”<sup>170</sup> They will claim that “[t]he Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”<sup>171</sup> They will claim that labor, too, may seek the protection of the Act; that labor, too, is entitled to the benefits of unfettered competition.<sup>172</sup>

All of these claims no doubt are true. But they fail to serve the purpose for which the players offer them. *Every* contract restrains trade to some extent,<sup>173</sup> and some party is always aggrieved as a result.<sup>174</sup> But the Sherman Act only outlaws those restraints that are “unreasonable.” And even though many constituencies could benefit from a more expansive interpretation of the Act, the purpose of “the Act is not [meant] to protect businesses from the working of the market; it is to protect the public from the failure of the market.”<sup>175</sup> Indeed, as antitrust expert Herbert Hovenkamp recently stated, “[t]he first sign of a bad antitrust case is lack of consumer harm.”<sup>176</sup> Thus, the reasonableness of any restraint can only be evaluated from the perspective of the consumer. Inquiring into the nature of a restraint from the perspective of the aggrieved party renders any such inquiry moot — from the perspective of the aggrieved, the effects are always anticompetitive.

The players are correct when they claim that labor may claim the protection of the Act.<sup>177</sup> With regard to sports-league player restraints, how-

---

<sup>170</sup> *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

<sup>171</sup> *Id.*

<sup>172</sup> See *supra* notes 39–43 and accompanying text for an explanation of the theory underlying the players’ claim that unfettered competition would yield higher compensation.

<sup>173</sup> See *supra* note 111.

<sup>174</sup> See *supra* note 114.

<sup>175</sup> *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (alteration in original).

<sup>176</sup> Claire Cain Miller & Nick Wingfield, *Google Pushed Hard Behind the Scenes to Convince Regulators*, N.Y. TIMES (Jan. 3, 2013), <http://www.nytimes.com/2013/01/04/technology/googles-lawyers-work-behind-the-scenes-to-carry-the-day.html?pagewanted=all> (last visited Jan. 12, 2014), archived at <http://www.perma.cc/0n6SajCMo5b> (quoting Herbert Hovenkamp’s explanation for why the Federal Trade Commission closed its investigation of Google’s search practices without bringing a complaint).

<sup>177</sup> See *supra* notes 138–43 and accompanying text (discussing how monopsonistic conduct directed at labor ordinarily results in an increase in price and decrease in output, thus negatively impacting consumer welfare).

ever, the procompetitive effects on product quality clearly outweigh the anticompetitive effects on product quality, if any exist at all. The oft-repeated axiom that the antitrust laws were enacted to “protect *competition*, not *competitors*,”<sup>178</sup> could easily be rephrased to say that they were enacted to “protect *labor*, not *laborers*.” “It is of no relevance that challenged conduct may adversely affect . . . the players, unless that effect can be translated into an overall injury to consumer interests.”<sup>179</sup> Holding player restraints illegal under Section 1 would actually *reduce* consumer welfare because the “only predictable effects [to consumers] of requiring league members to engage in intraventure rivalry for players’ services are: (1) to bid up the salaries of the players and thereby increase league production costs; (2) to diminish the athletic balance among the member clubs,”<sup>180</sup> thereby diminishing outcome uncertainty; (3) to limit the degree of strategic competition that clubs engage in to acquire talent;<sup>181</sup> and (4) to reduce the quality of on-field competition by interfering with the clubs’ ability to maintain roster continuity.<sup>182</sup> Such anticompetitive effects are actually the type the Act was designed to avoid. Accordingly, it is wrong and perverse to hold player restraints illegal under Section 1.

### C. Ancillary Restraints

The development of the “Rule of Reason” to judge the legality of joint business conduct under Section 1 appears to have been borne out of necessity, since Section 1 literally reads that “[e]very contract . . . in restraint of trade . . . is declared to be illegal.”<sup>183</sup> But it might (and should) seem a bit suspicious that, when Congress drafted and passed the Sherman Act in 1890, it actually meant to outlaw *every* contract, since doing so would eviscerate the economy by crippling the ability of businesses to contract with one another.<sup>184</sup> Indeed, courts applied Section 1 without difficulty for

---

<sup>178</sup> *E.g.*, *Leegin Creative Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 (1986); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 n.14 (1984); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

<sup>179</sup> Roberts, *Evolving Confusion*, *supra* note 28, at 985.

<sup>180</sup> *Id.* at 1014-15.

<sup>181</sup> See *infra* figure 5 and text accompanying note 230.

<sup>182</sup> See *supra* note 136.

<sup>183</sup> 15 U.S.C. § 1 (2012) (emphasis added).

<sup>184</sup> See *supra* note 111.

twenty-one years before the “Rule of Reason” was ever even fashioned.<sup>185</sup> And they didn’t do so by outlawing every contract.

### 1. Section 1 Only Outlaws “Naked” Restraints

When Congress passed the Sherman Act, it intended to merely federalize and codify the then-existing common law pertaining to business conduct.<sup>186</sup> “At pre-1890 common law, restrictions on unfettered competition were of two types: (1) naked restraints, which were agreements furthering no lawful business transaction . . . and (2) ancillary restraints, which were agreements that were attached and reasonably related to an otherwise lawful transaction or enterprise.”<sup>187</sup>

In layperson’s terms, a “naked restraint” is a restraint that is good for, at most, two things: increasing price and reducing quantity. For example, when a group of competitors already selling the same good come together to form a cartel and agree that they will not sell the good below a certain price, that agreement is a “naked” restraint on competition — its sole purpose and effect is to increase price. It does not, for instance, enhance the ability of the cartel’s members to produce the good more efficiently, to bring the good to market cheaper or faster, or to improve the good’s quality.

“Naked” restraints, however, are fairly rare. “Usually a contract in restraint of trade is ancillary to or supportive of another contract which is the principal one. If it were not for such principal contract, the ancillary contract would never be made.”<sup>188</sup> Thus, under pre-1890 common law, so long as the principal contract furthered a “legitimate transaction,”<sup>189</sup> and it is doubtful that without agreement on the ancillary issue the principal contract would have been consummated, the ancillary restraint would usually be held lawful.<sup>190</sup>

The classic English case, *Mitchel v. Reynolds*,<sup>191</sup> clearly illustrates this concept. In that case, Reynolds agreed to lease his bakery-shop business to

<sup>185</sup> See Roberts, *Evolving Confusion*, *supra* note 28, at 992-1001.

<sup>186</sup> See *id.* at 996 n.187 and accompanying text.

<sup>187</sup> *Id.* at 992-93.

<sup>188</sup> 1 EARL W. KINTNER, FEDERAL ANTITRUST LAW 54 (1980).

<sup>189</sup> See ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 27 (1966) (providing that an “ancillary restraint” is a “subordinate and collateral [agreement] to a separate, legitimate transaction . . . in the sense that it makes the main transaction more effective in accomplishing legitimate purposes”).

<sup>190</sup> 1 KINTNER, *supra* note 188, at 54 (“As a general rule, however, the ultimate question in each case is whether the ancillary covenant is reasonably necessary to protect the property or other interest covered by the principal contract.”).

<sup>191</sup> *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. 347 (K.B.).

Mitchel for 5 years.<sup>192</sup> A provision in the lease prohibited Reynolds from working as a baker within the same parish for the duration of the lease.<sup>193</sup> If Reynolds breached this condition, not only would the entire lease be voided, but Reynolds would also be forced to pay Mitchel a fee.<sup>194</sup> When Reynolds opened up a rival bakery, Mitchel sued Reynolds for breaking his promise not to compete. Interestingly, Reynolds made no attempt to deny having violated the provision, but instead attempted to convince the court that the provision of the lease restricting his ability to practice his trade was an illegal restraint of trade, and should therefore be severed from the lease as against public policy.<sup>195</sup> The court, however, did not agree. Rather, it upheld the provision as legally enforceable because it determined the provision was ancillary to the leasing of the business.<sup>196</sup> That is, since the leasing of a business is a legitimate transaction, and the restraint prohibiting Reynolds from working as a baker within the parish for the duration of the lease facilitated this transaction,<sup>197</sup> the restraint was deemed “ancillary” to the principal contract, and therefore upheld as legal and enforceable.<sup>198</sup>

The doctrine of ancillary restraints crafted in *Mitchel v. Reynolds* illustrates that restraints ancillary to a legitimate, principal contract are presumably lawful. Further doctrinal developments held that the presumption of legality could be rebutted if the restraint was not “reasonably necessary.” Although there has been some confusion regarding the actual meaning and proper application of the “reasonably necessary” standard,<sup>199</sup> a careful examination of the jurisprudence reveals two ways in which the ancillary restraint must be reasonable to maintain its presumption of legality: (1) the restraint cannot be unduly injurious to the public;<sup>200</sup> and (2) settlement of the issue

---

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *See id.* at 348.

<sup>197</sup> That is, without such a guarantee that Reynolds would not compete as a rival baker, it is doubtful that Mitchel would have ever leased the business in the first place. *See id.* at 350-51.

<sup>198</sup> *See id.* at 351.

<sup>199</sup> *See infra* notes 210–12 and accompanying text.

<sup>200</sup> Ancillary restraints at pre-1890 were most often in the form of covenants not to compete, and thus needed to be reasonable in both geography, and scope, as not to deprive the public of the benefits of the “industry and skill of a party in an employment useful to the public.” 1 KINTNER, *supra* note 188, at 72 (quoting *Union Strawboard, Co. v. Bonfield*, 193 Ill. 421, 427, 61 N.E. 1038, 1040 (1901)); *see also, e.g.*, *Horner v. Graves*, (1831) 131 Eng. Rep. 284 (C.P.) 287 (“Whatever restraint is larger than the necessary protection of the party [requires], can be of no benefit to either; it can only be oppressive; and if oppressive, it is, in the eye of the

underlying the restraint must be “reasonably necessary” before the parties would agree to finalize the principal transaction.<sup>201</sup> This second requirement merely ensures that the restraint is, in fact, “ancillary” to the principal transaction in accord with the pre-1890 common law understanding. For instance, an agreement between auto manufacturers not to compete in the sale of automobiles is not ancillary to a joint venture between those same manufacturers for the purpose of conducting antipollution control research because the agreement not to compete has no relation to or bearing upon the principal transaction, researching antipollution.<sup>202</sup>

Since the Sherman Act did not actually intend to outlaw *every* restraint, but merely *naked* restraints, sports-league player restraints should first be evaluated to determine whether they are naked or ancillary; and then, if ancillary, whether they are “reasonably necessary” to the consummation of a principal transaction to maintain their presumptive lawfulness.

## 2. Player Restraints Are Ancillary and “Reasonably Necessary” Restraints

Several agreements must be reached before any athletic competition can take place. Agreements governing how the game will be played and how a winner will be declared are the most obvious examples. For instance, before a tennis match can be played, the proposed competitors must agree on how high the net should be, the dimensions of the court, how many points it will take to win a game, how many games to win a set, and on and on. Although over time most of these rules have become norms codified by neutral third-party organizations (such as the United States Tennis Association), competitors must agree to either abide by these norms or else reach consensus on how they should be modified. In tennis, the “game, set, match” framework is an arbitrary way to structure tennis competition, but nevertheless has become generally accepted. This is not to say that individual competitors, or even the rulemaking bodies governing the sport, could not modify this framework.<sup>203</sup> But it is not particularly important to which

---

law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.”). Thus, “although undoubtedly nobody thought of [ancillary restraints] in these terms in the nineteenth century,” the “injury to the public” prong resembles the current rule of reason emphasis on consumer welfare. See Roberts, *Evolving Confusion*, *supra* note 28, at 1005.

<sup>201</sup> The underlying issues being distinguished from the terms of the actual restraint. See *infra* notes 210–12 and accompanying text.

<sup>202</sup> See Roberts, *Evolving Confusion*, *supra* note 28, at 1010.

<sup>203</sup> The arbitrariness in the rules of tennis is exemplified by the different rules regarding tiebreakers at major championships. The Australian Open, French Open,

specific framework the competitors eventually agree; what is important is agreement itself, since those who fail to reach consensus on the rules governing the competition will never stage it. As a result, all of the rules that must be agreed to before the competitors will compete are properly classified as “ancillary restraints.” That is, if not for the agreement to stage an athletic competition, it would not be necessary to consummate any other agreements pertaining to that competition either.

In team sports, it is just as necessary for there to be agreement over the delegation of particular players to particular teams as there is for agreement over the rules of the game itself. All of us remember gathering on the sandlot when we were kids to play, for instance, a football game. We placed cones down to set the boundaries of the field and the end zones. We argued over whether runners would be “down” after they were tackled, touched with two hands, or had a sock pulled from their shorts. We argued over whether “kickoffs” actually needed to be kicked or could be thrown, and whether after a team scored it would keep the ball or let the other team have a try. Importantly, we also argued over how the composition of each team would be established. Usually we elected “captains.” Then we had to decide which captain would choose first, and whether the captain with the second choice would get two consecutive picks. After all this was settled and the captains made their selections, the game began.

The decision to designate captains who then made alternate selections was, of course, completely arbitrary. Suppose for a moment that the father of one of the players who had gathered on the sandlot is a world-renowned chef, and that this player announces to the group, “If you decide to play on my team, and we win, you can all come over to my house for dinner to-

---

and U.S. Open, all provide that matches will be decided by a 7-point tiebreaker if the competitors are tied at six games apiece in the fifth set (the third set for women). But a competitor must best his opponent by two full games in the fifth and final set to be declared the winner at Wimbledon, no matter how many games this might take.

All sport rules are inherently arbitrary, and no matter how long any particular rule has governed, it is always subject to change if the competitors, or organization with rulemaking authority that the competitors agree to be bound by, decide to amend it. A case in point is baseball, the American version of which can be traced back as far as 1791. But the substitution rules in Little League (in which a player can re-enter the game after being removed from the game) differ from the substitution rules in the Major Leagues (in which a player is ineligible to return to a game after being removed). Many high school baseball leagues, utilize an “extra hitter,” while even the American and National Leagues as part of Major League Baseball have agreed to slightly different rules, with the American League allowing teams to substitute a “designated hitter” in place of its pitcher in its offensive line-up.

night!” Most likely, all of the players would beg to be on his team. After the player with the famous chef father selected the best players to join him, the players remaining would be forced to join together to play against them. Those players, however, might realize that they have a small chance of winning, and decide to go to the movies instead. The football game might never take place. This simple allegory<sup>204</sup> makes clear that before any team athletic competition can take place, there must also be agreement on the rules governing the delegation of players to each team.

Turning to professional sports leagues, the term “player restraint” is synonymous with the phrase “a rule governing strategic competition,” and thus with the acquisition and distribution of playing talent throughout a league. Although player restraints employed by professional sports leagues are often much more complex than the restraints used in the schoolyard, they are of the same fundamental nature and serve the same purpose. If member clubs could not agree on how new players will be acquired, or on the process by which clubs could acquire players who have already played for another club, the league would never be formed, or, if already formed, could cease to operate. Thus, the rules governing the acquisition and distribution of playing talent to each team are ancillary restraints to the principal transaction: the operation of the league sport.

Because player restraints are ancillary to the formation and continued operation of a legitimate, principal transaction, they are presumably lawful. But player restraints must also be “reasonably necessary” to retain their presumptive lawfulness. To be considered “reasonably necessary” player restraints cannot be unduly injurious to the public.<sup>205</sup> As already demonstrated, player restraints are at worst neutral, and in many ways quite beneficial to the public.<sup>206</sup> Additionally, it is “reasonably necessary” for member clubs to come to an agreement on the issue underlying player restraints — how talent will be acquired and distributed throughout the league — or the principal transaction would not come to fruition. Stated another way, contracts setting the terms of player restraints would not exist

---

<sup>204</sup> Clubs located in “big markets” like New York or Chicago are similar to the child with the famous chef father. Clubs located in these markets generally have far greater financial resources enabling them to pay more money than their small-market brethren. Off-the-field marketing opportunities are also likely greater for players playing in big markets. Thus, if one were to start a new league, it is likely that a prospective ownership group proposing a club to be located in, for instance, Topeka, KS, would vigorously negotiate the player allocation rules before forking over the cash required to become a member in the league.

<sup>205</sup> See *supra* text accompanying note 200.

<sup>206</sup> See *supra* Part II.B.3.



but for the underlying contract to produce a league sport. Thus, the ancillary restraint doctrine compels a finding that all player restraints are inherently lawful.

### 3. Misinterpreting “Reasonably Necessary” to Mean the “Least-Restrictive Alternative”

Until the Supreme Court turned antitrust jurisprudence on its head by “ignor[ing] Congress’s intended meaning of the term ‘restraint of trade’ by incorrectly interpreting it to encompass every agreement or contract instead of merely naked restraints,”<sup>207</sup> the ancillary restraint doctrine was the mode of analysis that courts used to evaluate business conduct under Section 1.<sup>208</sup> Despite being supplanted by the Rule of Reason for the better part of the twentieth century, the ancillary restraint doctrine has recently resurfaced in Supreme Court and lower court jurisprudence, especially in Section 1 cases implicating joint ventures.<sup>209</sup>

Unfortunately, however, modern courts applying the ancillary restraint doctrine have often incorrectly applied the second prong of the “reasonably necessary” standard to the *terms* embodied by the restraint rather than to the underlying *issue* that those terms help resolve.<sup>210</sup> Courts have held that, to retain its presumptive lawfulness, the *terms* of any ancillary restraint must be “absolutely essential” or “the least restrictive alternative” to meet the goals of the parties agreeing to the restraint. However, their inquiry should have focused on whether agreement on the *issue* — simply *embodied* by the terms of the restraint — helps effectuate the underlying transaction.<sup>211</sup> The courts’ mistake is fatal to any coherent application of this doctrine.

The primary problem with requiring the terms of any restraint to be “absolutely essential” or the “least restrictive alternative” to achieving the

<sup>207</sup> Roberts, *Evolving Confusion*, *supra* note 28, at 998.

<sup>208</sup> *See id.* at 992-1001.

<sup>209</sup> *See id.* at 1006-07.

<sup>210</sup> The error can most likely be traced to *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), the last Supreme Court decision to rely on the ancillary restraints doctrine before the Court changed its course in *Standard Oil*. *See supra* note 111 and accompanying text. In the opinion authored by Judge Taft (later President and Chief Justice of the Supreme Court) the Sixth Circuit opined: “Before such agreements [i.e., ancillary restraints] are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary . . . to the enjoyment by the buyer of the property, good will, or interest in the partnership bought.” *Addyston Pipe*, 85 F. at 281.

<sup>211</sup> *See supra* text accompanying note 202 for an example of a restraint that addresses an issue not absolutely essential to effecting the underlying transaction.

principal transaction's goals is that such a test substitutes the uninformed, disinterested views of a judge for the well-informed views of the parties interested in the transaction. For instance, Mitchel needed some protection from Reynolds's decision to immediately open a rival bakery in order to capitalize on the goodwill associated with the business, but wouldn't a four-year non-compete have been sufficient to satisfy Mitchel's interest? Perhaps two years should have been deemed the "least restrictive alternative," since Mitchel still might have purchased Reynolds's bakery with a twenty-four month restriction.

The point is that any line-drawing is necessarily arbitrary, and courts should not substitute their judgment for the judgment of the parties — at least absent unequal bargaining power or public injury.<sup>212</sup> In fact, the precise term that the parties ultimately settle on will often be an important part of the consideration exchanged in the principal transaction. Had Mitchel and Reynolds agreed to a two-year restrictive covenant, as opposed to a five-year non-compete, it is likely that the price Mitchel agreed to pay for the business would not have been as high. Whether the parties' *goal* is legitimate and reasonably necessary should be the sole focus of any Section 1 inquiry. The terms eventually agreed to are wholly irrelevant.

#### 4. Sports and "Least-Restrictive Alternatives" (or Lack Thereof)

The shortcomings of applying a "least restrictive alternative" or "absolutely essential" standard to determine whether a sports-league restraint is legal under Section 1 are illustrated by attempting to apply such a standard to an antitrust lawsuit that could be filed by NFL placekickers.<sup>213</sup>

---

<sup>212</sup> Non-compete clauses in a simple employment context cannot be said to be "reasonably necessary" to the employment in most circumstances. That is, even if non-compete agreements were outlawed in an employment context — as they largely are in California, for instance — employers would still need to hire employees. This situation is distinct from the situation found in *Mitchel v. Reynolds*, which was not an employer-employee non-compete, but a non-compete designed to effectuate the sale of a business. As a result, in most cases, employment non-compete agreements should not be deemed "ancillary," because they are not "absolutely essential" to facilitating the underlying employment, but rather evaluated as "naked" restraints, if they are to be evaluated under antitrust principles at all. That is, the "reasonableness" of non-compete agreements in the employment context often incorporates contract law principles, such as the consideration received for agreeing not to compete for a specified duration and geographic scope, and the relative bargaining power of the parties to the agreement.

<sup>213</sup> The idea for this hypothetical lawsuit comes from Goldman, *supra* note 28, at 796 n.213.

Placekickers could file suit challenging the rules that award three points for converted field goal attempts and six points for touchdowns. They would argue that this scoring system unreasonably restrains trade by artificially reducing the amount that clubs are willing to pay for their services. That is, if field goals were worth more, kickers would have a greater impact on the outcome of games, and, as a result of their increased importance, owners would bid up kickers' salaries. Of course, the NFL and its member clubs would respond that scoring touchdowns is more difficult than kicking field goals, and that teams should therefore earn a greater reward for scoring a touchdown than converting a field goal attempt. Or perhaps they would argue that the purpose of football is to acquire territory, and touchdowns represent the ultimate fulfillment of this goal, while the field goal is a consolation prize for acquiring a substantial, albeit incomplete amount of territory. But the awarding of four or even five points for a field goal conversion would not preclude the fulfillment of either of these objectives. Thus, employing a "least restrictive alternative" or "absolutely essential" mode of analysis could lead to the conclusion that the "three points for field goals and six points for touchdowns" restraint should be declared an illegal restraint under Section 1.

Of course, awarding five points for converted field goals would reduce the incentive for teams to "go for it" in "fourth and goal" situations. And since that situation is one of the more exciting plays in football, devaluing the field goal in relation to the touchdown clearly has "procompetitive" effects on product quality because such a framework presumably leads to a greater number of exciting plays. Perhaps, then, field goals should be worth only two points, to induce teams to "go for it" even more often. The point is that the relationship between the number of points awarded for a touchdown and those awarded for a field goal is completely discretionary. There is no *objectively* optimal relationship. The NFL and its member clubs, football experts who reap the financial consequences of such decisions, are better qualified and positioned to set the parameters of that relationship than a comparatively unknowledgeable and disinterested court. Accordingly, the clubs should be allowed to exercise their expert discretion when it comes to these matters.

Therefore, not only is applying the "least restrictive alternative" standard to *terms* rather than *issues* doctrinally incorrect, it is also unwise policy in the playing-rules context. Given that player allocation rules are just as vital to the staging of any athletic competition as are playing rules,<sup>214</sup> employing a "least restrictive alternative" analysis appears to be just as inap-

---

<sup>214</sup> See *supra* text accompanying notes 203–06.

propriate in the player allocation context. A thorough understanding of the nature of player allocation rules reveals that this is precisely the case.<sup>215</sup>

Determining whether a given restraint is the “least restrictive alternative” or “absolutely essential” to achieving a particular objective first requires identifying the objective that the restraint is designed to achieve. Most often, the NFL and its member clubs have claimed that increased on-field competitiveness, or outcome uncertainty — which increases excitement and therefore product quality — is the objective sought when imposing player restraints.<sup>216</sup> One of the principal player restraints used by the NFL in striving for on-field competitiveness is through the imposition of the salary cap. Of course, a salary cap is not the only way to increase on-field competitiveness. MLB employs a less restrictive alternative to achieve outcome uncertainty in the form of a competitive balance tax.<sup>217</sup> However, evidence suggests the competitive balance tax is not as successful as the hard salary cap in achieving outcome uncertainty.<sup>218</sup> To achieve an even greater level of outcome uncertainty than that generated by the salary cap, the NFL could also use a more restrictive alternative, such as a system in which a central league administrator allocates all players to each team each season.

This means that on-field competitiveness, or outcome uncertainty, is not an absolute or fixed objective, but one that is relative, just as the relationship between the amount of points to be awarded for a touchdown and field goal. That is, on-field competitiveness or outcome uncertainty exists on a continuum. A game that ends 49-0 is less competitive than a game that ends 25-24, but more competitive than a game that ends 98-0. Simi-

---

<sup>215</sup> Despite this fact, two courts have in fact employed a “least restrictive alternative” analysis when deciding Section 1 sports league cases. See generally *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381 (9th Cir. 1984).

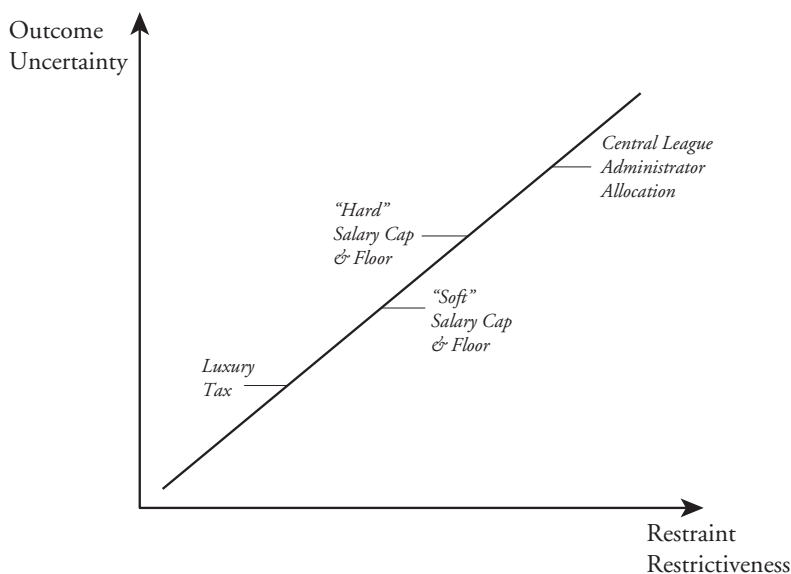
<sup>216</sup> See, e.g., *Smith*, 593 F.2d at 1173 (NFL annual player college draft constitutes Sherman Act Section 1 antitrust violation); *Kapp v. Nat’l Football League*, 586 F.2d 644, 646–47 (9th Cir. 1978) (alleging that annual player college draft, tampering rule, standard player contract, option rule, and Rozelle rule constitutes Sherman Act Section 1 antitrust violations); *Mackey v. Nat’l Football League*, 543 F.2d 606, 623 (8th Cir. 1976) (Rozelle rule requiring team signing a free agent to compensate the player’s former team constitutes Sherman Act Section 1 antitrust violation); *Powell v. Nat’l Football League*, 678 F. Supp. 777, 778 (D. Minn. 1988) (alleging Right of First Refusal/Compensation system and standard player contract constitute Sherman Act Section I antitrust violations).

<sup>217</sup> For a description of the competitive balance tax, see *supra* note 127.

<sup>218</sup> See Fisher, *supra* note 126, at 11–12 for the results of a regression analysis illustrating that the correlation between team player salaries and season outcomes is by far the weakest in the NFL compared to the other three major American sports, and much less predictable.

larly, a league season in which the best team posts a record of twelve wins and four losses (12-4), is more competitive than a season in which the best team posts a record of 14-2, but less competitive than one in which the best team finishes 10-6. Thus, while *some* degree of competitiveness can no doubt be achieved through the imposition of a less restrictive player restraint, the *same* degree of on-field competitiveness cannot. This is because less restrictive player restraints, by their very nature, do not distribute talent throughout the League as evenly as more restrictive restraints. This concept is represented by Figure 4, which illustrates the theoretical positive correlation between the restrictiveness of player restraints and outcome uncertainty. Because there is not an objectively optimal amount of outcome uncertainty, and outcome uncertainty exists as a function of the restrictiveness of the player restraints imposed, the notion that there could be a “least restrictive” or “absolutely necessary” player restraint is a myth. Accordingly, courts incorrectly applying such a standard to evaluate player restraints might always find the restraints illegal.

FIGURE 4



To further illustrate this point, consider another player restraint the NFL employs: the exclusive franchise tag.<sup>219</sup> Normally, when a player’s con-

<sup>219</sup> There are two types of franchise tags: “exclusive” and “non-exclusive.” See *infra* text accompanying notes 220–21 for a description of how the “exclusive” tag

tract with a given club expires, the player becomes an unrestricted free agent, meaning that the player may offer his services to any club.<sup>220</sup> If the club with whom the player's contract just expired decides to place the franchise tag on him, however, that club will retain the right to the player's services for the following season.<sup>221</sup> To evaluate whether the franchise tag is the "least restrictive alternative" or "absolutely necessary," the objective it seeks to accomplish must first be established to determine whether any other player-restraint option could also attain the same end.

There are at least four objectives for imposing the franchise tag: (1) to limit "big market" clubs' ability to cherry-pick all the talent it prefers; (2) to allow a club more flexibility to retain a player to which its fan-base is particularly attached; (3) to provide another strategic lever for clubs' general managers to pull as they go about assembling their teams; and (4) to provide a new form of off-season entertainment that the NFL can use to market, sell, and increase demand for its principal product, on-field competition.

As proof that player restraints are themselves a form of off-season entertainment to be marketed by the NFL, consider that all sixteen hours of the NFL Draft are broadcast live to football fans on ESPN,<sup>222</sup> and supplemented by numerous other television programs that discuss the strategic choices general managers must make when deciding which players to select.<sup>223</sup> A plethora of television programs cover and articles are written about other strategic rules, such as how the salary cap is affecting the ability

---

operates. The "non-exclusive" tag works in much the same way that the "exclusive" tag works, but allows the player tagged to still negotiate with other clubs. If another club signs the player to an offer sheet, the club that designated the player its "franchise player" has the opportunity to match the terms of that offer. If the club chooses not to match the offer and thus loses the player, the club is entitled to receive two first-round draft picks as compensation. *See* 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 10 (Aug. 4, 2011), *archived at* <http://perma.law.harvard.edu/0UcXeAWR7o8>.

<sup>220</sup> *See id.* art. 9. If a club chooses to place the franchise tag on a player, it must pay that player no less than the average of the top-five salaries at the player's position, or 120% of what the player earned the previous season, whichever is greater. *Id.* Players designated "exclusive" franchise players may not negotiate with any other team; the club that "franchised" the player owns the player's exclusive negotiating rights. *Id.* art. 6. Clubs may place the tag on only one player each season. *Id.* art. 10.

<sup>221</sup> *Id.*

<sup>222</sup> *See, e.g.,* Bill Gorman, *ESPN 2011 Draft Schedule, TV BY THE NUMBERS* (Apr. 14, 2011), <http://tvbythenumbers.zap2it.com/2011/04/14/espn-2011-nfl-draft-tv-schedule/89512/> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/OH3qGPtyTXn>.

<sup>223</sup> *Id.*

of certain clubs to re-sign key players,<sup>224</sup> and which players will or should be “franchised.”<sup>225</sup> In fact, ESPN currently employs several former general managers specifically to discuss these issues on various programs, including its flagship show SportsCenter.<sup>226</sup> Finally, just as millions of people participate in recreational sports leagues, it is estimated that 32 million people now participate in off-field strategic sports competitions, such as fantasy football, which are significantly affected by player movement.<sup>227</sup>

Strategic competition, then, not only maintains and enhances consumer interest for the on-field product during the off-season, but player restraints — which are the embodiment of strategic competition — have become a separate and distinct marketable product in and of themselves. Sports fans do not merely watch the on-field competition; many are enthralled by player personnel decisions, including whether or not a club will

---

<sup>224</sup> See, e.g., Pat Kirwan, *Salary Cap Casualties Mean Different Things To Different Teams, Players*, CBS SPORTS (Mar. 28, 2012), <http://www.cbssports.com/nfl/story/18111350/salary-cap-casualties-mean-different-things-to-different-teams-players> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0wZRXD9rpqS>.

<sup>225</sup> See, e.g., John Clayton, *Saints Put Franchise Tag on Drew Brees*, ESPN (Mar. 4, 2012), [http://espn.go.com/nfl/story/\\_/id/7641895/new-orleans-saints-tag-drew-brees-exclusive-rights-franchise-tag](http://espn.go.com/nfl/story/_/id/7641895/new-orleans-saints-tag-drew-brees-exclusive-rights-franchise-tag) (last visited Jan. 12, 2014), *archived at* <http://perma.law.harvard.edu/0kk7b7Zmzzq>.

<sup>226</sup> For instance, ESPN recently hired Bill Polian, former Vice Chairman of the Indianapolis Colts and former General Manager of both the Buffalo Bills and Carolina Panthers, as an NFL analyst. See Robert Klemko, *Bill Polian Joins ESPN as NFL Analyst*, USA TODAY (Feb. 29, 2012), [http://content.usatoday.com/communities/thehuddle/post/2012/02/bill-polian-joins-espn-as-nfl-analyst/1#.T3TC\\_ZjgB94](http://content.usatoday.com/communities/thehuddle/post/2012/02/bill-polian-joins-espn-as-nfl-analyst/1#.T3TC_ZjgB94) (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0vgsGAX6ycY>. The network also employs Tom Penn, former Vice President of Basketball Operations and Assistant General Manager of the Portland Trail Blazers, to provide expert insight on advanced analytics, salary cap issues, and the NBA Draft. See Mike Tokito, *Former Blazers Executive Tom Penn Lands Job with ESPN as a NBA Studio Analyst*, THE OREGONIAN (Nov. 9, 2010), [http://www.oregonlive.com/blazers/index.ssf/2010/11/post\\_3.html](http://www.oregonlive.com/blazers/index.ssf/2010/11/post_3.html) (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/0PfT3pVaXZh>.

<sup>227</sup> This figure includes people in both the United States and Canada. *Fantasy Sports Participation Sets All-Time Record, Grows Past 32 Million Players*, FANTASY SPORTS TRADE ASS’N (Jun. 10, 2011), <http://www.fsta.org/blog/fsta-press-release/fantasy-sports-participation-sets-all-time-record-grows-past-32-million-players> (last visited Jan. 12, 2014), *archived at* <http://www.perma.cc/05XNM25Dsoo>.

place the “franchise tag” on a particular athlete.<sup>228</sup> These fans consume and purchase strategic competition information from various media outlets.<sup>229</sup>

Just as there is no “optimal” relationship between the number of points awarded for field goals and touchdowns, or optimal amount of *on-field* competition, there is no optimal amount of *strategic* competition (i.e., player restraints). Strategic competition increases as both the quantity and complexity of decisions increase and as the financial disparities between clubs are limited to the greatest extent possible. For instance, a very restrictive player allocation system<sup>230</sup> in which a central league administrator assigns players to each club after the previous season had ended would result in less strategic competition than a competitive balance tax player-restraint system because the quantity and complexity of decisions clubs would need to make would be severely curtailed. The salary cap and floor, however, which is *more* restrictive than the competitive balance tax system, but *less* restrictive than the central administrator system, presumably yields a *greater* degree of strategic competition than either of the other two systems because it provides general managers with a greater degree of flexibility to make decisions than the central administrator system, while limiting the financial disparities between clubs that affect general managers’ ability to execute their visions as compared to the competitive balance tax system. Thus, unlike the positive correlation that exists between the restrictiveness of player restraints and *on-*

---

<sup>228</sup> For instance, fans tweeted John Clayton’s ESPN.com article about the Saints’ decision to put the franchise tag on Drew Brees 245 times, re-posted it on Facebook 242 times, and posted over 2,000 comments to the story itself. See John Clayton, *Saints Put Franchise Tag on Drew Brees*, ESPN (Mar. 4, 2012), [http://espn.go.com/nfl/story/\\_id/7641895/new-orleans-saints-tag-drew-brees-exclusive-rights-franchise-tag](http://espn.go.com/nfl/story/_id/7641895/new-orleans-saints-tag-drew-brees-exclusive-rights-franchise-tag) (last visited Jan. 12, 2014), *archived at* <http://perma.law.harvard.edu/0kk7b7Zmzzq>. Obviously these figures pertain only to this specific article, and not to the social media buzz and other discussions generated by the event itself and captured by other media outlets and forums.

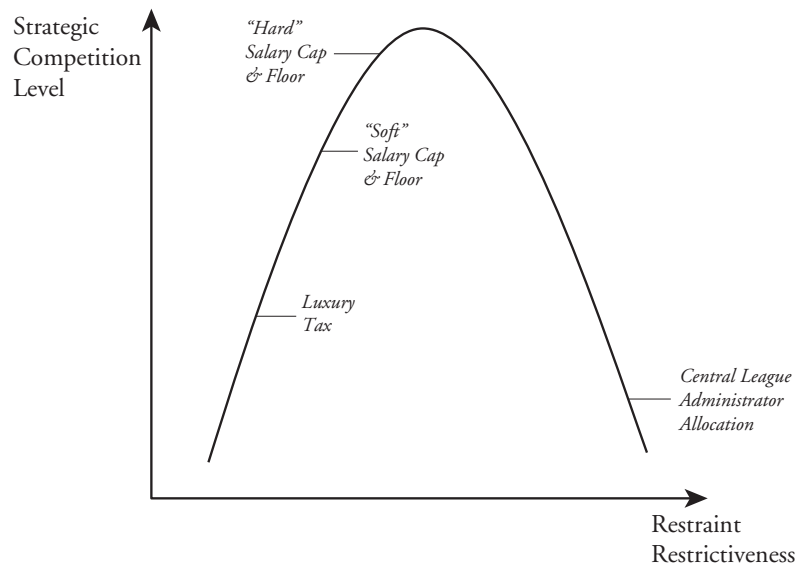
<sup>229</sup> For example, ESPN.com’s “Insider” service, which provides subscribers access to articles not available to non-subscribers for an annual subscription fee, as of September 2012 had approximately 670,000 subscribers, and “approximately 400,000 unique subscribers, a comparable number to The New York Times’ 530,000 digital subscribers.” Editorial Team, *ESPN Pushes Digital Subscription Service in New Marketing Campaign*, ARIA SYSTEMS (Sep. 27, 2012), <http://www.ariasystems.com/blog/espn-pushes-digital-subscription-service-in-new-marketing-campaign/> (last visited Jan. 12, 2014), *archived at* <http://perma.cc/668L-7PQV>. Much of this service’s content relates to strategic competition, such as trade and free agent signing rumors. It is critical to recognize that this content is quite distinct from viewing actual sports competition, or reading about the results of such competition.

<sup>230</sup> See *supra* note 132 for a description of what is meant by the “restrictiveness” of a given player restraint.



*field* competition, presumably an inverse-u-shaped relationship characterizes the correlation between the restrictiveness of player restraints and *strategic* competition. Figure 5 illustrates this theoretical relationship.

FIGURE 5



This means that the level of strategic competition, set by the imposition of various player restraints, is a discretionary choice. There is no “optimal” level of *on-field* or *strategic* competition, and thus there can never be a “least restrictive alternative.” No player restraint can ever be classified as “absolutely necessary.” Ergo, it is not only inappropriate, but also illogical for a court to engage in this type of analysis when evaluating the legality of any given player restraint in a Section 1 lawsuit. The application of legitimate ancillary restraint doctrine illustrates that player restraints are ancillary to the principal transaction — the operation of a league sport — and that player restraints do not result in public injury. Instead, the NFL and its member clubs, as expert, interested parties, should be granted the discretion, free from judicial interference, to impose the player restraints that yield the degree of on-field and strategic competition that in their opinions provide the best overall consumer experience, since it was for the consumer’s benefit that the Sherman Act was enacted in the first place.

### III. LABOR DEFENSES

Federal labor law was born with the passage of three statutes: Sections 6 and 20 of the Clayton Act in 1914,<sup>231</sup> the Norris-LaGuardia Act in 1932,<sup>232</sup> and the National Labor Relations Act (“NLRA”) in 1935 (originally known as the Wagner Act).<sup>233</sup> These statutes provide employees with the right to band together, forge a united front, and take concerted actions to counter-balance the leverage employers possess. But because “national labor policy is premised on creating incentives in both labor and management”<sup>234</sup> to *reduce or eliminate* competition<sup>235</sup> and “[a]ntitrust law is premised on *promoting* competition,”<sup>236</sup> there is a “perplexing and inevitable” tension between antitrust law and national labor policy.<sup>237</sup> As labor law jurisprudence developed, it quickly became clear that certain union and employer activities pertaining to labor and employment needed to be shielded from Sherman Act scrutiny if the labor laws were to have any meaningful impact and effect. In an effort to legitimize conduct taken by both employers and employees that would otherwise violate the Sherman Act, Congress drafted the “statutory” labor exemption, and the courts buttressed this legislation by judicially crafting the “nonstatutory” labor exemption. When evaluating the legality of sports-league player restraints — which are, at their core, agreements pertaining only to labor and employment — any analysis necessarily must first answer whether one or both of these special exemptions apply, since such application would automatically render the challenged restraint legal and preclude the need to further evaluate the players’ claims under traditional antitrust principles.

#### A. *The Statutory Exemption*

After the Sherman Act was enacted in 1890, courts routinely applied the statute to invalidate and enjoin labor organizations from engaging in “anticompetitive” conduct (such as strikes and boycotts) that tended to increase the costs of labor, and thus, the price of the goods that labor pro-

---

<sup>231</sup> 15 U.S.C. §§ 12–27 (1997).

<sup>232</sup> 29 U.S.C. §§ 101–15 (1997).

<sup>233</sup> 49 Stat. 449 (1935) (codified as amended, 29 U.S.C. §§ 151–169 (1988)).

<sup>234</sup> Jerry, II & Knebel, *supra* note 28, at 173.

<sup>235</sup> National labor policy reduces or eliminates competition over wages by promoting the creation and maintenance of unions and multiemployer bargaining groups.

<sup>236</sup> Jerry, II & Knebel, *supra* note 28, at 173.

<sup>237</sup> *Id.*

duced.<sup>238</sup> Responding to the dire working conditions that many laborers faced in the early twentieth century, Congress passed Section 6 of the Clayton Act in 1914,<sup>239</sup> which reads:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.<sup>240</sup>

Despite the enactment of Section 6, however, courts continued to declare union activities illegal under the Sherman Act if the union's conduct was directed at an organization with which it did not have a direct employment relationship; thus, courts often enjoined union activities (like secondary boycotts).<sup>241</sup> In response to the judiciary's obstinacy, Congress passed the Norris-LaGuardia Act in 1932 to prevent "federal courts from issuing injunctions in non-violent labor disputes because '[doing so] was necessary to remedy an extraordinary problem' of federal courts refusing 'to abide by the clear command of . . . the Clayton Act.'" <sup>242</sup> Together the Clayton Act and the Norris-LaGuardia Act comprise the "statutory exemption" to the Sherman Act, and unquestionably shield union activity from Sherman Act scrutiny.<sup>243</sup>

---

<sup>238</sup> See EDWARD BERMAN, LABOR AND THE SHERMAN ACT 11-54 (1930).

<sup>239</sup> Some commentators have argued that the legislative history accompanying the passage of the Sherman Act in fact lends strong support to the notion that the Act was never meant to apply to restraints on labor, and that when Congress enacted Section 6 of the Clayton Act it did so merely to force courts to interpret the Sherman Act in light of its original intent. Jerry, II & Knebel, *supra* note 28, at 192-99.

<sup>240</sup> 15 U.S.C. § 17 (2012).

<sup>241</sup> See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474-79 (1921) (holding that Section 20 of the Clayton Act, which provides certain substantive and procedural limitations on injunctions sought in any case "involving, or growing out of, a dispute concerning terms or conditions of employment," 29 U.S.C. § 52 (1997), does not prohibit injunctions against "secondary boycotts").

<sup>242</sup> *Brady v. Nat'l Football League (Brady I)*, 779 F.Supp.2d 992, 1023 (D. Minn. 2011) (quoting *Burlington N. R.R. v. Bhd. of Maint. of Way Emps.* 481 U.S. 429, 437 (1987)).

<sup>243</sup> This is true so long as the union engages in those activities "for the purpose of promoting legitimate labor objectives, such as improving wages or working conditions . . . ; however, unions have no protection from antitrust liability when they attempt to restrain the product market directly." Jerry, II & Knebel, *supra* note 28,

But the question remains whether the statutory exemption also shields employer conduct. Indeed, the first sentence of Section 6, “which declares that ‘the labor of a human being’ is not an ‘article of commerce,’” appears to exclude both “the selling and buying of labor from the scope of the Sherman Act.”<sup>244</sup> Based on the language of Section 6, the NFL member clubs have argued that all labor market restraints — regardless of whether they are imposed by employees or their employers — are not combinations in restraint of trade or commerce under the Sherman Act.

The only court to have explicitly considered this argument, however, has rejected it.<sup>245</sup> The Eighth Circuit reasoned that because “Section 6 of the Clayton Act was enacted for the benefit of unions to exempt certain of their activities from the antitrust laws after courts had [improperly] applied the Sherman Act to legitimate labor activities,” it does not also extend to bar the application of the antitrust laws to employer-initiated labor restraints.<sup>246</sup>

Notwithstanding this court’s ruling, the legislative history accompanying both the Sherman Act and Section 6 of the Clayton Act<sup>247</sup> indicates that the Sherman Act only outlaws labor restraints that also yield negative consequences in a consumer market.<sup>248</sup> Indeed, as even the Supreme Court has recognized:

---

at 212. “Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, *e.g.*, *Federation of Musicians v. Carroll*, 391 U.S. 99 (1968), the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market. *Connell Const. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622–23 (1975) (internal citation omitted).

<sup>244</sup> Jerry, II & Knebel, *supra* note 28, at 194.

<sup>245</sup> See *Mackey v. Nat’l Football League*, 543 F.2d 606, 617 (8th Cir. 1976).

<sup>246</sup> *Id.*

<sup>247</sup> See Jerry, II & Knebel, *supra* note 28, at 195 (citing proof that at least some members of Congress believed that separate legislation should cover labor markets. For instance, Senator Jones stated: “Let the Sherman law affect trade and commerce and those who deal in and with trade and commerce as it, in fact, was intended when it was passed. Take labor and labor organizations out from under the law entirely, and let us formulate a statute governing labor and its organizations . . . . [W]e must define the rights of labor so far as it affects commerce [and] . . . we should separate and legislate for it . . . but not treat it . . . as an article of commerce, because it is not an article of commerce. It is no part of commerce. It is not a commodity at all.”).

<sup>248</sup> See *supra* text accompanying notes 174–79.

[T]he Sherman Act was not enacted . . . to afford a remedy for wrongs, which . . . result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a *commodity*, such as to ‘monopolize the supply, control its price, or discriminate between its would-be purchasers.’<sup>249</sup>

Since Section 6 makes explicit that the “labor of a human being is *not* a commodity or article of commerce,”<sup>250</sup> those alleging that a labor restraint violates the Sherman Act should have to prove something more than artificially depressed wages or substandard terms and conditions of employment if they hope to succeed in a Section 1 lawsuit — that is, they should also be required to show how the labor restraint negatively affects the “commodity” (i.e., output) market.<sup>251</sup> Indeed, the enactment of Section 6 was necessary only because union activities tend to “increas[e] the price of wages . . . [which tend] to increase the price of the product [produced by] their labor”<sup>252</sup> in the output market, precisely the type of anticompetitive effect that the Sherman Act was designed to prevent. This point is especially relevant in the sports-league player-restraint context because in such lawsuits players typically allege only a reduction in labor market competition, not a reduction in product market competition.<sup>253</sup> And because “an employer agreement falls within the prohibitions of the Sherman Act only if it has an anticompetitive purpose or effect on some aspect of competition other than competition over wages or working conditions,”<sup>254</sup> “[c]hallenges to labor market restraints that are alleged only to have a purpose to restrain the labor market or an anticompetitive effect in a labor market do not state claims under the Sherman Act.”<sup>255</sup> In sum, the rationale underlying Section 6’s enactment, its statutory text, and the Supreme Court’s own jurispru-

<sup>249</sup> *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 512 (1940) (emphasis added).

<sup>250</sup> 15 U.S.C. § 17 (emphasis added).

<sup>251</sup> See Jerry, II & Knebel, *supra* note 28, at 184–92 (1984) (noting that “even if one concludes that the Sherman Act was intended to apply to labor organizations, it does not follow that the Sherman Act applies to restraints on labor market competition” by employers).

<sup>252</sup> 21 CONG.REC. 2561 (1890), reprinted in EARL W. KINTNER, 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS 160 (1978).

<sup>253</sup> Cf. *supra* notes 36–37 and accompanying text; *supra* note 52; *supra* notes 130–31; *supra* note 137.

<sup>254</sup> *Cal. State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc.*, 648 F.2d 527, 544 (9th Cir. 1980), *rev’d*, 459 U.S. 519 (1983) (Although the Supreme Court reversed the Ninth Circuit’s holding, it did so because it determined that the plaintiffs lacked standing. Importantly, the Supreme Court approved of the Ninth Circuit’s analysis regarding the scope of the Sherman Act.) See *id.* at 525.

<sup>255</sup> Jerry, II and Knebel, *supra* note 28, at 241.

dence supports the conclusion that to be successful in any player-restraint antitrust lawsuit, the players must first allege, and then prove, that the challenged restraint yields anticompetitive effects in the output market. As already demonstrated, this is something they are unlikely to be able to do.<sup>256</sup>

### B. *The Nonstatutory Exemption*

When Congress passed the National Labor Relations Act in 1935, it “set forth a national labor policy favoring free and private collective bargaining; which require[s] good-faith bargaining over wages, hours, and working conditions; and which delegate[s] related rulemaking and interpretive authority to the National Labor Relations Board.”<sup>257</sup> By enacting this statute — as when it enacted Section 6 of the Clayton Act nineteen years earlier — Congress “hoped to prevent judicial use of antitrust law to resolve labor disputes — a kind of dispute normally inappropriate for antitrust law resolution.”<sup>258</sup>

But unlike Section 6 of the Clayton Act and the Norris-LaGuardia Act, the NLRA does not explicitly protect concerted action (such as collective-bargaining agreements) between unions and nonlabor parties from Sherman Act scrutiny.<sup>259</sup> For instance, as part of a collective-bargaining agreement, a supermarket and a local butchers’ union might agree to limit the hours that the supermarket’s butcher shop could be held open as a way to improve the hours and working conditions of the butchers. This agreement, however, would probably be invalidated as an illegal restraint of trade under Section 1 because it clearly leads to anticompetitive effects (consumers would have one fewer outlet from which to purchase a freshly cut rib-eye in the middle of the night).<sup>260</sup> Situations like this, then, made clear that the “national labor law scheme would be virtually destroyed by the routine imposition of antitrust penalties upon parties engaged in collective bargaining.”<sup>261</sup> Hence, the Supreme Court crafted the “nonstatutory labor exemption” to protect

<sup>256</sup> See *supra* Section II.B.3.

<sup>257</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996) (internal citations omitted).

<sup>258</sup> *Id.*

<sup>259</sup> The exemption was crafted in a series of three Supreme Court decisions: *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Local Union No. 3, Int’l Bhd. of Electrical Workers*, 325 U.S. 797 (1945).

<sup>260</sup> This example is based on the facts of *Amalgamated Meat Cutters*, 381 U.S. 676.

<sup>261</sup> *Brown*, 518 U.S. at 236 (describing the Supreme Court’s reasoning in *Amalgamated Meat Cutters*, 381 U.S. at 711) (internal quotation marks omitted).

these types of agreements from antitrust attack by limiting “an antitrust court’s authority to determine, in the area of industrial conflict, what is or is not a ‘reasonable’ practice. [The nonstatutory labor exemption] thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict.”<sup>262</sup> In short, the exemption “applies where needed to make the collective-bargaining process work.”<sup>263</sup> And the exemption is just as applicable to multiemployer bargaining as it is to single employer bargaining.<sup>264</sup>

Recent lawsuits have focused on the scope of the nonstatutory labor exemption — specifically, whether it should shield multiemployer agreements that have been unilaterally imposed after negotiations with the employees’ bargaining representatives have reached impasse.<sup>265</sup> The Eighth Circuit has held that the exemption in fact does still apply in these situations because “[f]ederal labor policy sanctions . . . the goal of resisting union demands and . . . [doing so] has no anticompetitive effect unrelated to the collective bargaining negotiations.”<sup>266</sup> Consequently, “[u]nder [the labor laws], a union will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains.”<sup>267</sup>

The Supreme Court’s most recent decision regarding the scope of the nonstatutory labor exemption — *Brown v. Pro Football, Inc.*<sup>268</sup> — affirmed this reasoning when it noted that employers could take joint action with regard to labor markets “if those actions ‘grew out of and were ‘directly related to’ a multiemployer bargaining process, did not offend the federal labor laws that sanction and regulate the process, affected terms of employment subject to compulsory bargaining, and concerned only parties to the collective bargaining relationship.”<sup>269</sup> Thus, although the Court has never explicitly held that the nonstatutory labor exemption protects multiemployer agreements pertaining to mandatory subjects of bargaining so long as

---

<sup>262</sup> *Id.* at 236–37.

<sup>263</sup> *Id.* at 234.

<sup>264</sup> *See id.* at 239–40.

<sup>265</sup> *See, e.g., id.*; *Powell v. Nat’l Football League*, 930 F.2d 1293 (8th Cir.1989).

<sup>266</sup> *Powell*, 930 F.2d at 1301 (quoting *Amalgamated Meat Cutters & Butchers Workmen of N. Am., Local Union No. 576 v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir. 1979)).

<sup>267</sup> *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 539–40 (1983)) (internal quotation marks omitted).

<sup>268</sup> *Brown*, 518 U.S. 231 (1996).

<sup>269</sup> Harper, *supra* note 28, at 1663–64 (summarizing the holding in *Brown*, 518 U.S. 231).

employees have union representation,<sup>270</sup> its jurisprudence has had this practical effect.

To challenge the legality of league-imposed player restraints, then, it appears that players must first abandon the collective bargaining process<sup>271</sup> (through a disclaimer of interest or union decertification<sup>272</sup>). Notwithstanding Congress's preference for settling industrial disputes through collective bargaining, current jurisprudence appears to indicate that once the players have "sufficiently distan[ced themselves] in time and in circumstances from the collective bargaining process,"<sup>273</sup> player-restraint antitrust lawsuits may proceed and be adjudicated according to traditional antitrust doctrine.<sup>274</sup> Indeed, *Brown* appeared to be the impetus for the latest NFLPA decertification since failure to take this step most likely would have been fatal to any antitrust lawsuit filed by the players.<sup>275</sup>

### C. The "Single Employer" Defense

Despite the Supreme Court's jurisprudence that the scope of the non-statutory labor exemption extends only to situations in which the parties are in some way still tied to the collective-bargaining process, it is important to normatively question whether courts should ever evaluate the merits of a Section 1 player-restraint lawsuit, regardless of whether a collective-bargain-

---

<sup>270</sup> Indeed, the Court in *Brown* suggested that an "'extremely long' impasse, accompanied by 'instability' or 'defunctness' of [a] multiemployer bargaining unit" might be a situation where a union could then bring an antitrust challenge against the agreements made between those employers. See *Brown*, 518 U.S. at 250 (citing *El Cerrito Mill & Lumber Co.*, 316 N.L.R.B., at 1006–07).

<sup>271</sup> This argument will be discussed further *infra* Section IV.

<sup>272</sup> See Matt Moore, *Disclaimed Interest by NBPA? Here's What it Means to Labor Squabble*, CBS SPORTS (Nov. 15, 2011), <http://www.cbssports.com/nba/story/16130862/disclaimed-interest-by-nbpa-heres-what-it-means-to-labor-squabble> (last visited Jan. 12, 2014), *archived at* <http://perma.cc/7LP5-VQZM> (explaining that a "disclaimer of interest" differs from "union decertification," in that the former means the union leadership has voluntarily given up its role as the players' representative in collective bargaining, which has the benefits of speeding up the process through which players can bring antitrust lawsuits, and allows the union to regain its status as bargaining representative very quickly, as opposed to the latter in which the players vote to dissolve the union).

<sup>273</sup> *Brown*, 518 U.S. at 250.

<sup>274</sup> See *id.*

<sup>275</sup> See *Brady v. Nat'l Football League (Brady I)*, 779 F.Supp.2d 992, 1000–04 (D. Minn. 2011); *supra* notes 21–26; *infra* text accompanying notes 369–71.



ing relationship exists between clubs and players.<sup>276</sup> In its landmark holding clarifying the approach to analyzing a Section 1 claim, the Supreme Court opined that “[a] court must . . . consider the facts peculiar to the business to which the restraint is applied . . . [and] the nature of the restraint and its effect.”<sup>277</sup> Because the restraints typically challenged in player-restraint lawsuits merely affect employees’ interests in a labor market<sup>278</sup> (as opposed to consumers’ interests in a product market), established antitrust doctrine dictates that it is appropriate to consider federal labor law and policy when deciding how Section 1 should apply in this context, if at all. Furthermore, it is important to recognize that, although the players may elect to withdraw a union’s right to represent them in collective bargaining, such a decision does not withdraw them or their NFL employers from the purview of the federal labor laws. For instance, Section 6 of the Clayton Act applies to actions taken by parties other than labor organizations engaged in collective bargaining.<sup>279</sup> More importantly, both the NLRA and Norris-LaGuardia Act apply to “labor disputes” — defined as “any controversy concerning terms, tenure or conditions of employment”<sup>280</sup> regardless of whether a collective-bargaining relationship exists — unambiguous proof that the scope of the federal labor laws and their policies extend beyond the bounds of the union and collective-bargaining contexts.<sup>281</sup>

Thus, first inquiring into whether NFL member clubs are economic competitors such that they should or should not be viewed as a “single entity” for purposes of Section 1 puts the cart before the horse. When a group of players allege that the joint imposition of the terms and conditions of employment by their NFL employers violates the Sherman Act, a court should instead first inquire into whether the NFL member clubs are more properly viewed as a “single employer.” If they are in fact more properly viewed as such, then the NFL member clubs should merely be subject to the

---

<sup>276</sup> These types of restraints are distinguishable from those agreements that exclude particular persons from playing in the league at all. *See supra* note 49.

<sup>277</sup> *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

<sup>278</sup> *Cf. supra* notes 36–37 and accompanying text; *supra* note 49; *supra* notes 130–31; *supra* note 137.

<sup>279</sup> *See supra* text accompanying note 240.

<sup>280</sup> *See* 29 U.S.C. § 113(c); *id.* § 152(9) (defining “labor dispute” as “any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.”).

<sup>281</sup> *See Brady v. Nat’l Football League (Brady II)*, 644 F.3d 661, 670–73 (8th Cir. 2011).

same standards as any firm acting unilaterally when it sets the terms and conditions of employment for its employees, irrespective of whether those employees are represented by a union or engaged in the collective-bargaining process.

### 1. The Current “Single Employer” Test

The NLRA unambiguously supports the conclusion that the NFL and its member clubs should be viewed as a single employer. Section 152 sets forth the definitions of terms used throughout the statute.<sup>282</sup> Subsection (2) states: “The term ‘employer’ includes any *person* acting as an agent of an employer, directly or indirectly”<sup>283</sup> and Subsection (1) defines ‘person’ as “*one or more* individuals, labor organizations, *partnerships, associations, corporations*, legal representatives, trustees . . . or receivers.”<sup>284</sup> Thus, by definition, the NLRA stipulates that the term “employer” can include more than one entity, including partnerships and corporations — the most common legal forms that NFL member clubs take. Additionally, Article 1.1 of the NFL’s Constitution and Bylaws declares: “The name of this *association* shall be National Football League . . . .”<sup>285</sup> Because the NLRA expressly includes associations within the definition of “employer,”<sup>286</sup> it supports the conclusion that the NFL, an association comprised of member clubs, qualifies as a single employer.

Additionally, the National Labor Relations Board (“NLRB”), the agency charged with fulfilling the mandates prescribed by the NLRA,<sup>287</sup> and the Supreme Court, have already established that more than one legal entity may be considered a “single employer.”<sup>288</sup> The standard for determining whether “several nominally separate business entities” should be deemed “a single employer” turns on whether “they comprise an integrated enterprise.”<sup>289</sup> This determination should be distinguished from the “single entity” test announced in *American Needle*,<sup>290</sup> which attempts to define the

---

<sup>282</sup> See 29 U.S.C. § 152.

<sup>283</sup> *Id.* § 152(2) (emphasis added).

<sup>284</sup> *Id.* § 152(1) (emphasis added).

<sup>285</sup> CONST. & BYLAWS OF THE NAT’L FOOTBALL LEAGUE art. I, § 1.1 (Effective February 1, 1970, Revised 2006) *archived at* <http://perma.law.harvard.edu/B4U2-TJ9P>.

<sup>286</sup> 29 U.S.C. § 152.

<sup>287</sup> See *id.* § 156.

<sup>288</sup> *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

<sup>289</sup> See *id.* at 256.

<sup>290</sup> 130 S.Ct. 2201 (2010).

degree to which several entities compete with one another economically.<sup>291</sup> Rather, with regard to the single-employer inquiry, “[t]he controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.”<sup>292</sup> And “[w]hile none of these factors, separately viewed, have been held controlling, stress has normally been laid upon the first three factors which reveal functional integration with particular reference to whether there is centralized control of labor relations.”<sup>293</sup>

## 2. Evaluating Whether NFL Member Clubs Are a “Single Employer”

The single-employer test’s first criterion is “interrelation of operations.”<sup>294</sup> As previously explained, the NFL member clubs jointly produce individual games and the primary League product (a League season that culminates with a postseason tournament and eventual champion), and a single club is incapable of independently producing anything.<sup>295</sup> Recognizing this, Congress has expressly authorized the member clubs to jointly sell the broadcast rights to each game.<sup>296</sup> Thus, the NFL’s member clubs’ operations are highly interrelated, and consequently this first criterion supports the notion that the member clubs are properly grouped together as a single employer for labor relations purposes.

The second criterion is “common management.”<sup>297</sup> Although each club is independently owned and operated,<sup>298</sup> there is also a significant degree of common management among the member clubs. A centralized management group not employed by any individual club (the “League Office”) provides advice and guidance to member clubs, and acts as a regulatory body by making management decisions on behalf of all member clubs. The League Office also provides a forum in which representatives from each or several member clubs gather to make decisions on behalf of all member clubs. For instance, the League Office maintains an Executive Commit-

---

<sup>291</sup> *Id.* at 2212.

<sup>292</sup> *Radio*, 380 U.S. at 256.

<sup>293</sup> *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1121 n.1 (3d Cir. 1982) (quoting *Parklane Hoisery Co.*, 203 N.L.R.B. 597, 612 (1973)).

<sup>294</sup> *Radio*, 380 U.S. at 256.

<sup>295</sup> *See supra* Section II.A.2.

<sup>296</sup> 15 U.S.C. § 1291 (1982).

<sup>297</sup> *Radio*, 380 U.S. at 256.

<sup>298</sup> *See, e.g., Front Office*, GIANTS.COM, <http://www.giants.com/team/staff.html>, archived at <http://perma.cc/H82H-ACPX> (showing that club individually manages operations including player development, marketing and communications).

tee,<sup>299</sup> which has the power to (among other things) impose fines “upon any member, or any owner, director, partner, officer, stockholder, player, or employee of a member of the League,”<sup>300</sup> and to make decisions related to financing League business.<sup>301</sup> The League Office also includes a Commissioner, who is vested with significant authority, including “full, complete, and final jurisdiction and authority to arbitrate: any dispute involving two or more members of the League, any dispute between any player, coach, and/or other employee of any member of the League . . . and any member club or clubs.”<sup>302</sup> Most importantly, the Commissioner has “authority to arrange for and negotiate contracts on behalf of the League with other persons, firms, leagues, or associations.”<sup>303</sup> Finally, the League Office controls the production of each member club’s product through the issuance of a League-wide schedule,<sup>304</sup> and mandates that, when hosting a home game, each member club provide certain services, such as a physician and ambulance, to both clubs playing in that game.<sup>305</sup> Thus, member clubs are to a significant extent commonly managed, further supporting a finding that the clubs should be deemed a “single employer.”

The third criterion considered under the single-employer test is “centralized control of labor relations.”<sup>306</sup> NFL member clubs largely control labor relations in a centralized manner. For instance, the Commissioner has significant authority to discipline any employee of any member club,<sup>307</sup> with the potential discipline for such employee including expulsion from the

---

<sup>299</sup> CONST. & BYLAWS OF THE NAT’L FOOTBALL LEAGUE art. VI, § 6.1 (Effective February 1, 1970, Revised 2006) *archived at* <http://perma.law.harvard.edu/B4U2-TJ9P>.

<sup>300</sup> *Id.* art. VI, § 6.5(A).

<sup>301</sup> *Id.* art. VI, § 6.5(F) (ability “to make and deliver in the name of the League a promissory note or notes evidencing any . . . loan and to pledge as security therefore any stocks, bonds, or other securities owned by the League”).

<sup>302</sup> *Id.* art. VIII, § 8.3. The Commissioner also has significant financial authority, including the ability to “incur any expense, which in his sole discretion, is necessary to conduct and transact ordinary business of the League, including but not limited to, the leasing of office space and the hiring of employees and other assistance or services.” *Id.* art. VIII, § 8.4.

<sup>303</sup> *Id.* art. VIII, § 8.10.

<sup>304</sup> *Id.* art. XIII, § 13.1.

<sup>305</sup> *See id.* art. XIX, § 19.5.

<sup>306</sup> *See* Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc., 380 U.S. 255, 256 (1965).

<sup>307</sup> *See* CONST. & BYLAWS OF THE NAT’L FOOTBALL LEAGUE art. VIII, § 8.13 (Effective February 1, 1970, Revised 2006) *archived at* <http://perma.law.harvard.edu/B4U2-TJ9P>.

League.<sup>308</sup> The League Office has also established rules governing the eligibility of players,<sup>309</sup> and has mandated that all player contracts be “executed . . . in the form adopted by the member clubs of the League”<sup>310</sup> and filed with the League Office, not merely the member club.<sup>311</sup> Moreover, the Commissioner has the ability to disapprove or cancel a contract made between a player and a club.<sup>312</sup> Even the uniforms that players wear are strictly governed by League rules, and member clubs may not change their uniforms without prior approval by the Commissioner.<sup>313</sup> Finally, the Commissioner has the authority to negotiate collective-bargaining contracts with any players’ union on behalf of all of the member clubs.<sup>314</sup> These examples illustrate the degree to which labor relations are centralized in the NFL, and provide a firm basis for concluding that the member clubs should, in fact, be considered a single employer.<sup>315</sup>

The fourth and final criterion considered when determining whether a group of nominally separate entities are in fact a single employer is “common ownership.”<sup>316</sup> The clubs jointly produce NFL football games (the primary League product), and are therefore common owners in the product for which they employ labor.<sup>317</sup> However, each member club is individually owned and operated, and has independent value.<sup>318</sup> Therefore, this factor probably tips against a single employer finding.

---

<sup>308</sup> See *id.* art. IX.

<sup>309</sup> See *id.* art. XII.

<sup>310</sup> *Id.* art. XV, § 15.1.

<sup>311</sup> See *id.* art. XV, § 15.3.

<sup>312</sup> See *id.* art. VII, § 8.14.

<sup>313</sup> See *id.* art. XIX, § 19.8-19.9.

<sup>314</sup> See *id.* art. VIII, § 8.10.

<sup>315</sup> It may seem bizarre or illogical that the extent to which separate entities have combined their labor relations practices is a factor in determining whether they are a “single employer,” and immune from Section 1 scrutiny in player restraint lawsuits, which attempt to challenge these employers’ right to make specific agreements pertaining to labor and employment. However, considering this factor is both logical and relevant because it helps to distinguish between those employers that genuinely have a high degree of centralized control of labor relations, and those that have merely engaged in “naked” restraints to reduce wages. In the latter situation, these employers would not be able to claim the “single employer” defense, and their agreement to not pay more than a certain wage to their employees would be subject to Section 1 scrutiny.

<sup>316</sup> See *Radio & Television Broad. Technicians Local Union 1264 v. Broad. Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965).

<sup>317</sup> See *supra* Section II.A.2; Section II.A.3.

<sup>318</sup> See *The Business of Football*, *supra* note 5.

In sum, however, especially when stressing the first three criteria as the NLRB has instructed,<sup>319</sup> the NFL member clubs appear to satisfy the traditional single-employer test. Consequently, they should be treated as such, and should be immune from Section 1 scrutiny when making agreements pertaining to labor and employment.<sup>320</sup>

Those who wish to resist such a conclusion may point to the Fifth Circuit's holding in *North American Soccer League v. National Labor Relations Board*.<sup>321</sup> In that case, the NLRB characterized the member clubs of the North American Soccer League ("NASL"), structured similarly to the NFL,<sup>322</sup> as "joint employers."<sup>323</sup> (Presumably, joint employers would still be considered separate employers and thus could still be subjected to Section 1 scrutiny). It is important to note, though, that "a finding that companies are 'joint employers' assumes in the first instance that companies are 'what they appear to be' — independent legal entities that have merely historically chosen to handle jointly . . . important aspects of their employer-employee relationship."<sup>324</sup> Thus, there is nothing to prevent this "joint employer" assumption from being challenged and eventually proven incorrect.

In *North American Soccer League*, the players voted to certify a league-wide union to represent them in the collective bargaining process.<sup>325</sup> Because the NLRA permits multiemployer bargaining (i.e., grouping separate employers' employees into a single bargaining unit),<sup>326</sup> a determination of whether the member clubs were better characterized as a "single employer" — as opposed to "joint employers" — was irrelevant. That is, in this instance, "assuming" that the member clubs were joint employers as opposed to a single employer had no meaningful consequences since the players' ability to maintain a single bargaining unit would be unaffected by such a determination. When the member clubs challenged the appropriateness of the league-wide bargaining unit, the Fifth Circuit concluded that

---

<sup>319</sup> See *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1121 n.1 (3d Cir. 1982) (citing *Parklane Hosiery Co.*, 203 N.L.R.B. 597, 612 (1973)).

<sup>320</sup> This would not, however, preclude them from being subject to Section 2. See *supra* note 61.

<sup>321</sup> 613 F.2d 1379 (5th Cir. 1980).

<sup>322</sup> See *id.* at 1382-83 (describing features of the NASL, many of which pertain to the NFL, and have been described herein).

<sup>323</sup> See *id.* at 1381.

<sup>324</sup> *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1122 (3d Cir. 1982) (citing *NLRB v. Checker Cab Co.*, 367 F.2d 692, 698 (6th Cir. 1966)) (emphasis added).

<sup>325</sup> *N. Am. Soccer League*, 613 F.2d at 1381.

<sup>326</sup> See *infra* text accompanying note 332.

there was sufficient evidence to affirm the NLRB's determination that the member clubs were in fact joint employers.<sup>327</sup> Because it was simpler to "assume" the member clubs were "joint employers," and doing so led to the same result (the maintenance of a league-wide unit by the players) as would have a determination that the clubs were in fact better characterized as a "single employer," there is no indication of how the NLRB or Fifth Circuit would have ruled had they actually considered the issue. Thus, whether sports-league member clubs should be deemed a "single employer" as opposed to "joint employers" appears to be an open question, having never been squarely addressed by either the NLRB or any court.

### 3. Multiemployer Bargaining Units and Unit Appropriateness

The NLRA guarantees virtually all private-sector employees the right to collectively bargain with their employers.<sup>328</sup> Before a union is allowed to represent a group of employees, however, it must file a petition with the NLRB stating that the group of employees it seeks to organize constitutes an "appropriate unit."<sup>329</sup> The appropriateness of the unit turns on the degree to which the workers to be included share a "community of interest."<sup>330</sup> It is important to recognize that all of an employer's employees may not share enough of a community of interest to be grouped into a single

<sup>327</sup> *N. Am. Soccer League*, 613 F.2d at 1383.

<sup>328</sup> See 29 U.S.C. § 152 (defining "employer" to specifically exclude "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof.").

<sup>329</sup> See *id.* § 159; see also, e.g., *Lundy Packing Co., Inc.*, 314 N.L.R.B. 1042 (1994); *Omni Int'l Hotel*, 283 N.L.R.B. 475, 475 (1987); *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 (1950).

<sup>330</sup> *Ore-Ida Foods, Inc.*, 313 N.L.R.B. 1016, 1019 (1994) (providing a comprehensive discussion of the factors considered in determining a community of interest). Some of the factors considered include: (1) the degree of functional integrations of the work in the business of the employer, e.g., *Seaboard Marine Ltd.*, 327 N.L.R.B. 556, 556 (1999); (2) whether they perform similar types of work, including the nature of the workers' skills and functions, see *Phoenix Resort Corp.*, 308 N.L.R.B. 826, 827-28 (1992); (3) whether they have regular work contact and whether they are interchangeable with other workers, see *Novato Disposal Services*, 330 N.L.R.B. 632, 632 (2000); (4) whether they are subject to similar working conditions, see *Allied Gear & Machine Co.*, 250 N.L.R.B. 679, 681 (1980); (5) whether they have similar wage and benefit packages, see *Associated Milk Producers*, 251 N.L.R.B. 1407, 1407 (1980); (6) whether they are subject to common supervision, see *id.*; (7) prior bargaining history, see *Great Atlantic and Pacific Tea Co.*, 153 N.L.R.B. 1549, 1550 (1965); and (8) the extent and form of organization, either with that employer or within that industry, see *Overnite Transp. Co.*, 322 N.L.R.B. 723, 725.

bargaining unit. For example, one company's factory workers may comprise one bargaining unit, while the same company's office clerical workers may need to seek separate union representation because they do not share enough of a community of interest with the factory workers.<sup>331</sup> It is also important to recognize that separate employers' employees may share enough of a community of interest to be grouped together into a single bargaining unit; such units are referred to as "multiemployer bargaining units."<sup>332</sup> Separate employers, however, cannot be forced into a multiemployer bargaining arrangement.<sup>333</sup> Rather, each employer has the right to separately bargain with its own employees, and therefore each must demonstrate an intent to be bound by a joint bargaining arrangement before its employees' inclusion in the multiemployer unit will be deemed appropriate.<sup>334</sup>

Bargaining units comprised of all players in a given league — as opposed to those comprised of only players playing for a particular club, or in a particular division or conference — are the norm in the four major American sports leagues.<sup>335</sup> Courts have always characterized these bargaining units as "multiemployer bargaining units" without considering their nature.<sup>336</sup> This cursory classification is analogous to the cursory classification of NASL member clubs as "joint employers" in *North American Soccer League*.<sup>337</sup> Such characterizations are important, though, because the "multiemployer bargaining unit" designation implies that league-wide bargaining units could be subdivided into smaller units at the behest of either the

---

<sup>331</sup> See *Mitchellace, Inc.*, 314 N.L.R.B. 536, 537 (1994) (holding that units of office clerical units are presumptively separate from production, maintenance, or warehouse units that include plant clerical workers).

<sup>332</sup> Public data is not available, but in 1996, "multiemployer bargaining account[ed] for more than 40% of major collective-bargaining agreements, and [was] used in such industries as construction, transportation, retail trade, clothing manufacture, and real estate, as well as professional sports." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 240 (1996).

<sup>333</sup> See *Kroger Co.*, 148 N.L.R.B. 569, 573 (1964).

<sup>334</sup> See *id.*

<sup>335</sup> See *supra* note 19; the Major League Baseball Players Association ("MLBPA") represents all MLB baseball players. See *2012-16 Basic Agreement, MLBPA*, archived at <http://perma.law.harvard.edu/0fmYf2qiRpz>. The National Basketball Players Association ("NBPA") represents all NBA basketball players. See *About the NBPA*, NBPA, <http://www.nbpa.org/about-us> (last visited Jan. 12, 2014), archived at <http://perma.law.harvard.edu/0ZHKQkMenSL>. The National Hockey League Players Association ("NHLPA") represents all NHL hockey players. See *Inside NHLPA*, NHLPA, <http://www.nhlpa.com/inside-nhlpa> (last visited Jan. 12, 2014), archived at <http://perma.law.harvard.edu/0TpVc5Ej3PE>.

<sup>336</sup> See, e.g., *Brown v. Pro Football, Inc.*, 518 U.S. 231, 239 (1996).

<sup>337</sup> See *supra* notes 321–27 and accompanying text.



clubs or players.<sup>338</sup> According to well-settled collective bargaining principles, each employer has the right to reject the “multiemployer bargaining unit” and individually bargain with its own employees.<sup>339</sup> As just explained, one employer’s employees sometimes must maintain separate bargaining units, and multiple employers’ employees are sometimes *permitted* to bargain together in a single bargaining unit. But it appears that if a group of employers were *compelled* to bargain together — such that any employer’s failure to evince an intent to be bound in a joint bargaining arrangement had no meaningful significance — then that group of employers should be deemed a single employer.<sup>340</sup> Stated another way, if a given bargaining unit cannot be subdivided, then the management with which that unit is negotiating should be considered a single employer; on the other hand, just because management is a single employer, it does not necessarily follow that its employees will always be allowed to maintain a single bargaining unit. To analogize to a well-known maxim: a square is a rectangle, but a rectangle is not necessarily a square.

#### 4. An Alternative to Determine “Single Employer” Status: the “Smallest Appropriate Unit” Test

In addition to a community of interest, the NLRB requires the unit to comprise the smallest appropriate unit before it will be certified.<sup>341</sup> Thus, if employees in a given bargaining unit “do not possess a community of interest separate and distinct from” other employees to justify maintenance of two separate units, only a petition to represent all of the employees in a single unit will be certified.<sup>342</sup> The non-exhaustive list of factors that the NLRB considers when evaluating whether distinct groups of employees possess a sufficient community of interest — and therefore whether a single bargaining unit would be more appropriate than multiple units — includes: organizational structure and operations, wages, benefits, and work rules, supervision/discipline, skills and contact, interchange and transfer, and other miscellaneous factors such as uniforms.<sup>343</sup> A recent NLRB case, *Boeing*

---

<sup>338</sup> Even if employees of multiple employers certify a union to represent all of them in a single bargaining unit, the employers must consent or demonstrate their intent to bargaining collectively in a “multiemployer unit.” *See Kroger Co.*, 148 N.L.R.B. 569, 573 (1964).

<sup>339</sup> *See id.*

<sup>340</sup> *See infra* notes 341–59 and accompanying text.

<sup>341</sup> *See Boeing Co.*, 337 N.L.R.B. 152, 153 (2001).

<sup>342</sup> *See id.*

<sup>343</sup> *See Ore-Ida Foods, Inc.*, 313 N.L.R.B. 1016, 1016–19 (1994); *see also supra* note 330.

*Co.*,<sup>344</sup> illustrates how the NLRB determines whether a proposed unit is the smallest appropriate unit.

Boeing is a corporation that is involved in the building, maintenance, and repair of aircrafts.<sup>345</sup> In November of 2000, a union petitioned to represent a subset of Boeing's employees.<sup>346</sup> Specifically, the union sought to represent C-17 aircraft engine inspectors (known as "RAM" employees<sup>347</sup>) but sought to exclude from representation other employees responsible for servicing their equipment ("ESE" employees) and storing their materials ("ROR" employees). The NLRB rejected the union's petition, finding that the smallest appropriate unit constituted all three groups, rather than just the RAM employees.<sup>348</sup> To make this determination, the NLRB relied on several facts: (1) the employees in each group possessed "the same skills, qualifications, and certifications;"<sup>349</sup> (2) "[t]he RAM employees do not receive specialized training;"<sup>350</sup> (3) the "employees do the same type of work, albeit usually on different types of equipment;"<sup>351</sup> (4) "the employees' work is highly integrated;"<sup>352</sup> and (5) the "employees receive the same benefits, are subject to the same personnel policies, receive comparable wages . . . and, on occasion, permanently transfer into each other's group."<sup>353</sup> The NLRB concluded that, "[i]n sum, the Employer's servicing of the C-17 aircraft is only accomplished through the coordinated efforts of the RAM, ESE, and ROR groups."<sup>354</sup> Importantly, the NLRB also stated:

We recognize that the RAM employees are separately supervised, attend separate employee meetings, [and] work in a separate area from the ESE and ROR employees . . . . These distinctions, however, are offset by the highly integrated work force, the similarity in training and job functions between the RAM and ESE employees, and the comparable terms and conditions of employment among all three groups.<sup>355</sup>

---

<sup>344</sup> See *Boeing Co.*, 337 N.L.R.B. 152, 152 (2001).

<sup>345</sup> *Id.* at 153.

<sup>346</sup> See *id.*

<sup>347</sup> "RAM," or "recovery and modification" employees, were responsible for "inspect[ing] and repair[ing] a specific engine part" used in the C-17 aircraft. *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> See *id.*

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

### 5. The “Smallest Appropriate Unit” Test Applied to the NFL

Utilizing the same sort of analysis that the NLRB did in *Boeing*, it is not difficult to understand why the league-wide bargaining unit is the smallest appropriate bargaining unit in professional sports leagues. Indeed, all NFL players, regardless of the club they play for, or the division or conference to which that club belongs: (1) possess the same skills and qualifications; (2) do not receive any specialized training;<sup>356</sup> (3) engage in the same type of work; (4) have highly integrated work;<sup>357</sup> and (5) receive the same benefits, are subject to the same personnel policies, receive comparable wages, and on occasion join another club through a trade or free agency.<sup>358</sup> And just as in *Boeing*, the NFL member clubs are only able to engage in their business through the coordinated efforts of all NFL member club players.<sup>359</sup> Finally, under the reasoning of the NLRB in *Boeing*, the fact that the players on each NFL member club are supervised by different coaches, attend different club meetings, and practice in separate cities should not outweigh the players’ other community of interests.<sup>360</sup>

Consequently, if NFL member clubs amended the NFL Constitution & Bylaws to allow them to collectively bargain club-by-club, rather than as a League, it is doubtful that the NLRB would recognize this withdrawal from the League-wide unit. Similarly, if enough players on “big market” clubs decided that a “big market” club union could better represent their interests than the NFLPA, these players could attempt to decertify the NFLPA and elect a union to represent only big market clubs’ players’ interests. Again, however, it is unlikely that the NLRB would recognize such a decision given that it precluded the RAM employees from forming their own bargaining unit in *Boeing*. Thus, there is strong support for concluding that the smallest appropriate bargaining unit for NFL players is a league-wide bargaining unit.

Common sense yields the same conclusion. In most industries, the strike is an effective weapon because it may force employers to temporarily halt or reduce production, allowing the employer’s economic competitors to capitalize by increasing their own market shares. However, if NFL players

---

<sup>356</sup> Although the quality of training varies for each club, all clubs provide professional coaching to their players.

<sup>357</sup> See *supra* text accompanying notes 295–96.

<sup>358</sup> See generally 2011 NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT (Aug. 4, 2011), archived at <http://perma.law.harvard.edu/0UcXeAWR7o8>; see also *supra* notes 307–15 and accompanying text.

<sup>359</sup> See *supra* Section II.A.3.

<sup>360</sup> See *Boeing Co.*, 337 N.L.R.B. 152, 153 (2001).

formed club-specific unions and decided to strike, it would do more than just interrupt their employer-club's own operations — it would compromise the entire League's operations. That the club's "competitors" would be unable to take advantage of the labor dispute further proves that the NFL member club's labor relations are interrelated,<sup>361</sup> and that the member clubs are not truly economic competitors.<sup>362</sup> Indeed, NFL member-club "competitors" in fact have a vested interest in ensuring labor peace between each other member club and its players.

Of course, labor disputes and work stoppages have the potential to disrupt the operations of third-party employers in most industries. For instance, if a spark plug manufacturer's employees were to strike, automobile assemblers' ability to produce their own products would be compromised. The difference is that Ford, for instance, could "second-source" spark plugs from other manufacturers. Indeed, this is precisely why the strike is effective — the spark plug manufacturer's competitors will begin increasing their market share at the manufacturer's expense. Alternatively, Ford could prepare for potential supplier work stoppages by stockpiling parts when times are good. In the NFL, however, the Washington Redskins cannot avoid the consequences that would flow from a sudden New York Giants player strike the week they are scheduled to play; since the Redskins produce live entertainment, they are incapable of stockpiling components. Furthermore, it is doubtful that "second-sourcing" (for example, attempting to field a team of replacement players to compete against regular players) would be a suitable strategy to deal with the situation. Indeed, a spontaneous strike by Giants players would compromise the entire League product because the fairness and integrity of playoff determinations would be severely impacted.

The appropriateness of an alternative to a league-wide bargaining unit also has important implications related to how far the scope of the nonstatutory labor exemption should be extended. Those who refute that the league-wide bargaining unit is the smallest appropriate bargaining unit must necessarily abandon support for the principal argument levied against the Supreme Court's holding in *Brown*. Critics contend that the holding of *Brown*, which extends the nonstatutory exemption past impasse, effectually forces the players to choose between exercising their right to engage in collective bargaining and their right to pursue relief under the antitrust laws.<sup>363</sup> But

---

<sup>361</sup> Cf. *supra* Section III.C.2.

<sup>362</sup> Cf. *supra* Section II.A.

<sup>363</sup> See, e.g., *id.* at 258 (Stevens, J., dissenting) ("Other employees, no less than well-paid athletes, are entitled to the protections of the antitrust laws when their employers unit to undertake anticompetitive action that causes them direct harm

such a choice would not be necessary if players could in fact form bargaining units on the club level. True, the holding in *Brown* would still preclude players from maintaining a league-wide bargaining unit if they wished to file a Section 1 antitrust lawsuit, but *Brown* would pose no impediment to their ability to collectively bargain at the club level. After forming club-specific unions, any collaboration between clubs would of course no longer be protected by the nonstatutory exemption because collective-bargaining privity between clubs would no longer exist. In fact, since league-wide collaboration is precisely the conduct attacked in any Section 1 lawsuit, *Brown*'s prohibition against maintaining a league-wide bargaining unit should not be distasteful to the players. If players had the ability to simultaneously exercise their labor law and antitrust rights, the criticism accompanying the Supreme Court's holding to extend the scope of the nonstatutory labor exemption past impasse would vanish.

Of course, the fact that courts have never even considered club-specific unionization — and perhaps more importantly, that the players themselves have never pursued it<sup>364</sup> — lends credence to the fact that the league-wide bargaining unit is, in fact, the only feasible bargaining unit. Since a strike by one club-specific union would interfere with another club's players' abil-

---

and alters the state of employer-employee relations that existed prior to unionization.”); *Powell v. Nat'l Football League*, 930 F.2d 1293, 1306 (8th Cir. 1989) (Heaney, J., dissenting) (“It follows that the end result of the majority opinion is that once a union agrees to a package of player restraints, it will be bound to that package forever unless the union forfeits its bargaining rights.”); *id.* at 1309-10 (Lay, C.J., dissenting) (“[T]his court’s unprecedented decision leads to the ineluctable result of union decertification in order to invoke rights to which the players are clearly entitled under the antitrust laws. The plain and simple truth of the matter is that the union should not be compelled, short of self-destruction, to accept illegal restraints it deems undesirable. Union decertification is hardly a worthy goal to pursue in balancing labor policy with the antitrust laws.”).

<sup>364</sup> See *History*, NFL PLAYERS ASSOCIATION, <https://www.nflplayers.com/about-us/History/> (last visited Jan. 12, 2014), archived at <http://perma.law.harvard.edu/05FFgHnpUms> (noting that, “even very early on, there were not separate unions, but only one union that represented the majority of players in the league”). It should be noted that, for a few years following the announcement of a merger between the NFL and the American Football League (“AFL”), one union represented all of the AFL players, and the NFLPA represented all of the NFL players. However, during these years, the two leagues maintained completely separate schedules. Thus, a strike by one union would not significantly disrupt the operations of the other “league” or its players. The only cooperation between the “leagues” for these seasons was the staging of a single game: the Super Bowl. Thus, the collaboration and impact that a lack of collaboration between the “leagues” could have was minimal. Once the schedules merged in 1970, the two unions also agreed to a merge, with the resulting union still called the NFLPA.

ity to earn a living, it makes sense that players have never pursued club-specific unions and it appears that players are just as interested in maintaining labor peace throughout the League as are the clubs.

In sum, because antitrust doctrine dictates that the nature and effects of a given restraint should be considered when deciding how Section 1 should be applied to alleged violations, and because player restraints merely affect employees in a labor market, it is appropriate to consider whether the NFL member clubs are a single employer under labor law principles, and thus, whether they should be immune from Section 1. The NFL member clubs should indeed be considered a “single employer” regardless of whether the question is answered with the NLRB’s and Supreme Court’s traditional “single employer” test, or with the “smallest appropriate bargaining unit” test proposed here. Common sense and historical practice illustrate the complete impracticability of maintaining anything other than a league-wide bargaining unit. Indeed, even the Supreme Court acknowledged when it last considered an NFL player-restraint lawsuit that “[i]n the present context . . . the league [is acting] more like a single bargaining employer”<sup>365</sup> than as a group of separate employers. Thus, the terms “joint employer” and “multiemployer” are misnomers and incorrectly characterize the employment relationship between NFL member clubs. Because the NFL member clubs are compelled to collaborate when determining the wages and terms and conditions of employment of NFL players whenever the players elect to engage in the collective bargaining process, it is illogical and perverse for an antitrust court to impose an absolute prohibition on this very same collaboration whenever the players decide to abandon Congress’s preferred method for settling labor disputes.<sup>366</sup> Rather, the clubs should be permitted to co-determine player wages and terms of conditions of employment irrespective of any formal collective-bargaining relationship.

---

<sup>365</sup> *Brown*, 518 U.S. at 248 (1996) (determining, however, that the consideration of whether the member clubs are more properly viewed as a single bargaining employer is “irrelevant” because the nonstatutory labor exemption applied regardless).

<sup>366</sup> See 29 U.S.C. § 151 (“It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . .”).

#### IV. CONCLUSION

Those familiar with the contentious labor history between NFL Players and management<sup>367</sup> might have foreseen the most recent player-restraint lawsuit, *Brady v. National Football League*, as the inevitable result of the NFL's decision nearly three years earlier to opt out of the final two years of its previous CBA with the Players.<sup>368</sup> The NFL's decision, made in May 2008, resulted in a March 2011 rather than a March 2013 expiration date. Unable to successfully negotiate the terms of a new CBA, and in light of the Supreme Court's decision in *Brown v. Pro Football*,<sup>369</sup> the NFLPA "disclaimed any interest in representing the Players in further negotiations" mere hours before the CBA was set to expire.<sup>370</sup> Doing so enabled the Players to file their antitrust suit the very same day.<sup>371</sup>

Although the lawsuit's most serious claims alleged that the member clubs' joint imposition of the salary cap, franchise tag, and annual draft constituted illegal restraints of trade under Section 1 of the Sherman Act, the litigation never addressed the merits of those claims.<sup>372</sup> Instead, it focused on the likelihood of success of the Players' Section 1 claim challenging the legality of the NFL's lockout<sup>373</sup> — or, in the Players' language, "group boycott"<sup>374</sup> — and on the federal courts' power to issue a preliminary injunc-

---

<sup>367</sup> See *Brady v. Nat'l Football League* (Brady I), 779 F.Supp.2d 992, 998-1004 (D. Minn. 2011) (providing a detailed description of this history starting with *Mackey v. Nat'l Football League*).

<sup>368</sup> *Id.* at 1003.

<sup>369</sup> 518 U.S. 231 (1996). The decision potentially suggests that the nonstatutory labor exemption immunizes the League from any antitrust challenges mounted by the Players so long as the Players maintain a collective bargaining relationship with the NFL. See *supra* Section III.B.

<sup>370</sup> *Brady I*, 779 F.Supp.2d at 1003.

<sup>371</sup> See *id.* at 1004.

<sup>372</sup> See generally *Brady I*, 779 F.Supp.2d 992; *Brady v. Nat'l Football League* (Brady II), 644 F.3d 661 (8th Cir. 2011).

<sup>373</sup> "A lockout occurs when an employer lays off or 'locks out' its unionized employees during a labor dispute to bring economic pressure in support of the employer's bargaining position." *Brady I*, 779 F.Supp.2d at 1003.

<sup>374</sup> *Brady I*, 779 F.Supp.2d at 1004. The classification of the actions being taken by the NFL's member clubs as either a "lockout" or a "group boycott" was disputed. *Id.* The NFL maintained that the players' decertification of the NFLPA was a sham, such that it still maintained a collective bargaining relationship with its employees, and that the NFL was therefore merely exercising its congressionally delegated right to implement a lockout of its employees. See *id.* at 1007, 1015. On the other hand, the Players contended that the decertification of the NFLPA was valid, and that since they no longer maintained a collective bargaining relationship, the "lockout" was actually an illegal "group boycott" under Section 1 of the Sher-

tion prohibiting a party to a labor dispute from implementing an employee lockout.<sup>375</sup> Despite the District Court's conclusion that the NFL Players established a fair chance of success on the merits of their "group boycott" claim,<sup>376</sup> and that they would suffer irreparable harm save the issuance of a preliminary injunction prohibiting the continuation of the lockout by the NFL,<sup>377</sup> the Court of Appeals held that the Norris-LaGuardia Act prohibited federal courts from issuing such injunctions.<sup>378</sup> Regardless of the legal correctness or wisdom of these holdings at the time they were issued, the events that transpired in the immediate aftermath of their issuance reveal several important insights regarding the merits of the Players' antitrust challenges to the salary cap, franchise tag, and annual draft, and more generally the role that antitrust courts should play in resolving labor disputes pertaining to the implementation of player restraints.

A. *Lessons Learned in the Aftermath of Brady v. National Football League*

Less than three weeks after the Eighth Circuit issued the final opinion in this latest series of litigation, the NFL Players recertified the NFLPA as their exclusive bargaining representative.<sup>379</sup> And only five days after that, the NFL and NFLPA officially agreed to the terms of a new ten-year CBA, which will govern the wages and terms and conditions of NFL player employment through the end of the 2020 season.<sup>380</sup> In light of these developments, the reasoning employed by the courts in this dispute appears dubious at best.

Although the District Court of Minnesota expressly stated that it was "not ruling on whether the non-statutory labor exemption shields the

---

man Act. *See id.* at 1040. Furthermore, they argued that since no collective bargaining relationship existed, the nonstatutory labor exemption could no longer be invoked to shield the NFL's actions from Section 1 scrutiny. *See id.*

<sup>375</sup> *See id.* at 1026–32.

<sup>376</sup> *See id.* at 1039.

<sup>377</sup> *See id.* at 1034.

<sup>378</sup> *See Brady II*, 644 F.3d at 680–81 (but also holding that the courts could issue injunctions prohibiting a party from "locking out" non-employees, which in the present context meant free agents and prospective players).

<sup>379</sup> Associated Press, *Report: NFLPA Recertified as Union*, ESPN (Jul. 30, 2011), [http://espn.go.com/nfl/story/\\_/id/6818756/report-nfl-players-union-recertified-final-negotiations-nfl](http://espn.go.com/nfl/story/_/id/6818756/report-nfl-players-union-recertified-final-negotiations-nfl) (last visited Jan. 12, 2014), *archived at* <http://perma.law.harvard.edu/0QeuDSgUY98>.

<sup>380</sup> 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. I (Aug. 4, 2011), *archived at* <http://perma.law.harvard.edu/0UcXeAWR7o8>.



League from [the Players'] claims,"<sup>381</sup> it did issue a preliminary injunction prohibiting the League from continuing its lockout. It based its decision in part on the determination that the Players' disclaimer of the NFLPA as its bargaining representative had "serious consequences for the Players."<sup>382</sup> That is, "by disclaiming their union, the Players [purportedly] [gave] up the right to strike, to collectively bargain, to have union representation in its grievances, to have union representation in benefits determinations, and to have union regulation of agents."<sup>383</sup> Hindsight, however, reveals that this supposition was simply untrue.

First, although the NFLPA technically disclaimed its role as the Player's bargaining representative, a group of executives and lawyers not officially employed by the NFLPA along with a group of Players continued to negotiate the terms of the next CBA with the NFL's executive committee.<sup>384</sup> And although the NFLPA reconstituted itself into a "trade association" (as opposed to a labor organization) and technically NFLPA officials did not sit in on these negotiations, the NFLPA readily acknowledged that it served in an advisory capacity to the Players during these discussions.<sup>385</sup> Thus, despite the fact that members of the NFLPA presumably did not communicate directly with the NFL executive committee during their temporary four-month hiatus as the Players' official bargaining representative, it would be naïve to think that NFLPA executives were not orchestrating the Players' entire negotiating strategy during this timeframe. Indeed, the latest CBA was finalized and agreed to less than a week after the NFLPA was recertified, a feat the NFL and NFLPA were unable to achieve in the more than two years of negotiations that they engaged in prior to "decertification." This development undermines the District Court's conclusion that the Players had given up their right to collectively bargain by disclaiming the union. In reality, the Players did no such thing. Moreover, the fact that the Players forfeited their right to strike by decertifying the union appears meaningless since the NFL had already instituted a lockout. The fact that the decertification ended before the playing season resumed substantially

---

<sup>381</sup> *Brady I*, 779 F.Supp.2d at 1039.

<sup>382</sup> *Id.* at 1017.

<sup>383</sup> *Id.* (quoting Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction at 6, *Brady I*, 779 F.Supp.2d 992 (D. Minn. 2011) (No. 41)).

<sup>384</sup> See Gary Graves, *DeMaurice Smith: NFLPA Decision to Recertify will be 'Serious, Sober'*, USA TODAY (Jul. 21, 2011), <http://content.usatoday.com/communities/thehuddle/post/2011/07/demaurence-smith-nflpa-decision-to-recertify-will-be-serious-sober/1#.UoK7gZRKnZZ> (last visited Jan. 12, 2014), archived at <http://perma.law.harvard.edu/0AhcaW8P5Fs>.

<sup>385</sup> *Id.*

mitigated the consequences flowing from the Players' forfeiture of NFLPA representation in any grievance proceedings since those proceedings almost always flow from in-season conduct. And finally, although agent activity may have gone unregulated during this four-month period, the universal expectation that the NFLPA would be recertified and agent regulations reinforced (perhaps retroactively) rendered minimal the negative consequences of such deregulation. Thus, contrary to the District Court's affirmations, the decision to disclaim the NFLPA did not have serious consequences for the Players. Rather, the decision to disclaim was all smoke and mirrors.

Second, it is important to normatively question the wisdom of allowing players to bring Section 1 lawsuits challenging the legality of various player restraints given the impact that doing so has on labor law and policy. The District Court did not seem to think that allowing such suits to proceed would be at all troublesome when it opined, "[t]here is nothing inherently unfair or inequitable about a disclaimer effecting an immediate termination of the framework of labor law."<sup>386</sup> Setting aside the fact that a union disclaimer does not immediately terminate the operation of the labor laws,<sup>387</sup> allowing a party to a labor dispute to unilaterally subject its negotiating opponent to the full force of the antitrust laws with the flip of a switch has grave consequences for the collective bargaining process, and it is startling that the District Court failed to recognize them.

It is universally acknowledged that there must be some collaboration between NFL member clubs if the league sport is to exist at all.<sup>388</sup> But until the legality of any such collaboration is litigated, the NFL member clubs remain unaware of whether they have crossed the line. Necessarily, then, they must be wary of any antitrust litigation, actual or potential, especially given that Section 4 of the Clayton Act trebles the damages awarded for Sherman Act violations.<sup>389</sup> It is not difficult to understand that the ability of the NFLPA to unilaterally thrust the full weight of the Sherman Act onto the NFL member clubs seriously undermines the NFLPA's ability to collectively bargain in good faith. Indeed, what reason would the NFLPA have to make any agreement until it fully flexed its muscles and utilized all availa-

---

<sup>386</sup> *Brady I*, 779 F.Supp.2d at 1021.

<sup>387</sup> Both the National Labor Relations Act and Norris-LaGuardia Act apply to "labor disputes," the definition of which does not depend on the maintenance of a union or collective bargaining relationship, meaning that decertification does not effect an immediate termination of the framework of labor law. *See supra* notes 276–81 and accompanying text; *see also* *Brady v. Nat'l Football League (Brady II)*, 644 F.3d 661 (8th Cir. 2011).

<sup>388</sup> *See supra* text accompanying note 83.

<sup>389</sup> *See supra* text accompanying note 46.

ble leverage to ensure that it was getting the best possible deal? Thus, under the District Court's precedent, when negotiating over player restraints or any other terms discussed in the collective bargaining process, the NFLPA could effectively say, "Agree to our terms or else we will decertify, and not only will you be prohibited from implementing player restraints, but you will also be liable for hundreds of millions of dollars in damages." Sanctioning such conduct blurs the line separating extortion from good faith negotiation.

Yet this is precisely the result that flows from allowing such claims to move forward. Case in point is the decertification charade accompanying the *Brady* suit which challenged the legality of the salary cap, franchise tag, and annual draft — all of which were later agreed to and incorporated into the latest CBA.<sup>390</sup> The Supreme Court expressly recognized the difficult situation that NFL member clubs would find themselves in — and the way in which the collective bargaining process would be undermined — if the nonstatutory exemption was not extended beyond impasse.<sup>391</sup> The Supreme Court explained the very purpose behind the development of the nonstatutory exemption when it stated the exemption reflects the view that:

Congress, not [antitrust] judges, was the body which should declare what public policy in . . . the industrial struggle demands. The . . . nonstatutory exemption interprets the labor statutes in accordance with this intent, namely, as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a reasonable practice. It thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict.<sup>392</sup>

To allow NFL players to so easily sidestep the Supreme Court's holding in *Brown* and Congress's mandate that labor disputes are to be reconciled through the application of labor — not antitrust — laws, would force "antitrust courts to answer a host of important practical questions about how collective bargaining over wages, hours, and working conditions is to proceed — the very result that the implicit labor exemption seeks to avoid."<sup>393</sup>

---

<sup>390</sup> In and of itself this fact should lead one to question the wisdom of allowing Players to challenge these practices and their legality. See *infra* note 394 and accompanying text.

<sup>391</sup> See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 247 (1996) (nothing that failure to extend the exemption past impasse would "forc[e] [NFL member clubs] to choose their collective-bargaining responses in light of what they predict or fear that an antitrust court, not labor law administrators, will eventually decide").

<sup>392</sup> *Id.* at 236-37 (internal citations and quotation marks omitted).

<sup>393</sup> *Id.* at 240-41.

Third, when considering the legitimacy of the challenges to the salary cap, franchise tag, and annual draft mounted by the Players in *Brady*, the logical implications flowing from the fact that the Players eventually agreed to and incorporated each of these restraints into the latest CBA cannot be overlooked.<sup>394</sup> It would be rare for a party aggrieved by and bringing a lawsuit against a legitimate antitrust violation to do an about-face and expressly sanction such conduct. Unlike the players who can combine, bargain, and strike, those whom the antitrust laws were actually meant to protect — consumers and third parties who do not have a direct relationship with the alleged transgressors — have no other recourse save filing a lawsuit to remedy any alleged transgressions. For instance, American Needle Co. had no other options but to file an antitrust lawsuit challenging the legality of the exclusive intellectual property licensing deal the NFL member clubs signed with Reebok. Additionally, the application of the antitrust laws to regulate monopsonistic conduct in most contexts finds strong support in the fact that the Sherman Act expressly prohibits the sellers affected by such conduct from themselves combining to form a monopoly to counter such buyer power. But permitting and encouraging workers to monopolize labor through the formation of unions so that they can effectively respond to monopsony power is precisely what Sections 6 and 20 of the Clayton Act, the Norris-LaGuardia Act, and the National Labor Relations Act authorize. The deal that eventually springs forth from the statutorily-authorized leverage that these counter-veiling forces are able to bring to bear reflects the true market value of the players' labor. Indeed, the players "should not be entitled to invoke the antitrust laws to gain something [they] could not win at the bargaining table."<sup>395</sup> Rather the desirability of the outcomes that such clashes yield is a policy determination that should be made by Congress, not the antitrust courts.

Fourth, it is vitally important to not let the "underdog" status of the players blind us to the negative effects that flow from allowing such litigation to move forward. America loves the National Football League.<sup>396</sup> And the imposition of restrictive player restraints has been a big contributor to the League's success by increasing the degree of on-field outcome uncertainty that would otherwise exist absent these restraints.<sup>397</sup> Player restraints

---

<sup>394</sup> See 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 6 (Aug. 4, 2011), archived at <http://perma.law.harvard.edu/0UcXeAWR7o8> (college draft); *id.* art. 10 (franchise tag); *id.* art. 12-14 (salary cap).

<sup>395</sup> *Powell v. Nat'l Football League*, 930 F.2d 1293, 1309 (8th Cir. 1989) (Lay, C.J., dissenting) (explaining the rationale underlying the majority's holding).

<sup>396</sup> See *supra* text accompanying notes 3-17.

<sup>397</sup> See *supra* Section II.C.4.

also establish a system that attempts to maximize strategic competition, which simultaneously creates new products and increases consumers' willingness to pay for anything and everything NFL-related.<sup>398</sup> The players share directly in the financial windfall that flows from the NFL's expertise in managing the rules governing the acquisition and distribution of playing talent since the collective bargaining process has yielded a system in which one of those "restrictive restraints" — the salary cap — is directly tied to League revenues.<sup>399</sup>

Finally, we should not forget that there is no inherent right to specific wages, terms or conditions of employment in the National Football League,<sup>400</sup> nor can we ignore the natural market forces that protect players' interests. If any given player decides that the wages, terms or conditions of employment are unsuitable, he can pursue any other occupation, just as any other participant in the labor force must make decisions regarding whether the benefits of any given job are worthwhile enough to undertake it. This free-market check on the power of NFL member clubs prevents them from driving player wages and terms and conditions of employment down to an economically undesirable level (i.e., the level at which the talent pool becomes noticeably shallower, decreasing consumers' willingness to pay).<sup>401</sup> Additionally, imposing worse wages and terms and conditions of employment than those which the free market dictates the players deserve incentivizes others to invest in rival football leagues, which would be true economic competitors to the NFL's member clubs. Alternatively, the players can form a union, collectively bargain, and when necessary withhold their services by striking in an attempt to achieve more favorable working conditions. Practically, it is reasonable to question the oppressiveness of any given player restraint when: (1) the Players agreed to the imposition of these allegedly egregious restraints in their latest CBA, and (2) almost anyone with enough ability to become an NFL player nevertheless chooses to do so.

---

<sup>398</sup> See *supra* Section II.C.4.

<sup>399</sup> Players will no doubt continue to make more and more money as the NFL expects to increase its current \$9.4 billion revenue stream to \$25 billion by 2027. See Terry Lefton, *New Products, New Licenses Line Up with the Lucrative NFL*, SPORTS BUSINESS JOURNAL DAILY 9 (Mar. 12, 2009), <http://www.sportsbusinessdaily.com/Journal/Issues/2012/03/12/Marketing-and-Sponsorship/The-Lefton-Report.aspx> (last visited Jan. 12, 2014), *archived at* <http://perma.law.harvard.edu/0sByyZrtEYi>; see also *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1194-1205 (D.C. Cir. 1978) (MacKinnon, J., concurring in part and dissenting in part) (describing how the imposition of the college draft led to increased financial compensation for players).

<sup>400</sup> As Commissioner Roger Goodell recently noted, "Being associated with the NFL is a privilege. It is not a right." *60 Minutes: The Commissioner*, *supra* note 52.

<sup>401</sup> See *supra* text accompanying notes 164-66.

Consequently, lawyers, judges, policymakers and the public must question the wisdom of allowing NFL players to subject these very same player restraints to Section 1 scrutiny. Whether one approaches the issue from the vantage point of the single entity defense, the rule of reason, the ancillary restraints doctrine, the statutory and nonstatutory labor exemptions, or the single employer theory, a thoughtful and nuanced understanding of antitrust doctrine, economics, and federal labor law reveals that the NFL member clubs should be free to manage the rules governing the acquisition and distribution of playing talent throughout the League as they see fit. Otherwise, the risk that disinterested judges will mangle antitrust doctrine and issue an opinion obliterating the NFL's ability to deliver the game the country has come to love will continue to loom over all sports fans like a dark cloud ready to burst.



## Ignorance, Harm, and the Regulation of Performance-Enhancing Substances

Lisa Milot\*

### TABLE OF CONTENTS

INTRODUCTION .....	92
I. REGULATING IGNORANCE .....	97
A. <i>Legal Regulation of Drugs</i> .....	97
B. <i>Legal Regulation of Supplements</i> .....	104
C. <i>Regulation of Performance-Enhancing Substances in Sports</i> .	107
D. <i>Ignorance Through Regulation</i> .....	110
II. IGNORANCE AND HARM .....	112
A. <i>Evaluation of Current Approach</i> .....	112
B. <i>Ignorance Increases Athletes' Use of Performance-Enhancing Substances</i> .....	116
1. Athletes' calculations of costs and benefits are skewed .....	117
2. Overestimations of rates of use lead to increased use .....	122
3. Lack of information about unergogenic effects increases risk-taking .....	124
4. Prohibition itself increases desirability .....	125
C. <i>Ignorance Increases Harm from Athletes' Use of Performance-Enhancing Substances</i> .....	128

---

\* Associate Professor, University of Georgia School of Law. Many thanks to Diane Amann, Michael McCann, Joe Miller, Lori Ringhand, James P.A. Ryan, and Logan Sawyer for their interest, comments and ideas at critical stages of this project; to Amanda Seals Bersinger and T.J. Striepe for their invaluable research help; to workshop participants from Pace Law School, Emory Law School, and UGA School of Law who provided suggestions on early drafts; and to the presenters and participants of the 2011 Brocher-Hastings Center Summer Academy.

1. Ignorance undermines medical authority . . . . .	128
2. Ignorance prevents legal liability for harm . . . . .	129
3. Ignorance increases collateral harms . . . . .	130
III. INFORMATION: WHAT DO WE NEED (AND HOW DO WE GET IT)? . . . . .	132
A. <i>Information We Need (and Why We Need It)</i> . . . . .	133
1. Rates of use . . . . .	133
2. Identity of “performance-enhancing substances” that do not enhance performance . . . . .	136
3. Examples of enhancement failures . . . . .	139
4. Proof of harm . . . . .	140
5. What athletes are actually taking . . . . .	141
B. <i>Sources of Information</i> . . . . .	142
CONCLUSION . . . . .	146

#### INTRODUCTION<sup>1</sup>

It was in the seventies and overcast at midday when the pack of 129 cyclists started Stage 15 of the 1995 Tour de France. The stage was the hardest of the Tour that year: six grueling Pyrenean mountain passes and 128 miles stood between the riders and the day’s finish just southwest of Lourdes. The highlight was expected to be the hellish Col du Tourmalet on whose slopes the riders would ascend nearly a vertical mile, and tens of thousands of spectators lined the road leading up the mountainside days in advance to secure a prime viewing spot.

The peloton rode quickly up and over the first peak—the well-known Col du Portet d’Aspet—in pursuit of an early breakaway. Speeds reached 55 miles per hour on the descent, with quickly turning wheels only inches apart despite the twists and turns carved out of the mountain’s face. The climb was a popular warm-up for the longer and steeper mountains in the range, and it was regularly included in the Tour despite being the scene of

<sup>1</sup> For news coverage of the 1995 Tour on which this description is based, see Tour De France 1995 Stage 15 Fabio Casartelli Rip, YOUTUBE (August 23, 2013), <http://www.youtube.com/watch?v=VJSP-QoZN2s> archived at <http://perma.cc/KPU6-9XVL>; Tour De France 1995 Stage 18 Armstrong Casartelli Tribute, YOUTUBE (August 23, 2013), <http://www.youtube.com/watch?v=TQDL2PnMcyU> archived at <http://perma.cc/9WGA-J2D5>; Samuel Abt, *Cycling; Italian Rider Dies After High-Speed Crash*, N.Y. TIMES, (July 19, 1995), archived at <http://perma.cc/S6WC-DBG9>; Austin Murphy, *A Test of Heart*, 83 SPORTS ILLUSTRATED 36 (July 31, 1995), archived at <http://perma.cc/46Y8-8LHM>.



several high-profile crashes.<sup>2</sup> Riders usually used it to test their legs, and those of their competitors, before the real racing began a few hours later, but on this day it had started early. For a handful of riders, it would end disastrously on one of the Col's hairpin turns.

The first to fall was Fabio Casartelli. The Italian's body and bike slid sideways, felling nearby cyclists and only stopping when his unhelmeted head hit one of the concrete pylons that lined the turn. The barricade intended to prevent cars from plummeting into the ravine below proved deadly to Casartelli. Despite an emergency airlift, he died before the stage was even finished. French rider Dante Rezza was more fortunate: He slid into a gap between two pylons and off the face of the mountain. While team personnel managed to hoist Rezza out of the ravine after half an hour, his injuries that day ended his race. A third rider lay just down the road, his left leg bent at an excruciating angle. The peloton sped away from the fallen riders, some of whom lay curled and motionless, others quickly jumping up from the wreckage, shaking out their arms and legs and brushing away debris before resuming the high speed descent.

Three days later, Casartelli's twenty-three-year-old teammate Lance Armstrong won his second-ever stage of the Tour de France. Race coverage shows the young American—on his way to finishing 36th in his first completed Tour—pointing repeatedly to the sky, both arms raised in tribute to his fallen friend as he crossed the finish line, his head unself-consciously bare.

In the years following Armstrong, of course, became the best-known and most successful American cyclist ever.<sup>3</sup> His near death from cancer in 1996, followed by his ascent to the top of the Tour podium on the Champs d'Elysees in 1999 and again in each of the next six years, made for a comeback story like no other. He had returned from the precipice of death

---

<sup>2</sup> The most memorable fall prior to 1995, perhaps, was that of perennial Tour runner-up Raymond Poulidor during Stage 13 of the 1973 Tour de France. Poulidor crashed into an adjacent ravine, injuring his head and requiring an airlift off the mountain. See Bill McGann & Carol McGann, *THE STORY OF THE TOUR DE FRANCE: 1965-2007* 79 (2008); CORBIS IMAGES, *Raymond Poulidor in 1973 Tour de France*, <http://www.corbisimages.com/stock-photo/rights-managed/AAJA001204/raymond-poulidor-in-1973-tour-de-france> (last visited Aug. 23, 2013), *archived at* <http://perma.cc/C8JH-VU8G>.

<sup>3</sup> For an overview of Armstrong's career at its peak, see generally Austin Murphy, *A Grand Finale*, *SPORTS ILLUSTRATED*, Aug. 1, 2005; LANCE ARMSTRONG WITH SALLY JENKINS, *IT'S NOT ABOUT THE BIKE: MY JOURNEY BACK TO LIFE* (Putnam 2000).

stronger, faster, and more determined. Recently, he admitted he had also returned pharmacologically enhanced.<sup>4</sup>

Armstrong's admission was the culmination of years of speculation and an investigation by cycling's governing body. In its 2012 "Reasoned Decision" announcing its findings and the sanctions it would administer, the United States Anti-Doping Agency ("USADA") detailed Armstrong's use of banned drugs.<sup>5</sup> Nearly 1,000 pages long, the report includes lurid descriptions of blood stored in hidden refrigerators,<sup>6</sup> faked engine trouble to provide cover and time for transfusions between race stages,<sup>7</sup> injections of variously colored unidentified substances into riders' bodies,<sup>8</sup> and belatedly manufactured documentation to excuse a positive drug test.<sup>9</sup>

The report details Armstrong's eagerness to serve as a human guinea pig, and his expectation that his teammates would do the same, ingesting and injecting previously untested performance-enhancing cocktails.<sup>10</sup> Team doctors and coaches closely monitored Armstrong's hematocrit and lactate levels in order to precisely adjust his drug protocol, experimenting with substances, combinations, and dosages to find the optimal balance between enhancement and detection.<sup>11</sup> The anticipated benefits—increased efficiency in carrying and processing oxygen, decreased recovery times, and, ultimately, victory—took precedence over any possible side effects or long-term harm from the drugs.

Both Casartelli's death and Armstrong's self-experiments bring into high relief some of the more extreme risk of harm to which elite athletes voluntarily expose themselves. Yet on a more mundane level, competitive sports inevitably involve the risk of bodily harm. Training is itself a process

---

<sup>4</sup> *Oprah and Lance Armstrong: The Worldwide Exclusive* (OWN television broadcast Jan. 17-18, 2013), archived at <http://perma.cc/RW5N-9ZP8> (hereinafter "*Oprah and Lance Armstrong*"). An abridged transcript of the interview is available at *Lance Armstrong's Interview with Oprah Winfrey: the transcript*, TELEGRAPH (Jan. 18, 2013, 2:34 P.M.), [www.telegraph.co.uk/sport/othersports/cycling/lancearmstrong/9810801/Lance-Armstrong-interview-with-Oprah-Winfrey-the-transcript.html](http://www.telegraph.co.uk/sport/othersports/cycling/lancearmstrong/9810801/Lance-Armstrong-interview-with-Oprah-Winfrey-the-transcript.html), archived at <http://perma.cc/D66F-AFY3>.

<sup>5</sup> USADA v. Armstrong, *Reasoned Decision of the United States Anti-Doping Agency on Disqualification and Ineligibility* (Oct. 10, 2012) (hereinafter "ARMSTRONG REASONED DECISION").

<sup>6</sup> *Id.* at 61.

<sup>7</sup> *Id.* at 70-71.

<sup>8</sup> *Id.* at 117 & n. 639.

<sup>9</sup> *Id.* at 32.

<sup>10</sup> See *id.* at 6 & 59-60; see generally *id.* (describing Armstrong's use, and encouragement and enforcement of his teammates' use, of EPO for untested and unapproved enhancement purposes).

<sup>11</sup> *Id.* at 100.

of traumatizing muscles—tearing them down in the hope that the body rebuilds them stronger. In some sports, like boxing, causing harm to a competitor is the basis of success. And continuing despite devastating injury is the hallmark of a modern sports hero—think Kerri Strug vaulting to golden super-stardom on a badly damaged ankle before collapsing to the mat in agony during the 1996 Olympics.<sup>12</sup> Regardless of the sport, the risk of grave injury is ever-present and accepted on the elite level. Not all such risks, though, are regulated in the same way.

Some risks are at most minimally regulated. The Col de Portet d'Aspet, with its hazardous cement pylons and hairpin turns, has remained a popular cycling trial and riders in more than half of the Tours de France since Casartelli's death have taken on its challenges. Moreover, while helmets have been required in most instances in professional bicycle racing by the sport's governing bodies since 2003,<sup>13</sup> outside of that context their use is discretionary in the United States.<sup>14</sup> The immediate risk of bodily harm—and even death—while training or competing is just one of the trials for the athletes to overcome, and is accepted by our laws, our athletes, the sport's governing bodies, and the American public.

In contrast, the perceived risk from performance-enhancing substances is subject to intense regulation; that is, federal and state laws prohibit the sort of self-experimentation that Armstrong undertook. While popular discussion has focused on his use of performance-enhancing substances as a form of cheating, the laws governing this area are, perhaps surprisingly, unconcerned with morality or fairness in the competition itself.<sup>15</sup> Instead,

---

<sup>12</sup> George Vecsey, *Sports of the Times: Strug Took Her Chances For the Gold*, N.Y. TIMES, July 24, 1996, archived at <http://perma.cc/49TQ-9SGX>. Similarly, sports sociologist Jay Coakley has noted that “a player's willingness to compete in pain while subjecting one's body to danger on the field is the mark of a true athlete.” Jay Coakley, *SPORT IN SOCIETY: ISSUES AND CONTROVERSIES* 164 (2009).

<sup>13</sup> Press Release, Union Cycliste Internationale, *Mandatory Wear of Helmets for the Elite Category* (May 5, 2003) (on file with author), [http://oldsite.uci.ch/english/news/news\\_2002/20030502i.pdf](http://oldsite.uci.ch/english/news/news_2002/20030502i.pdf), archived at <http://perma.cc/J7FU-38A2>.

<sup>14</sup> GOVERNOR'S HIGHWAY SAFETY ASSOCIATION, *Helmet Laws* (November 2013), [http://www.ghsa.org/html/stateinfo/laws/helmet\\_laws.html](http://www.ghsa.org/html/stateinfo/laws/helmet_laws.html), archived at <http://perma.cc/9BG-WUM8>.

<sup>15</sup> Federal investigations into Armstrong focused not on whether he cheated, but on whether he defrauded the government, trafficked drugs, laundered money, intimidated witnesses, and engaged in a conspiracy with respect to these possible crimes. See Ian Austen, *Inquiry on Lance Armstrong Ends With No Charges*, N.Y. TIMES, Feb. 4, 2012, at D1, archived at <http://perma.cc/F7XR-RP9G>; see also Press Release, Dept. of Justice, *U.S. Attorney Closes Investigation of Professional Cycling Team*, Rel. No. 12-024 (Feb. 3, 2012)(on file with author), available at <http://perma.cc/9U4D-375G>, (announcing closing of federal criminal conduct investigations into

the legal restrictions on doping are justified as a way to prevent an unacceptable risk of harm from the use of unsafe substances.<sup>16</sup> Our legal perception of, and attitudes towards, this potential for harm—harm to the athletes like Armstrong who choose to use performance-enhancements, to others who believe they must use them to “level the playing field,” and to the “spirit of competition”—means the use of performance-enhancing substances is prohibited, monitored, investigated, and punished in a way other potentially harmful actions are not.

To elite athletes, though, these risks are more similar than not: they are both just part of the game, and part of the job. These contrasting approaches evidence a disconnect between how the law, sporting organizations, and fans approach performance-enhancing substances, and how elite athletes do. As a result of this disjuncture, athletes’ compliance with anti-doping regulations and laws in at least some sports remains low,<sup>17</sup> and any risks associated with the use of prohibited substances are, like high speeds, hairpin turns, and concrete pylons, simply part of an elite athlete’s day’s work. We are no closer to eliminating the use of performance-enhancing substances in sport than we were half a century ago when such efforts began.

This Article analyzes this gap between how legal and sporting authorities, on the one hand, and elite athletes, on the other, approach, understand, and react to the risk of harm from the use of performance-enhancing substances. Specifically, Part I explains the various tangled strands of the United States’ legal and quasi-legal regulation of these substances. It also exposes the staggering ignorance that this approach created and perpetuates with respect to even the most commonly used substances. The successes and failures of this regime are then examined in Part II, which argues that our ignorance concerning the actual effects—both helpful and harmful—of performance-enhancing substances ultimately *increases* demand for these substances. Part III turns to behavioral research to identify specific information we need to successfully align the interests of athletes, sporting officials, legislators, and fans in reducing the harm from doping. In addition, it outlines some sources from which this information may be gathered effectively and ethically with minimal modifications to existing laws and practices. The

---

Armstrong and his team). The Department of Justice also intervened in a lawsuit filed by Armstrong’s former teammate Floyd Landis that alleges civil fraud violations by Armstrong and his associates. Complaint, United States *ex rel.* v. Tailwind Sports Corp., No. 10-cv-0976-RLW (D.D.C. Apr. 23, 2013).

<sup>16</sup> Part I, *infra*, discusses the American regulation and prohibition of performance-enhancing substances.

<sup>17</sup> Part II, *infra*, details and critiques our lack of success in preventing the use of performance-enhancing substances.

Article concludes by emphasizing the need for an approach to regulating the use of performance-enhancing substances that is consistent with the values and practices of elite sport, while reducing the risk of unnecessary harm.

## I. REGULATING IGNORANCE

In the United States, performance-enhancing substances are not subject to a single regulatory regime. Instead, a substance's classification as a "drug" or as a "supplement" determines its legal treatment. This legal framework, then, is formally distinct from the anti-doping efforts of sporting organizations, although at critical times these efforts overlap.

### A. Legal Regulation of Drugs

At their most basic level, many performance-enhancing substances are simply drugs: formulations "intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man . . . [or to] affect the structure or function of the body of man."<sup>18</sup> As such, the Food and Drug Administration ("FDA") is the federal agency tasked with overseeing their premarket testing.<sup>19</sup>

Federal regulations for human-subjects research limit testing of drugs to instances in which the anticipated benefits of the research to the subjects, together with the more general importance of the knowledge expected to result, outweigh any risk to the subjects from the research.<sup>20</sup> This so-called "Common Rule" applies to all research subject to federal regulation and involving human beings.<sup>21</sup> Fifteen federal departments and agencies have adopted it, including the Department of Health and Human Services, which oversees the FDA.<sup>22</sup> Under associated regulations, an Institutional Review Board ("IRB") must approve any human-subjects research in advance after

---

<sup>18</sup> 21 U.S.C. § 321(g)(1) (2009).

<sup>19</sup> FOOD AND DRUG ADMINISTRATION, *What is the Approval Process for a New Prescription Drug?*, [www.fda.gov/AboutFDA/transparency/basics/ucm194949.htm](http://www.fda.gov/AboutFDA/transparency/basics/ucm194949.htm), archived at <http://perma.cc/EY3U-6VZC> (last visited November 5, 2013).

<sup>20</sup> 45 C.F.R. § 46.111(a)(2) (2012).

<sup>21</sup> 45 C.F.R. § 46.101(a) (2012). Research that is at most only minimally invasive is exempted. For a list of these exceptions, see 45 C.F.R. § 46.101(b) (2012).

<sup>22</sup> DEPARTMENT OF HEALTH AND HUMAN SERVICES, *Federal Policy for the Protection of Human Subjects ('Common Rule')*, <http://www.hhs.gov/ohrp/humansubjects/commonrule/index.html>, archived at <http://perma.cc/DR2N-KGMT> (last visited Aug. 23, 2013).

assessing the risks and benefits of the research.<sup>23</sup> This approach was formulated in part to ensure that the abuses of past studies were not repeated.<sup>24</sup>

The legal question in drug approvals is whether a new drug is safe and efficacious for its intended purpose: Given the initial disease or injury the drug is intended to treat, are the side effects and other potential risks worth it? Does it *help* more than it *hurts*? This is an explicitly therapeutic focus, in which drugs are used to treat a particular medical ailment and return a patient's body to normal functioning.<sup>25</sup>

In contrast to this approach, the use of drugs for performance-enhancement is an effort to improve human functioning and performance *beyond* a normal state or merely good health.<sup>26</sup> Because no initial disease or injury is present when enhancement rather than treatment is the goal, any risk or side effect—an ever-present reality with drugs<sup>27</sup>—is enough to doom any proposed study on human subjects.<sup>28</sup> After all, the starting point for enhance-

<sup>23</sup> 45 C.F.R. § 46.111 (2012).

<sup>24</sup> For example, in the infamous Tuskegee syphilis study, the United States Public Health Service tracked the untreated progression of syphilis in an African-American community for forty years under the auspices of providing free health care. During the course of the study, twenty men died from syphilis, more died from syphilis-related complications, and many more passed the disease on to their partners and children. For an overview of the Tuskegee study, see generally James H. Jones, *BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT* (1981). For the ways in which the study impacted future human-subjects research, see CENTERS FOR DISEASE CONTROL AND PREVENTION, *How Tuskegee Changed Research Practices*, <http://www.cdc.gov/tuskegee/after.htm>, archived at <http://perma.cc/XT6U-F9LA> (last visited Nov. 6, 2013).

<sup>25</sup> Gary A. Green, *The Role of Physicians, Scientists, Trainers, Coaches, and Other Nonathletes in Athletes' Drug Use*, in *PERFORMANCE-ENHANCING TECHNOLOGIES IN SPORTS: ETHICAL, CONCEPTUAL, AND SCIENTIFIC ISSUES* 82 (Thomas H. Murray, et al., eds. 2009) (hereinafter, "PERFORMANCE-ENHANCING TECHNOLOGIES").

<sup>26</sup> For an overview of approaches to understanding enhancements, see Eric T. Juengst, *What Does Enhancement Mean?*, in *ENHANCING HUMAN TRAITS: ETHICAL AND SOCIAL IMPLICATIONS* 29 (Erik Parens, ed. 2000).

<sup>27</sup> See, e.g., Anjan Chatterjee, *Cosmetic Neurology: The Controversy Over Enhancing Movement, Mentation, and Mood*, 63 *NEUROLOGY* 968, 970 (2004) ("Virtually all medications have potential side effects that range from minor inconveniences to severe disability or death."); cf., Anita Bernstein & Joseph Bernstein, *An Information Prescription for Drug Regulation*, 54 *BUFF. L. REV.* 569, 570 (2006) (noting that, in the context of FDA approval, "[s]afe' does not mean 'incapable of doing harm'; all drugs do harm.").

<sup>28</sup> See generally Maxwell Mehlman & Jessica Berg, *Human Subjects Protections in Biomedical Enhancement Research: Assessing Risk and Benefit and Obtaining Informed Consent*, 36 *J. LAW, MEDICINE & ETHICS* 546 (2008) (arguing that, contrary to current assumptions and practices, enhancement research requires few protections for human subjects beyond those accepted for therapeutic research).

ment is normal health, not illness.<sup>29</sup> Thus, while an IRB may deem a drug that treats anemia but increases a user's risk of stroke beneficial enough given its therapeutic benefits to test as a treatment for anemia, the same risk of stroke would be unacceptable were a manufacturer instead to propose testing the drug to increase the blood's oxygen-carrying capacity to improve an athlete's endurance.<sup>30</sup> Whether the availability of a drug constitutes cheating or potentially provides an unfair advantage to an athlete is not part of the consideration in the FDA's approval process.<sup>31</sup> Just as American law does not concern itself with the composition of baseball bats,<sup>32</sup> whether a football coach spies on opponents' signals,<sup>33</sup> or how much of the course a marathoner actually runs,<sup>34</sup> only where enhancement involves a legal offense—not simply cheating—does the law involve itself.<sup>35</sup>

<sup>29</sup> *Id.* at 547.

<sup>30</sup> Synthetic erythropoietin ("EPO"), one of the drugs USADA repeatedly cited in its case against Armstrong, offers this trade-off. See Malcolm Gladwell, *Performance-Enhancing Drugs Should Be Regulated Not Prohibited*, in PERFORMANCE-ENHANCING DRUGS 56–58 (James Haley, ed., Greenhaven Press 2003).

<sup>31</sup> Others have also noted this fact. See, e.g., Maxwell J. Mehlman, *How Will We Regulate Genetic Enhancement*, 34 WAKE FOREST L. REV. 671, 701 (1999) ("[T]he scope of FDA review is statutorily limited to safety and efficacy. It currently does not have any statutory authority to consider . . . social problems of fairness or cheating.").

<sup>32</sup> Unlike the law, sporting regulations are very concerned with such things. For example, Major League Baseball suspended Chicago Cubs star player Sammy Sosa for eight games in 2003 after his bat shattered in a game, revealing pieces of cork. See *Cork Screwed*, CNN SPORTS ILLUSTRATED, (June 7, 2003), [http://sportsillustrated.cnn.com/baseball/news/2003/06/06/sosa\\_suspension\\_ap/](http://sportsillustrated.cnn.com/baseball/news/2003/06/06/sosa_suspension_ap/), archived at <http://perma.cc/RRP4-JJ55>

<sup>33</sup> In 2007, the National Football League fined Bill Belichick and the New England Patriots a combined total of \$750,000 and caused the team to forfeit its 2008 first-round draft selection for videotaping the New York Jets' defensive coaches' signals. See *NFL fines Belichick, strips Patriots of draft pick*, NFL.COM, (Sept. 13, 2007) <http://www.nfl.com/news/story/09000d5d80251b7e/article/nfl-fines-belichick-strips-patriots-of-draft-pick>, archived at <http://perma.cc/G6MQ-SBLR>.

<sup>34</sup> Race officials originally declared Rosie Ruiz the winner of the 1980 Boston Marathon, but later disqualified her after it came to light that she had entered the race only in the last mile. Moreover, Ruiz had qualified for the marathon based on her performance in the 1979 New York Marathon, which was later discovered to be another instance of cheating: Ruiz had ridden the subway for part of the distance. See *This Day in History*, HISTORY.COM, <http://www.history.com/this-day-in-history/rosie-ruiz-fakes-boston-marathon-win>, archived at <http://perma.cc/8S8W-QPGC> (last visited Aug. 23, 2013).

<sup>35</sup> For example, prosecutors charged Barry Bonds and Roger Clemens with obstruction of justice and perjury in connection with their testimony about their use of prohibited performance-enhancing drugs, but not for the use of the drugs them-

As a result, neither the government nor manufacturers conduct tests to determine whether a new drug is effective to enhance performance. Instead, doctors, coaches, and athletes formulate enhancement protocols by extrapolating from how drugs act in the tested, therapeutic context. For example, researchers developed human growth hormone (“HGH”) to treat growth disorders in children and hormonal deficiencies that lead to a loss of muscle mass and decreased energy in adults.<sup>36</sup> However athletes began using it in the hope it would enhance their athletic performance, guessing that if HGH increased muscle mass and decreased fatigue in individuals with naturally low levels of the hormone, it should have the same effect on them. More recently, the multi-billion dollar anti-aging industry has marketed it as a fountain of youth based on similar logic.<sup>37</sup>

No testing supports these uses; instead, they rest on an assumption that HGH will produce the same results when taken by an otherwise healthy individual as it does when taken by someone who naturally underproduces it.<sup>38</sup> Similarly, researchers derive the assumed negative effects of HGH when used for performance enhancement by extrapolating from known effects on individuals whose bodies naturally overproduce the hormone.<sup>39</sup> It may well be, though, that it is the *underproduction* of HGH in the

---

selves. *United States v. Bonds*, 580 F. Supp. 2d 925 (N.D. Cal. 2008) (dismissing perjury charge from indictment on Bonds’s motion, but denying motion to dismiss obstruction of justice charge); *United States v. Clemens*, No. 10-cr-00223-RBW, 2010 WL 3260179 (D.D.C. Aug. 19, 2010) (indictment). *See also* note 15, *supra* (describing Armstrong criminal investigations). On a related point, see Matt Hlinak, *Cheating in Professional Sports and the Criminal Justice System*, 9 WILLAMETTE SPORTS L.J. 19 (2012) (questioning whether criminal law is correct venue for policing sports cheating).

<sup>36</sup> *See generally* Susan Cohen & Christine Cosgrove, *NORMAL AT ANY COST* (Penguin Group 2009) (examining the development and use of HGH).

<sup>37</sup> In some instances these uses overlap, as seen with the “anti-aging clinic” scandal in Major League Baseball. *See* Tim Elfrink, *A Miami Clinic Supplies Drugs to Sports’ Biggest Names*, MIAMI NEW TIMES, (Jan. 31, 2013) <http://www.miaminewtimes.com/2013-01-31/news/a-rod-and-doping-a-miami-clinic-supplies-drugs-to-sports-biggest-names/full/> (last visited Aug. 23, 2013) (exposing Florida anti-aging clinic Biogenesis’s provision of HGH, testosterone, and anabolic steroids to Major League Baseball players).

<sup>38</sup> Ioulietta Erotokritou-Mulligan, et al., *Growth Hormone Doping: A Review*, *OPEN ACCESS J. SPORTS MED.* 2011:2 99–102; *see also* Charles E. Yesalis & Michael S. Bahrke, *Issues, Concerns, and the Future of Performance Enhancing Substances in Sport and Exercise*, in *PERFORMANCE-ENHANCING SUBSTANCES IN SPORT AND EXERCISE* 351, 352 (Michael S. Bahrke & Charles E. Yesalis, eds.).

<sup>39</sup> *See, e.g.*, Brian P. Brennan, et al., *Human Growth Hormone Abuse in Male Weightlifters*, 20 *AM. J. ON ADDICTIONS* 9, 9 (2010) (“There is substantial evidence that long-term supraphysiologic levels of HGH may cause adverse effects—as suggested



first instance that makes its supplementation beneficial in the therapeutic context.<sup>40</sup> Simply put, it might be that only people who naturally produce low levels of HGH respond positively to its artificial introduction. In individuals who naturally produce normal levels, the excess hormone may be simply a waste product, just as excess vitamin C is flushed unused from the body.<sup>41</sup> We just don't know.

If prescribed by a doctor, enhancement and anti-aging uses of HGH would be “off-label”: prescribed for a use other than those for which the drug was tested and approved. In most instances, physicians are free to write off-label prescriptions, limited only by medical malpractice standards.<sup>42</sup> The use of drugs for performance enhancement is always an off-label use since there is no testing of the drugs for this purpose, and thus no FDA approval. Instead, enhancement is an imprecise extension of a therapeutic use of the drug.<sup>43</sup>

For many drugs, off-label prescriptions dwarf those for approved purposes. For example, approximately 90% of the prescriptions written for the drug modafinil are off-label.<sup>44</sup> An anti-narcolepsy drug also approved for

---

by studies of acromegaly, a naturally occurring disorder characterized by prolonged supraphysiologic levels of HGH.”); *Report of the Council on Scientific Affairs: Steroids in Amateur and Professional Sports—The Medical and Social Costs of Steroid Abuse: Hearings Before the H. of Representatives Comm. on the Judiciary*, 101st Cong. 81 (April 3 & May 9, 1989) (hereinafter “1989 STEROIDS HEARINGS”) (predicting adverse effects of HGH use on athletes by reference to known effects of natural hyperproduction of the hormone).

<sup>40</sup> See Brennan et al., *supra* note 39, at 12 (“[T]here is little evidence that supraphysiologic HGH produces anabolic effects in non-HGH-deficient individuals—although it may have such effects when used in conjunction with [anabolic steroids] . . .”).

<sup>41</sup> Katherine Zeratsky, *Too much vitamin C: Harmful?*, THE MAYO CLINIC (Mar. 20, 2012), <http://www.mayoclinic.com/health/vitamin-c/AN01801>.

<sup>42</sup> See Philip M. Rosoff & Doriane Lambelet Coleman, *The Case for Legal Regulation of Physicians’ Off-Label Prescribing*, 86 NOTRE DAME L. REV. 649, 660–76 (2011) (providing an overview of existing regulations—and the virtual lack thereof—concerning physicians’ off-label prescribing); James T. O’Reilly, *FDA and Off-Label Drug Promotion*, 1 FOOD & DRUG ADMIN. 15:45 (2011) (explaining that, once the FDA approves marketing and sale of a new drug, informal and nonstatutory provisions allow individual physicians freedom to use the drug in unapproved ways).

<sup>43</sup> David C. Radley, et al., *Off-Label Prescribing Among Office-Based Physicians*, 166 ARCHIVES OF INTERN. MED. 1021 (2006) (finding 73% of off-label prescriptions lacked scientific support for the use).

<sup>44</sup> Renee A. Penalzoza, et al., *Trends in On-Label and Off-Label Modafinil Use in a Nationally Representative Sample*, 173 JAMA INTERN. MED. 704, 704 (2013). Modafinil is sold both as a generic drug and as “Provigil” in the United States

obstructive sleep apnea and certain other sleeping problems, modafinil is also a popular cognitive enhancer for students cramming for exams, surgeons seeking to stay alert for one more procedure, and computer programmers staying up all night on coding binges.<sup>45</sup> These enhancement purposes are off-label, yet pervasive and legal.

It is illegal, however, to prescribe or use certain drugs in off-label ways.<sup>46</sup> The Controlled Substances Act (“CSA”) regulates the manufacture, importation, possession, use, and distribution of certain “controlled substances.” The CSA divides these substances into five categories or “schedules” based on their characteristics. Schedule I substances are considered unsafe for any use.<sup>47</sup> They have no currently-accepted medical uses and a high potential for abuse; physicians may not prescribe them at all.<sup>48</sup> Inclusion on Schedules II-V reflects the judgment that, while its off-label use is not legitimate, the substance does have proven medical use.<sup>49</sup>

Almost all controlled substances are popular for recreational use and are addictive, and most are narcotics, depressants, stimulants, or psychotropic drugs.<sup>50</sup> However, in a flurry of outrage in 1990 after their widespread use in sports was revealed, Congress included anabolic steroids under the CSA even though they did not fit this profile.<sup>51</sup> As such, their off-label use is prohibited, and their distribution, use, or possession without a prescription for an approved purpose is a criminal offense.<sup>52</sup> The goal is deterring use of these drugs outside of a very narrowly conscribed medical context.

---

(www.provigil.com, *archived at* <http://perma.cc/Z9XL-R9C8>). While physicians may write off-label prescriptions for it, the World Anti-Doping Agency (“WADA”) prohibits its use by athletes. WADA, *The 2013 Prohibited List S6(a)*, [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-Prohibited-list/2013/WADA-Prohibited-List-2013-EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Prohibited-list/2013/WADA-Prohibited-List-2013-EN.pdf), *archived at* <http://perma.cc/K5FG-L7ZB> (Sept. 10, 2012) (hereinafter “WADA Prohibited List”).

<sup>45</sup> Penaloza, *supra* note 44, at 704.

<sup>46</sup> 21 U.S.C. § 829 (2009) (setting forth requirements for prescribing controlled substances); 21 C.F.R. § 1306.04(a) (2013) (“A prescription for a controlled substance . . . must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”).

<sup>47</sup> 21 U.S.C. § 812(1)(B) (2009).

<sup>48</sup> *Id.* Heroin, peyote, and LSD, for example, are Schedule I substances. *Id.*

<sup>49</sup> 21 C.F.R. § 1306.04(a) (2009).

<sup>50</sup> See 21 U.S.C. §§ 801–904 (2009); *Legislation to Amend the Controlled Substances Act (Anabolic Steroids): Hearing on H.R. 3216 Before the Subcomm. on Crime of the H. of Representatives Comm. on the Judiciary*, 100th Cong. 2d Sess. 60 (1988) (statement of Gene Haislip) (hereinafter “1988 STEROID HEARING”).

<sup>51</sup> 21 U.S.C. § 812 Schedule III(e) (2012).

<sup>52</sup> 21 U.S.C. §§ 841–44 (2010); 21 C.F.R. § 1306.04(a) (2013).

In prohibiting the off-label use of anabolic steroids, Congress primarily focused its inquiries on the drugs' potential for harm when used for performance-enhancement, asking:

What risks are American athletes running if they take these drugs? Just how big a problem are these drugs becoming? What is the nature of the abuse of these drugs and how widespread has it become? What are the current laws available to prevent this abuse and what should we be doing to better protect athletes, young and old, from these particular drugs?<sup>53</sup>

In answer, numerous agency and medical witnesses repeatedly testified about the lack of information on these points, and questioned whether strategies other than prohibition might curtail the use of steroids for enhancement purposes.<sup>54</sup> One witness succinctly summarized the state of research into the harmful effects of steroids when he answered his own question, "What are the long-term health effects in otherwise healthy people? We do not know. It is pure conjecture what is going to happen in the long-run. That has not been studied."<sup>55</sup>

Representatives from the American Medical Association ("AMA"), Drug Enforcement Agency ("DEA"), FDA, and Department of Justice ("DOJ") unequivocally opposed including steroids under the CSA. These agencies were unified in expressing concern over the lack of information concerning the risk of harm from the nontherapeutic use of steroids.<sup>56</sup> Specifically, the DOJ urged Congress to await the results of an already-commissioned task force study into the use and abuse of steroids before deciding whether to schedule them<sup>57</sup> and the AMA stressed the folly of limiting off-label medical uses for the drugs,<sup>58</sup> arguing that existing data failed to demonstrate that steroids were either physically or psychologically addic-

---

<sup>53</sup> Statement of William J. Hughes (Chairman of the Subcommittee on Crime), 1988 STEROID HEARING, *supra* note 50, at 3.

<sup>54</sup> Statement of Dr. David L. Bever, 1988 STEROID HEARING, *supra* note 50, at 54–55; *Anabolic Steroid Restriction Act of 1989: Hearing on H.R. 995 Before the Subcomm. on Crime of the H. of Representatives Comm. on the Judiciary*, 101st Cong., 1st Sess. 47 (1989) (statement of Dr. Charles E. Yesalis III) (hereinafter "MARCH 1989 STEROID HEARING"); Statement of Dr. David E. Katz, 1989 STEROIDS HEARINGS, *supra* note 39, at 56.

<sup>55</sup> Testimony of Dr. Charles E. Yesalis III, 1988 STEROID HEARING, *supra* note 50, at 42.

<sup>56</sup> Statement of the AMA, 1988 STEROID HEARING, *supra* note 50, at 91–92.

<sup>57</sup> *Anabolic Steroids Control Act of 1990: Hearings on H.R. 4658 Before the Subcomm. on Crime of the H. of Representatives Comm. on the Judiciary*, 101st Cong., 2nd Sess. 37 (1990) (statement of Leslie Southwick (DOJ)).

<sup>58</sup> Statement of the AMA, 1988 STEROID HEARING, *supra* note 50, at 94.

tive.<sup>59</sup> The DEA pointedly expressed concern with taking legislative action under these circumstances, stating: “There is a great deal about the problem that we don’t know, a great deal about the steroids themselves in terms of their impacts, a great deal about this casual traffic and what I would refer to as abuse of steroids—that is unknown and that we should try to discover. . . .”<sup>60</sup> Disregarding this opposition, Congress amended the CSA to include anabolic steroids.<sup>61</sup> In parallel legislation, Congress also prohibited the off-label use of HGH.<sup>62</sup> As a result of these prohibitions, our knowledge about the effects of anabolic steroids and HGH on healthy bodies has barely advanced in a quarter of a century.

### B. Legal Regulation of Supplements

While we know little about performance-enhancing drugs like steroids and HGH, we know even less about supplements. The Food, Drug & Cosmetic Act<sup>63</sup> defines supplements as substances intended for human ingestion that contain vitamins, minerals, herbs or other botanical products, amino acids, enzymes, or other substances found in the human diet,<sup>64</sup> so long as they do not have a proven therapeutic use as a drug.<sup>65</sup>

In contrast to drugs, supplements receive very little oversight from anyone. From a regulatory perspective, supplements are merely food.<sup>66</sup> Like other foods, supplements are free from the regulatory scheme that applies to drugs, including the FDA’s testing requirements.<sup>67</sup> Instead, they are subject to the Dietary Supplement Health & Education Act (“DSHEA”), under

<sup>59</sup> Statement of Dr. Edward L. Langston, 1989 STEROIDS HEARINGS, *supra* note 39, at 69; Statement of the AMA, 1988 STEROID HEARING, *supra* note 50, at 94.

<sup>60</sup> Testimony of Gene Haislip, 1988 STEROID HEARING, *supra* note 50, at 60.

<sup>61</sup> 21 U.S.C. § 812 Schedule III(e) (2012) (listing anabolic steroids as a controlled substance); *id.* at § 802(41) (defining anabolic steroids); *see also* Maxwell J. Mehlman, et al., *Doping in Sports and the Use of State Power*, 50 ST. LOUIS U. L.J. 15 & Appendix A (2005) (discussing the CSA’s regulation of steroids and listing the states that include anabolic steroids in their controlled substances acts).

<sup>62</sup> 21 U.S.C. § 333(e)(1) (2012).

<sup>63</sup> 21 U.S.C. § 301, *et seq.*

<sup>64</sup> 21 U.S.C. § 321(ff) (2009).

<sup>65</sup> *FDA Basics: Is a dietary supplement a food or a drug?* FOOD & DRUG ADMIN. (Dec. 30, 2009), <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm194355.htm>, archived at <http://perma.cc/686P-VP29> (“If a dietary supplement meets the definition of a drug, it is regulated as a drug.”).

<sup>66</sup> 21 U.S.C. § 321(ff) (2009).

<sup>67</sup> Lars Noah & Barbara A. Noah, *A Drug by Any Other Name . . .?: Paradoxes in Dietary Supplement Risk Regulation*, 17 STAN. L. & POL’Y REV. 165, 168–69 (2006).

which manufacturers may market them absent an affirmative showing by the FDA that they are adulterated.<sup>68</sup>

No pre-market testing or FDA approval of supplements is required under DSHEA; unlike drugs, the safety of supplements is assumed and efficacy toward any end is not required.<sup>69</sup> Even where the product contains a “new dietary ingredient”, the manufacturer need only notify the FDA of its basis for believing the ingredient to be reasonably safe.<sup>70</sup> The FDA then bears the burden of proving otherwise.<sup>71</sup> In fact, the law does not require a manufacturer even to report injuries or illnesses caused by its product unless they are “serious.”<sup>72</sup> As a result, manufacturers do little themselves to determine their products’ side effects, problems, or benefits<sup>73</sup>—or even to confirm that their products’ labeling matches the ingredients.<sup>74</sup> This lack of regulation of supplements perpetuates our ignorance about their effects.

Some of the better-known performance-enhancing “drugs” are actually supplements, unproven to achieve any end but marketed as simulating the effects of harder-to-get, more expensive, or prohibited drugs. In 1998, for example, as Mark McGwire and Sammy Sosa were in the midst of the home

---

<sup>68</sup> Dietary Health & Supplement Act of 1994, Pub. L. No. 103-417, 108 Stat. 4325 (codified in scattered sections of 21 U.S.C.). For an in-depth discussion of dietary supplement regulation, see generally *supra* note 67.

<sup>69</sup> See Thomas L. Schwenck & Chad D. Costley, *When Food Becomes a Drug: Nonanabolic Nutritional Supplement Use in Athletes*, 30 AM. J. OF SPORTS MED. 907, 915 (2002) (“Many supplements are marketed and promoted based on various theoretical benefits, often derived from limited animal studies, without any basis for recommending their human use for specific, proven ergogenic benefits.”).

<sup>70</sup> Andrew L.T. Green, Note, *Spreading the Blame: Examining the Relationship Between DSHEA and the Baseball Steroid Scandal*, 90 B.U. L. REV. 399, 410 (2010).

<sup>71</sup> *Id.*

<sup>72</sup> Noah & Noah, *supra* note 67. Serious adverse events include death, life-threatening injury, inpatient hospitalization, persistent or significant disability or incapacity, and congenital anomaly or birth defect, as well as medical or surgical intervention reasonably needed to prevent one of these events. Dietary Supplement and Nonprescription Drug Consumer Protection Act, Pub. L. No.109-462, 21 U.S.C. §379aa-1(a)(2).

<sup>73</sup> John M. Tokish, et al., *Ergogenic Aids: A Review of Basic Science, Performance, Side Effects, and Status in Sports*, 32 AM. J. SPORTS MED. 1543, 1551 (2004); see also Ron J. Maughan, et al., *Dietary Supplements*, 22 J. SPORTS SCI. 95, 97 (2004) (“For most of these supplements, there are few supporting data—indeed, few experimental data at all.”).

<sup>74</sup> See Hans Geyer, et al., *A-Z of Nutritional Supplements: Dietary Supplements, Sports Nutrition Foods and Ergogenic Aids for Health and Performance—Part 22*, 45 BRITISH J. SPORTS MED. 752 (2011); Maxie Kohler, et al., *Confiscated Black Market Products and Nutritional Supplements with Non-Approved Ingredients Analyzed in the Cologne Doping Control Laboratory 2009*, 2 DRUG TESTING & ANALYSIS 533 (2010).

run race McGwire would ultimately win, an Associated Press reporter noted the name on a brown bottle sitting in McGwire's locker.<sup>75</sup> When asked, a cardiologist told the reporter that the substance marked on the bottle—"Androstenedione"—was a testosterone precursor commonly known as "andro". A supplement taken by some athletes in the belief it would stimulate their bodies' production of testosterone, andro's proponents believed that it acted as a then-legal steroid.<sup>76</sup>

Does it work? Who knows? As with other supplements, andro's manufacturers performed no research into its efficacy before marketing it.<sup>77</sup> The minimal research that exists suggests the substance may well be just a placebo: A 2003 review summarizing four published sports medicine studies into the effects of andro supplementation concluded the substance showed "questionable ergogenic effects."<sup>78</sup> A 2004 overview of research concluded, "the marketing of this supplement's effectiveness far exceeds its science . . . . No study has shown a significant ergogenic effect of any kind with andro supplementation."<sup>79</sup> Despite the lack of evidence that andro does much of anything, the International Olympic Committee ("IOC") prohibited its use as of 1997<sup>80</sup> and the World Anti-Doping Agency ("WADA") followed suit in 2004.<sup>81</sup> Falling in line, Congress amended the CSA shortly thereafter to

---

<sup>75</sup> See *Special Report: Who Knew*, ESPN THE MAGAZINE, <http://sports.espn.go.com/espn/eticket/story?page=steroids&num=8>, archived at <http://perma.cc/MPL7-5HEZ> (last visited Oct. 8, 2013).

<sup>76</sup> *Id.*

<sup>77</sup> Or if it was, it was not required and the results have not been published. *Legal in Baseball*, CNN SPORTS ILLUSTRATED, Aug. 22, 1998, [http://sportsillustrated.cnn.com/baseball/mlb/news/1998/08/22/mcgwire\\_supplement/](http://sportsillustrated.cnn.com/baseball/mlb/news/1998/08/22/mcgwire_supplement/), archived at <http://perma.cc/V97N-38YJ>.

<sup>78</sup> Eric G. Boyce, *Use and Effectiveness of Performance-Enhancing Substances*, 16(1) J. OF PHARMACY PRACTICE 28 (2003). See also Greg E. Bradley-Popovich & Christopher R. Mohr, *Androstenedione and Androstenediol in Sport: A Brief Review of Safety and Efficacy*, 15 J. SPORTS CHIROPRACTIC & REHABILITATION 20 (2001) (finding mixed, and at most minimal, effects on muscle strength from andro supplementation); Maughan, et al., *supra* note 73, at 109 ("There is no evidence that androstenedione and similar prohormones are anabolic agents").

<sup>79</sup> Tokish, et al., *supra* note 73, at 1550.

<sup>80</sup> Kirk Johnson, *As Drugs in Sports Proliferate, So Do Ethical Questions* N. Y. TIMES (1998), archived at <http://perma.cc/7TAN-8CC3>.

<sup>81</sup> See *The 2004 Prohibited List*, WORLD ANTI-DOPING AGENCY, 2004, [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-Prohibited-list/WADA\\_Prohibited\\_List\\_2004\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-Prohibited-list/WADA_Prohibited_List_2004_EN.pdf), archived at <http://perma.cc/X4QN-T8UB> (prohibiting androstadeinone as of Jan. 1, 2004).

add andro and similar substances as Schedule III controlled substances<sup>82</sup> and the FDA banned its sale entirely.<sup>83</sup>

### C. Regulation of Performance-Enhancing Substances in Sports

In contrast to this dual legal framework, no differentiation between the regulation of drugs and of supplements exists for purposes of sports governance of the use of performance-enhancing substances. Instead, both are evaluated under identical criteria.

The primary document governing the use of performance-enhancing substances in Olympic sports is the WADA “Prohibited List.”<sup>84</sup> The list includes substances that meet at least two of the following criteria: (1) enhancing, or having the potential to enhance, performance; (2) posing an actual or potential health risk to athletes using them; and (3) being contrary to the spirit of sport.<sup>85</sup> In short, those that “work” and those that harm. However, in many cases no solid evidence exists that a prohibited substance offers any enhancement or causes any harm: Instead, presumptions stand in for data.<sup>86</sup>

Once WADA includes a substance on the Prohibited List, athletes can no longer take it without risking a positive drug finding and suspension from competition. A “positive” finding can result from a laboratory test that shows the presence of a prohibited substance in the athlete’s body or from a “non-analytical positive”, based on circumstantial evidence of prohibited drug use such as witness testimony,<sup>87</sup> “whereabouts” violations,<sup>88</sup> or

<sup>82</sup> Anabolic Steroid Control Act of 2004, Pub. L. 108–358, 118 Stat. 1661 (Oct. 22, 2004).

<sup>83</sup> See News Release, FDA, HHS Launches Crackdown on Products Containing Andro: FDA Warns Manufacturers to Stop Distributing Such Products (Mar. 11, 2004), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2004/ucm108262.htm>, archived at <http://perma.cc/NL2G-S4AF>.

<sup>84</sup> *WADA Prohibited List*, *supra* note 81. United States professional sports leagues also have their own governing frameworks, but the specifics of each are beyond the scope of this Article.

<sup>85</sup> World Anti-Doping Agency, WORLD ANTI-DOPING CODE Art. 4.3.1 & comment to Art. 4.3.2 (2009), [http://www.wada-ama.org/Documents/World\\_Anti-Doping\\_Program/WADP-The-Code/WADA\\_Anti-Doping\\_CODE\\_2009\\_EN.pdf](http://www.wada-ama.org/Documents/World_Anti-Doping_Program/WADP-The-Code/WADA_Anti-Doping_CODE_2009_EN.pdf), archived at <http://perma.cc/4VLT-W98C> (hereinafter “WORLD ANTI-DOPING CODE”). In addition, the Prohibited List includes substances that mask the use of other prohibited substances. *Id.*

<sup>86</sup> See Green, *supra* note 25, at 87; Srikumaran Melethil, *Making the WADA Prohibited List: Show Me the Data*, 50 ST. LOUIS U. L.J. 75, 77 (2005).

<sup>87</sup> Armstrong, Michelle Collins, Chryste Gaines, and Tim Montgomery were each found to have violated anti-doping rules largely based on testimony from team-

suspicious biological passport information.<sup>89</sup> While an athlete may receive a “therapeutic use exemption” to excuse the use of a prohibited substance if he has a recognized medical need for the substance,<sup>90</sup> athletes are strictly liable for all substances in their bodies.<sup>91</sup> Under this approach, either an athlete has used an impermissible substance without advance permission, and has thus engaged in performance enhancement, or he has not. Neither the athlete’s intent nor his knowledge of what he ingested or a substance’s status as prohibited, nor the actual therapeutic or enhancement effect on his body, is relevant in declaring a positive finding.

In the United States, USADA enforces athletes’ use of substances on the Prohibited List. Created in 2000 by Congress and receiving approximately two-thirds of its funding from the United States government,<sup>92</sup> USADA is a quasi-governmental organization. Its responsibilities include fulfilling American obligations under the International Convention Against

---

mates and team personnel. ARMSTRONG REASONED DECISION, *supra* note 5; USADA v. Collins, AAA 30 190 00658 04 (Oct. 12, 2004); USADA v. Gaines, CAS 2004/O/649 (Dec. 13, 2005); USADA v. Montgomery, CAS 2004/O/645 (Dec. 13, 2005).

<sup>88</sup> WADA requires elite athletes to file their anticipated location for every day of the following three month period at the start of each calendar quarter, including the exact location they will be during a 60-minute window on each day. If an athlete fails to file the information accurately or to update it as needed, or misses three unannounced tests in any 18-month period, he has committed a “whereabouts” doping violation. See WADA-AMA, *Doping Control*, ATHLETE GUIDE (5th ed.) (2009), [http://www.wada-ama.org/Documents/Anti-Doping\\_Community/Athlete\\_Guide\\_2008\\_EN.pdf](http://www.wada-ama.org/Documents/Anti-Doping_Community/Athlete_Guide_2008_EN.pdf), archived at <http://perma.cc/9T7Q-U64A>.

<sup>89</sup> An athlete’s “biological passport” is a record of his biological parameters, established by blood and urine testing, over time. The information is used both to target athletes with suspicious profiles for additional drug testing and as indirect evidence of doping. See WADA-AMA, *Questions & Answers on the Athlete Biological Passport*, <http://www.wada-ama.org/en/Science-Medicine/Athlete-Biological-Passport/Q—A-on-the-Athlete-Biological-Passport/> (last updated November 2011), archived at <http://perma.cc/Q6YW-4LNM>.

<sup>90</sup> WORLD ANTI-DOPING CODE, *supra* note 85, at Art. 4.4; see also WADA-AMA, *Questions & Answers on Therapeutic Use Exemptions*, <http://www.wada-ama.org/en/Science-Medicine/TUE/QA-on-Therapeutic-Use-Exemptions/>, archived at <http://perma.cc/YDK7-EDYQ> (last updated Nov. 2012) (providing detailed information on when such exemptions are granted). If an exemption is granted, the athlete’s doping test will be categorized as “adverse analytical finding”, but not “positive”. See *infra* notes 111–16 and accompanying text for further discussion of this distinction.

<sup>91</sup> WORLD ANTI-DOPING CODE, *supra* note 85, at Art. 2.1.1.

<sup>92</sup> U.S. Anti-Doping Agency Audit Report (May 5, 2011), <http://www.usada.org/ar-audit-report>, archived at <http://perma.cc/9K92-JHXL>.



Doping in Sport, which obligates signatories to combat the use of banned performance-enhancing substances.<sup>93</sup>

While the Prohibited List is a sporting—not a legal—document, efforts to combat banned substances have at times led to government enforcement of its prohibitions. For example, federal agents subpoenaed and seized emails and other incriminating documents belonging to the Bay Area Laboratory Co-Operative (“BALCO”) in connection with a federal criminal investigation into the company’s creation and distribution of so-called “designer steroids” to elite athletes.<sup>94</sup> Federal officials interviewed athletes and team personnel about performance-enhancing drug use, and threatened them with perjury and obstruction of justice charges if they were not truthful and forthcoming.<sup>95</sup> The agents then provided transcripts of the interviews and the written evidence they had accumulated to USADA for use in its non-analytical positive drug cases against sprinters Tim Montgomery,<sup>96</sup> Marion Jones,<sup>97</sup> Michelle Collins,<sup>98</sup> Alvin Harrison,<sup>99</sup> Kelli White,<sup>100</sup> and

---

<sup>93</sup> UNESCO International Convention against Doping in Sport, Feb. 1, 2007, 2419 U.N.T.S. 201; see also Treasury and General Appropriations Act, Pub. L. No. 107-67, 115 Stat. 514, 593 (2003) (designating USADA as United States’ anti-doping agency for Olympic and international sports competition).

<sup>94</sup> Eleven people were sentenced in connection to the investigation. For a summary of the BALCO investigation and resulting convictions, see Paul Elias, *Bonds sentencing brings BALCO saga near a close*, UT SAN DIEGO (Dec. 14, 2011) <http://www.utsandiego.com/news/2011/dec/14/bonds-sentencing-brings-balco-saga-near-a-close/all/>, archived at <http://perma.cc/C2EK-Z6AU>.

<sup>95</sup> Baseball player Barry Bonds and sprinter Marion Jones were convicted and sentenced for their statements during the BALCO hearings, and the government threatened New York Yankees’ athletic trainer Brian McNamee with prosecution for perjury concerning statements he made about his role in delivering performance-enhancing drugs to athletes. See *United States v. Bonds*, No. 3:07-cr-73251, 2011 (N.D. Cal. Dec. 6, 2011) (sentencing memorandum: obstruction of justice); *United States v. Jones*, No. S6 05-cr-01067-KMK (S.D. N.Y. Oct. 5, 2007) (sentencing memorandum: false statements); *McNamee v. Clemens*, 762 F.Supp. 2d 584, 589 (E.D.N.Y. 2011).

<sup>96</sup> *USADA v. Montgomery*, CAS 2004/0/645 4-5 (Dec. 13, 2005).

<sup>97</sup> See *Anderson, et al., v. International Olympic Committee*, CAS 2008/A/1545 2 (July 16, 2010) (referring to the description of the BALCO scandal found in *USADA v. Montgomery* and *USADA v. Gaines* with respect to Marion Jones).

<sup>98</sup> *USADA v. Collins*, AAA 30 190 00658 04 (2004).

<sup>99</sup> Press Release, USADA, U.S. Track and Field Athlete Harrison Receives Four-Year Suspension for Participation in BALCO Drug Conspiracy (Oct. 19, 2004) (on file with author), archived at <http://perma.cc/9XZL-PM8Z>.

<sup>100</sup> Press Release, USADA, U.S. Track and Field Athlete Accepts Two-Year Suspension from USADA (May 19, 2004) (on file with author), archived at <http://perma.cc/G5FE-Z5F2>.

Chryste Gaines.<sup>101</sup> In addition, the United States Senate provided USADA with materials prepared during the grand jury investigation into BALCO, and IRS agent Jeff Novitsky testified against Montgomery regarding evidence Novitsky accumulated in the course of the federal investigation.<sup>102</sup> Similarly, Travis Tygart, USADA's current CEO, participated in witness interviews during the federal criminal case against Lance Armstrong then spearheaded the USADA proceeding against him.<sup>103</sup> Moreover, riders who provided statements in connection with the criminal case against Armstrong were potentially open to perjury charges if they provided contrary testimony in the USADA case against him.<sup>104</sup> Thus explicitly sporting rules are backed at times by the force of the United States government.

#### D. Ignorance Through Regulation

The overlap of these legal and sporting regimes means little is actually known about the substances commonly thought to enhance performance. And even less is known about them as they are used by athletes: The possibility that an athlete can be declared positive for doping, be publicly humiliated, and lose years of results based largely on witness testimony means athletes are loath to disclose any information about their use of these substances. Even where disclosure would be in an athlete's medical best interests, he has strong incentive to stay silent: USADA's use of statements Armstrong made to his doctors during his treatment for testicular cancer concerning his use of prohibited drugs<sup>105</sup> is a powerful message to all American athletes to remain silent and isolated in their use of banned substances.<sup>106</sup> Thus, in at least some instances, athletes rely on rumors,

---

<sup>101</sup> USADA v. Gaines, CAS 2004/O/649 (Dec. 13, 2005).

<sup>102</sup> USADA v. Montgomery, CAS 2004/O/645 at 2, 14, 16–17 (Dec. 13, 2005).

<sup>103</sup> Letter from Robert D. Luskin, counsel to Lance Armstrong, to William Bock, III, General Counsel of USADA, (June 8, 2012), (on file with author) *archived at* <http://perma.cc/PT9-ZXF5>. See also *Armstrong v. Tygart*, No. 1:12-CV-00606, 2012 WL 26887744 (W.D. Tex. July 9, 2012) (citing concerted action by USADA, DOJ, FBI, "and other federal law enforcement agencies" in investigating Armstrong); ARMSTRONG REASONED DECISION, *supra* note 5, at 11 (acknowledging that USADA coordinated witness interviews with federal investigation).

<sup>104</sup> However, while USADA sought evidence collected by law enforcement agencies against Armstrong, the request was denied. ARMSTRONG REASONED DECISION, *supra* note 5, at 3.

<sup>105</sup> *Id.*

<sup>106</sup> In addition, Armstrong's professional relationship and communications with Dr. Michele Ferrari were a cornerstone of USADA's case. See *id.* at 45–53, 67–74, 77–86, & 90–106.

anecdotes, and guesses instead of medical or other professional advice in their use of performance-enhancements.<sup>107</sup> And we remain ignorant as to the actual scale, scope, nature, and effect of the use of performance-enhancing substances.

Almost twenty-five years after Congressional hearings focused on the dearth of actual information about anabolic steroids as performance-enhancers, we still lack definitive data on this point.<sup>108</sup> Instead, our understanding of how these and other such substances act in a healthy human body is primarily based on anecdotal reports of their unconfirmed, uncontrolled, unmonitored, and unmeasured use.<sup>109</sup> This lack of data does not, of course, mean that any of these substances are safe or recommended for non-therapeutic use. Nor does it mean they are not performance-enhancing. Rather, it simply points to a critical gap in current knowledge, a gap that is a direct result of the existing legal and quasi-legal regimes.<sup>110</sup> In its anxiety

---

<sup>107</sup> See, e.g., Aaron C.T. Smith & Bob Stewart, *Drug Policy in Sport*, 27 *DRUG & ALCOHOL REV.* 123, 146 (2008) (“[T]he policy of banning drugs has made it more difficult for athletes to obtain medical advice that might reduce the health damage of the drugs they are using.”).

<sup>108</sup> See, e.g., Berno Buechel, et al., *Nobody’s Innocent—The Role of Customers in the Doping Dilemma 2* (Working Papers, 2013), archived at <http://perma.cc/F7L-ASQM> (“Empirical studies about doping are rare because it is very hard to collect data of a high quality.”); Bengt Kayser & Aaron C.T. Smith, *Globalisation of Anti-Doping: The Reverse Side of the Medal*, 337 *BMJ* 85, 87 (2008) (“Anti-doping policy has been forged without the benefit of robust data concerning the long term health effects of the most prevalent performance-enhancing drugs.”); Michael Shermer, *The Doping Dilemma: Game Theory Helps to Explain the Pervasive Abuse of Drugs in Cycling, Baseball and Other Sports*, 298 *SCIENTIFIC AMERICAN* 82 (2008) (“Scientific studies on the effects of performance-enhancing drugs are few in number and are usually conducted on nonathletes or recreational ones . . .”). But see Boyce, *supra* note 78, at 22 (summarizing the research that does exist).

<sup>109</sup> See, e.g., *Eradicating Steroid Use Part IV: Hearing Before the H. Comm. on Gov’t Reform*, 109th Cong., 60 (2005) (statement of Dr. Todd Schlifstein) (“Data on the benefits of [steroids] is based on little scientific dat[a] and mostly self reports.”); Mehlman, *supra* note 31, at 30 (noting that most data on steroid use by athletes consists of unconfirmed and unmeasured anecdotal reports and observational studies); Statement of Dr. Yesalis, 1989 *STEROID HEARINGS*, *supra* note 39, at 55 (characterizing research into steroids as “anecdotes, isolated case histories or ill-conceived research”).

<sup>110</sup> Cf., Tokish, et al., *supra* note 73, at 1546 (“Because [HGH] is illegal except under the prescription of a physician, well-controlled studies are lacking and its impact is largely unknown, although the rumors of its use abound throughout the sports world.”). Similarly, Julian Savulescu has noted, “[t]here is very little rigorous, objective evidence because the athletes are doing something that is taboo, illegal, and sometimes highly dangerous.” Julian Savulescu, et al., *Why We Should*

to show it was doing *something* about drugs in sport, Congress ensured we would remain ignorant about whether, how, and at what cost these substances enhance human performance.

## II. IGNORANCE AND HARM

Despite the lack of information about performance-enhancing substances, the existing legal framework could still be effective: If the laws curtail use of the substances they prohibit without encouraging riskier behavior, then they avert potential harm. This is an area where *over*-deterrence simply means any corresponding benefits to use are missed, while *under*-deterrence means harm is potentially caused. How is it going? Are the prohibitions preventing the use of potentially harmful performance-enhancing substances?

### A. Evaluation of Current Approach

Few athletes are disqualified or suspended from competition based on positive doping tests. For example, of nearly 9,000 pre- and post-competition doping tests performed in connection with the 2012 London Summer Olympic Games, only 52 showed the presence of a prohibited drug.<sup>111</sup> Of these, only *nine* tests—two from a single athlete—resulted in disqualifications or exclusions from competition;<sup>112</sup> the remainder were permitted therapeutic uses of the prohibited substances.<sup>113</sup>

---

*Allow Performance Enhancing Drugs in Sport*, 38 BRIT. J. SPORTS MED. 666, 666 (2004).

<sup>111</sup> 2012 *Anti-Doping Testing Figures Report* 9, WADA-AMA, <http://www.wada-ama.org/Documents/Resources/Testing-Figures/WADA-2012-Anti-Doping-Testing-Figures-Report-EN.pdf>, archived at <http://perma.cc/6Q3S-2FX7> (hereinafter *2012 Anti-Doping Report*) (providing data for Harlow, UK Olympic anti-doping laboratory).

<sup>112</sup> See <http://www.olympic.org/content/news/search-page/?news=true&press=true&practical=true&frommonth=july&fromyear=2012&tomonth=september&toyear=2012&topic=all&search=doping>, archived at <http://perma.cc/F8CJ-5K6X> (last visited Aug. 23, 2013) (listing disqualification of Nadzeya Ostapchuk, Ghfran Almouhamad, and Nicholas Delpopolo based on post-competition testing, and exclusions from competition for Diego Palomeque Echavarria, Alex Schwazer, Victoria Baranova, Hysen Pulaku, and Luiza Galiulina based on pre-competition testing; Ostapchuk's pre-competition test was also positive).

<sup>113</sup> See *2012 Anti-Doping Report*, *supra* note 111, at 8 (differentiating between tests showing an “adverse analytical finding”—meaning the presence of a prohibited substance—and those resulting in sanctions); *supra* note 90 and accompanying text (explaining therapeutic use exemptions).

This very low rate of positive tests, representing only one-tenth of one percent of all samples tested, is not anomalous. Of nearly 5,000 tests performed at the 2008 Beijing Summer Olympics, only seven resulted in a contemporaneous finding of doping,<sup>114</sup> and officials recorded only one doping case out of over 2,000 tests at the 2010 Vancouver Winter Olympics.<sup>115</sup> More generally in 2012, WADA-accredited laboratories worldwide conducted approximately 270,000 doping tests, of which only 3,190 revealed the use of prohibited substances.<sup>116</sup> Assuming the same percentage of these tests represented therapeutic use exemptions as at the 2012 Summer Olympics,<sup>117</sup> only 552 tests out of the 270,000 would have revealed evidence of doping.

To the extent the actual rate of prohibited substance use is, in fact, less than 1%, the current system is working quite well. If this is the case, then few athletes are doping and many of those who do dope are caught. Moreover, as testing becomes increasingly sophisticated, the rate of undetected doping can be expected to fall even further. For example, when more sensitive carbon-isotope testing is used, prohibited substances are detected at a significantly higher rate in certain sports than under traditional testing.<sup>118</sup> In the case of Thai weightlifters, for example, 96.2% of tested samples showed the presence of prohibited substances, and 5.75% of the tests on track-and-field athletes did the same.<sup>119</sup> Thus advances in testing technology are increasing the likelihood of detection and disqualification.

However, suspensions based on more sophisticated testing of samples years later and non-analytical findings make it clear that actual rates of use are, in fact, much higher than the modest number of positive tests implies. While WADA initially tests samples immediately after procurement, it

---

<sup>114</sup> *Factsheet: The Fight Against Doping and Promotion of Athletes' Health*, Int'l Olympic Committee 2 (Jan. 2013), [http://www.olympic.org/Documents/Reference\\_documents\\_Factsheets/Fight\\_against\\_doping.pdf](http://www.olympic.org/Documents/Reference_documents_Factsheets/Fight_against_doping.pdf), archived at <http://perma.cc/3QYD-KDLP> (hereinafter, "*Olympic Factsheet*").

<sup>115</sup> *Id.*

<sup>116</sup> *2012 Anti-Doping Report*, *supra* note 111, at 8. This is a rate of 1.2%, which is the same as it was in 2011. This rate has stayed fairly constant since at least 2008. *See id.* *See also* Alan Abrahamson, *106 Tests in All of 2012*, 3 *Wire Sports* (July 31, 2013), <http://www.3wiresports.com/?p=3855>, archived at <http://perma.cc/8F6A-JEPB> (interpreting and summarizing this report).

<sup>117</sup> *See supra* notes 111–13 and accompanying text. At the London Olympics, only 9/52, or 17.3%, of the tests that showed the presence of a banned substance resulted in action against the athlete. *See 2012 Anti-Doping Report*, *supra* note 111, at 9; *supra* note 112.

<sup>118</sup> *See Abrahamson*, *supra* note 116.

<sup>119</sup> *2012 Anti-Doping Report*, *supra* note 111, at 41–46.

reserves the right to retest them at a later date as well<sup>120</sup> and has an eight-year statute of limitations for related suspensions.<sup>121</sup> In the international arena, recent retests of frozen samples have resulted in retroactive disqualifications for six athletes from the 2005 World Track & Field Championships<sup>122</sup> and four from the 2004 Athens Summer Olympics.<sup>123</sup> These positives represent use of substances banned at the time of competition but for which tests were not contemporaneously available. The rate of retroactive disqualifications can provide some guide to the rate of doping that is undiscovered at the actual time of use, but still misses use that is not detectable under even current tests.<sup>124</sup>

Even this retesting, though, falls short of capturing at least some significant use. In 2013, Major League Baseball suspended Ryan Braun,<sup>125</sup> Alex Rodriguez,<sup>126</sup> and twelve other players<sup>127</sup> for the use of prohibited substances based on documentary evidence and witness testimony, not positive drug tests.<sup>128</sup> This scandal was presaged by a decade by that of BALCO, in

---

<sup>120</sup> WORLD ANTI-DOPING CODE, *supra* note 85, at Art. 6.5.

<sup>121</sup> *Id.* at Art. 17.

<sup>122</sup> See *Sample retests reveal 6 track & field athletes doped at '05 worlds*, SPORTS ILLUSTRATED, <http://sportsillustrated.cnn.com/more/news/20130308/iaaf-world-championships-drug-retests.ap/>, archived at <http://perma.cc/EMA9-NYN7> (Mar. 8, 2013) (reporting retests of frozen samples within the eight-year statute of limitations).

<sup>123</sup> See *IOC strips 4 medals from 2004 Games*, ESPN, [http://espn.go.com/olympics/story/\\_/id/8714605/ioc-strips-4-medals-2004-athens-olympics-postpones-decision-lance-armstrong](http://espn.go.com/olympics/story/_/id/8714605/ioc-strips-4-medals-2004-athens-olympics-postpones-decision-lance-armstrong), <http://perma.cc/6AF8-23XM> (Dec. 5, 2012).

<sup>124</sup> One anecdotal report places use as high as 95%. Andrea Petroczi, et al., *Comfort in Big Numbers: Does Over-Estimation of Doping Prevalence in Others Indicate Self-Involvement*, 3 J. OCCUPATIONAL MED. & TOXICOLOGY 19, 20 (2008); see also Carnegie Research Institute, *International Literature Review: Attitudes, Behaviors, Knowledge and Education—Drugs in Sport: Past, Present and Future*, WADA 19-20 (2007) (reporting athletes' estimates of banned substance use by others at 6%-72%).

<sup>125</sup> Press Release, Major League Baseball, Milwaukee's Ryan Braun suspended (July 22, 2013), available at [http://mlb.mlb.com/news/article.jsp?ymd=20130722&content\\_id=54364310](http://mlb.mlb.com/news/article.jsp?ymd=20130722&content_id=54364310).

<sup>126</sup> Press Release, Major League Baseball, Yankees' Rodriguez disciplined (Aug. 5, 2013), available at [http://mlb.mlb.com/news/article.jsp?ymd=20130805&content\\_id=55963494](http://mlb.mlb.com/news/article.jsp?ymd=20130805&content_id=55963494).

<sup>127</sup> Press Release, Major League Baseball, Discipline issued in Biogenesis investigation (Aug. 5, 2013), available at [http://mlb.mlb.com/news/article.jsp?ymd=20130805&content\\_id=55962130](http://mlb.mlb.com/news/article.jsp?ymd=20130805&content_id=55962130) (listing Antonio Bastardo, Everth Cabrera, Francisco Cervelli, Nelson Cruz, Fautino De Los Santos, Sergio Escalona, Fernando Martinez, Jesus Montero, Jordan Norberto, Jhonny Peralta, Cesar Puello, and Jordany Valdespin).

<sup>128</sup> Brian Costa, *Drug Suspension Hits A-Rod, 12 Others*, WALL ST. J., Aug. 5, 2013, at A3, archived at <http://perma.cc/R9AQ-YB7W>. In fact, only three players

which comprehensive performance-enhancement over a period of years went undiscovered under USADA's regular testing regimen.<sup>129</sup> Moreover, Lance Armstrong famously, repeatedly, and correctly<sup>130</sup> pointed out that he never failed the hundreds of drug tests (including retests<sup>131</sup>) he took,<sup>132</sup> prior to confessing his use in 2012.<sup>133</sup> Instead, Armstrong's suspension for his use of prohibited performance-enhancing substances, and those of his former teammates who confessed their own use in providing evidence against him,<sup>134</sup> resulted from circumstantial and testimonial evidence.

---

linked to Biogenesis tested positive for banned substances: Melky Cabrera, Bartolo Colon, and Yasmani Grandal. James Wagner, *Gio Gonzalez won't be suspended in Biogenesis investigation*, WASH. POST, Aug. 5, 2013, archived at <http://perma.cc/T9JB-VTHC>. While one of Braun's urine samples did show the presence of testosterone in 2011, he was successful in appealing the associated suspension. The 65-game suspension he accepted in June 2013 relied on a nonanalytical positive, not a positive drug test. Steve Eder, *For Rodriguez, Suspended Animation: 12 Other Players Agree Not to Fight M.L.B. Punishment*, N.Y. TIMES, Aug. 6, 2013, at B8, archived at <http://perma.cc/GB2N-NVHR>.

<sup>129</sup> For further discussion of BALCO, see *supra* notes 94–102, and accompanying text.

<sup>130</sup> Armstrong did have an adverse analytical finding with respect to cortisone, but it was excused (and thus not a positive test) under a therapeutic use exception. See ARMSTRONG REASONED DECISION, *supra* note 5, at 31–33; *supra* note 90 (concerning therapeutic use exceptions); *supra* notes 111–113 and accompanying text (explaining distinction between adverse analytical findings and positive tests).

<sup>131</sup> While six frozen samples from the 1999 Tour de France allegedly belonging to Armstrong tested positive for EPO upon retesting years later, they were never formally identified as his and were not considered positive tests because no second sample was available to confirm the preliminary findings. *L'Equipe story accuses Armstrong of 1999 EPO use*, TOUR DE FRANCE BLOG (Aug. 23, 2005), [http://www.tdf-blog.com/2005/08/lequipe\\_story\\_a.html](http://www.tdf-blog.com/2005/08/lequipe_story_a.html), archived at <http://perma.cc/Q5K5-RZ3D>.

<sup>132</sup> See, e.g., Lance Armstrong, TWITTER (May 19, 2011 4:37 P.M.), <https://twitter.com/lancearmstrong/status/71358750434402306>, archived at <http://perma.cc/Q6UB-VTG8> (“20+ year career, 500 drug controls worldwide, in and out of competition. Never a failed test. I rest my case.”). In connection with his suit against USADA, Armstrong initially asserted that he had “passed every drug test ever administered to him in his career—a total of 500 to 600 tests,” Jury Demand, *Armstrong v. USADA*, Civ. Action No. 1:12-CV-00606, at 3 (W.D. Tex.) (July 9, 2012). The next day, though, he withdrew this assertion. See Jury Demand, *Armstrong v. USADA*, Civ. Action No. 1:12-CV-00606 (W.D. Tex.) (July 10, 2012) (omitting the assertion).

<sup>133</sup> *Oprah and Lance Armstrong*, *supra* note 4.

<sup>134</sup> USADA suspended Michael Barry, Tom Danielson, George Hincapie, Levi Leipheimer, Christian Vande Velde, and David Zabriskie for six months and erased numerous results for each athlete based on their confessions during the course of the Armstrong investigation. See *Six former Armstrong USPS teammates receive bans from USADA*, CYCLING NEWS, <http://www.cyclingnews.com/news/six-former-arm>

Moreover, even WADA's own research suggests that the use of prohibited substances is commonplace in at least the world of elite track and field competitors.<sup>135</sup> The as-yet-unpublished study,<sup>136</sup> comprised of an anonymous survey completed by more than 2,000 athletes, revealed that 29% of the competitors at the 2011 World Championships and 45% at the 2011 Pan-Arab Games were willing to admit to doping during the prior year.<sup>137</sup> Due to predictable self-reporting issues, the researchers concluded that the actual rate of doping most likely exceeded these figures.<sup>138</sup> In combination with the results of testing, retesting, and testimonials concerning use, this research shows that enhancement—attempted or actual—is pervasive on the elite level of at least some high-level sports.

*B. Ignorance Increases Athletes' Use of Performance-Enhancing Substances*<sup>139</sup>

Not only is the current approach to the regulation of performance-enhancing substances ineffective in preventing use of these substances in at least some sports, ignorance concerning purported performance-enhancing substances *increases* athletes' attempts at enhancement for four reasons. First, athletes misjudge the objective benefits and costs they can expect to experience from their use of performance-enhancing substances in systematic and predictable ways. Second, athletes overestimate rates of use by their compet-

---

strong-usps-teammates-receive-bans-from-usada, *archived at* <http://perma.cc/3RJY-V453> (last updated Oct. 10, 2012).

<sup>135</sup> See Tim Rohan, *Study Revealing Doping in Track Strikes Hurdle*, N.Y. TIMES, Aug. 23, 2013, at A1, *archived at* <http://perma.cc/C2MG-22UW> (revealing the existence of the study and summarizing its findings).

<sup>136</sup> While WADA initially encouraged publication of the study, in March 2013 it directed the researchers to delay publishing the results. *Id.*

<sup>137</sup> *Id.* To protect athletes' anonymity, researchers asked participants to think of a birthday. If it occurred during the months of January through June, the participant simply indicated so. If it occurred in the latter half of the year, participants were asked to answer "yes" or "no" to the question: "Have you knowingly violated anti-doping regulations by using a prohibited substance or method in the past 12 months?" Only the individual athlete knew which question he was answering, and the researchers then used statistical analysis to estimate the overall rate of admitted doping by the athletes at the event. *Id.*

<sup>138</sup> Rohan, *supra* note 135.

<sup>139</sup> Game theory analyses of doping similarly conclude that the current regulatory approach increases athletes' use of performance-enhancing substances but for other reasons. See, e.g., Gunnar Breivik, *Doping Games: A Game Theoretical Exploration of Doping*, 27 INT'L REV. SOC. SPORT 235, 237 (1992) (finding that athletes experience a "prisoner's dilemma" with respect to doping); Buechel, et al., *supra* note 108 (focusing on role of "customers" such as media and fans in increasing doping by athletes).



itors and adjust their own use upwards correspondingly. Third, athletes take substances they believe have ergogenic benefits but which in fact do not enhance performance. Finally, prohibition itself increases the desirability of the prohibited substances.

#### 1. Athletes' calculations of costs and benefits are skewed

Analyses of athletes' use of performance-enhancing substances assume athletes engage in a rational decision-making process when evaluating whether to dope.<sup>140</sup> Under this approach, athletes are assumed to weigh the benefits of use, such as faster times clocked, greater weights lifted, and an improved chance of victory, against the costs, including unwanted side effects and long-term damage to health, difficulty in procuring the substances, the probability of detection, and the expected punishment for detection. In their efforts to decrease doping and the harm from doping, legislators, commentators, and sporting organizations focus on manipulating the cost side of the equation. In some proposals, the costs are increased in the belief that rational athletes will then choose not to dope.<sup>141</sup> These include improving the quantity and sophistication of tests;<sup>142</sup> making prohibited substances harder to obtain with harsher penalties for their sale, possession, or use;<sup>143</sup>

<sup>140</sup> See, e.g., Richard A. Posner, *In Defense of Prometheus: Some Ethical, Economic, and Regulatory Issues of Sports Doping*, 57 DUKE L.J. 1725, 1736 (2008) (“[L]et B be the benefit from violating a rule, P (smaller than 1) the probability that the violation will be detected and punished, and S the sanction for the violation; then PS is the expected cost of the sanction to the violator, and it must exceed B (PS>B) to deter the violation.”); Peter Strelan & Robert J. Boeckmann, *Why Drug Testing in Elite Sport Does Not Work: Perceptual Deterrence Theory and the Role of Personal Moral Beliefs*, 36 J. APPLIED SOC. PSYCHOL. 2909 (2006) (refining a rational choice model of decision-making concerning doping); see also Joshua Whitman, *Winning at All Costs: Using Law and Economics to Determine the Proper Role of Government in Regulating the Use of Performance-Enhancing Drugs in Professional Sports*, 2008 U. ILL. L. REV. 459 (employing rational choice model).

<sup>141</sup> Judge Posner, though, has noted that unless they are completely effective, testing and other anti-doping efforts may result in *increased* doping; since the measures deter some athletes, the expected benefits to use for undeterred athletes—the difference between their performance and that of their clean competitors—*increase*. Posner, *supra* note 140, at 1737.

<sup>142</sup> See, e.g., Shermer, *supra* note 108 (proposing increased and better testing). *But see* Jay Coakley, *supra* note 12, at 182 (2009) (calculating the cost of effective testing for United States athletes at billions of dollars annually).

<sup>143</sup> See, e.g., *Drug Penalties to Stiffen*, N.Y. TIMES, Aug. 8, 2013, at B12, *archived at* <http://perma.cc/CMU4-KFYD> (reporting IAAF's increase in suspensions from two years to four for serious doping offenses); Shermer, *supra* note 108 (proposing increased penalties for positive tests, including suspensions of entire teams for a

and providing explicit governmental oversight of anti-doping to better ensure compliance.<sup>144</sup> Alternatively, some commentators have proposed adjusting the cost side of the equation by eliminating the current prohibitions on the athletic use of substances<sup>145</sup> or increasing the oversight of athletes' use of substances to reduce any resulting harm.<sup>146</sup> In each case, though, the proposals assume the benefits, side effects, and long-term effects of the substances themselves are well-known constants.

Even if this assumption were correct, simply manipulating the costs associated with enhancement may well prove unsuccessful in deterring the use of banned substances because individuals' decision-making often departs from rational-choice models due to the intervention of cognitive biases.<sup>147</sup> Primary among these is an optimism bias: Individuals typically believe they are more likely to experience positive results and less likely to experience negative results, both compared to the actual likelihood of experiencing those results generally<sup>148</sup> and as compared to other members of their peer

---

single member's violation of doping rules). This appeared to be Congress's focus when it classified anabolic steroids and andro as controlled substances. *See supra* notes 50–62 (discussing the addition of these substances to the CSA).

<sup>144</sup> *See* Shayna M. Sigman, *Are We All Dopes? A Behavioral Law and Economics Approach to Legal Regulation of Doping in Sports*, 19 MARQ. SPORTS L. REV. 125 (2008).

<sup>145</sup> *See* Bengt Kayser, et al., *Current Anti-Doping Policy: A Critical Appraisal*, 8 BMC MED. ETHICS 2 (2007); Bengt Kayser & Barbara Broers, *The Olympics and Harm Reduction*, 9 HARM REDUCTION J. 33 (2012); Savulescu, et al., *supra* note 110; William Spencer Topham, *Muscle Melee: Redefining Anabolic Steroid Policy in a Post-"Great Recession" Economy*, 7 WILLAMETTE SPORTS L.J. 44, 49 (2010). *But see* Thomas S. Petersen & Johannes K. Kristensen, *Should Athletes Be Allowed to Use All Kinds of Performance-Enhancing Drugs?—A Critical Note on Claudio M. Tamburrini*, 26 J. PHILOSOPHY OF SPORT 88 (2009) (arguing against lifting the ban on performance-enhancing drugs in sport).

<sup>146</sup> *See, e.g.*, Ken Kirkwood, *Considering Harm Reduction as the Future of Doping Control Policy in International Sport*, 61 QUEST 180 (2009) (suggesting increased medical supervision of athletes' doping); Whitman, *supra* note 140 (recommending that federal government develop comprehensive drug management strategies for doping in professional sports).

<sup>147</sup> Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979). For an analysis of the role of cognitive biases in athletes' decision-making concerning competing contract offers, *see* Michael McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics Among Professional Athletes*, 71 BROOK. L. REV. 1501 (2006).

<sup>148</sup> Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1091 (2000).

group.<sup>149</sup> Thus, with respect to doping, many athletes likely overestimate the likelihood that their performances are enhanced, and underestimate the likelihood of being caught or incurring long-term harm.

Further tipping the equation, examples of enhancement successes are more readily available than those of enhancement failures. For this, “success” can be understood as the times an athlete uses a performance-enhancing substance and becomes more successful, while a “failure” occurs when an athlete uses a substance in order to enhance performance, but the substance fails to deliver: there is no associated improvement in performance benefit, it causes harm equal to or greater than any benefit it provides, or performance declines with use.

Lance Armstrong,<sup>150</sup> Tyson Gay,<sup>151</sup> Ryan Braun,<sup>152</sup> and Alex Rodriguez<sup>153</sup> are all highly visible examples of enhancement successes: Athletes who are known to have used performance enhancing substances and reached the top of their sports. Even in the absence of direct evidence of doping, though, we often assume that record-breaking performances are examples of successful enhancement. For example, sixteen-year-old Chinese swimmer Ye Shiwen became the subject of speculation concerning doping after swimming the final fifty meters of the women’s 400-meter Individual Medley at the 2012 Summer Olympics faster than American Ryan Lochte did in winning the men’s race.<sup>154</sup> While Shiwen may have used as-yet undetectable but prohibited substances—testing cannot conclusively prove lack of doping—there is currently no analytical, testimonial, or documentary evidence that she did so.<sup>155</sup> Instead, the speculation rests solely on her record-breaking performance. Contrary to the schoolyard taunt, we assume that winners often cheat, and cheaters often win.

At the same time, enhancement *failures* are largely invisible. Athletes who experience unwanted side effects from the use of a prohibited substance are unlikely to complain because admitting to side effects from doping is admitting to doping itself. Even when an athlete is known to have taken performance-enhancing substances, evidence of physical injury from the use

---

<sup>149</sup> Cass Sunstein, *Selective Fatalism*, 27 J. LEGAL STUD. 799, 807 (1998).

<sup>150</sup> See *supra* notes 5–9, and accompanying text.

<sup>151</sup> See *infra* note 174.

<sup>152</sup> See *supra* notes 125 & 128.

<sup>153</sup> See *supra* notes 127 & 128.

<sup>154</sup> See Erik Niiler, *Olympic Doping Scandal Over Chinese Swimmer Grows*, DISCOVERY, (Aug. 1, 2012, 3:00 AM), <http://news.discovery.com/adventure/extreme-sports/ye-shiwen-doping-scandal-olympic-swimming-120801.htm>, archived at <http://perma.cc/6CBZ-UAGQ>.

<sup>155</sup> *Id.*

is often lacking: Athletes suspended for doping are generally at the top of their game and, while some may appear over-developed, few appear to be suffering from ill health.

Public evidence of long-term harmful effects is also thin. While Arnold Schwarzenegger has spoken openly about his use of anabolic steroids throughout the 1970s,<sup>156</sup> Terry Bollea (better known as Hulk Hogan) testified that he used steroids during the 1980s,<sup>157</sup> and Mark McGwire admitted using steroids and HGH in the 1990s,<sup>158</sup> all appear to be aging normally. Only in rare cases do athletes suffering from ill health associated with the use of performance-enhancing substances publicly reveal their use and symptoms. One such example is former professional football player Lyle Alzado, who attributed his brain cancer to his use of steroids and human growth hormone.<sup>159</sup> At the time of his use, however, the National Football League did not ban these substances so there was no cost—in terms of lost legacy, stripped titles, or suspensions—to the revelations. Moreover, at least one expert publicly questioned whether the substances Alzado used could even have caused the type of cancer he had,<sup>160</sup> undermining any clear connection between these substances and the harm suffered by Alzado.

Athletes who use prohibited substances but fail to reach the highest level of their sport are equally unlikely to disclose their use, and far less likely to be tested. After all, drug testing is heavily concentrated at the upper end of the athletic hierarchy: In each event of the 2012 Summer Olympics, for example, only the top five finishers and two randomly selected athletes were drug tested.<sup>161</sup> That means that in an event like the 2012 Olympic men's 100-meter sprint where there were 75 competitors, there was less than a 3% chance that the athletes finishing sixth place or

---

<sup>156</sup> Tom Farrey, *Conan the Politician*, ESPN (Nov. 17, 2003), [http://espn.go.com/columns/farrey\\_tom/1655597.html](http://espn.go.com/columns/farrey_tom/1655597.html).

<sup>157</sup> *Hulk Hogan, On Witness Stand, Tells of Steroid Use in Wrestling*, N.Y. TIMES, July 15, 1994, <http://www.nytimes.com/1994/07/15/nyregion/hulk-hogan-on-witness-stand-tells-of-steroid-use-in-wrestling.html>.

<sup>158</sup> *McGuire Apologizes to La Russa, Selig*, ESPN (Jan. 12, 2010, 2:01 PM) <http://sports.espn.go.com/mlb/news/story?id=4816607>, archived at <http://perma.cc/LT7G-ZVYK>.

<sup>159</sup> Lyle Alzado, *I'm Sick and I'm Scared*, 75 SPORTS ILLUSTRATED 20 (July 8, 1991), available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1139729/index.htm>, archived at <http://perma.cc/QG9U-VUGU>.

<sup>160</sup> BIGGER STRONGER FASTER\* (Mad Men Films 2008) (including statements of Dr. Norm Fost to that effect).

<sup>161</sup> *Olympic Factsheet*, *supra* note 114, at 1.

lower were tested.<sup>162</sup> This includes, for example, Jamaican Asafa Powell who finished in eighth place in the event and, less than a year later, tested positive for a banned stimulant at the Jamaican National Trials.<sup>163</sup> Out-of-competition tests are even less frequent and similarly focused on the top athletes.<sup>164</sup> Thus, the chance a middle of the field elite athlete will test positive and have his use of a prohibited substance revealed is low, so no counterexamples weaken the connection between enhancement and athletic success. Instead, the absence of information about enhancement failures—or even enhancement successes that do not achieve super-stardom—dilutes the limited clinical evidence that exists concerning the physical costs of performance-enhancing substances.

This asymmetry makes athletic success seem inevitably a product of enhancement, and enhancement a necessary component of athletic success. Because individuals overweight outcomes they consider certain relative to those they consider merely possible,<sup>165</sup> this consistent and strong association between athletic success and the use of performance-enhancing substances, especially paired with the invisibility and uncertainty of enhancement failures, causes athletes to miscalculate the relative benefits and costs of enhancement. This miscalculation then magnifies the effect of the optimism bias.

The difference in timing between the realization of enhancement benefits and any costs further unbalances the equation. Christine Jolls, Cass Sunstein, and Richard Thaler analyze the limitations that bounded willpower impose on decision-making: Even when individuals know there are long-term negative consequences to an action, they still often pursue it to achieve a lesser short-term pay-off.<sup>166</sup> This effect is greater where there is a close association between an action and a short-term gain, but an unclear relation-

---

<sup>162</sup> See *London 2012 Athletics, 100m Men*, OLYMPIC.ORG (2013), <http://www.olympic.org/olympic-results/london-2012/athletics/100m-m>, archived at <http://perma.cc/CM55-CG9N>.

<sup>163</sup> *Id.*; see also *Statement from Asafa Powell*, ASAFA POWELL, <http://www.iamasafa.com/asafa-scoop/statement-from-asafa-powell/>, archived at <http://perma.cc/ST8F-DQ4F>.

<sup>164</sup> See Alan Abrahamson, *Most drug-tested: Ryan Lochte*, 3 WIRE SPORTS (July 27, 2013), <http://www.3wiresports.com/2013/07/27/most-drug-tested-ryan-lochte/>, archived at <http://perma.cc/L3ZA-AHYC> (critiquing data concerning out of competition drug tests of swimming and track and field athletes).

<sup>165</sup> Kahneman & Tversky, *supra* note 147, at 265 (labeling this a “certainty effect”).

<sup>166</sup> Christine Jolls, et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1479 (1998).

ship to the long-term harm.<sup>167</sup> Thus, in the context of the studied criminal behavior, potential offenders often behaved contrary to expectations because of the time lapse between when they realized the near-term benefits of a crime and some indefinite point in the future when they may incur costs.<sup>168</sup> The result is that the potential costs involved with a chosen course of action are discounted—at times dramatically—because of the degree of self-control necessary to forego short-term gains for long-term losses.

Similarly, athletes generally realize any benefits of enhancement rather quickly. Assuming a substance is effective, an athlete who uses it might win a race, gain strength, or set a record in the minutes, days, or months after use. The costs, though, are often delayed, even if ultimately realized: While stimulant use in a competition at which the athlete is tested likely will lead to swift consequences, non-analytic positives and long-term negative health effects come to light only after the passage of often-significant time, if ever.

The combination of these effects means that athletes misjudge the objective benefits and costs they can expect to experience from their use of performance-enhancing substances in predictable ways. Without research into the effects specific substances have on performance, there is no objective data available to correct the resulting mistaken weights assigned the various benefits and costs of enhancement. In other words, in the absence of information, we can expect athletes to overestimate the helpfulness of performance-enhancing substances and underestimate both their harmfulness and the possibility of detection.

## 2. Overestimations of rates of use lead to increased use

While athletes' use of performance-enhancement substances is often understood as an attempt to beat the competition, even high-profile athletes caught for doping often cite their use as a way merely to "level the playing field" with competitors they believe are doing the same thing.<sup>169</sup> While it may be tempting to dismiss such explanations as convenient rationaliza-

---

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1538.

<sup>169</sup> Among others, Lance Armstrong and Ben Johnson (who was stripped of an Olympic gold medal after testing positive for a steroid at the 1988 Olympic Games) have claimed doping was commonplace in their sports. See *Oprah and Lance Armstrong*, *supra* note 4 (Armstrong); *Athletics still 'all corrupt' claims Ben Johnson*, BBC SPORT, <http://news.bbc.co.uk/sport2/hi/athletics/8798855.stm>, archived at <http://perma.cc/KXE7-FWPD> (last updated July 8, 2010) (Johnson). See also Roger Gardner, *On Performance-Enhancing Substances and the Unfair Advantage Argument*, 16 J. PHIL. SPORT 59 (1989) (examining the unfair advantage argument against enhancement).

tions, ignorance concerning actual rates of use of banned substances may result in athletes' overestimations of these rates. These overestimations, in turn, influence athletes otherwise undecided whether to use prohibited substances to do so.<sup>170</sup>

When judging the likely frequency of an event, individuals employ heuristics—mental shortcuts—to ease the task.<sup>171</sup> One commonly employed shortcut is the availability heuristic: Because large classes of associated events are easier and quicker to recall than smaller classes, individuals often estimate the frequency of an event by how easy it is to think of relevant examples.<sup>172</sup> This approach can be rational where ease of recollection is, in fact, associated with frequency of occurrence, but it leads to mistakes in logic when other factors, like the publicity given to one set of outcomes instead of another, affect recall.<sup>173</sup>

In many sports, examples of athletes known to use performance-enhancing substances are easy to call to mind. The impossibility of proving an athlete is definitively clean, though, makes it much more difficult to name with any degree of certainty athletes who have never used a performance-enhancing substance: Today's clean athlete may well be tomorrow's doper.<sup>174</sup> However, the relative ease of identifying examples does not reveal the actual frequency of doping.

---

<sup>170</sup> See Jaime Morente-Sanchez & Mikel Zabala, *Doping in Sport: A Review of Elite Athletes' Attitudes, Beliefs, and Knowledge*, 43 *SPORTS MEDICINE* 395, 398 (2013) (citing studies showing that athletes' decisions to take prohibited substances is influenced by a belief that their competitors are doing so); Thomas H. Murray, *Drugs, Sport, and Ethics*, in *ANALYZING MORAL ISSUES* 317 (Judith Boss, ed., 2004) (arguing that many athletes take steroids only because they believe others do the same).

<sup>171</sup> Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COG. PSYCH.* 207, 207 (1973).

<sup>172</sup> *Id.*

<sup>173</sup> See *id.* at 208–09.

<sup>174</sup> For example, sprinter Tyson Gay was one of eleven athletes who signed USADA's "My Victory" pledge. See *Athletes, MY VICTORY*, <http://www.usada.org/MyVictory/athletes/>, archived at <http://perma.cc/932Y-H74J> (last visited Oct. 8, 2013). The pledge states, in relevant part, "The only sport I believe in is clean sport, sport that is free of all cheating, including doping." *Take the Pledge!*, *MY VICTORY*, <http://www.usada.org/MyVictory/take-pledge/>, archived at <http://perma.cc/Y58M-A9KT> (last visited Oct. 8, 2013). As part of the pledge, Gay promised to always compete clean. *Id.* In May 2013, he tested positive for a prohibited substance at an out-of-competition test and has been reported to have tested positive additional times during competition. *Report: Tyson Gay failed drug test at Nationals*, *SPORTS ILLUSTRATED*, <http://sportsillustrated.cnn.com/more/news/20130726/tyson-gay-drug-tests-u-s-nationals.ap/index.html> (last updated July 26, 2013).

The narratives of athletes who have been caught using performance-enhancing substances are often highly salient, contributing to this bias.<sup>175</sup> For example, Armstrong's personal story of near death from cancer followed by repeated success in one of the world's most grueling competitions is well-known inside and outside of bicycle racing circles. His many denials, the surrounding drama and lawsuits, and the use of experimental cocktails to fuel his miraculous turnaround only increase the memorability of the story.

The sensationalism of Armstrong's account does not make it more likely that other athletes dope than if he was simply a successful rider who had tested positive for drugs with little fanfare. Yet for an athlete deciding whether to use a performance-enhancing substance, the easy recall of Armstrong's story, paired with the lack of verifiable examples of clean athletes and ignorance concerning the actual rates of doping in sport, means the athlete is more likely to overestimate the frequency of use than to underestimate it. This overestimation has a domino effect on use rates: it increases the likelihood that the athlete will use the banned substance himself, both as a way to fit into the sporting culture<sup>176</sup> and to compete on equal terms with his competitors who he believes are doping. With this increased use, other athletes then have more examples to draw on in making their own decisions concerning doping, increasing the likelihood they too will choose to enhance.

### 3. Lack of information about unergogenic effects increases risk-taking

Some individuals most likely forego the use of performance-enhancing substances because of the uncertainty about the physical side effects and possible long-term harm from use. However, sport itself is a physically risky activity,<sup>177</sup> and elite athletes repeatedly demonstrate their disregard for the many associated bodily risks.<sup>178</sup> For elite athletes the risk of physical harm is normalized. As a result, vague warnings concerning possible side effects and

---

<sup>175</sup> See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1127 (1974) (finding that salience increases the retrievability of instances, strengthening availability bias).

<sup>176</sup> Jay Coakley terms this desire by athletes to conform even to harmful norms as "deviant overconformity." Coakley, *supra* note 12, at 155–56.

<sup>177</sup> See, e.g., Kevin Young, *Violence, Risk and Liability in Male Sports Culture*, 10 SOC. OF SPORT J. 373 (1993) (noting that rates of injury in men's professional contact sports are often higher than those at construction sites, oil-drilling rigs, or underground mines).

<sup>178</sup> Smith & Stewart, *supra* note 107, at 126 (noting that male athletes show a propensity toward high risk experiences). In fact, even where athletes are informed of the known side effects and possible health risks from the use of medications, their



the risk of long-term physical harm can be expected only to minimally affect athletes' decision-making.<sup>179</sup> As Cass Sunstein explained in the context of the tendency by individuals to treat certain risks as "background noise" while worrying a great deal about quantitatively identical risks, "For people immersed in a particular culture, it is hard to even see the relevant risks as such."<sup>180</sup>

The little data that does exist about the risk of harm from the use of performance-enhancing substances rarely includes information about the harm that might be expected to most heavily influence athletes' decision-making: the risk that a substance will impede performance. Even when information about nonergogenic effects of commonly used performance-enhancing substances is available, popular culture fails to afford it the same prominence as reports of potential ergogenic effects. For example, while it is well-known that Mark McGwire used andro during his homerun record-setting year,<sup>181</sup> findings that andro increases the natural production of estrogen and decreases the body's own production of testosterone,<sup>182</sup> thereby perhaps impeding performance, have received much less publicity. The invisibility of this negative information, even when it exists, means it does not inhibit risk-taking by athletes.

#### 4. Prohibition itself increases desirability

In many instances, simply prohibiting substances increases demand for them.<sup>183</sup> For athletes, three factors contribute to this phenomenon: (1) an erroneous assumption that only substances that enhance performance are banned; (2) psychological reactance; and (3) a placebo effect. As a result,

---

attitudes concerning the use remain unchanged. Morente-Sanchez & Zabala, *supra* note 170, at 405.

<sup>179</sup> Willy Voet, soigneur for former professional bicycle racing team Festina, recounted that "all some of the riders wanted was to become guinea-pigs for new kinds of doping." Willy Voet, *BREAKING THE CHAIN: DRUGS AND CYCLING: THE TRUE STORY* 105 (Yellow Jersey Press 2002).

<sup>180</sup> Sunstein, *supra* note 149, at 805.

<sup>181</sup> See *Special Report: Who Knew*, *supra* note 75, and accompanying text.

<sup>182</sup> Tokish, *supra* note 73, at 1550.

<sup>183</sup> This effect can be seen outside the sporting world as well: Alcohol consumption in the United States increased during Prohibition, both in terms of quantity and strength of alcohol consumed. In addition, both glue-sniffing and dropping acid increased greatly in popularity after publicity campaigns warned of injury and laws were passed against the practices. Edward M. Brecher, et al., *LICIT AND ILLICIT DRUGS* 321–33 & 368–89 (Consumers Union 1972).

prohibiting a substance's use without evidence of any ergogenic effect<sup>184</sup> may well increase the demand for that substance—and any harm it might cause—without actually decreasing enhancement itself.

First, athletes understand prohibitions against the use of certain substances as implicit acknowledgements that the substances enhance performance.<sup>185</sup> That non-athletes may freely use many prohibited substances and doctors may prescribe others for medical purposes reinforces this perspective: If the substances were really so unsafe, surely they would be impermissible for everyone's use? One logical interpretation for the athletic prohibition, then, is that the banned substance “works”—it enhances performance.<sup>186</sup>

For some individuals, prohibition may create an even stronger incentive. Instead of mistakenly extrapolating efficacy from prohibition, they affirmatively seek out items they can't have *simply because* they can't have them. Here, the loss of a previous behavioral freedom motivates an individual's desire to restore it.<sup>187</sup> To the extent he believes the loss is illegitimate or unjustified, an individual will experience this “psychological reactance” more strongly.<sup>188</sup> The implications in the context of performance-enhancing substances are clear: Prohibiting a formerly permissible substance can be expected to engender a reaction in favor of the substance, which will be greater in magnitude if the prohibition seems illegitimate. Thus, adding substances to the prohibited list without providing legitimizing data may well prove counterproductive by making athletes more inclined to seek out the substances to reassert their freedom.

---

<sup>184</sup> See *supra* notes 46–60 & 86, and accompanying text, critiquing the processes by which Congress and WADA have prohibited the use of potentially enhancing substances.

<sup>185</sup> Melethil, *supra* note 86, at 87 (“The mere listing of a substance or method . . . is misinterpreted by most athletes that the substance or method offers an advantage. The logic simply is: If a substance or method does not offer an advantage, why would WADA put it on the list?”).

<sup>186</sup> *Id.* This problem extends beyond athletes: Because there is little to no policing of performance-enhancing substances in the United States outside the context of elite sport, recreational athletes assume the substances banned in elite competition will improve their conditioning and physique with no realistic repercussions. As a result, the use of performance enhancing substances in society generally seems to be increasing. See Kayser & Smith, *supra* note 108, at 86.

<sup>187</sup> Jack W. Brehm, *Control, Its Loss, and Psychological Reactance*, in CONTROL MOTIVATION AND SOCIAL COGNITION 3, 15 (G. Weary, et al., eds., Springer-Verlag 1993). See also Jack W. Brehm, et al., *The Attractiveness of an Eliminated Choice Alternative*, 2 J. EXPERIMENTAL SOC. PSYCH. 301 (1966) (finding this phenomenon only where the choice was originally available, then later removed).

<sup>188</sup> Jack W. Brehm, A THEORY OF PSYCHOLOGICAL REACTANCE 7–9 (Academic Press 1966).

Moreover, in the absence of contrary evidence, this association between prohibition and enhancement means that nonergogenic substances may actually produce a placebo effect in users, encouraging further use.<sup>189</sup> Researchers have at times attempted to disentangle the actual and perceived ergogenic effects of performance-enhancing substances by measuring their placebo effects. One early study focusing on anabolic steroids found that competitive weightlifters who took pills they thought were steroids got stronger than the athletes in a control group, even though both groups were given placebos.<sup>190</sup> In another study comparing the effects of positive and negative information about a substance on performance, researchers randomly assigned participants to two groups.<sup>191</sup> Each participant completed a timed sprint workout before taking a gelatin capsule filled with cornstarch.<sup>192</sup> Researchers told one group that the substance was likely to improve performance, and the other that it was likely to negatively impact performance.<sup>193</sup> Twenty minutes later, the participants repeated the sprint workout.<sup>194</sup> Members of the first group did the same or better than in the baseline test, and members of the second group did worse.<sup>195</sup> This shows that the effect an athlete ascribes to a substance affects his physical response to it, independent of the substance's actual biological effect.<sup>196</sup> Thus, what athletes believe about a substance—whether they believe it helps or hurts

---

<sup>189</sup> See Tokish et al., *supra* note 73, at 1550 (“A critical review of the literature reveals that substances that . . . are even perceived to improve performance[ ] are widely used by athletes.”). See also Christopher J. Beedie, et al., *Positive and Negative Placebo Effects Resulting from the Deceptive Administration of an Ergogenic Aid*, 17 INT’L J. SPORT NUTRITION & EXERCISE METABOLISM 259, 266 (2007) (finding that approximately 35% of the United States’ population is placebo-responsive).

<sup>190</sup> Gideon Ariel & William Seville, *Anabolic Steroids: The Physiological Effect of Placebos*, 4 MEDICINE & SCIENCE IN SPORTS 124, 124–25 (1972).

<sup>191</sup> Beedie, et al., *supra* note 189, at 260.

<sup>192</sup> *Id.* at 261 (the workout consisted of 3 timed sprints of 30 meters each).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 262.

<sup>196</sup> Coaches and trainers recognize and exploit this effect at times. See, e.g., ARMSTRONG REASONED DECISION, *supra* note 5, at 19 (noting that a team official “came up with a placebo, whittling down an aspirin pill and wrapping it in tin foil” when cortisone Armstrong requested was unavailable); see also *The Mitchell Report: The Illegal Use of Steroids in Major League Baseball: Hearing Before the Comm. on Oversight and Gov’t Reform of the House of Representatives*, 110th Cong (2008) (Testimony of Donald M. Fehr) (“undoubtedly there are [baseball] players, and perhaps most of them, who use [a prohibited substance] because they think it has [ergogenic] effects whether it does or not”) (hereinafter “THE MITCHELL REPORT”).

performance—likely affects their rates of use of the substance and any harm resulting from that use.

Some of the harm from an athlete's increased use of banned but ultimately ineffective substances is abstract. Regardless of the effect on his body, the athlete has still violated the rules of his sport. However, if the substance has negative side effects or injures the athlete's long-term health, increased use also means increased physical harm. Therefore, prohibition in the absence of evidence of actual ergogenic effects may serve to increase demand and harm with no offsetting fairness or other benefit to sport. Of course, a sporting ban might still make sense even if a collateral effect of the prohibition is increased demand by some athletes: That is simply a decision about the permissible parameters of sport. However, this is distinct from any legal prohibitions on use or governmental enforcement of sporting regulations.

*C. Ignorance Increases Harm from Athletes' Use of Performance-Enhancing Substances*

In addition to increasing rates of use of performance-enhancing substances, ignorance about purported performance-enhancing substances increases any harm to athletes that may result from this use in two ways. First, ignorance critically undermines medical authority so that athletes rely on faulty anecdotes and rumors, instead of medical advice, in using banned substances. Second, it ensures that individuals who encourage or even facilitate the use of dangerous substances are not legally liable for any harm that results from their use.

1. Ignorance undermines medical authority

The actual efficacy and long-term effects of many purported performance-enhancing substances are unknown.<sup>197</sup> As a result, for years many medical professionals denied that anabolic steroids had any effect on performance<sup>198</sup> and doctors made dire predictions about the increased likelihood of death and other ill effects in an effort to discourage use of the drugs.<sup>199</sup> However, anecdotal and easily observable examples of steroids' effects on users' bodies,<sup>200</sup> coupled with few examples of longtime users exper-

---

<sup>197</sup> See *supra* Part I.

<sup>198</sup> Testimony of Dr. Yesalis, 1989 STEROID HEARINGS, *supra* note 38, at 48.

<sup>199</sup> Kayser & Smith, *supra* note 108, at 87; Testimony of Dr. Yesalis, 1989 STEROIDS HEARINGS, *supra* note 39, at 48.

<sup>200</sup> See *infra* note 239, and accompanying text (listing examples of these changes).

encing these side effects,<sup>201</sup> undermined this official stance. Moreover, in the high profile BALCO,<sup>202</sup> Armstrong<sup>203</sup> and Biogenesis<sup>204</sup> scandals, doctors and chemists in highly specialized practices worked closely in developing new performance-enhancing substances for some of the most successful athletes of the past decade, while journeymen athletes struggle to find sources for less exotic drugs. As a result, athletes do not trust many mainstream doctors' objectivity and medical advice concerning performance-enhancing substances.<sup>205</sup>

This lack of medical authority increases the likelihood athletes' use of prohibited substances will physically harm them. It causes athletes to ignore medical assessments of harm and to fail to disclose information about their use that is necessary or helpful for diagnosing and treating illness.<sup>206</sup> Moreover, at least some athletes never learn best practices for safe use and, instead, rely on internet searches and locker room gossip in developing enhancement regimes, resulting in combinations, dosages, and processes more likely to harm than to enhance.<sup>207</sup> Thus pronouncements about the dangers of enhancement become self-fulfilling prophecies.

## 2. Ignorance prevents legal liability for harm

While information about the potential for harm from use of a performance-enhancing substance may not discourage its use by an athlete,<sup>208</sup> the associated risk of liability for encouraging use could influence the behavior

<sup>201</sup> See Testimony of Dr. Yesalis, 1989 STEROID HEARINGS, *supra* note 39, at 48.

<sup>202</sup> See *supra* notes 94–102, and accompanying text.

<sup>203</sup> See *supra* INTRODUCTION, at 3–5.

<sup>204</sup> See *supra* notes 125–128, and accompanying text.

<sup>205</sup> See, e.g., Ivan Waddington & Andy Smith, AN INTRODUCTION TO DRUGS IN SPORT: ADDICTED TO WINNING? 229 (2009) (“[U]sers of anabolic steroids generally felt that most medical practitioners had little knowledge of their use and were unable to provide unbiased information on different drugs and their effects on health.”); *cf.*, American Academy of Pediatrics, *Policy Statement: Use of Performance-Enhancing Substances*, 115 PEDIATRICS 1103, 1103 (2005) (“Attempts to discourage use through scare tactics or by dismissing known performance-enhancing effects of these substances may seriously damage the credibility of the physician and do little to diminish use.”).

<sup>206</sup> See *supra* notes 105–30, and accompanying text.

<sup>207</sup> See Smith & Stewart, *supra* note 107, at 126; Kayser, et al., *supra* note 145; see also Ian Lovett, ‘Tattooed Guy’ Was Pivotal in Armstrong Case, N.Y. TIMES, Oct. 18, 2012, at B11, archived at <http://perma.cc/FVU6-XHCG> (relating guesswork involved in determining EPO dose for one user, and resulting side effects).

<sup>208</sup> See *supra* INTRODUCTION at 6–7.

of an athletes' entourage: the coaches, trainers, team management, teammates, and other sports professionals that surround and advise him.

In many instances, an athlete's decision to use performance-enhancing substances is not an isolated one. It is based on the advice or encouragement of his entourage.<sup>209</sup> In the absence of hard evidence concerning the causation of any negative physical effects from an athlete's use of performance-enhancing substances, these individuals may be subject to criminal or sporting sanctions for helping to acquire or cover up use of the drug, but not held responsible for any harm to the athlete himself. As a result, any harm caused by the use of prohibited substances is currently borne entirely by the athlete and not shared by the network that encouraged and facilitated the use.

### 3. Ignorance increases collateral harms

Prohibition itself may increase the risk of harm from the substances athletes use. Some of these harms are similar to those caused by prohibitions of recreational drugs, such as a high reliance on black market, counterfeit, and/or contaminated formulations.<sup>210</sup> Some of the harms, though, are unique. Athletes emphasize undetectability over efficacy or safety in selecting between substances and thus, at times, select more dangerous, but less easily detected, substances over safer ones. This is the case with, for example, anabolic steroids. While injectable steroids are more effective and less damaging than oral steroids in the therapeutic context, they stay in the body weeks longer.<sup>211</sup> Thus, the window for detecting them is significantly greater. Because of this difference, athletes often opt for the oral formula-

<sup>209</sup> See Johanna O. Thomas, et al., *Illicit Drug Knowledge and Information Seeking Behaviors Among Elite Athletes*, SCIENCE & MEDIC. IN SPORT 278, 278 (2011); John Hoberman, 'Athletes in Handcuffs?' *The Criminalization of Doping*, in Mike McNamee & Verner Moller, DOPING AND ANTI-DOPING POLICY IN SPORT 99; Holger Strulik, *Riding High: Success in Sports and the Rise of Doping Cultures*, 114 SCAND. J. ECONOMICS 539, 541 (2012).

<sup>210</sup> See Tokish, et al., *supra* note 73, at 1544 (reporting annual black market sales of steroids in excess of \$100 million)

<sup>211</sup> See GOV'T REFORM COMM., REPORT ON INVESTIGATION INTO RAFAEL PALMEIRO'S MARCH 17, 2005, TESTIMONY BEFORE THE COMM. ON GOV'T REFORM 15 (reporting that injectable stanozolol is detectable for three to four weeks while oral formulations are only detectable for seven to ten days); Sidney Gendin, *Ban Athletes Who Don't Use Steroids*, in PERFORMANCE-ENHANCING DRUGS 60, 60 (James Haley, ed.) (2003) (comparing side effects of oral and injectable steroids); Kayser, et al., *supra* note 145 ("The [ease of] detection of oil-based esters of nandrolone, belonging to a class of anabolic steroids with little side effects and low risk for hepatic disease, has led to the use of oral-based analogues with more side effects, but more rapidly eliminated from the body and thus less easy to detect."); Paul J. Perry, et al., *Ana-*

tions over injectable ones. Moreover, athletes often turn to new and unproven substances for which tests are not yet available, instead of those about which more is known (including how to detect them),<sup>212</sup> effectively acting as guinea pigs in uncontrolled drug trials.<sup>213</sup> Alternatively, they at times use veterinary formulations since they are easier to obtain than prohibited substances that are designed for human use.<sup>214</sup> These formulations are completely untested on humans, and sold in dosages appropriate for the horses and other large livestock for which they were developed instead of for much-smaller humans.

While these harms are not the direct product of ignorance concerning performance-enhancing substances, they do result from prohibitions on the use of these substances. Where those prohibitions prevent greater harms from the prohibited substances themselves, the risk of these harms may be worth taking. However, prohibiting substances based on anecdotes and conjecture risks exposing athletes to these additional harms without a reduction in physical or competitive harm.

What evidence exists suggests that the contemporary regulatory scheme concerning performance-enhancing substances has been stunningly ineffective in preventing their use. Instead, it has largely been effective only in ensuring that legislators, athletes, and fans remain ignorant about the use and effects of performance-enhancing substances. This ignorance, then, contributes to the use of these substances and increases the harm that results from this use. While other commentators have suggested increasing the

---

*bolic Steroid Use in Weightlifters and Bodybuilders*, 15 CLINICAL J. SPORT MED. 326 (2005) (noting hepatotoxicity risk of oral steroids as opposed to injectable).

<sup>212</sup> See L. ELAINE HALCHIN, REPORT FOR CONG., RL 32894 CRS-5, ANTI-DOPING POLICIES: THE OLYMPICS AND SELECTED PROFESSIONAL SPORTS (2007); see also Kirkwood, *supra* note 146, at 186 (noting that by the time a test for synthetic EPO existed, “the substance was already antiquated and athletes had moved on to brand-new substances with unknown side and long-term effects”).

<sup>213</sup> See WILLY VOET, BREAKING THE CHAIN: DRUGS AND CYCLING: THE TRUE STORY 96 (2002) (A first person account of this approach, noting that “[t]o work out [the effects of clenbuterol] precisely, we needed a guinea-pig . . . . We found the right man soon enough: me.”).

<sup>214</sup> For examples of athletes who tested positive for horse steroids, see Todd Zolecki, *Phillies Minors Pitcher Solano Suspended*, MLB.COM (Jan. 20, 2011), [http://mlb.mlb.com/news/print.jsp?ymd=20110120&content\\_id=16471982&vkey=news\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/print.jsp?ymd=20110120&content_id=16471982&vkey=news_mlb&c_id=mlb); MLB.com, *archived at* <http://perma.cc/CP26-HJQJ>; Conway, *Parke Banned 10 Matches for Positive Drug Tests*, ESPNSOCCERNET (Oct. 16, 2008), <http://espnfc.com/news/story?id=582565&sec=mls&cc=5901>, *archived at* <http://perma.cc/4K9X-RJLS>; Ivan Trembow, *Bonnar Suspended for 9 Months for Steroid Use*, MMAWEEKLY.COM (Nov. 3, 2006), [www.mmaweekly.com/bonnar-suspended-9-months-for-steroid-use-2](http://www.mmaweekly.com/bonnar-suspended-9-months-for-steroid-use-2), *archived at* <http://perma.cc/ZV9-9BXQ>.

sanctions for violations of these regulations, this focus rests on unproven assumptions about the substances' effectiveness and capacity to harm, and fails to recognize the impossibility of rational decision-making in the absence of information. By contrast, this Article suggests that information alone can reverse some of the more critical failures with respect to the effective regulation of performance-enhancing substances while minimizing the risk of harm to the athletes using them and to the legitimacy of sport.

### III. INFORMATION: WHAT DO WE NEED (AND HOW DO WE GET IT)?

More information is, in itself, not necessarily a solution: An endless search for information can impede decision-making, and in some instances people make *worse* decisions when presented with more information.<sup>215</sup> Thus, it is important to define narrowly the needed information and connect it to the current problems it would resolve to ensure the information would actually affect athletes' decisions instead of serving merely as an end in itself. While filling in the details is well beyond the scope of this Article, this Part concludes by identifying potential sources of data that can be gathered and analyzed, ethically and efficiently.

While sporting organizations may have different goals, including ensuring more competitive and engaging events, this analysis emphasizes harm reduction. Thus, its focus is on identifying the information that will best help overcome the risk of harm from the regulation and use of performance-enhancing substances.<sup>216</sup> In this, harm is defined broadly, to include harm to

---

<sup>215</sup> See, e.g., Crystal C. Hall, et al., *The Illusion of Knowledge: When More Information Reduces Accuracy and Increases Confidence*, 103 *ORG. BEHAV. & HUMAN DECISION PROCESSES* 277 (2007) (finding that, in predicting the outcome of basketball games, participants were less accurate, but more confident when provided with additional information than when provided only with limited relevant information). Moreover, the task is not done even once the information is gathered; instead, the ways in which information is conveyed shapes the decisions people make. See, e.g., Jolls, et al., *supra* note 195, at 1533–34; 1536–37 (discussing role of the presentation of information in decision-making).

<sup>216</sup> Other scholars have also argued in favor of a harm reduction approach to the regulation of performance-enhancing substances. See, e.g., Ross Coomber, *Drugs in Sport: Rhetoric or Pragmatism*, 4 *INT'L J. DRUG POLICY* 169 (1993) (advocating a pragmatic, harm-reduction approach to the regulation of drugs in sport); Kayser & Broers, *supra* note 145, at 33 (citing “needle and syringe exchange programmes, safe use facilities, opiate substitution therapy, overdose prevention and chemical analysis of party drug” as successful harm reduction strategies concerning recreational drugs); Kayser & Smith, *supra* note 108, at 87 (arguing in favor of regulating athletes' health rather than their doping).



competition and public support for elite sport, as well as direct physical harm to athletes themselves.

A. *Information We Need (and Why We Need It)*

There are five types of information that are critical to overcoming the biases and miscalculations described above, namely: (1) data concerning the rates of use of performance-enhancing substances by athletes; (2) identification of substances commonly thought to be performance enhancing that fail to deliver an ergogenic effect; (3) examples of athletes for whom doping did not equate with athletic success; (4) verifiable causal links between enhancements and physical injury; and (5) identification of the substances used by athletes.

1. Rates of use

Estimates of rates of performance-enhancing substances use by athletes vary widely—between 1%<sup>217</sup> and 95%.<sup>218</sup> This range may be due to the populations studied in each case, the definition of “use” employed, the way data is collected, or the fact that athletes are not necessarily forthcoming about their use. In any event, the extreme breadth of this range indicates that we simply do not know whether doping is an occasional practice of relatively small groups of athletes or if it is commonplace throughout elite sport.<sup>219</sup>

Obtaining this information is critical.<sup>220</sup> Data concerning the pervasiveness of doping within different sports would clarify for athletes whether their own use of performance-enhancing substances provides them an advantage over competitors or if it levels a playing field otherwise tilted by others’ doping. Moreover, it would allow governing bodies to address enhancement in a more finely tuned way than is possible currently.

If background rates of enhancement are low in a sport, many athletes using performance-enhancing substances may well choose to stop using

<sup>217</sup> This figure is based on actual rates of positive doping tests. See Abrahamson, *supra* note 116.

<sup>218</sup> Petroczi, et al., *supra* note 124, at 20.

<sup>219</sup> See Carnegie Research Institute, Leeds Metropolitan University, INTERNATIONAL LITERATURE REVIEW: ATTITUDES, BEHAVIORS, KNOWLEDGE AND EDUCATION—DRUGS IN SPORT: PAST, PRESENT AND FUTURE 91 (2007) (“At the present time a reliable estimate of prevalence is yet to be established.”).

<sup>220</sup> Social scientists Berno Buechel, Eike Emrich, and Stefanie Pohlkamp called this the most important scientific question concerning doping. See Buechel, et al., *supra* note 108, at 2.

them. This is because doping has a strong social norm component: In evaluating whether to use performance-enhancing substances, the attitude of fellow athletes influence an individual's decision-making in two important ways.<sup>221</sup>

First, when caught for using banned substances, many athletes protest that they were simply doing what others in their sport were doing.<sup>222</sup> Thus, they claim they were not gaining an advantage over the competition, but merely participating according to the same unwritten rules. Taken at face value, this would mean that these individuals believe they are only doping *defensively*—in response to perceived doping by others.<sup>223</sup> Even if this is just a rationalization, revealing it as a false one could prove helpful. The claim itself seems to be a way to differentiate enhancement that the athlete believes to be cheating—that meant to chemically assist his performance—from that which he believes is legitimate—meant to allow him to maintain his relative rank in the athletic hierarchy. To the extent actual rates of use in a sport are low, athletes deciding whether to use banned substances will know they are choosing between cheating and competing on their own merits, forcing a more honest evaluation of the situation.

Additionally, in many instances athletes learn about doping and are encouraged in their use of prohibited substances by their compatriots.<sup>224</sup> In sports where sufficiently many athletes are doping, this practice means that the use of prohibited substances becomes the norm.<sup>225</sup> Even the *perception* that many others are using prohibited substances can influence the development of this norm, since peer influence comes from what individuals think others believe or do, not necessarily what is objectively true.<sup>226</sup>

To the extent athletes currently overestimate the use of banned substances by their peers, information about sport-specific rates of use may successfully reduce enhancement where regulations have failed. Research into peer influence on underage drinking shows that many adolescents increase

---

<sup>221</sup> Holger Strulik, *Riding High: Success in Sports and the Rise of Doping Cultures*, 114 SCAND. J. ECONOMICS 539 (2012).

<sup>222</sup> See *supra* note 169.

<sup>223</sup> See Kenneth Kirkwood, *Defensive Doping: Is There a Moral Justification for 'If You Can't Beat 'Em—Join 'Em?'*, 36 J. SPORT & SOCIAL ISSUES 223, 224–25 (2012) (summarizing and critiquing the distinction between offensive and defensive doping).

<sup>224</sup> Strulik, *supra* note 221, at 541.

<sup>225</sup> *Id.*

<sup>226</sup> See H. Wesley Perkins, *The Emergence and Evolution of the Social Norms Approach to Substances Abuse Prevention*, in THE SOCIAL NORMS APPROACH TO PREVENTING SCHOOL AND COLLEGE AGE SUBSTANCE ABUSE 8 (H. Wesley Perkins, ed., John Wiley & Sons 2003) (hereinafter “Perkins, SOCIAL NORMS”).

their own consumption of alcohol to match more closely what they believe is the average rate of drinking by their peers.<sup>227</sup> In that context, interventions focused on publicizing actual rates of consumption have dramatically reduced rates of heavy drinking.<sup>228</sup> Thus, to the extent athletes currently overestimate the prevalence of banned substance use among their competitors and alter their own use as a result, it may be that simply learning actual rates of use would decrease the use of performance-enhancing substances.<sup>229</sup>

Furthermore, different rates of enhancement suggest different anti-doping enforcement approaches. If research shows that very few athletes engage in doping in a specific sport, then it may be that the current approach—focusing on testing the highest achievers with some small amount of random testing farther down—is effectively capturing the most problematic use within that sport and preventing much of the possible harm. Moreover, more recent efforts to monitor biological profiles<sup>230</sup> and power output,<sup>231</sup> and to strategically test athletes who turn in aberrational values or performances, should go a long way to ensuring athletes do not use doping to get ahead of their competition.

However, to the extent enhancement is pervasive within a sport,<sup>232</sup> this testing and monitoring for abnormalities can be expected to capture very

---

<sup>227</sup> *Id.* at 9.

<sup>228</sup> Michael P. Haines & Gregory P. Barker, *The Northern Illinois University Experiment*, in Perkins, *SOCIAL NORMS*, *supra* note 226, at 21; H. Wesley Perkins & David W. Craig, *The Hobart and William Smith Colleges Experiment*, in Perkins, *SOCIAL NORMS*, *supra* note 226, at 35.

<sup>229</sup> Of course, this information could have the opposite effect: To the extent athletes are more interested in using banned substances to get ahead than to level the field, learning about low rates of use in their sport may encourage increased doping. However, this is not a reason to remain ignorant, but a reason to monitor any interventions carefully and adjust them as needed.

<sup>230</sup> See *supra* note 89 discussing the biological passport program.

<sup>231</sup> Intriguingly, some sports scientists did this for Tour de France riders in 2013. Exercise physiologist Ross Tucker estimated power output by the top riders on the hardest climbs of the 2013 Tour and compared these calculations to past performances known to be doping-fueled. In doing so, he identified specific performances that pushed the limits of physiological possibility. See James Dao, *Watchdogs Seek Doping Clues From a Distance*, N.Y. TIMES, July 18, 2013, at B11, *archived at* <http://perma.cc/9TKC-U7EM>; see also Ross Tucker, *The Power of the Tour de France: Performance analysis, laying the groundwork*, THE SCIENCE OF SPORT, (July 3, 2013), <http://www.sportsscientists.com/2013/07/the-power-of-tour-de-france-performance.html>, *archived at* <http://perma.cc/TJ5D-PLZY> (explaining the “pVAM” method used by Tucker to calculate and interpret riders’ power output).

<sup>232</sup> WADA’s own research suggests this is the case in at least some sports. See Rohan, *supra* notes 135-138 (discussing track and field athletes’ admitted rates of use in a recent WADA study).

little of the existing use. Since most athletes will likely not be tested, and most performances will not appear anomalous—instead, the general performance level will just be elevated—enhancement will remain common and necessary for anyone interested in participating at the sport’s highest level. Thus, for any sport in which use is above some threshold point that routine testing should control, regulators will need to develop a different approach. Depending on the sport, that approach may be making a substantial economic investment in widescale testing until the sport’s norms change, working with sports organizations to change social norms concerning doping, or regulating hormone levels and other physiological markers rather than testing for substance use.<sup>233</sup>

From a policy and regulatory perspective, data concerning the background rates of doping on a sport-specific level is the most critical piece of missing information. Without it, it is impossible to evaluate the success or failure of a regulatory regime based on testing. Moreover, this information would help athletes locate their intended behavior within the actual norms of their sport instead of presumptions based on guesswork and the most visible examples.

## 2. Identity of “performance-enhancing substances” that do not enhance performance

In discussing the troubling absence of information about performance-enhancing substances, other commentators have largely focused on the lack of *safety* information.<sup>234</sup> In these analyses, the implicit or explicit assumption is that if athletes knew a substance was unsafe, either in terms of its immediate side effects or long-term physical harm, they would choose not to use the substance. Thus, FDA oversight of safety testing for supplements and drugs as used for enhancement proves a common prescription.<sup>235</sup> Yet, as previously discussed, risk of physical harm is not a dissuading factor for

---

<sup>233</sup> This is already done in some instances. For example, in addition to testing for EPO, some sports federations regulate blood doping by capping the proportion of red blood cells in an athlete’s bloodstream. A level too high results in the athlete being declared unfit for the instant competition, but does not result in an anti-doping violation. Mario Ziroli, *Biological Passport Parameters*, 6 J. HUMAN SPORT & EXERCISE 2, 205 (2011).

<sup>234</sup> See, e.g., Henry T. Greely, *Remarks on Human Biological Enhancement*, 56 U. KAN. L. REV. 1139 (2008) (discussing the ways athletes use banned substances that have never been scientifically tested or are not otherwise known to be safe).

<sup>235</sup> *Id.*

many elite athletes who routinely put their health and their bodies at risk as an everyday part of their training and competing.<sup>236</sup>

Instead, a more relevant risk from an elite athlete's perspective is that of a nonergogenic effect from a banned substance: it simply doesn't work. In this case, the athlete risks detection and punishment without receiving a performance benefit, and in some instances may have his performance impaired. The cost-benefit equation is clearly tilted against use. Thus, to the extent research establishes that a substance commonly thought to be performance-enhancing fails to provide an ergogenic boost, information alone should eliminate its without need for regulation or anti-doping controls.<sup>237</sup>

The scientific literature contains hints and suggestions concerning prohibited substances that may not enhance performance, at least under some important circumstances.<sup>238</sup> Intriguingly, at least some uses of anabolic steroids may be in this category for elite athletes. In summarizing the existing research into the use of steroids, Eric Boyce lists increases in strength (by 14%-18%), muscle size, and lean body mass (8%).<sup>239</sup> Seemingly proof of the *ergogenic* effects of steroids, the data behind these studies prove less beneficial for elite athletes upon close inspection: Boyce specifies that the studies showing strength increases used untrained and elderly men as subjects.<sup>240</sup> Importantly, Boyce concluded that, "[T]here was no difference in the strength of elite, highly trained athletes between those who used and those who did not use anabolic-androgenic steroids."<sup>241</sup> These results raise the question whether anabolic steroids increase maximum attainable strength, or merely reduce the time and effort needed to achieve maximum strength.<sup>242</sup> In other words, athletes who are already at the top of their sports may not enhance their performances through the use of anabolic steroids. If that is, in fact, the case, then there is no reason other than ignorance

<sup>236</sup> See INTRODUCTION, *supra*, and *supra* notes 178–179 and accompanying text.

<sup>237</sup> Ross Tucker has opined that substances that have not been established to provide an ergogenic effect should be removed from sporting prohibitions in order to simplify, and thus improve the credibility of, enforcement of anti-doping regulations. Ross Tucker, *Time to rethink sports doping*, SPORT LIVE (July 22, 2013, 7:54), <http://www.sportlive.co.za/opinion/article9581915.ece>.

<sup>238</sup> See, e.g., D.S. King, et al., *A-Z of Nutritional Supplements: Dietary Supplements, Sports Nutrition Foods and Ergogenic Aids for Health and Performance—Part 34*, 46 BRIT. J. SPORTS MEDICINE 689, 689–690 (2012) (finding that ribose and smilax, prohormones commonly thought to enhance athletic performance, fail to provide an ergogenic benefit).

<sup>239</sup> Boyce, *supra* note 78, at 25.

<sup>240</sup> *Id.* at 26.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 27.

about the actual effects of these substances for athletes to continue to use steroids to gain strength or speed once they have reached the elite level.

In addition, the use of steroids by elite athletes may at times have a *negative* effect on performance. Gains in muscle size and lean body mass not associated with strength gains may simply be increases in water weight.<sup>243</sup> In many sports, larger size is itself not correlated with success; only in sports like football or sumo wrestling do size gains, independent of increases in strength, improve performance.<sup>244</sup> In other sports, for athletes who have already attained their maximum strength, the use of steroids may not help, and could actually hurt, performance by simply adding unaerodynamic water weight to carry around.<sup>245</sup>

If anabolic steroids do not enhance performance for elite athletes, then current prohibitions and enforcement mechanisms are not preventing enhancement. As previously shown, prohibition itself may *increase* the use of the banned substances both by suggesting the substances enhance performance and due to psychological reactance.<sup>246</sup> Testing, though, only focuses on *use* by *elite* athletes; actual ergogenic effect is not required for a positive test, and only in rare cases are developing athletes monitored closely.<sup>247</sup> As a result, current testing may only capture steroid use by those athletes who do not actually benefit from it contemporaneously. It may be that information alone could curb the use of anabolic steroids by athletes who have already attained the elite level,<sup>248</sup> freeing resources for use in other more effective anti-doping efforts.

---

<sup>243</sup> See Fred Hartgens & Harm Kuipers, *Effects of Androgenic-Anabolic Steroids in Athletes*, 34 SPORTS MED. 513, 519 (2004).

<sup>244</sup> See generally, David Epstein, THE SPORTS GENE (2013) (discussing, *inter alia*, data on ideal body types by sport).

<sup>245</sup> See Hartgens & Kuipers, *supra* note 243, at 519.

<sup>246</sup> See Brehm, *Control, Its Loss, and Psychological Reactance*, *supra* notes 187–188, and accompanying text.

<sup>247</sup> See *supra* notes 161–93, and accompanying text.

<sup>248</sup> Similarly, economist Kjetil Haugen has provocatively suggested that, Research on doping effectiveness may also be an interesting strategy. If athletes believe (more strongly than they actually have scientific reason to do so) in the effects of dope, then the task of fighting doping may . . . be a very hard one . . . [O]pen knowledge about actual effects of various doping strategies may, by itself, prove valuable in the fight against doping. Kjetil Haugen, *The Performance-Enhancing Drug Game*, 5 J. SPORTS ECONOMICS 67, 85 (2004).

### 3. Examples of enhancement failures

Currently, the examples of enhancement that are the most highly visible are enhancement successes: Athletes who used performance-enhancing substances and became highly successful in their sports.<sup>249</sup> However, enhancement failures are undoubtedly more common. Identifying and publicizing these cases could help undermine the current strong association between doping and athletic success by providing visible counter-narratives.

For example, statistical analysis of data on baseball players identified as using performance-enhancing substances found that “There is no example of a mediocre player breaking away from the middle of the pack and achieving stardom with the aid of drugs.”<sup>250</sup> Instead, close examination of players’ performances immediately before and in the years after each was alleged to begin their use of these substances undercuts the narrative that steroids and other banned substances as actually used by athletes significantly alter baseball players’ performance given the complexity and variety of skills required for success. Specifically, the study concludes that, “in most cases the drugs had either little or a negative effect.”<sup>251</sup>

This story, though, is not the one usually told about performance-enhancing substance use in baseball. Instead, the public narrative of enhancement is a glamorous one of home run championships or skinny players bulking up and garnering multi-million dollar paydays along the way. What if equal time was given to the player who never made it out of the minor leagues despite his use of steroids, HGH, and andro? Or to the aging player, desperate to hold onto his career and fame, whose performance tailed off in a pattern similar to that of Babe Ruth or Joe DiMaggio despite regular injections of steroids and HGH?

For many athletes, telling these stories—putting faces on enhancement’s mediocrity, failure, and decline—could well prove more persuasive in dissuading use than citing statistics about the probability of long-term harm from the use of various substances. While objective evidence of harm may be persuasive to individuals who are already disinclined to use banned substances, narrative examples of enhancement failures may prove more effective at persuading individuals biased in favor of use to change their pref-

---

<sup>249</sup> See *supra* notes 150–155, and accompanying text (defining enhancement success and failure and discussing the reasons for this high visibility).

<sup>250</sup> Jonathan R. Cole & Stephen M. Stigler, *More Juice, Less Punch*, N.Y. TIMES (Dec. 22, 2007), <http://www.nytimes.com/2007/12/22/opinion/22cole.html>, archived at <http://perma.cc/3787-B5RL>. The study on which this op-ed is based is currently unpublished.

<sup>251</sup> See *id.*

erences.<sup>252</sup> Thus, providing visibility to the many athletes who have used performance-enhancing substances but not become superstars, or who ceased improving after beginning heavy use, or who have experienced performance setbacks due to their use of banned substances may ultimately dissuade more athletes from use, and especially use that results in cognizable harm, than statistical data concerning risk of physical harm.

#### 4. Proof of harm

While most likely ineffective in dissuading use by many athletes, sound data concerning injury causation could affect decisions by an athlete's entourage to encourage or assist doping. If, for example, research established a link between the enhancement use of anabolic steroids and brain tumors, individuals who promote and assist in this use, as well those providing the drugs, could be held civilly liable for the resulting injuries.

Of course, in the case of anabolic steroids these individuals may already be criminally liable under the CSA.<sup>253</sup> However, athletes currently have little or no incentive to assist the government in pursuing convictions because, at best, revealing use will negatively impact their own athletic legacies and, at worst, they could also be prosecuted themselves for their illegal use of these substances.<sup>254</sup> In addition, athletes receive no personal vindication for the convictions—no acknowledgement of the damage to their bodies—since the underlying offense is selling or otherwise distributing prohibited substances, not causing harm to the athlete.<sup>255</sup>

Because of the lack of data concerning physical harm caused by banned substances, athletes currently internalize all of the risks from the use of performance-enhancing substances despite the fact that use is seldom a completely isolated act. Establishing harm causation means an athlete could recoup medical costs and other damages from the personnel involved in his

---

<sup>252</sup> This disparity occurs at least in the context of changing behavior towards alcohol use. See Michael D. Slater & Donna Rouner, *Value-Affirmative and Value-Protective Processing of Alcohol Education Messages That Include Statistical Evidence or Anecdotes*, 23 COMMUNICATION RESEARCH 210 (1996). See also John B.F. de Wit, et al., *What Works Best: Objective Statistics or a Personal Testimonial? An Assessment of the Persuasive Effects of Different Types of Message Evidence on Risk Perception*, 27 HEALTH PSYCHOLOGY 110 (2008) (finding narrative evidence more successful than statistical data in communicating health risks to participants otherwise inclined to undertake high risk sexual behavior).

<sup>253</sup> See *supra* note 52, and accompanying text (describing criminal liability under the CSA).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*



use of ultimately harmful substances, under either battery or negligence theories, ultimately reducing the likelihood that these individuals would encourage and assist in the use in the first place.

### 5. What athletes are actually taking

For as little information as we have about what athletes *believe* they are taking, we know even less about what in fact they *are* injecting and ingesting. Because many desired substances cannot be obtained legally, and even where they can be they require a doctor's prescription, athletes often obtain the substances they use through black market or other untrustworthy sources.<sup>256</sup> In many instances, the labeling and contents of these substances do not match. For example, one study of steroids obtained from black markets found that 53% of the injectable steroid samples and 21% of the oral ones were counterfeit and, in some cases, contaminated with bacteria known to cause abscesses.<sup>257</sup> Another study found that only four of eleven confiscated black market performance enhancement products actually contained what their labels advertise.<sup>258</sup> Even when obtained from reputable sources, this mismatch between contents and labeling exists routinely for supplements.<sup>259</sup> As a result, even studies that successfully elicit truthful responses from athletes about what they use do little to reveal what they actually use.

If we do not know what substances athletes are actually taking, thoughtfully reducing the use of harmful substances and minimizing any harm resulting from their use becomes nearly impossible. Athletes cannot possibly make a rational decision about whether to use a potentially enhancing substance without knowing, in the first instance, what is in the product they propose to use. Moreover, no generalizable causal link between substance use and any outcome—positive or negative—is possible where the substance used is unidentified.

Further revealing the importance of information concerning what is contained in the products used by athletes, interventions intended to reduce optimism biases prove successful only where they offer individuals information about their own particular likelihood of experiencing a potential

---

<sup>256</sup> See Tokish et al., *supra* note 73, and accompanying text.

<sup>257</sup> Michael R. Graham, et al., *Counterfeiting in Performance- and Image-Enhancing Drugs*, 1 DRUG TESTING & ANALYSIS 135 (2009).

<sup>258</sup> Kohler, et al., *supra* note 74, at 536–37.

<sup>259</sup> See *id.* at 536–37 (discussing the lack of consistency in the contents of nutritional supplements).

harm.<sup>260</sup> More general manipulations, such as alerting participants to relevant risk factors for health hazards,<sup>261</sup> presenting risk factors in a way that encourage participants to see their own status as non-ideal,<sup>262</sup> inducing participants to visualize a person who embodied high risk factors before judging their own risk,<sup>263</sup> and asking participants to generate a list of factors that would increase or decrease a risk,<sup>264</sup> each served, contrary to the researchers' expectations, to exacerbate pre-existing optimism biases.<sup>265</sup> As a result, common strategies intended to decrease undesirable behavior, such as media campaigns emphasizing the negative effects of substance use, may well increase athletes' tendency to unreasonably discount these risks.<sup>266</sup> Successfully reducing the optimism bias instead requires specific information about an athlete's own likelihood of experiencing a negative outcome; absent information about what substances an athlete is actually taking, this level of specificity is impossible.

We currently know very little about performance-enhancing substances and athletes' use of them. What we do know is that, in at least some critical instances, the current regulatory approach is largely ineffective in preventing and detecting their use. Instead of continuing to legislate in the dark, the focus of lawmakers and sporting organizations should be on obtaining the most critical information we currently lack in order to more effectively prevent harm to the athletes using these substances, to competitors deciding whether to use them, and to the spirit of competition.

### B. Sources of Information

If information concerning performance-enhancing substances and their use by athletes were easy to collect, it would undoubtedly already have been done: Both Congress and researchers have acknowledged the need for more information for at least half a century.<sup>267</sup> However, because doping is a cov-

---

<sup>260</sup> Neil D. Weinstein & William M. Klein, *Resistance of Personal Risk Perceptions to Debiasing Interventions*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 313, 322 (Thomas Gilovich, et al., eds, Cambridge University Press 2002).

<sup>261</sup> *Id.* at 314–16.

<sup>262</sup> *Id.* at 316–17.

<sup>263</sup> *Id.* at 317–20.

<sup>264</sup> *Id.* at 320–22.

<sup>265</sup> *Id.* at 322.

<sup>266</sup> *Id.* at 323.

<sup>267</sup> See *supra* notes 53–62 & 77–83, and accompanying text; see also Kayser & Smith, *supra* note 108, at 87 (“rigorous clinical and policy studies are imperative”); David R. McDuff & David Baron, *Substance Use in Athletics: A Sports Psychiatry Per-*

ert activity, information about it is elusive: Even where use is common in an athlete's cohort, many of the specifics remain private. Moreover, when testimony or other evidence establishes an athlete's use of banned substances, public and official attention focuses on the identity of other transgressors—who assisted the athlete in obtaining, learning about, and using prohibited substances, and who else used them—not the specifics of use. The resulting ignorance in turn increases athletes' use of banned substances, increasing the potential for harm.

Yet this ignorance does not need to persist. The amount of information that exists about performance-enhancing substances is staggering: Athletes keep exhaustive records of their use, team personnel monitor and medical professionals and adapt programs for efficacy for the athletes under their care, and human bodies register and record the effects of substances taken long after their use is discontinued. What if, instead of focusing on finger-pointing and retroactive record-erasing, anti-doping efforts were focused on accumulating the information already available but largely unanalyzed in order to develop a more effective and less harmful approach to enhancement for the future?

A primary source of information concerning athletes' use of performance-enhancing substances and the effects of use on their bodies exists in the exhaustive documentation kept by many teams, physicians and athletes. For example:

- Professional cycling teams records that detail the riders' drug protocols and the physical effects of enhancement in minute detail;<sup>268</sup>
- United States Olympic Committee records from 1991-2000 that, over the course of 30,000 pages, detail the use of prohibited substances by United States athletes;<sup>269</sup>

---

*spective*, 24 *CLINICS IN SPORTS MED.* 895 (2005) (calling for large scale clinical trials where possible); Melethil, *supra* note 86, at 88 (calling for animal studies where human trials are not possible).

<sup>268</sup> See, e.g., ARMSTRONG REASONED DECISION, *supra* note 5, at 77 & 109 (describing internal testing and calibrations on the United States Postal Service cycling team). See also Benjamin D. Brewer, *Commercialization in Professional Cycling 1950-2001: Institutional Transformations and the Rationalization of "Doping"*, 19 *SOCIOLOGY SPORT J.* 276, 294 (2002) (chronicling oversight and tracking of doping by team management); Juliet Macur, *Welcoming Testing, Team Battles Cycling's Image*, *N.Y. TIMES*, Feb. 13, 2007, available at <http://www.nytimes.com/2007/02/13/sports/othersports/13cycle.html> (last visited Aug. 23, 2013) (focusing on internal testing and record-keeping by the Slipstream professional cycling team).

<sup>269</sup> See Tim Layden & Don Yaeger, *Playing Favorites?*, *SPORTS ILLUSTRATED* (Apr. 21, 2003) (describing records possessed by Dr. Wade Exum, the USOC's former director of drug control administration).

- East German records reporting the results of doping research and the use of performance-enhancing substances by the country's top athletes since 1966;<sup>270</sup>
- An as-yet-unpublished 800-page report detailing West German doping since the 1950s;<sup>271</sup> and
- Records from the BALCO<sup>272</sup> and Biogenesis investigations.<sup>273</sup>

Gathering and analyzing this information should be the focus of officials investigating collateral or past instances of doping. While these records are not always based on scientific experiments, they provide much more information than is currently available. The current emphasis on retroactive punishment means that, instead, athletes and team personnel have strong incentive to destroy their records at the first hint of trouble,<sup>274</sup> perpetuating ignorance of the use and effects of performance-enhancing substances.

A further source of information is athletes themselves. As indicated by the 2011 WADA survey of track and field athletes,<sup>275</sup> if properly assured of anonymity many athletes will provide some of the critical data that is currently lacking. Cooperating athletes should not receive amnesty for any use they disclose as part of the process, but the data itself should not be able to be used against the athletes providing it. While this data would be comprised of anecdotes and suffer from the usual self-reporting constraints,<sup>276</sup> in the aggregate it could prove helpful in identifying rates of use of prohibited substances, athletes' beliefs about these substances, and how the substances are actually used by athletes.

Furthermore, researchers should gather data concerning the long-term effects of performance-enhancing substance use from athletes known to have used these substances. This could be accomplished in two ways. Recently

---

<sup>270</sup> See Charles E. Yesalis & Michael S. Bahrke, *History of Doping in Sport*, in PERFORMANCE-ENHANCING SUBSTANCES IN SPORT AND EXERCISE 9 (Michael S. Bahrke & Charles E. Yesalis, eds.) (noting the existence of these records).

<sup>271</sup> See *Study Says West Germany Used Doping*, N.Y. TIMES, Aug. 4, 2013, at SP10, available at <http://www.nytimes.com/2013/08/04/sports/study-says-west-germanys-athletes-used-doping.html> (revealing existence of the study).

<sup>272</sup> See *supra* notes 94–102, and accompanying text.

<sup>273</sup> See *supra* notes 125–128, and accompanying text.

<sup>274</sup> At times, this destruction is even legally mandated. See Juliet Macur, *Spanish Judge Orders Destruction of Evidence*, N.Y. TIMES, May 1, 2013, at B19, available at <http://www.nytimes.com/2013/05/01/sports/cycling/spanish-doctor-sentenced-in-operation-puerto-doping-case-in-cycling.html>.

<sup>275</sup> See *supra* notes 135–138, and accompanying text (discussing the survey).

<sup>276</sup> For example, there would most likely be a selection bias among those who agreed to participate and some athletes may further choose not to be truthful in order to maintain a competitive advantage or because they distrust the intermediary.

retired athletes could be offered amnesty from invalidation of records and public disclosure of use in return for disclosure of past use to sporting researchers and on-going physical monitoring. In addition, researchers should follow-up with the high school and college athletes who were the subjects of early experiments concerning anabolic steroids<sup>277</sup> to determine the effects on their morbidity and other aspects of long-term health. In each case, careful collection and analysis of this data could help identify any real long-term health consequences to the use of steroids and other substances as enhancements, not therapy.

Finally, a number of doctors could be trained to assist athletes in safe practices to the extent they feel comfortable doing so within the bounds of their professional responsibilities.<sup>278</sup> While this would not need to extend to issuing prescriptions or otherwise procuring substances for use by athletes, it could include testing substances obtained by athletes prior to use to identify the contents, and working with researchers to provide anonymized data on the substances used and observed physical effects. This assistance could serve to reduce collateral harms from doping, including harm from unsafe processes and contaminated substances,<sup>279</sup> provide valuable real-time information to researchers about the enhancements being employed by athletes, and help rehabilitate the reputation of medical professionals with athletes.<sup>280</sup>

Of course, collating and organizing this information in a meaningful way would be a daunting task. However, models for similarly mammoth information-gathering and analysis exist. For example, using its “Sentinel” system, the FDA collects the electronic records of prescriptions filled, associated diagnoses, and adverse events. From these records, then, it derives patterns of causality between events that historically simply took too much

---

<sup>277</sup> See Yesalis & Bahrke, *supra* note 270, at 65–66 (describing the studies).

<sup>278</sup> But see John Hoberman, *Sports Physicians and the Doping Crisis in Elite Sport*, 12 CLINICAL J. SPORTS MED. 203 (2002) (summarizing ethical conflicts inherent in doctors’ participation in doping, even where it reduces the harm to the athletes involved); see also Steve P. Calandrillo, *Sports Medicine Conflicts: Team Physicians vs. Athlete-Patients*, 50 ST. LOUIS U. L.J. 185 (2005) (examining the ethical conflicts that team physicians employed by teams have when treating athletes, particularly when using substances or procedures with questionable therapeutic value); Barry R. Furrow, *The Problem of the Sports Doctor: Serving Two (Or is it Three or Four?) Masters*, 50 ST. LOUIS U. L.J. 165 (2005) (same).

<sup>279</sup> For this reason, other commentators have also suggested encouraging medical oversight of athletes’ doping. See, e.g., Preface, in Murray, et al., PERFORMANCE-ENHANCING TECHNOLOGIES, *supra* note 25 (discussing this approach). But see Urban Wiesing, *Should Performance-Enhancing Drugs in Sport be Legalized Under Medical Supervision?*, 41 SPORTS MEDICINE 167 (2011) (arguing against this approach).

<sup>280</sup> See *supra* notes 197–207, and accompanying text.

manpower to analyze.<sup>281</sup> The FDA intends the system to identify and quantify adverse-events quickly and accurately, optimizing the safety and efficacy of medication.<sup>282</sup> In addition, researchers have been collecting and analyzing medication and symptom-related queries entered into major search engines, allowing them to identify evidence of otherwise-unreported drug side effects more quickly than under formal warning systems.<sup>283</sup> Similarly, collecting and analyzing the large repositories of data concerning the use of performance-enhancing substances, in combination with novel approaches to gathering contemporary information anonymously, may well yield significant insights into the use of these substances. While the details remain to be worked out, the critically needed information is not unknowable or, in some instances, truly unknown.

#### CONCLUSION

The current approach to regulating the use of performance-enhancing substances has proven ineffective. Repeated scandals and WADA's own research shows that, at least in many sports, the use of prohibited substances is pervasive. The only thing more pervasive, it seems, is ignorance about enhancement.

This ignorance is in many ways voluntary: The information we need to overcome it in many cases exists, but is uncollected, unpreserved, and unanalyzed. This Article argues in favor of an approach to regulating performance enhancement that emphasizes reducing the risk of harm from use of these substances in a way that is both pragmatic and persuasive given the norms and practices of elite sport.

---

<sup>281</sup> Jerry Avorn & Sebastian Schneeweiss, *Managing Drug-Risk Information—What to Do with All Those New Numbers*, 361 NEW ENG. J. MED. 647, 647 (2009).

<sup>282</sup> *Id.* at 649.

<sup>283</sup> Ryen W. White, et al., *Web-Scale pharmacovigilance: listening to signals from the crowd*, J. AM. MED. INFORMATICS ASS'N 403 (2013).



# Smooth Sailing: Why the Indian Film Industry Remains Extremely Successful in the Face of Massive Piracy

Brandon Hammer\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	148
II. INDIA'S ROBUST COPYRIGHT REGIME .....	155
A. <i>Ample Protection</i> .....	156
B. <i>A Host of Remedies</i> .....	159
C. <i>Concerns About the Regime</i> .....	165
III. LACK OF ENFORCEMENT .....	167
A. <i>The Ineffectiveness of Judicial Proceedings</i> .....	167
B. <i>Lack of Police Cooperation</i> .....	170
C. <i>Lack of International Cooperation</i> .....	171
IV. ENFORCEMENT-BASED STRATEGIES .....	172
A. <i>Enforcement Agencies</i> .....	173
B. <i>John Doe Orders</i> .....	174
C. <i>Limited Success</i> .....	176
V. NON-LEGAL STRATEGIES .....	178
A. <i>Increased Distribution</i> .....	179
B. <i>Interference with the Piracy Supply Chain</i> .....	181
C. <i>Education Campaigns</i> .....	182

---

\* Brandon Hammer received his J.D. *magna cum laude* from Harvard Law School in 2013. He is currently clerking on the United States Court of Appeals for the Fifth Circuit. Brandon would like to thank Phil Malone, Christopher Bavitz, the Berkman Center for Internet & Society, the Linklaters India Internship Program, the HLS Program on the Legal Profession, Ashish Nanda, Rachel Gibson, and Khaitan & Co for their immense assistance and invaluable guidance and for making this article possible.

VI. AN ALTERNATIVE EXPLANATION: INDIA'S THEATRICAL CULTURE . . . . .	184
VII. CONCLUSION . . . . .	186

## I. INTRODUCTION

In the summer of 2006,<sup>1</sup> Bollywood superstar Shah Rukh Khan and director Anubhav Sinha set out on “an audacious dream.”<sup>2</sup> As one of the top film stars in India for the better part of two decades,<sup>3</sup> Khan could have stayed in his “comfort zone, mak[ing] two films a year, hyp[ing] them because I’ve signed them as a star, mak[ing] them cheap and they [would have] be[en] big hits.”<sup>4</sup> Instead, he invested five years of time and much of his fortune in a film that he hoped would revolutionize the Indian film industry.<sup>5</sup> Specifically, Khan and Sinha sought to make the first Indian science fiction superhero movie, a genre that, because of its high costs, “ha[d] until now been pure Hollywood.”<sup>6</sup> The vehicle for this endeavor was *Ra.One*, which stars Khan and tells the story of a video-game villain who escapes into the real world and must be stopped by the game-maker’s son.<sup>7</sup> In order to make *Ra.One* as “clean, nice, [and] as good as . . . an international film,” Khan and Sinha contracted 5,000 crewmembers, utilized 3D technology,

<sup>1</sup> See Chandrima Pal, *Ra.One Challenges Shah Rukh Khan, the Star*, TIMES OF INDIA (Sept. 25, 2011, 10:43 AM IST), [http://articles.timesofindia.indiatimes.com/2011-09-25/news-interviews/30200118\\_1\\_srks-red-chillies-shah-rukh-khan-anubhav-sinha](http://articles.timesofindia.indiatimes.com/2011-09-25/news-interviews/30200118_1_srks-red-chillies-shah-rukh-khan-anubhav-sinha), archived at <http://perma.law.harvard.edu/03NzXrm4pjf>.

<sup>2</sup> *The Best Special Effects of Ra.One Happened at Mannat*, REDIFF MOVIES (Oct. 13, 2011, 5:49 PM IST), <http://www.rediff.com/movies/slide-show/slide-show-1-anubhav-sinha-on-ra-one/20111013.htm#4>, archived at <http://perma.law.harvard.edu/0L5EPB6D1u5> (quoting Sinha).

<sup>3</sup> See *Shahrukh Khan Biography*, ONE INDIA ENTERTAINMENT, <http://entertainment.oneindia.in/celebs/shahrukh-khan/biography.html> (last visited Mar. 22, 2013), archived at <http://perma.law.harvard.edu/0L5EPB6D1u5>.

<sup>4</sup> Shilpa Jamkhandikar, *A Minute with: Shah Rukh Khan*, REUTERS (Oct. 13, 2011, 5:19 PM IST), <http://in.reuters.com/article/2011/10/13/idINIndia-59860120111013>, archived at <http://perma.law.harvard.edu/0W9rLoTftky> (quoting Khan).

<sup>5</sup> David Sillito, *Ra.One: Can Bollywood Take on Hollywood*, BBC (Oct. 25, 2011), <http://www.bbc.co.uk/news/entertainment-arts-15455987>, archived at <http://perma.law.harvard.edu/0ss81TDLQ5z>.

<sup>6</sup> *Id.*

<sup>7</sup> Tamara Baluja, *Ra.One: Bollywood Superhero Epic’s Secret Weakness? Plot*, GLOBE AND MAIL, Oct. 28, 2011, archived at <http://perma.law.harvard.edu/0cKjqdEyK6i>.



and allegedly employed more special effects than *Avatar*.<sup>8</sup> In taking this “quantum leap” ahead of anything that the Indian film industry had previously produced,<sup>9</sup> the filmmakers shattered Bollywood budget records.<sup>10</sup> Khan provided most of the funding himself,<sup>11</sup> hosting an unpopular game show to earn part of the funds<sup>12</sup> and promising distributors that he would work for them for free if the film did not turn a profit.<sup>13</sup>

After one of the longest and most extensive marketing campaigns in Indian history,<sup>14</sup> trade analysts predicted that *Ra.One* would break previous box office records, allowing Khan and Sinha to recover their substantial investment.<sup>15</sup> Nonetheless, the specter of piracy appeared to threaten the entire venture. Months before the film’s release, pirates gained access to, and posted online, *Ra.One*’s centerpiece song, *Chammak Challo*.<sup>16</sup> A few months

<sup>8</sup> Tom Brook, *Ra.One: Bollywood’s ‘Quantum Leap’*, BBC (Oct. 25, 2011, 9:01 AM GMT), [http://news.bbc.co.uk/today/hi/today/newsid\\_9623000/9623515.stm](http://news.bbc.co.uk/today/hi/today/newsid_9623000/9623515.stm), archived at <http://perma.law.harvard.edu/02znL3bXqpm> (quoting Khan).

<sup>9</sup> *Id.*

<sup>10</sup> See Rachel Saltz, *Computer Nerd Creates Superhero Showdown*, N.Y. TIMES, Oct. 27, 2011, at C2, archived at <http://perma.law.harvard.edu/0Axj9CPdYFf> (noting that *Ra.One* was the “most expensive Bollywood movie ever made”); see also *Ra.One Costs 150 Crores?*, HINDIFILMNEWS.COM (Apr. 12, 2011, 7:28 PM), [http://www.hindifilmnews.com/bollywood\\_buzz/bollywood-actors/shahrukh-khan-bollywood-actors/ra-one-costs-150-crores/](http://www.hindifilmnews.com/bollywood_buzz/bollywood-actors/shahrukh-khan-bollywood-actors/ra-one-costs-150-crores/), archived at <http://perma.law.harvard.edu/0Jz9r9MPbpc> (noting that *Ra.One* likely cost more than the most expensive Indian films made up to that time).

<sup>11</sup> Bharti Dubey, *Today, a Steven Spielberg Is Looking for Investment from Us*, TIMES OF INDIA, (Sep. 26, 2011, 12:00 AM IST), [http://articles.timesofindia.indiatimes.com/2011-09-26/edit-page/30201105\\_1\\_raone-film-special-effects](http://articles.timesofindia.indiatimes.com/2011-09-26/edit-page/30201105_1_raone-film-special-effects), archived at <http://perma.law.harvard.edu/0GH1RDn4tXf>.

<sup>12</sup> *Shah Rukh Khan Won’t Do Zor Ka Jhatka 2*, TIMES OF INDIA (Nov. 21, 2011, 12:19 PM IST), [http://articles.timesofindia.indiatimes.com/2011-11-21/tv/30425474\\_1\\_zor-ka-jhatka-game-show-shah-rukh-khan](http://articles.timesofindia.indiatimes.com/2011-11-21/tv/30425474_1_zor-ka-jhatka-game-show-shah-rukh-khan), archived at <http://perma.law.harvard.edu/0D8FB5PhYwR>

<sup>13</sup> Dubey, *supra* note 11.

<sup>14</sup> See *Ra.One to Have Bollywood’s Longest Promotion*, SIFY MOVIES, <http://www.sify.com/movies/ra-one-to-have-bollywood-s-longest-promotion-news-bollywood-ljvknXcgjcb.html> (Sept. 21, 2011, 10:13 AM), archived at <http://perma.law.harvard.edu/0fi4nUMJQw4>; *Ra.One Gets Rs 52-Cr Promotional Push*, CNN IBN (Oct. 14, 2011, 7:10 PM), <http://ibnlive.in.com/generalnewsfeed/news/raone-gets-rs-52cr-promotional-push/861677.html>, archived at <http://perma.law.harvard.edu/0fi4nUMJQw4>.

<sup>15</sup> Rachana Dubey, *Ra.One Will Make ? 100 Crore in a Week*, HINDUSTAN TIMES (Oct. 21, 2011, 11:13 AM IST) <http://www.hindustantimes.com/Entertainment/Bollywood/RA-One-will-make-Rs-100-crore-in-a-week/Article1-759816.aspx>, archived at <http://perma.law.harvard.edu/0zfXAuZ1KgR>.

<sup>16</sup> *Bollywood Movie: ‘Ra.One’ Team’s Fight Against Piracy*, SUPERGOODMOVIES.COM, <http://www.supergoodmovies.com/27200/bollywood/bollywood-movie-ra->

later, pirates posted the full musical album online right before its official rollout, infuriating the producers.<sup>17</sup> And within hours of *Ra.One*'s Indian theatrical premiere, pirated versions of the entire film became available not only on all of the prominent file-sharing websites, but also on YouTube.<sup>18</sup>

Amid so much piracy, one may have readily expected it to be difficult for a film that had broken prior Bollywood budget records to recover its investment. Nonetheless, *Ra.One* had substantial financial success, even though "Indian critics largely panned" it.<sup>19</sup> The movie "shatter[ed] regional, national and international box office record after record,"<sup>20</sup> and was ultimately the second highest grossing Indian film of all time.<sup>21</sup> In terms of profitability, the exact financial figures for the film are disputed. Khan has stated that the film cost 1.25 billion INR (approximately \$23.0 million) to produce, "plus Rs 10 crore [\$1.8 million] for prints and advertising."<sup>22</sup> A number of others, however, estimated the film's production cost at 1.5 billion INR (\$27.6 million),<sup>23</sup> and valued the marketing campaign at 520 mil-

---

one-team-s-fight-against-piracy-news-details/, archived at <http://perma.law.harvard.edu/0u5Kp7Fico1> (last updated on Sep. 12, 2011).

<sup>17</sup> Bindu Suresh Rai, *SRK's 'Ra.One' Falls Victim to Piracy Again: Superstar's Sci-Fi Flick's Music Leaked Online*, EMIRATES 24/7 (Sept. 13, 2011), <http://www.emirates247.com/entertainment/films-music/srk-s-ra-one-falls-victim-to-piracy-again-2011-09-13-1.418085>, archived at <http://perma.law.harvard.edu/0TWib8ZN1f1>.

<sup>18</sup> BOC Editorial, *Shah Rukh Khan's RA.One Succumbs to Piracy*, BUS. OF CINEMA (Oct. 27, 2011), <http://businessofcinema.com/bollywood-news/shah-rukh-khans-raone-succumbs-to-piracy/34337>, archived at <http://perma.law.harvard.edu/0QBdr7RThGV>.

<sup>19</sup> Anupama Chopra, *The Ra.One Marketing Mania*, *India Ink*, N.Y. TIMES (Nov. 1, 2011, 3:54 AM), <http://india.blogs.nytimes.com/2011/11/01/the-ra-one-marketing-mania/>, archived at <http://perma.law.harvard.edu/09khPmywHE6>.

<sup>20</sup> BollySpice Editors, *Ra.One Breaks all Box Office Records: Weekend Collections of Rs. 170 Crore Worldwide*, BOLLY SPICE (Oct. 31, 2011), <http://bollyspice.com/31435/ra-one-breaks-all-box-office-records-weekend-collections-of-rs-170-crore-worldwide>, archived at <http://perma.law.harvard.edu/0nKNNgg9GDU>.

<sup>21</sup> See *About 40-45% of Our Revenue Comes from Box Office: Eros International*, ECON. TIMES (Dec. 8, 2011, 4:31 PM IST), [http://articles.economictimes.indiatimes.com/2011-12-08/news/30490618\\_1\\_three-films-eros-international-cinema](http://articles.economictimes.indiatimes.com/2011-12-08/news/30490618_1_three-films-eros-international-cinema), archived at <http://perma.law.harvard.edu/0gNN82hb1Us> [hereinafter *Our Revenue*].

<sup>22</sup> See Avijit Ghosh, *It Took Me 20 Years to Be an Overnight Success: Shah Rukh Khan*, TIMES OF INDIA (Nov. 6, 2011, 7:14 AM IST), [http://articles.timesofindia.indiatimes.com/2011-11-06/special-report/30366066\\_1\\_ke-liye-shah-rukh-khan-big-stars](http://articles.timesofindia.indiatimes.com/2011-11-06/special-report/30366066_1_ke-liye-shah-rukh-khan-big-stars), archived at <http://perma.law.harvard.edu/0ZWnibBEX6L>.

<sup>23</sup> Nandini Raghavendra, *Indian Cinema Must Evolve; Ra.One Not Urban Centric: Shabrukh Khan*, ECON. TIMES (Sept. 13, 2011, 5:47 AM IST), [http://articles.economictimes.indiatimes.com/2011-09-13/news/30149445\\_1\\_indian-cinema-raone-film](http://articles.economictimes.indiatimes.com/2011-09-13/news/30149445_1_indian-cinema-raone-film), archived at <http://perma.law.harvard.edu/07HxHzJo8wf>.

lion INR (\$9.6 million).<sup>24</sup> Either way, the film produced a substantial profit, grossing 2.4 billion INR (\$44.2 million), at least \$7 million more than its cost.<sup>25</sup>

*Ra.One* is exemplary of the apparent paradox in the Indian film industry: On the one hand, India suffers from some of the worst film piracy in the world. Accounting firm PricewaterhouseCoopers (PwC), for instance, writes that “India is among the top five countries in the world, in terms of piracy.”<sup>26</sup> The Motion Picture Association (MPA), an American film trade organization, similarly reports that India is “the fourth-largest downloader [of pirated films] behind the US, Great Britain and Canada” and that, “[r]elative to the number of broadband subscribers, India ha[s] the highest level of film piracy of any English-speaking country.”<sup>27</sup> Even India’s own government has conceded that “video piracy [is] quite rampant here.”<sup>28</sup>

On the other hand, India’s film industry is experiencing substantial success, with growth in recent years outpacing that of the overall economy. In 2011, for instance, India’s overall economy grew at an estimated annual rate of 6.8%,<sup>29</sup> while the film industry registered a growth rate of 9.4% over the same period.<sup>30</sup> Likewise, although India’s overall economic situation appears to be declining in the near-term,<sup>31</sup> with growth for 2012 estimated to be a disappointing 6.5%,<sup>32</sup> the film industry is expected to continue its robust growth. According to a recent report prepared by PwC and the Con-

<sup>24</sup> *Ra.One Gets Rs 52-Cr Promotional Push*, *supra* note 14.

<sup>25</sup> *Our Revenue*, *supra* note 21.

<sup>26</sup> PRICEWATERHOUSECOOPERS, INDIA ENTERTAINMENT AND MEDIA OUTLOOK 2011 68 (2011), *archived at* <http://perma.law.harvard.edu/0vojJzQs9Av>.

<sup>27</sup> *Online Piracy a Genuine Threat to the Indian Film & Television Industry*, MOTION PICTURE ASS’N (Dec. 15, 2009), [http://mpa-i.org/index.php/news/online\\_piracy\\_a\\_genuine\\_threat\\_to\\_the\\_indian\\_film\\_television\\_industry/%20http://copyright.gov.in/Documents/STUDY%20ON%20COPYRIGHT%20PIRACY%20IN%20INDIA.pdf](http://mpa-i.org/index.php/news/online_piracy_a_genuine_threat_to_the_indian_film_television_industry/%20http://copyright.gov.in/Documents/STUDY%20ON%20COPYRIGHT%20PIRACY%20IN%20INDIA.pdf), *archived at* <http://perma.law.harvard.edu/0g9EzWQXVvL>.

<sup>28</sup> GOV’T OF INDIA, MINISTRY OF HUMAN RES. DEV., STUDY ON COPYRIGHT PIRACY IN INDIA 14 (1999), *archived at* <http://perma.law.harvard.edu/0pH6D8GvCsA>.

<sup>29</sup> See Cent. Intel. Agency, *India*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html>, *archived at* <http://perma.law.harvard.edu/0SHwix9CXi5> (last updated Mar. 15, 2013).

<sup>30</sup> CONFED. OF INDIAN INDUS. & PRICEWATERHOUSECOOPERS, INDIA ENTERTAINMENT AND MEDIA OUTLOOK 2012, at 31 (2012), *archived at* <http://perma.law.harvard.edu/0N5Ru19Pt2w>.

<sup>31</sup> See, e.g., *IMF Lowers India’s Growth Forecast to 6.1% for 2012*, HINDUSTAN TIMES (July 16, 2012, 8:49 PM IST), <http://www.hindustantimes.com/business-news/WorldEconomy/IMF-lowers-India-s-growth-forecast-to-6-1-for-2012/Article1-890055.aspx>, *archived at* <http://perma.law.harvard.edu/0qKWtg8Fyrz>.

<sup>32</sup> Cent. Intel. Agency, *supra* note 29.

federation of Indian Industry (CII), “The Indian [film] industry is expected to grow from 95.8 billion INR [about \$1.8 billion] in 2011 to 153.6 billion INR [about \$2.8 billion] in 2016 showing a CAGR [compound annual growth rate] of 9.9% for the next five years.”<sup>33</sup>

Box office growth has been especially robust. The *Economic Times*, for instance, has noted that “[b]ox office revenues have nearly quadrupled in India since 2000. If 2010 was good, 2011 great, 2012 was a smashing year for the industry.”<sup>34</sup> And such growth is expected to continue. According to the PwC/CII report, the domestic box office is expected to “grow from the current size of 68.0 billion INR [\$1.25 billion] in 2011 to 112.0 billion INR [\$2.06 billion] in 2016,” while “[o]verseas collections are expected to grow from 8.5 billion INR [\$157 million] in 2011 to 13.8 billion INR [\$254 million] in 2016.”<sup>35</sup> At these rates, “[t]he Indian box office is among the fastest growing markets in the world next only to China among markets greater than 15 billion INR [\$276 million].”<sup>36</sup> “It is expected,” moreover, “that in the next few years, the Indian [box office] market will surpass the UK market [as well as that of Australia] and will be the fifth largest market in the world by 2016.”<sup>37</sup>

This massive growth in the face of so much piracy is especially surprising considering the Indian film industry is by no means in its incipency. Indians have been producing their own feature films for as long as Americans. Indeed, the first indigenous Indian feature film, *Raja Harishchandra*, actually antedates by two years D.W. Griffith’s *Birth of a Nation*,<sup>38</sup> which many consider the first modern American feature.<sup>39</sup> Moreover, the “Indian Film Industry has been in the forefront of total production since 1960 till

<sup>33</sup> CONFED. OF INDIAN INDUS. & PRICEWATERHOUSECOOPERS, *supra* note 30.

<sup>34</sup> Binoy Prabhakar, *Bollywood No Longer Talks of Piracy; But Ignoring Dangers of Online Can Be Costly*, *ECON. TIMES* (Feb. 3, 2013, 11:03 AM IST), [http://articles.economictimes.indiatimes.com/2013-02-03/news/36704530\\_1\\_piracy-box-office-alliance-against-copyright-theft](http://articles.economictimes.indiatimes.com/2013-02-03/news/36704530_1_piracy-box-office-alliance-against-copyright-theft) archived at <http://perma.law.harvard.edu/0S8xsLNh7Df>.

<sup>35</sup> CONFED. OF INDIAN INDUS. & PRICEWATERHOUSECOOPERS, *supra* note 30.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See *Raja Harishchandra* (1913), *N.Y. TIMES*, <http://movies.nytimes.com/movie/249829/Raja-Harishchandra/overview>, archived at <http://perma.law.harvard.edu/0oHQFvVWaPp> (last visited Mar. 23, 2013).

<sup>39</sup> See, e.g., Richard Brody, *The Worst Thing About “Birth of a Nation” Is How Good It Is*, *NEW YORKER* (Feb. 6, 2013) <http://www.newyorker.com/online/blogs/movies/2013/02/birth-of-a-nation-revisited.html>, archived at <http://perma.law.harvard.edu/08YYcAd68C1> (describing *Birth of a Nation* as “the founding work of cinematic realism”); *Feb 8, 1915: Birth of a Nation Opens, This Day in History*, *HISTORY*, <http://www.history.com/this-day-in-history/birth-of-a-nation-opens>, archived at <http://>

date,”<sup>40</sup> producing in recent years double the number of Hollywood films.<sup>41</sup> As a result, the Indian film industry’s rapid growth cannot be attributed to a temporary spike in demand in response to a new product,<sup>42</sup> but something more fundamental.

Notwithstanding this rapid growth amid so much piracy, some in the film industry do not believe that Bollywood and the regional cinemas<sup>43</sup> have reached their full potential. For instance, Kulmeet Makkar, the Chief Executive Officer of the Film & Television Producers Guild of India, bemoans the fact that, while India produces far more films per year than Hollywood, “two large Hollywood blockbusters in a year will deliver box office numbers which are more than the numbers of the entire Indian film industry.”<sup>44</sup> Though he recognizes that India will achieve robust growth in the years to come, he argues that such growth is insufficient. Considering the size of India, its young population, and its strong middle class, he believes the film industry should generate \$20 billion per year instead of \$2 billion.<sup>45</sup>

Irrespective of how much money the industry “should” generate, the experience of *Ra.One* demonstrates that piracy, despite its pervasiveness, does not pose a substantial impediment to growth or innovation. A creative team like Sinha and Khan can experiment with unexplored genres, employ state-of-the-art special effects, and risk record-breaking sums of money without serious concern that piracy will prevent them from recouping their investment. Though pirates will certainly copy and post such a film, the movie can still be a financial success. This is not the case for other film industries

---

perma.law.harvard.edu/0FAqXD83DeF (last visited Mar. 23, 2013) (noting that *Birth of a Nation* was “America’s first feature-length motion picture”).

<sup>40</sup> See M.M.K. Sardana, *Bollywood on the Wings of Technology and Its Contribution to Economy: Hundredth Year of Indian Cinema*, INST. FOR STUDIES IN INDUST. DEV., Mar. 2012, at 7, archived at <http://perma.law.harvard.edu/0ky4j6cJaLU>.

<sup>41</sup> *Id.* at 7–8.

<sup>42</sup> Cf. *Lights, Camera, Africa*, ECONOMIST, Dec. 16, 2010, archived at <http://perma.law.harvard.edu/0JVSdXxcJCe> (noting that, while Nigeria’s film industry has experienced very rapid growth, it is barely twenty years old).

<sup>43</sup> It is a common misconception that the term Bollywood refers to the entire Indian film industry. Bollywood, the Mumbai-based Hindi film industry, is just one of a host of vibrant cinemas in India. A number of states, most notably Tamil Nadu, Andhra Pradesh, Karnataka, and Kerala, have their own regional cinemas. See generally ONE INDIA ENTERTAINMENT, <http://entertainment.oneindia.in>, archived at <http://perma.law.harvard.edu/0Hb6Qn2gtua> (last visited Mar. 25, 2013) (providing different sections for Bollywood, Hollywood, Tamil, Telugu, Malayalam, and Kan-nada cinemas).

<sup>44</sup> Interview with Kulmeet Makkar, Chief Exec. Officer, The Film & Television Producers Guild of India, in Mumbai, India (Jan. 22, 2013).

<sup>45</sup> *Id.*

plagued by piracy. In Nigeria, for instance, piracy has so devastatingly interfered with the ability of producers to generate revenues that filmmakers are frequently unable to make the high-quality and innovative productions they may envision.<sup>46</sup> Indeed, piracy has become such a problem that producers “have taken to cutting production costs . . . [and] compromis[ing] production values” in order to avoid losing money.<sup>47</sup>

This paper explores why “[n]obody is talking about piracy anymore” in India,<sup>48</sup> and why the massive amount of piracy in India has not frustrated the ability of filmmakers to innovate and make the films that they want to produce. PARTS II and III examine the degree to which the law may be responsible. The former assesses the extent to which India’s copyright regime as written provides not only protection to films, but also remedies in the event of infringement. Those in the industry generally agree that Indian law provides both the requisite statutory protection and ample remedies. In order for most laws to be effective, however, they must be enforced. PART III, therefore, assesses the degree to which rights holders, police officers, and the courts have been able or willing to utilize the law in order to reduce or ameliorate piracy. According to those in the industry, copyright enforcement in India suffers from an array of serious problems, including an inefficient judiciary that frequently refuses to follow black letter law; a vast array of unconnected enforcement officials who are often unwilling to respond to infringement claims; and an international lack of cooperation that makes it difficult to prevent the importation of pirated films. For many in the industry, these problems are so severe as to render the robust copyright law practically nugatory.

As a result, filmmakers have had to pursue alternative strategies to prevent piracy from sapping their revenues. Some of these strategies seek to work within the legal and enforcement machinery, while others endeavor to reduce piracy without relying upon state assistance. PART IV explores the former, specifically examining the strategies that filmmakers have employed to improve the enforcement of the copyright regime. These measures include the hiring of private enforcement agencies to monitor illegal activities and liaise with the police, as well as the development of innovative legal orders that do not suffer from the problems of traditional injunctions. While some of these efforts may diminish piracy over the long term, their present success appears too limited to explain the resilience of the industry. PART V

---

<sup>46</sup> See Uzoma Esonwanne, *Interviews with Amaka Igwe, Tunde Kelani, and Kenneth Nnebue*, RESEARCH AFR. LITS., Winter 2008, at 24, 38, archived at <http://perma.law.harvard.edu/0vG5pXQtUxZ> (quoting Nigerian filmmaker Amaka Igwe).

<sup>47</sup> *Id.*

<sup>48</sup> Prabhakar, *supra* note 34.

examines the non-legal strategies that filmmakers have pursued. These measures include increasing distribution, interfering with the piracy supply chain, and leveraging the star power of actors to dissuade consumers from purchasing or downloading pirated works. Though statistically significant empirical data is unavailable, these strategies offer a plausible explanation for the continued resilience of the film industry because their effectiveness, unlike that of the measures explored in PART IV, is consistent with the widespread piracy that exists in India.

Nonetheless, it is always possible that the reason for the Indian film industry's resilience has nothing to do with any of these efforts. There may instead be something unique about Indian entertainment culture that makes pirated versions of films less attractive to consumers. PART VI explores this possibility. It examines whether, as some in the industry have suggested, going to the movie theater is such a fundamental aspect of Indian cinematic culture that consumers will continue to buy tickets, even if that means foregoing the chance to purchase or download a less expensive version of the same content.

Ultimately, it is likely not possible to pin down one reason for the resilience of the Indian film industry. Nonetheless, by exploring various explanations, my hope is to provide insights into how those in film and entertainment industries of other countries can diminish the effects of piracy on their capacity to grow and innovate.

## II. INDIA'S ROBUST COPYRIGHT REGIME

The first possible explanation for the resilience of India's film industry is the strength of the country's copyright regime. Indeed, in the opinion of scholars, practitioners, and those involved in the industry, India provides not only ample copyright protection, but also a vast array of remedies to deter, ameliorate, and prevent piracy.<sup>49</sup>

---

<sup>49</sup> See, e.g., Interview with Zaheer Khan, Chairman, Enforcers of Intellectual Prop. Rights (India) Ltd., in Mumbai, India (Jan. 15, 2013) (noting that India's copyright regime is sufficiently robust to allow him and his company to pursue those who infringe his clients' works); Nirmal John, *FORTUNE*, Oct. 2012, at 123 (on file with author) (noting that "Ameet Datta, a lawyer specialising in intellectual property at Delhi-based law firm Saikirshna & Associates, says the copyright protection law is quite strong in India, as is the punishment for those breaking the law"); ALKA CHAWLA, *COPYRIGHT AND RELATED RIGHTS: NATIONAL & INTERNATIONAL PERSPECTIVES* 178 (2007) (describing India's Copyright Act as "very progressive").

## A. Ample Protection

The current governing statute in India is the Copyright Act, 1957 (“Copyright Act” or “Act”), which has been amended on six instances over the last five decades, most recently in 2012.<sup>50</sup> As amended and interpreted, the Copyright Act provides protection to films, in terms of both coverage and rights, that is largely comparable to that afforded by many highly developed countries. With respect to coverage, Section 13 of the Act, like the U.S. Copyright Act,<sup>51</sup> provides explicitly that “copyright shall subsist throughout India . . . in cinematograph films.”<sup>52</sup> Though other provisions of the Act restrict such protection to films produced in Berne member countries or by entities from such countries,<sup>53</sup> this limitation is largely consistent with those contained in the U.S. Copyright Act<sup>54</sup> and the copyright provisions of other developed states.<sup>55</sup> The Copyright Act does, however, diverge from other statutes in its definitional provision. Section 2(f) of the Act provides that “cinematograph film” means “any work of visual recording [including] a sound recording accompanying such visual recording” and that “‘cinematograph’ shall be construed as including any work produced by any process analogous to cinematography including video films.”<sup>56</sup> The U.S. Copyright Act, by contrast, defines “motion pictures” as “audiovisual works consisting of a series of related images, which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.”<sup>57</sup> This difference does not seem to be overly significant, however, since

---

<sup>50</sup> CHAWLA, *supra* note 49, at 29-33; *Full Text: The Copyright (Amendment) Bill, 2012*, CNN IBN (May 22, 2012, 5:52pm IST), <http://ibnlive.in.com/news/full-text-the-copyright-amendment-bill-2012/260333-53.html>, *archived at* <http://perma.law.harvard.edu/04Y7mCyQfAy> [hereinafter *Full Text*] (providing the text to the recent amendment).

<sup>51</sup> See 17 U.S.C. § 102(a)(6).

<sup>52</sup> The Copyright Act, No. 14, Acts of Parliament, 1957 (India) *available with all subsequent amendments excluding the 2012 one in* V K AHUJA, LAW OF COPYRIGHT AND NEIGHBORING RIGHTS: NATIONAL AND INTERNATIONAL PERSPECTIVES app. 1 at 345 (2007) [hereinafter *Copyright Act, 1957*].

<sup>53</sup> See CHAWLA, *supra* note 49, at 70.

<sup>54</sup> See 17 U.S.C. § 104(b) (2012).

<sup>55</sup> See, e.g., Canada Copyright Act, R.S.C. 1985, c. C-42, § 5, *archived at* <http://perma.law.harvard.edu/0kHh6APQx3z>.

<sup>56</sup> See The Copyright (Amendment) Act, 2012, No. 27, Acts of Parliament, 2012 (India), *quoted in Full Text, supra* note 50 [hereinafter *Copyright (Amendment) Act, 2012*]; *Copyright Act, 1957, supra* note 52.

<sup>57</sup> 17 U.S.C. § 101 (2012).



many countries define films dissimilarly in their copyright statutes.<sup>58</sup> Indeed, a number of states do not even provide a definition of what constitutes a “cinematograph.” Australia, for instance, simply defines “cinematograph film” as “the complete and final version of a cinematograph film in which copyright subsists.”<sup>59</sup> The Indian judiciary, moreover, has been willing to define “cinematograph” in other contexts in accordance with common understandings of what constitutes a film,<sup>60</sup> and neither academics nor those involved in the industry have indicated that Section 2(f) has had any significant impact on the rights of filmmakers.

In terms of rights, Section 14(d) of the Copyright Act provides the holder of a film copyright with the exclusive right:

- (i) to make a copy of the film, including—
  - (A) a photograph of any image forming part thereof; or
  - (B) storing of it in any medium by electronic or other means;
- (ii) to sell or give on commercial rental or offer for sale such rental, any copy of the film; [and]
- (iii) to communicate the film to the public [including by means of satellite or cable].<sup>61</sup>

With one possible exception, these rights largely parallel those accorded copyright holders in the U.S.<sup>62</sup> and the UK.<sup>63</sup> As in most countries,<sup>64</sup> moreover, copyright protection is automatic, though India does provide a proce-

<sup>58</sup> See, e.g., Canada Copyright Act, R.S.C. 1985, c. C-43, § 2, *archived at* <http://perma.law.harvard.edu/0pVhWe5Cz5> (defining “cinematographic work” as “any work expressed by any process analogous to cinematography, whether or not accompanied by a soundtrack”); Copyright, Designs and Patents Act, 1988, c. 48, § 5B(1) (U.K.), *archived at* <http://perma.law.harvard.edu/0i5GjGvFgYn> (defining “film” as a “recording on any medium from which a moving image may by any means be produced”).

<sup>59</sup> *Copyright Act 1968* s 189 (Austl.), *archived at* <http://perma.law.harvard.edu/0aNuFvK9xZA>.

<sup>60</sup> See CHAWLA, *supra* note 49, at 69–70 n.140.

<sup>61</sup> Copyright Act, 1957, *supra* note 52; Copyright (Amendment) Act, 2012, *supra* note 56.

<sup>62</sup> See 17 U.S.C. § 106 (2012).

<sup>63</sup> See Copyright, Designs and Patents Act, 1988, c. 48, § 16 (U.K.), *archived at* <http://perma.law.harvard.edu/0gasbQUGCAN>. In terms of the exception, Section 14 fails to provide explicitly a right to adaptation, which both the UK and U.S. protect. See *id.* at § 16(1)(e); 17 U.S.C. § 106(2) (2012). Nonetheless, the Indian judiciary’s receptiveness to actions by American studios claiming that Indian films are illegal adaptations of their works, as discussed pages 163–65 *infra*, indicates that the courts largely have read this protection into the statute. Moreover, since piracy does not consist in the production of adaptations or derivative works, this omission is largely irrelevant to the degree to which India protects piracy.

dure whereby rights holders can voluntarily register their works.<sup>65</sup> In the event of litigation, such registration “serves as *prima facie* evidence of . . . ownership.”<sup>66</sup> It is not, however, statutorily required in order to obtain protection.<sup>67</sup>

Despite providing coverage and rights comparable to those afforded by many developed nations, the Copyright Act does contain one exception that could, in theory, make it difficult for many Indian filmmakers to obtain protection. Somewhat similar to the UK Copyright, Designs, and Patents Act,<sup>68</sup> Section 13(3)(a) of the Copyright Act provides that “[c]opyright does not subsist in . . . any cinematograph film, if a substantial part of the film is an infringement of the copyright in any other work.”<sup>69</sup> This exception could present a problem for many in the Indian film industry since many Indian producers have been known to “borrow” concepts from Hollywood, “rang[ing] from melodies for background scores to entire plot summaries and even translated dialogues.”<sup>70</sup> Until the last decade, as the Indian film industry remained small and isolated, few outside India took cognizance of this “borrowing.”<sup>71</sup> But as Bollywood and the regional cinemas have become more global and profitable in recent years, Hollywood producers have not only gained awareness of the infringing activity, but also “started going

---

<sup>64</sup> See, e.g., *Copyright*, CANADIAN INTELLECTUAL PROP. OFFICE, [http://www.opic.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h\\_wr00003.html](http://www.opic.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr00003.html), archived at <http://perma.law.harvard.edu/081mAHyARop> (last visited Mar. 24, 2013) (“Although copyright in a work exists automatically when an original work is created, a certificate of registration is evidence that your creation is protected by copyright and that you, the person registered, are the owner. It can be used in court as evidence of ownership”).

<sup>65</sup> See NISHITH DESAI ASSOCS., INDIAN FILM INDUSTRY: TACKLING LITIGATIONS 7 (2012), archived at <http://perma.law.harvard.edu/0RtAfw7exHj>.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See Copyright, Designs and Patents Act, 1988, c. 48, § 5B(4) (U.K.), archived at <http://perma.law.harvard.edu/09kmHRL6W5s> (providing that “Copyright does not subsist in a film which is, or to the extent that it is, a copy taken from a previous film”).

<sup>69</sup> Copyright Act, 1957, *supra* note 52.

<sup>70</sup> Suman Tatpudy, *Bollywood & Hollywood: Opportunity for Collaboration Through Reform of Policies Governing Copyright and Plagiarism*, MICH. TELECOMM. & TECH. L. REV. BLOG (Mar. 20, 2012, 2:54 PM), <http://www.mttlrblog.org/2012/03/20/bollywood-hollywood-opportunity-for-collaboration-through-reform-of-policies-governing-copyright-and-plagiarism/>, archived at <http://perma.law.harvard.edu/0ur5WPwodcD>.

<sup>71</sup> Elizabeth Flock, *Who Will Be the Copycat*, FORBES INDIA, Jul. 31, 2009, archived at <http://perma.law.harvard.edu/0mKvgWd7GCQ>.

after the copycats.”<sup>72</sup> In the summer of 2009, for instance, 20th Century Fox sought to enjoin the release of *Banda Yeb Bindaas Hai*, which the American studio claimed was “a remake of their Oscar Award-winning film *My Cousin Vinny*.”<sup>73</sup> Likewise, in 2007, the producers of *Hitch* sued Indian production house K Sera Sera claiming that the latter’s *Partner* was a complete Hindi copy of the Will Smith blockbuster.<sup>74</sup> There were even allegations that Shah Rukh Khan and Anubhav Sinha engaged in plagiarism when they produced *Ra.One*.<sup>75</sup>

Considering that the Indian judiciary has been receptive to these suits,<sup>76</sup> it seems possible that claims of this sort could threaten the protection the Copyright Act grants to Indian filmmakers by providing pirates with an affirmative defense, in either civil or criminal litigation. Nonetheless, those in the industry with whom I spoke neither indicated that this had ever occurred nor expressed any concern about such a possibility. And journalists and scholars who discuss piracy have largely ignored the issue. As such, it does not appear that the Section 13(3)(a) exception diminishes in any serious way the coverage and rights that the rest of the Copyright Act affords.

### B. *A Host of Remedies*

In addition to offering protection similar to that afforded by many developed states, the Copyright Act provides filmmakers with a vast array of civil, criminal, and administrative remedies in order to deter, remedy, and prevent infringement. Civilly, Section 55(1) of the Act provides that, in the event of infringement, “the owner of the copyright shall . . . be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right.”<sup>77</sup> Though the Act does not provide greater specificity than this, background principles of Indian law provide copyright holders with the ability to pursue compen-

---

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *SRK’s Ra.One Faces Plagiarism Lawsuit*, HINDUSTAN TIMES (Oct. 21, 2011, 1:30 AM IST), <http://www.hindustantimes.com/Entertainment/Bollywood/SRK-s-RA-One-faces-plagiarism-lawsuit/Article1-759724.aspx>, archived at <http://perma.law.harvard.edu/OTr3ExnFb7S>.

<sup>76</sup> See, e.g., Flock, *supra* note 71 (noting that, in response to 20th Century Fox’s petition, “the Bombay High Court stayed the release of BR Films’ *Banda Yeb Bindaas Hai*”).

<sup>77</sup> Copyright Act, 1957, *supra* note 52, at 299.

satory damages, punitive damages, an account of profits, and four distinct kinds of equitable orders in the event of infringement.

With respect to damages, University of Delhi Professor V K Ahuja has noted that, because “[c]opyright infringement is a tort” under Indian law, “the overriding principle . . . is that damages should be compensatory.”<sup>78</sup> As such, courts generally look to “the fair fee or royalty which the defendant would have paid had he got the licence from the copyright owner” and sometimes also consider the “diminution of the sales of [the] copyright owner’s work, or the loss of profit which he might otherwise have made” as well as the reputational cost of the infringement.<sup>79</sup>

In some instances, there may not be enough evidence to make such calculations.<sup>80</sup> And even when there is sufficient documentation, the resulting figure may be too low to do justice in the case of a repeat offender.<sup>81</sup> Indian law, therefore, provides plaintiffs with other measures. First, as an alternative to damages, “[a] plaintiff is entitled to opt . . . for an account of profits.”<sup>82</sup> In such an instance, the court will require the defendant to pay the plaintiff “the profits made by him by infringing the plaintiff’s copyright.”<sup>83</sup> Second, although “there is no provision in the Copyright Act for the award of additional damages in special circumstances, such as flagrancy of the infringement,” the tortious character of copyright infringement means that courts may award punitive and exemplary damages in order to send a message to pirates that violation of the law “may spell financial disaster.”<sup>84</sup>

Although Indian law thus provides a wide range of damages, such measures are frequently not the most efficient means of resolving infringement. Rather, since “[a] copyright owner normally wants speedy and effective relief to prevent further infringements of his copyright and damage to his business,” injunctions are “the most important remedy against copyright

---

<sup>78</sup> V K AHUJA, LAW OF COPYRIGHT AND NEIGHBOURING RIGHTS: NATIONAL AND INTERNATIONAL PERSPECTIVES 224 (2007).

<sup>79</sup> *Id.* at 224–25.

<sup>80</sup> *See, e.g.*, CHAWLA, *supra* note 49, at 239 (“A difficulty often encountered in obtaining a satisfactory judgement [sic] in damages is the production of evidence as to the extent of sales which have taken place and thus the extent of damage which has been caused to the plaintiff’s copyright”).

<sup>81</sup> *See, e.g., id.* at 240 (quoting a case in which the Delhi High Court noted that compensatory damages were insufficient on their own to “deter a wrongdoer and the like minded from indulging in such unlawful activities”).

<sup>82</sup> AHUJA, *supra* note 78, at 229.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 227–28.

infringement.”<sup>85</sup> The most important of these is the interim or interlocutory injunction. Such orders enjoin the defendant from engaging in the infringing activity “during the period before a full trial of an infringement action takes place, thus preventing an irreparable damage from occurring to the plaintiff’s rights.”<sup>86</sup> Under Indian law, litigants can typically obtain interim injunctions within 24 or 48 hours “if a *prima facie* case, urgency, balance of convenience and comparative hardship can be established in favor of the plaintiff.”<sup>87</sup> Though not as useful, Indian law also provides for permanent injunctions for the term of the copyright “[i]f the plaintiff succeeds at the trial” and can show “that there is a probability of damage, that the defendant is likely to continue his infringement, and that this is not simply trivial.”<sup>88</sup>

In addition to the two traditional injunctions, Indian law allows plaintiffs to seek two other orders that aim to increase the ability of the plaintiff both to preserve evidence and recover damages. The Mareva injunction serves predominantly the latter goal. Often issued *ex parte*, a Mareva injunction “restrains the defendant from disposing of assets which may be required to satisfy the plaintiff’s claim or removing them from the jurisdiction of the court.”<sup>89</sup> In doing so, the order seeks to ensure that a rights holder will not win at trial only to find the defendant completely judgment proof.<sup>90</sup> The Anton Piller Order, meanwhile, allows a plaintiff and his attorney to engage in an “inspection of premises on which it is believed that some activity which infringes the copyright of the plaintiff is being carried on.”<sup>91</sup> While the subject of the order may refuse to allow the rights holder and his attorney to enter, she will face contempt of court as a result.<sup>92</sup> The goal of this order is to allow the copyright holder to discover and preserve not only evidence of infringement that will be useful at trial, but also information about “the source of supply of pirated works,” so that the plaintiff can track down who is ultimately responsible.<sup>93</sup> Because such an order constitutes a rather extreme invasion of a defendant’s privacy and is furnished *ex parte*, a court will only issue it if the plaintiff can demonstrate “that he has an ex-

---

<sup>85</sup> *Id.* at 213.

<sup>86</sup> CHAWLA, *supra* note 49, at 236.

<sup>87</sup> NISHITH DESAI ASSOCS., *supra* note 65, at 19.

<sup>88</sup> AHUJA, *supra* note 78, at 222.

<sup>89</sup> CHAWLA, *supra* note 49, at 235.

<sup>90</sup> See AHUJA, *supra* note 78, at 215 (noting that the purpose of the Mareva injunction is to preserve assets to “satisfy the plaintiff’s claim”).

<sup>91</sup> CHAWLA, *supra* note 49, at 234.

<sup>92</sup> AHUJA, *supra* note 78, at 223.

<sup>93</sup> CHAWLA, *supra* note 49, at 235.

tremely strong prima facie case,” that he has or will suffer “very serious and irreparable damage if an order is not made,” that the defendant has incriminating documents, and that “there is a real possibility of [such documents] being destroyed.”<sup>94</sup>

In addition to this bevy of civil remedies, the Copyright Act also provides rights holders with a jurisdictional advantage. As in other common law countries,<sup>95</sup> “choice of jurisdiction” under India’s normal rules of civil procedure is “primarily . . . governed by the convenience of the defendant.”<sup>96</sup> Section 62 of the Act, however, provides that rights holders may bring civil copyright suits in any court having jurisdiction over the territory in which one plaintiff “resides or carries on business.”<sup>97</sup> As scholars and courts have observed, this provision is designed to “expose the transgressor / pirate with inconvenience rather than compelling the sufferer to chase after the former.”<sup>98</sup>

Complementing this robust array of civil measures is a criminal regime that not only punishes infringers, but also makes it easier for rights holders and enforcement officials to locate, prosecute, and imprison pirates. Section 63 is the primary criminal provision of the Copyright Act and provides that anyone “who knowingly infringes or abets the infringement of” copyright “shall be punishable with imprisonment for a term” of between six months and three years and a fine of up to 200,000 INR (\$3684).<sup>99</sup> Section 63A further provides that, in the case of a repeat offender, the minimum term of imprisonment must be one year, and the fine no less than 100,000 INR (\$1842).<sup>100</sup> Though these sentences are potentially lower than some provided for under U.S. law,<sup>101</sup> the Copyright Act contains other provisions that arguably make it substantially easier to find and prosecute offenders. Section 64, for instance, provides that “[a]ny police officer, not below the rank of a sub-inspector, may, if he is satisfied that an offence under section

---

<sup>94</sup> AHUJA, *supra* note 78, at 224.

<sup>95</sup> *See, e.g.*, Int’l Shoe Co. v. Office of Unemp’t Comp. & Placement, 326 U.S. 310, 316 (1945) (“[I]n order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”) (internal quotation marks omitted).

<sup>96</sup> CHAWLA, *supra* note 49, at 234.

<sup>97</sup> Copyright Act, 1957, *supra* note 52.

<sup>98</sup> *See, e.g.*, CHAWLA, *supra* note 49, at 234.

<sup>99</sup> Copyright Act, 1957, *supra* note 52.

<sup>100</sup> *Id.*

<sup>101</sup> *See* 18 U.S.C. § 2319 (2012) (providing that infringers, depending on their actions, may be imprisoned for up to ten years).

63 . . . has been, is being, or is likely to be, committed, seize without warrant” all infringing copies as well as all materials used to make such copies.<sup>102</sup> Section 65, meanwhile, provides that anyone who knowingly possesses materials “for the purpose of making infringing copies” may be punished with “imprisonment which may extend to two years,” even if the person is not found with any infringing works.<sup>103</sup>

In addition to these provisions, various states within India have enacted statutes that permit “preventive detentions” of copyright infringers. For instance, Maharashtra, the state of which Mumbai is a part, has a statute that “allows the police to place offenders or potential offenders in detention for as long as 3 months without bail, and up to a maximum of 12 months.”<sup>104</sup> Other states have similarly provided that pirates may be charged under their “Goonda Acts,” harsh laws designed to deter and punish drug dealers and members of organized crime.<sup>105</sup> Such laws generally provide for preventive detentions of up to a year,<sup>106</sup> and in some cases, permit police to shoot those covered on site.<sup>107</sup>

Finally, unlike in the United States where prosecutorial discretion reigns supreme,<sup>108</sup> in India “[t]he owner of [a] copyright can take criminal proceedings against [an] infringer.”<sup>109</sup> Though such rights holders do not have the capacity to “charge” defendants, they are entitled to file a First Information Report.<sup>110</sup> Once such a report is filed, the police are required “to report the case to a magistrate, investigate the crime, and proceed with other police work, such as making arrests and preparing the case for prosecu-

<sup>102</sup> Copyright Act, 1957, *supra* note 52.

<sup>103</sup> *Id.*

<sup>104</sup> NISHITH DESAI ASSOCS., *supra* note 65, at 20.

<sup>105</sup> *Id.*

<sup>106</sup> See Jaideep Shenoy, *It's Not Easy to Invoke Goondas Act, Say Cops*, TIMES OF INDIA (Aug. 3, 2012, 12:02 PM IST) [http://articles.timesofindia.indiatimes.com/2012-08-03/mangalore/33019310\\_1\\_goondas-act-immoral-traffic-offenders-habitual-offenders](http://articles.timesofindia.indiatimes.com/2012-08-03/mangalore/33019310_1_goondas-act-immoral-traffic-offenders-habitual-offenders), *archived at* <http://perma.law.harvard.edu/0tVB5J7kQ1Q> (noting “that the Goondas Act prescribes a one-year preventive detention with no bail”).

<sup>107</sup> See *Kerala Goonda Act Minus Shoot-at-Sight Clause*, FINANCIAL EXPRESS (June 29, 2004, 10:40 PM IST), <http://www.financialexpress.com/news/kerala-goonda-act-minus-shootatsight-clause/109024/0>, *archived at* <http://perma.law.harvard.edu/0sGiXZjpwB> (noting that most Goonda Acts permit the police to shoot on sight).

<sup>108</sup> See, e.g., William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1337 (1993) (conceding that American “prosecutors have tremendous discretion”).

<sup>109</sup> AHUJA, *supra* note 78, at 239.

<sup>110</sup> See Interview with Uday Singh, Managing Director, Motion Picture Ass’n, in Mumbai, India (Jan. 9, 2013).

tion”<sup>111</sup> Though the police are not absolutely required to file charges, if they decide “to close a case, they must give their reasons to the court and inform the complainant, who can challenge the closure before the court.”<sup>112</sup>

Though the Copyright Act thus provides rights holders with myriad tools to prevent, punish, and recover funds lost due to domestic piracy, these measures arguably do little to impede the importation of pirated goods from abroad, which, as discussed in PART III.C, *infra*, has been substantial over the past few years. To address this concern, the Act provides an administrative means by which rights holders may petition officials to halt the importation of infringing goods. Section 53 of the Act provides that a copyright holder may alert the Commissioner of Customs that infringing copies of her goods are expected to arrive in India at a given place and time and request that the Commissioner disallow the importation of such good for up to one year.<sup>113</sup> If the Commissioner is satisfied with the sufficiency of the evidence proffered by the rights holder, he is directed to prevent the goods’ importation into the country.<sup>114</sup>

Lastly, through the Information Technology Act (“IT Act”), India provides rights holders with a means to handle the proliferation of pirated content over the Internet. Section 79 of the IT Act, as amended in 2008, provides that Internet service providers and other “intermediaries” will not be liable for infringing content hosted over their networks, unless, “upon receiving actual knowledge . . . that any information, data or communication link residing or connected to a computer resource controlled by the intermediary is being used to commit [an] unlawful act, the intermediary fails to expeditiously remove or disable access to the material on that resource.”<sup>115</sup> Though this provision is written as a limitation of liability, it functions to provide rights holders with a “notice and takedown” remedy similar to that prescribed by the U.S. Digital Millennium Copyright Act.<sup>116</sup> Under this procedure, a rights holder can alert an ISP or other intermediary that infringing material is available over its network. In doing so, the rights holder conscripts the intermediary to take down the infringing content

---

<sup>111</sup> IMMIGRATION AND REFUGEE BD. OF CAN., INDIA: FIRST INFORMATION REPORTS (FIRS), INCLUDING PROCEDURES AND TIME FRAMES FOLLOWED BY POLICE TO INFORM COMPLAINANTS THAT AN INVESTIGATION WILL NOT BE CONDUCTED (2011), *archived at* <http://perma.law.harvard.edu/0xbDA1cumC3>.

<sup>112</sup> *Id.*

<sup>113</sup> Copyright (Amendment) Act, 2012, *supra* note 56.

<sup>114</sup> *Id.*

<sup>115</sup> The Information Technology Act, 2008, *archived at* <http://perma.law.harvard.edu/0J1SoNoCdKD>; *see also* HARISH CHANDER, CYBER LAWS AND IT PROTECTION, 194–196 (2012) (providing Section 79 in its present form).

<sup>116</sup> *See* 17 U.S.C. § 512(c) (2012).



within 36 hours.<sup>117</sup> If the intermediary fails to take down the material, “it can be dragged to the court as a co-accused.”<sup>118</sup>

### C. *Concerns About the Regime*

As a result of such a vast array of remedies, many in the film industry believe that India’s copyright regime is quite robust. “Ameet Datta, a lawyer specialising in intellectual property at Delhi-based law firm Saikrishna & Associates,” for instance, “says the copyright protection law is quite strong in India, as is the punishment for those breaking the law.”<sup>119</sup> Some, however, have complained that, while the law provides strong overall protection, there are a handful of holes. A number of individuals have argued, for instance, that, unlike the United States and a number of developing countries, India lacks specific anti-camcording legislation.<sup>120</sup> Such legislation would make “it unlawful to use an audiovisual recording device . . . to make (or attempt to make) a copy, in whole or in part, of a motion picture while inside a theater, and . . . prohibit the unlawful onward distribution or transmission (e.g., wireless upload to the Internet) of the camcorded copy.”<sup>121</sup> Others, meanwhile, have noted that, while the IT Act provides a notice and takedown procedure, India lacks legislation prohibiting the circumvention of digital rights management (“DRM”) technologies.<sup>122</sup> Lastly, one individual with whom I spoke complained that India does not have a law governing the circumstances in which courts may block access to websites containing infringing content.<sup>123</sup>

By and large, these concerns seem largely unfounded. With respect to the anti-camcording legislation, it seems hard to understand why the absence of such a law presents any significant impediment to the prevention of

---

<sup>117</sup> See Alaya Legal, *India: Intermediaries Under The Information Technology (Amendment) Act 2008*, MONDAQ (Mar. 6, 2013), <http://www.mondaq.com/india/x/225328/Telecommunications+Mobile+Cable+Communications/Intermediaries+Under+The+Information+Technology+Amendment+Act+2008>, archived at <http://perma.law.harvard.edu/0msbjcoj7S2>.

<sup>118</sup> *Id.*

<sup>119</sup> John, *supra* note 49, at 123.

<sup>120</sup> See, e.g., Interview with Uday Singh, *supra* note 110; Interview with Kulmeet Makkar, *supra* note 44; INT’L INTELLECTUAL PROP. ALLIANCE, INDIA: INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2012 SPECIAL 103 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 74, archived at <http://perma.law.harvard.edu/0nrGnV1Uqh2>.

<sup>121</sup> INT’L INTELLECTUAL PROP. ALLIANCE, *supra* note 120.

<sup>122</sup> Interview with Uday Singh, *supra* note 110.

<sup>123</sup> *Id.*

piracy. The proposed law merely prohibits what the Copyright Act already proscribes, namely the copying and distribution of a copyrighted film. It does not make theaters liable for recordings that happen on their premises or make it easier to demonstrate that someone has engaged in infringement. Though the proposed law also prohibits “attempted” recordings, there do not appear to be any cases in which suspected camcorders have avoided punishment by claiming that they were only attempting to copy a film. Moreover, the private enforcement agencies, who have sought to prevent and prosecute the camcording of films,<sup>124</sup> have not said that the absence of a specific anti-camcording law poses an impediment to their efforts. Rather, those with whom I spoke said that the regime as it exists is “very enforceable.”<sup>125</sup>

As for the absence of anti-DRM-circumvention legislation, it does not seem all that necessary considering that the vast majority of pirated films are the product of camcording rather than the circumvention of DRM.<sup>126</sup> Moreover, India has recently amended the Copyright Act in order to resolve this concern. The Copyright Act (Amendment), 2012 makes it an offense to “circumvent[ ] an effective technological measure applied for the purpose of protecting any of the rights conferred by this Act, with the intention of infringing such rights.”<sup>127</sup> Finally, access control legislation also does not appear necessary, since, as discussed in PART IV.B, *infra*, the courts have been quite willing to block access to a host of websites, much to the consternation of site owners, internet users, and ISPs.

The robustness of India’s law could thus present an explanation for the resiliency of India’s film industry. In addition to extending protection that is comparable to that of advanced nations, the Copyright Act, as amended and interpreted, provides a cornucopia of remedies, including compensatory and punitive damages, four types of injunctions, the ability to initiate criminal proceedings, preventive detention, a notice and takedown procedure, and administrative means of interdicting the importation of pirated goods. While some have advocated the addition of other provisions to protect rights holders further, the absence of these measures does not seem to provide a significant loophole for pirates to exploit.

---

<sup>124</sup> See *infra* PART IV.A.

<sup>125</sup> Interview with Zaheer Khan, *supra* note 49.

<sup>126</sup> Interview with Uday Singh, *supra* note 110.

<sup>127</sup> Copyright (Amendment) Act, 2012, *supra* note 56.

### III. LACK OF ENFORCEMENT

Notwithstanding this broad array of civil, criminal, and administrative remedies, the immense difficulty filmmakers face in enforcing their rights roundly rebuts the contention that the law is responsible for the continued growth of the Indian film industry. Indeed, the inefficiency and uncooperativeness of India's judiciary, the police's lack of sensitization to the problem of piracy, and the unwillingness of foreign states to lend assistance present such massive impediments to enforcement that many of the Copyright Act's provisions have become little more valuable to filmmakers than words on paper.<sup>128</sup>

#### A. *The Ineffectiveness of Judicial Proceedings*

As discussed in PART II.B *supra*, Indian law provides not only for compensatory damages, but also punitive damages and accounts of profits in cases of infringement. Nonetheless, to obtain such remedies, litigation must reach a final hearing.<sup>129</sup> Because of the inefficiencies plaguing India's judicial system, it can "take twelve to sixteen years to reach" this point.<sup>130</sup> For most individuals in the industry, such delays are not only extremely time consuming, but also prohibitively expensive.<sup>131</sup> Indeed, the inefficiencies are so pronounced that the individuals with whom I spoke did not even raise the possibility of pursuing civil damages; it was as though the law did not even provide such a remedy.<sup>132</sup>

Nor do individuals within the industry seriously consider using injunctions. When asked about these measures, Uday Singh of the MPA responded, "What purpose [sic] will you do with an injunction? What are you going to do with it?"<sup>133</sup> Elaborating, Singh noted that injunctions frequently do little to keep pirates off the streets: "You go there [to court], you fight the guy, and then what happens? Eventually . . . in three or four days'

<sup>128</sup> See, e.g., Interview with Uday Singh, *supra* note 110.

<sup>129</sup> See, e.g., AHUJA, *supra* note 78, at 211 (noting implicitly that the law provides interim relief because other forms of relief, like damages, require a full trial); NISHITH DESAI ASSOCS., *supra* note 65, at 20 (noting that because of how long it can take normal trials to proceed, "it becomes crucial for the aggrieved IP holder to obtain some temporary relief").

<sup>130</sup> NISHITH DESAI ASSOCS., *supra* note 65, at 20.

<sup>131</sup> See, e.g., Interview with Uday Singh, *supra* note 110; Interview with Kulmeet Makkar, *supra* note 44.

<sup>132</sup> Interview with Kulmeet Makkar, *supra* note 44; Interview with Zaheer Khan, *supra* note 49.

<sup>133</sup> Interview with Uday Singh, *supra* note 110.

time . . . he's back out there.”<sup>134</sup> The Mareva and Anton Piller orders, which as discussed in PART II.B, *supra*, are designed to help plaintiffs ensure the availability of assets and discover evidence, are no more useful. As Satya Banerji of the MPA explains, the “syndicates” responsible for recording and distributing pirated materials tend to be the same groups involved in “[n]arcotics or other more notorious” activities.<sup>135</sup> These groups generally recruit poor, middle school dropouts to conduct the camcording activities.<sup>136</sup> To pay these agents, the syndicates utilize Hawala,<sup>137</sup> an ancient South Asian remittance system that relies on “the extensive use of connections such as family relationships or regional affiliations” instead of “negotiable instruments.”<sup>138</sup> Because Hawala operators deliberately avoid keeping any records of their transactions, “the source and destination [of the funds are] almost untraceable.”<sup>139</sup> As a result, very little can be achieved by freezing assets or raiding the premises of an operative. Thus, for those in the industry, the Anton Piller and Mareva orders simply “don[']t work.”<sup>140</sup>

In light of these difficulties, filmmakers who have taken on piracy have relied predominantly on the criminal justice system. It too, though, has proved largely ineffective. First, although the criminal justice system is somewhat more expedient than its civil counterpart, pursuing criminal sanctions is still both costly and time-consuming. As Singh notes, these cases “drag[ ] on for 8, 10 years,” during which time the plaintiff needs to pay an enforcement agency to be present at all the hearings.<sup>141</sup> Moreover, as the trial proceeds, the alleged infringer remains at large. As Singh describes the situation: “If I take a street guy out here, a street vendor . . . I file an FIR against him, [and] I put him behind bars. [But] then he's out in three days because he gets bail, he moves two states away and starts the same thing again. . . . It's not an efficient way to get things done.”<sup>142</sup>

---

<sup>134</sup> *Id.*

<sup>135</sup> Email from Satya Banerji, Country Manager—Legal, Legislative, Content Protection & Operations, Motion Picture Ass'n (India), to author (Jan. 23, 2013, 6:48am EST) (on file with author).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Patrick M. Jost & Harjit Singh Sandhu, *The Hawala Alternative Remittance System and Its Role in Money Laundering*, INTERPOL (Jan. 2000), <https://secure.interpol.int/Public/FinancialCrime/MoneyLaundering/hawala/default.asp>, archived at <http://perma.law.harvard.edu/0RUUs8vYFnX>.

<sup>139</sup> Email from Satya Banerji, *supra* note 135.

<sup>140</sup> *Id.*

<sup>141</sup> Interview with Uday Singh, *supra* note 110.

<sup>142</sup> *Id.*

Even when trials make it all the way to judgment, rights holders find that many courts, especially those in rural areas, are frequently very unfamiliar with copyright law and concepts.<sup>143</sup> As such, they are often unreceptive to rights-holder claims when the copyright is not registered, even though the Copyright Act, as discussed in Part II.A *supra*, specifically does not require registration.<sup>144</sup> Those courts that are familiar with the copyright regime, moreover, generally “do not view criminal prosecution for infringement of copyright with due seriousness” and frequently stretch the law in order to dismiss cases against infringers.<sup>145</sup> University of Delhi Professor Alka Chawla, for instance, recounts how two of the most highly regarded courts in India completely misconstrued the law in order to dismiss cases against copyright criminal defendants. In the first such case, the defendants moved the Delhi High Court for dismissal of the charges against them on the ground that a related civil suit had settled.<sup>146</sup> It is black-letter Indian law that “[a] criminal complaint cannot be dismissed on the ground that the dispute is civil in character” and “[t]he pendency of a civil suit does not justify the stay of criminal proceedings.”<sup>147</sup> Nonetheless, the court agreed to quash the criminal complaint, stating that “no useful purpose would be served by permitting the above complaint and proceedings to continue.”<sup>148</sup> Likewise, in a proceeding before the Bombay High Court, the defendant “filed petition for quashing of the process on the ground that the copyright was not registered and a civil suit was pending.”<sup>149</sup> Although, as mentioned *supra*, the Copyright Act specifically provides that registration is not a condition precedent for protection, the court dismissed the complaint “since the copyright was not registered and the civil suit was pending and . . . there was delay in filing the criminal case.”<sup>150</sup>

The extent of the judiciary’s unwillingness to enforce the criminal provisions of the Copyright Act is perhaps best demonstrated by a comment made by Zaheer Khan, the chairman of an enforcement agency that aids rights holders in prosecuting infringement. Unlike Singh and others who lament the delays in the Indian criminal courts, Khan believes it is a good

---

<sup>143</sup> See, e.g., ERNST & YOUNG, THE EFFECTS OF COUNTERFEITING AND PIRACY ON INDIA’S ENTERTAINMENT INDUSTRY 9 (Mar. 2008) (on file with author).

<sup>144</sup> See NISHITH DESAI ASSOCS., *supra* note 65, at 21-22.

<sup>145</sup> CHAWLA, *supra* note 49, at 244.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 242.

<sup>148</sup> *Id.* at 244.

<sup>149</sup> *Id.* at 245.

<sup>150</sup> *Id.*

thing that criminal proceedings can take eight to ten years to prosecute.<sup>151</sup> Because the cases last so long, he says, criminal defendants have to deal with the nuisance of regularly coming into court.<sup>152</sup> And since this is probably the only punishment such individuals will ultimately receive, the greater the nuisance, the more onerous the punishment.<sup>153</sup>

### B. Lack of Police Cooperation

An even greater impediment to the enforcement of copyright law than the courts' inefficiencies and unwillingness to apply black letter law is the lack of effective police assistance. As lawyers from Nishith Desai Associates note, "some police cells are not well equipped nor properly trained to handle counterfeiting cases as they are not adequately educated on the laws governing IP."<sup>154</sup> As such, they have been known to require rights holders to produce proof of registration before taking action, even though the law unequivocally makes such registration optional.<sup>155</sup> In addition to not understanding the law, the police are sometimes unfamiliar with the technology used to make infringing copies. To demonstrate the depth of this lack of sensitization, Kulmeet Makkar of the Producers Guild tells the story of a police raid on a facility that used computers to store or make infringing copies.<sup>156</sup> During the course of the raid, he says, the police seized the computer monitors, but not the towers because they believed that the key information was stored inside the screens.<sup>157</sup>

Compounding the lack of proper training, police frequently suffer from a severe shortage of manpower. Shri D. Sivanandhan, a former police commissioner who now heads an enforcement agency, notes that the police are often short-staffed and tasked with a host of very pressing problems ranging from terrorism to organized crime.<sup>158</sup> As such, police generally view intellectual property matters as "luxury litigation"<sup>159</sup> and are frequently unwilling

---

<sup>151</sup> Interview with Zaheer Khan, *supra* note 49.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> NISHITH DESAI ASSOCS., *supra* note 65, at 21.

<sup>155</sup> *Id.* at 22.

<sup>156</sup> Interview with Kulmeet Makkar, *supra* note 44.

<sup>157</sup> *Id.*

<sup>158</sup> Interview with Shri D. Sivanandhan, Chairman, Securus First India Pvt. Ltd., in Mumbai, India (Jan. 22, 2013).

<sup>159</sup> John, *supra* note 49, at 124.

to take action even when presented with a duly filed First Information Report.<sup>160</sup>

If there were a centralized enforcement organization, akin to the U.S. Federal Bureau of Investigation, some of these problems could potentially be ameliorated through education campaigns sponsored by the film industry or by creating one special cell to handle intellectual property crimes. Under India's federal structure, however, "policing . . . is a state subject."<sup>161</sup> As such, there is no centralized enforcement force in India.<sup>162</sup> Rather, each state, and frequently each locality, has its own, completely independent police force.<sup>163</sup> While some, like Zaheer Khan, see this situation as conducive to intellectual property enforcement because piracy syndicates cannot bribe one top official,<sup>164</sup> many others find it quite frustrating because it is costly for rights holders to have to establish relationships with a host of different groups and individuals, many of whom speak different languages.<sup>165</sup>

### C. *Lack of International Cooperation*

Finally, the administrative scheme to prevent the importation of pirated goods does not appear to be particularly effective. According to Nirmal John, a journalist who has written about piracy, after most films are illegally recorded, "prints are sent to centres in Sri Lanka, Bangladesh and Pakistan, where they are copied on to cheap DVDs," after which they are shipped back to India for distribution.<sup>166</sup> Though Section 53 provides a means by which rights holders can block the importation of such goods into India, doing so requires knowledge of a shipment's place and time.<sup>167</sup> Rights holders are normally unlikely to have such information, but they sometimes do know information about specific distribution networks.<sup>168</sup> Nonetheless, they have found that the officials of the countries in which the foreign syndicates reside are frequently unwilling to take action. John notes, for instance, that one of the biggest producers and distributors of infringing copies in the 1990s and early 2000s was "Pakistan-based Sadaf Trading

---

<sup>160</sup> Interview with Pavan Duggal, Principal, Pavan Duggal Associates, in Mumbai, India (Jan. 14, 2013).

<sup>161</sup> Interview with Uday Singh, *supra* note 110.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Interview with Zaheer Khan, *supra* note 49.

<sup>165</sup> Interview with Uday Singh, *supra* note 110.

<sup>166</sup> John, *supra* note 49, at 119.

<sup>167</sup> Copyright (Amendment) Act, 2012, *supra* note 56, at 298.

<sup>168</sup> John, *supra* note 49, at 119–20.

Company,” the front used by organized crime syndicate D-Company.<sup>169</sup> While “Indian authorities had been aware of D-Company’s film operations in Pakistan since the 1990s[, they] were practically powerless to intervene” because Pakistan was unwilling to cooperate.<sup>170</sup> According to a Rand Report, it was “[o]nly after 2005, when U.S. Customs seized a large shipment of SADAF-branded counterfeit discs in Virginia, [that] Pakistani authorities, under threat of trade sanctions beg[an] raiding D-Company’s duplicating facilities in Karachi.”<sup>171</sup>

Thus, “[w]hile Indian laws certainly provide for adequate protection, the challenge really lies with its enforcement.”<sup>172</sup> In the face of the inefficiency of the court system, the difficulty of achieving police assistance, and international non-cooperation, many of the seemingly robust measures provided by the Copyright Act are mostly ineffectual in the fight against piracy. As a result, it is unlikely that India’s copyright regime can explain the film industry’s continued success. In response to the enforcement difficulties, however, filmmakers in India have begun to employ an array of alternative strategies. Some of these seek to overcome the problems with the enforcement regime, in the hope of still relying on state action to suppress the production and distribution of pirated films. These measures, and the degree to which they may explain the resilience of the film industry, are discussed in PART IV.

#### IV. ENFORCEMENT-BASED STRATEGIES

In order to resolve the problems with the enforcement regime, filmmakers within India have employed two major tactics. First, they have hired private enforcement agencies to fill the gaps left by police inaction and to liaise with officials in order to encourage them to take piracy seriously. Second, they have pursued novel legal orders that do not suffer from the pitfalls of the four traditional injunctions discussed in PARTS II and III, *supra*. While some of the enforcement agencies’ efforts, like police liaising, may produce benefits in the long-term, in the near-term these entities’ actions do not appear to have significantly reduced the incidence of piracy. Though some reports suggest that the novel legal orders have been more successful,

---

<sup>169</sup> *Id.*

<sup>170</sup> GREGORY F. TREVERTON ET AL., RAND CORP., FILM PIRACY, ORGANIZED CRIME, AND TERRORISM 92 (2009), *archived at* <http://perma.law.harvard.edu/0zPVEsSyY5J>.

<sup>171</sup> *Id.*

<sup>172</sup> NISHITH DESAI ASSOCS., *supra* note 65, at 21.



these contentions are disputed. Moreover, the recentness and scarcity of these orders belie their explanatory force.

#### A. *Enforcement Agencies*

In order to fill the holes left by police inaction, filmmakers have hired private enforcement agencies.<sup>173</sup> These agencies generally conduct the investigations that the police are either unwilling or unable to do and, after presenting enough evidence to officials, monitor prosecutions to their conclusions. Enforcers of Intellectual Property Rights (India), Ltd, is the largest such agency in the country, with seven offices throughout India and one in Bangladesh.<sup>174</sup> According to Zaheer Khan, the agency's Chairman, individual producers usually approach the firm shortly before the release of their films.<sup>175</sup> The agency then utilizes the intelligence it has previously gathered on the locations of piracy distribution centers, conducts surveillance of those areas, and, upon determining a given group or person is distributing illegal copies of the client's film, contacts the police to make arrests or conduct a raid.<sup>176</sup>

Securus First, another enforcement agency, takes a somewhat different approach. Hired by the MPA, Securus does not pursue individuals who pirate one or two specific films, but employs a team of former police officers who gather intelligence on larger piracy syndicates, and then contacts the police to conduct raids and seize the infringing materials.<sup>177</sup> In addition, Securus seeks to go directly after camcording. To do this, the firm deploys former officers during the first few days of a film's release at movie theaters the MPA knows to have the highest rates of camcording.<sup>178</sup> While there, the officers monitor the theaters and, in the event they catch someone camcording, initiate criminal proceedings.<sup>179</sup>

Though private enforcement agencies can take on some of the functions of police, conducting raids and turning a First Information Report into a prosecution still require police action and cooperation. As such, filmmakers, through their enforcement agencies, have sought to liaise with the police in

---

<sup>173</sup> See, e.g., John, *supra* note 49, at 119.

<sup>174</sup> *Introduction*, EIPR (INDIA) LTD., <http://www.antipiracy-india.com/copro.html> (last visited Mar. 24, 2013), *archived at* <http://perma.law.harvard.edu/0M1F4MqMEPt>.

<sup>175</sup> Interview with Zaheer Khan, *supra* note 49.

<sup>176</sup> *Id.*

<sup>177</sup> Interview with Shri D. Sivanandhan, *supra* note 158.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

order to encourage them to take piracy more seriously. One method of doing this has consisted of hiring prominent former police officials who can leverage their strong reputations. For instance, Shri D. Sivanandhan, the chairman of Securus First, is the former police commissioner of Mumbai with a reputation as “one of the most successful police officers in Maharashtra when it comes to dealing with the underworld in Mumbai.”<sup>180</sup> Likewise, a number of filmmakers have hired A.A. Khan & Associates,<sup>181</sup> an enforcement agency that is run by a former Deputy Inspector of Police who was “[o]nce Mumbai’s most feared cop.”<sup>182</sup> According to those in the industry, the police are generally much more responsive to filmmakers when they speak through individuals with such reputations. As Sivanandhan, noted candidly, “When people like me are involved, obviously the police [are] very cooperative.”<sup>183</sup>

A second method of liaising with the police has been to explain to them the consequences of piracy. As Zaheer Khan of EIPR notes:

[What] everybody is doing now is sensitizing the police to understand that piracy is a crime and revenues generated from piracy move into organized crime. It may not look like a priority, but by the amount of money that piracy generates and sends back into the criminal system, it is a priority. When a policeman understand[s] that money generated from piracy goes into drugs, goes into weapon purchases and far more serious things like that, he will take it seriously.<sup>184</sup>

### B. John Doe Orders

In addition to employing enforcement agencies to resolve some of the problems frustrating the Copyright Act’s criminal provisions, filmmakers have sought to increase the available civil remedies. Most notably, as the well-established injunctive measures have proven largely ineffective, some filmmakers have begun seeking preemptive John Doe, or “Ashok Kumar,”

---

<sup>180</sup> Vineeta Pandey, *National Security System in for a Major Makeover*, DNA (July 12, 2011, 4:22 AM IST), [http://www.dnaindia.com/india/report\\_national-security-system-in-for-a-major-makeover\\_1564825](http://www.dnaindia.com/india/report_national-security-system-in-for-a-major-makeover_1564825), archived at <http://perma.law.harvard.edu/06hdaqCPy9a>.

<sup>181</sup> See, e.g., *14 Mumbai Film Festival Fights Piracy with AA Khan*, INDIA GLITZ.COM (Oct. 17, 2012), <http://www.indiaglitz.com/channels/hindi/article/87315.html>, archived at <http://perma.law.harvard.edu/0ByHZy61kWG>.

<sup>182</sup> John, *supra* note 49, at 118–19.

<sup>183</sup> Interview with Shri D. Sivanandhan, *supra* note 158.

<sup>184</sup> Interview with Zaheer Khan, *supra* note 49.

orders.<sup>185</sup> These orders “are *ex parte* injunctions [issued] against unknown persons,” enjoining them from engaging in the infringing activity.<sup>186</sup> Generally, they offer two primary advantages. First, they allow for immediate action. As lawyers from Nishith Desai explain, “When a John Doe/Ashok Kumar order is passed, the plaintiff can serve a copy of the same on the party which is violating the order and seek adherence to the order. Failure to comply with the order may result in initiation of contempt proceedings.”<sup>187</sup> As a result, filmmakers need not initiate a new suit or go through any burdensome procedures, all while pirates continue to sell infringing copies.<sup>188</sup> Rather, they can simply “serve the notice and take action at the same time against anyone who is found infringing the copyright.”<sup>189</sup>

Second and more importantly, such orders frequently cover more than just the alleged infringers. As the *Deccan Herald* notes, John Doe orders are typically drafted to “appl[y] to all those websites which allow their users/customers to download/stream films without proper licence from the film’s copyright owner and also to ISPs which make their platform available to their customers to download/stream films without proper licence.”<sup>190</sup> As a result, though the orders may not clearly require such drastic action,<sup>191</sup> rights holders are frequently able to use them to pressure ISPs to completely

---

<sup>185</sup> See Lawrence Liang, *Meet Ashok Kumar the John Doe of India; or the Pirate Autobiography of an Unknown Indian*, KAFILA (May 18, 2012), <http://kafila.org/2012/05/18/meet-ashok-kumar-the-john-doe-of-india-or-the-pirate-autobiography-of-an-unknown-indian/>, archived at <http://perma.law.harvard.edu/0tYU2NpFGcj>.

<sup>186</sup> *Id.*

<sup>187</sup> NISHITH DESAI ASSOCS., *supra* note 65, at 21.

<sup>188</sup> See *Want to Combat Piracy? Go for John Doe Order*, DECCAN HERALD (May 25, 2012), <http://www.deccanherald.com/content/252129/F>, archived at <http://perma.law.harvard.edu/0XbjGREUTHr> [hereinafter *Want to Combat Piracy?*] (quoting a film producer as noting, “If we approach the court for copyright infringement, it takes a lot of time because it requires filing court papers . . . and by that time the owner of the copyright has already incurred huge losses”).

<sup>189</sup> Kunal M Shah, *Singham on Piracy Alert*, TIMES OF INDIA (July 24, 2011, 12:00 AM IST), [http://articles.timesofindia.indiatimes.com/2011-07-24/news-interviews/29807206\\_1\\_singham-unidentified-prospective-infringers-reliance-entertainment](http://articles.timesofindia.indiatimes.com/2011-07-24/news-interviews/29807206_1_singham-unidentified-prospective-infringers-reliance-entertainment), archived at <http://perma.law.harvard.edu/0KtAUGgEtT2>.

<sup>190</sup> *Want to Combat Piracy?*, *supra* note 188.

<sup>191</sup> See, e.g., Vasudha Venugopal, *Internet Users Enraged over Blocking of File-Sharing Sites*, THE HINDU, May 18, 2012, archived at <http://perma.law.harvard.edu/0PsqWVbEHSM> (“Harish Ram, CEO, Copyright Labs, hired by producers of the movie 3, R K Productions Private Limited, for the online anti-piracy management of the movie, said that the ISPs had misinterpreted the order. ‘Instead of blocking specific URLs that were screening the movie, they blocked the whole sites,’ he said.”).

block access to a host of popular websites on which pirated videos sometimes appear, including Vimeo, Daily Motion, and The Pirate Bay.<sup>192</sup>

### C. Limited Success

Though individuals at the enforcement agencies readily tout their successes,<sup>193</sup> the available evidence indicates that overall they have done little to stop piracy; a number of sources have noted that it remains quite easy to obtain illegal versions of the most coveted films throughout India. As an example of the ease with which consumers can obtain pirated goods, Nirmal John recounts his experience during the release of *Barfi*, India's 2011 submission to the Academy Awards for Best Foreign Language Film.<sup>194</sup> On the "very day" of the film's release, John reports, "file-sharing sites were crammed with purportedly great rips of the movie. A day after, I went to watch it at a Delhi multiplex, paying over Rs 350 [approximately \$7] for a ticket. A short distance from the multiplex, 20-year-old Praveen Kumar [was] selling *Barfi* DVDs for Rs 30 [about 60¢]."<sup>195</sup>

My personal encounter with piracy distributors during my time in India similarly demonstrates the limited degree to which the enforcement agencies have had any impact. If the agencies' efforts had been even remotely successful, one would expect distributors of pirated films to engage in some effort to avoid detection. One would expect distributors to, *inter alia*, maintain the capacity to collect their products and flee rapidly in the event of a raid or police action, keep some sort of lockout, or at least hold business in a somewhat secluded area so as to avoid detection. Nonetheless, the pirate shop I visited was the exact opposite. Set up in downtown Mumbai, the shop functioned like any other store in the area. There were no lookouts, the pirated DVDs were displayed in a manner that would likely not lend itself to any sort of rapid-getaway, and the shop was in a crowded area near a very popular food stand. The distributors even had business cards.

Such open-air distribution may be consistent with effective enforcement if the enforcement is focused on the production, rather than the distribution of pirated DVDs. In that case, however, one would expect the distributors to have a relatively limited supply of the most popular movies.

---

<sup>192</sup> See, e.g., Nikhil Pawa, *No More John Doe Orders? Indian ISPs Get Court Order for Specificity in URL Blocks*, *MEDIA NAMA* (June 20, 2012), <http://www.medianama.com/2012/06/223-no-more-john-doe-orders-indian-isps-get-court-order-for-specificity-in-urls/>, archived at <http://perma.law.harvard.edu/0YeAGDL37zL>.

<sup>193</sup> See, e.g., Interview with Zaheer Khan, *supra* note 49.

<sup>194</sup> John, *supra* note 49, at 118.

<sup>195</sup> *Id.*

The pirate shop I visited, however, had not only an extremely wide selection of products, but also some of the most sought after American and Hindi titles. Their selection included films like *Les Misérables* and *Zero Dark Thirty*, which had yet to even premiere in India, as well as *Dabangg 2*, the most popular film in India at the time.<sup>196</sup> Under such circumstances, it seems difficult to argue that the enforcement agencies have had any meaningful success.

The situation seems to be somewhat different for the John Doe orders. According to a number of individuals in the industry, the orders have successfully reduced the rate illegal downloading. Madhu Gadodia, whose law firm has been one of the leaders in obtaining such orders, has said, for instance, that her “clients have realised that the rate of piracy has gone down after John Doe orders.”<sup>197</sup> Likewise, Pavan Duggal, a lawyer specializing in Internet technology, noted that *Singham*, *Bodyguard*, and *3*, three of the biggest films to be covered by John Doe orders, each experienced lower piracy as a result.<sup>198</sup> These opinions are somewhat controverted, however. Nirmal John, for instance, notes that, despite an outstanding John Doe order, “illegal copies of *3* were up on most file sharing sites” on the day of the film’s release.<sup>199</sup>

Moreover, to the extent these orders have limited piracy, such success is unlikely to be sustainable, as courts have begun responding to numerous outcries that the injunctions unduly limit free speech.<sup>200</sup> Last summer, for instance, the Madras High Court responded to a petition from ISPs to amend a broad John Doe order it had issued.<sup>201</sup> The amended order noted that “the interim injunction is granted only in respect of a particular URL where the infringing movie is kept and not in respect of the entire website. Further, the applicant is directed to inform about the particulars of URL where the interim movie is kept within 48 hours” (emphasis removed).<sup>202</sup>

---

<sup>196</sup> See Raksha Kumar, *What Made ‘Dabangg 2’ a Hit?*, *India Ink*, N.Y. TIMES (Jan. 24, 2013, 3:11 AM), <http://india.blogs.nytimes.com/2013/01/24/why-was-salman-khans-dabangg-2-a-hit-when-it-bombed-with-critics/>, archived at <http://perma.law.harvard.edu/0ctCMNriBbG>.

<sup>197</sup> Kian Ganz, *Bombay HC Passes First Anti-Piracy John Doe Order, as Law Firms Commoditise the New Vertical*, LEGALLY INDIA (June 15, 2012, 7:45 PM), <http://www.legallyindia.com/201206152894/Litigation/bombay-hc-passes-first-anti-piracy-john-doe-order-as-law-firms-commoditise-the-new-vertical>, archived at <http://perma.law.harvard.edu/0wgv4xtrQEW>.

<sup>198</sup> Interview with Pavan Duggal, *supra* note 160.

<sup>199</sup> John, *supra* note 49, at 117.

<sup>200</sup> See Pawa, *supra* note 192.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

Demonstrating that such limited orders are likely to be the way of the future, the same court issued an order containing similar limitations later the same year.<sup>203</sup> Though the other high courts do not appear to have followed suit just yet, such seems inevitable considering the immense burden that broad John Doe orders place on expression and the willingness of the ISPs to challenge such measures.

The John Doe orders also lack explanatory force because they are a very recent and sporadic phenomenon. The first such order was only issued in the summer of 2011,<sup>204</sup> and *Ra.One* was not even subject to one. As such, these orders are likely not the reason for the growth of the entire Indian film industry, and certainly cannot explain why *Ra.One* was able to make a substantial profit in the face of massive piracy.

Thus, notwithstanding the claimed successes of the John Doe orders and the enforcement agencies, it appears that neither of these mechanisms explains the resilience of the Indian film industry. Considering the continued prevalence throughout India of pirated DVDs and VCDs of the most coveted films, it seems difficult to claim that the enforcement agencies have successfully impeded piracy. Though some have argued that John Doe orders have successfully limited the capacity of consumers to access pirated copies, these accounts are subject to dispute, and the emergence of such orders is too recent and limited to explain the sustained growth of an entire industry. Moreover, to the extent John Doe orders have achieved success, that success is likely to be short lived since courts are beginning to narrowly tailor them. As such, it becomes necessary to explore the non-legal measures that producers have taken.

## V. NON-LEGAL STRATEGIES

In addition to trying to rectify the problems with the enforcement regime, Indian filmmakers have begun to employ measures that seek to reduce the impact of piracy without relying upon state assistance. These “non-le-

---

<sup>203</sup> *Court Issues Order Restraining Online Piracy of Suriya Film*, TIMES OF INDIA (Oct. 13, 2012, 5:46 AM IST), [http://articles.timesofindia.indiatimes.com/2012-10-13/chennai/34431089\\_1\\_online-piracy-court-issues-order-tamil-film](http://articles.timesofindia.indiatimes.com/2012-10-13/chennai/34431089_1_online-piracy-court-issues-order-tamil-film), archived at <http://perma.law.harvard.edu/03TGogf8HEa> (noting that the Madras High Court injunction “clarified that the order pertained to the specific universal resource locator (URL), a specific character string that constitutes a reference to an internet resource, and not the entire website”).

<sup>204</sup> See Anant Rangaswami, *Singham Anti-Piracy Order Shows Law is an Ass Without Meaning to Be*, FIRSTPOST (July 23, 2011), <http://www.firstpost.com/business/singham-anti-piracy-order-shows-law-is-an-ass-without-meaning-to-be-46817.html>, archived at <http://perma.law.harvard.edu/0kYWPA6Fkcf>.

gal” measures include increasing the availability of legitimate copies, attacking the piracy supply chain, and leveraging India’s star system to encourage consumers to refrain from watching illegal copies. Through these efforts, filmmakers have managed to both diminish consumers’ demand for pirated prints and increase the appeal of legitimate copies. As a result, these measures may be at least partially responsible for the continued resilience of the Indian film industry.

#### A. *Increased Distribution*

One of the most prominent strategies that Indian filmmakers have pursued in recent years is to increase the distribution of their films, in terms of location, time, and media.<sup>205</sup> The idea behind this effort is to “cut[ ] off one of the main reasons why people seek out infringing copies.”<sup>206</sup> As Rajesh Mishra, the CEO of UFO Films explains, many Indian consumers have historically purchased pirated products simply because legitimate copies were unavailable. “Films,” he says, “are promoted heavily [in India] through every possible medium, reaching every possible person, down to the smallest village. But [filmmakers in years past] end[ed] up releasing in only a few centres. So you create[d] a hunger but d[id]n’t give the food to everyone.”<sup>207</sup> Although legitimate copies would ultimately reach these smaller centers in three to six months, this was too late to satisfy demand because by this point “[p]irates [had already] gleefully filled [the] vacuum by bombarding consumers with cheap optical discs.”<sup>208</sup>

The advent of digitization has allowed Indian filmmakers to close this distribution gap. As the PwC/CII report notes, digitization “enabl[es] film producers to simultaneously release their films across” India.<sup>209</sup> The 2012 blockbuster *Ek Tha Tiger*, for example, “released in nearly 3,300 screens,” a feat that was “unheard of four or five years ago, when . . . a big budget film

<sup>205</sup> See, e.g., Prabhakar, *supra* note 34.

<sup>206</sup> Mike Masnick, *Bollywood No Longer Worrying About Piracy as Studios Keep Setting New Records at the Box Office*, TECHDIRT (Feb. 18, 2013, 10:08 AM), <http://www.techdirt.com/articles/20130218/03033922013/bollywood-no-longer-worrying-about-piracy-as-studios-keep-setting-new-records-box-office.shtml>, archived at <http://perma.law.harvard.edu/0E1UekJUcPR>.

<sup>207</sup> John, *supra* note 49, at, 122.

<sup>208</sup> Prabhakar, *supra* note 34.

<sup>209</sup> CONFED. OF INDIAN INDUS. & PRICEWATERHOUSECOOPERS, *supra* note 30, at 28; see also Prabhakar, *supra* note 34 (noting that “[d]igital prints, which cost one-fifth of analog prints, have facilitated the swift reach of movies across the country.”).

would release in around 1000 screens.”<sup>210</sup> *Dabangg 2* recently topped this figure, releasing on 3,700 screens just before Christmas 2012.<sup>211</sup> This greater distribution is not limited to blockbusters. Rather, “most movie releases in 2011 were shown on about double the number of movies [sic] screens as similar movies just the year before.”<sup>212</sup>

In addition to expanding the number of locations that their movies reach, Indian producers and studios have increased the amount of time during which their films are available. To do this, filmmakers have drastically reduced their theater-to-television release windows. These windows were designed to create a time lag between a film’s theatrical release and its television premiere, in the hope that such stratification would “prevent different media . . . from cannibalising each other.”<sup>213</sup> Nonetheless, by creating sustained periods of time in which there was no legitimate version of a given film available, producers gave rise to a situation in which consumers wanted a product but pirates were the only ones offering it.<sup>214</sup> In India this problem was especially acute because release windows averaged sixth months, thereby giving pirates what amounted to a half-year monopoly.<sup>215</sup> In recent years, numerous Indian producers have filled this gap by reducing their release windows.<sup>216</sup> Last year’s *Son of Sardaar*, for instance, had its television premiere a mere two months after its theatrical release.<sup>217</sup>

Lastly, Indian filmmakers have sought to increase the number of media they reach. As the PwC/CII report notes, “There is an increasing trend of films being viewed on personal devices (mobile phones and tablets), internet platforms such as YouTube and [the] DTH [direct-to-home] PPV [pay-per-view] model.”<sup>218</sup> Filmmakers have recently sought to meet this demand by pre-selling (i.e. selling before a film’s release) rights to these alternative me-

---

<sup>210</sup> CONFED. OF INDIAN INDUS. & PRICEWATERHOUSECOOPERS, *supra* note 30, at 28.

<sup>211</sup> *Dabangg 2 Stands at 155 Crores at the Domestic Box Office*, BOLLYHQ (Jan. 11, 2013), <http://bollyhq.com/bollywood/dabangg-2-stands-at-155-crores-at-the-domestic-box-office/>, archived at <http://perma.law.harvard.edu/0cZ2DwH3w2U>.

<sup>212</sup> Masnick, *supra* note 206 (emphasis in original).

<sup>213</sup> Frederic Filloux, *Different Release Times of Films and TV Shows Boost Global Piracy*, GUARDIAN (Nov. 26, 2012, 10:09 AM EST), <http://www.guardian.co.uk/technology/2012/nov/26/films-tvs-global-piracy>, archived at <http://perma.law.harvard.edu/08BfuNN9Vth>.

<sup>214</sup> *See id.*

<sup>215</sup> *Id.*

<sup>216</sup> Prabhakar, *supra* note 34.

<sup>217</sup> *Id.*

<sup>218</sup> CONFED. OF INDIAN INDUS. & PRICEWATERHOUSECOOPERS, *supra* note 30, at 28.



dia.<sup>219</sup> Some companies have even “started offering apps and websites that allow viewers to rent or stream films.”<sup>220</sup>

Shortening release windows, expanding the number of screens a film reaches, and increasing the number of media on which viewers can watch a product do not take pirated prints off the market. Nonetheless, by increasing the availability of legitimate copies, producers reduce the desire of customers to purchase pirated versions by offering them an alternative that many viewers consider to be both of better quality<sup>221</sup> and safer.<sup>222</sup> Moreover, by increasing distribution to different places and media, producers can diversify their revenue streams.<sup>223</sup>

### B. *Interference with the Piracy Supply Chain*

In addition to increasing the availability of legitimate products, Indian filmmakers have sought to make pirated copies less attractive by interfering with the piracy supply chain. Part of this effort has focused on the consumer. Specifically, filmmakers and private enforcement agencies have sought to reduce the ease of obtaining pirated prints. Private enforcement agency Republique Media, for instance, has purchased “software that scans for and helps take down illegal content” so as to make it more time-consuming and arduous for potential consumers to find illegal copies online.<sup>224</sup> Republique has also engaged in “spoofing.”<sup>225</sup> As Nirmal John explains:

---

<sup>219</sup> Interview with Pavan Duggal, *supra* note 160.

<sup>220</sup> CONFED. OF INDIAN INDUS. & PRICEWATERHOUSECOOPERS, *supra* note 30, at 28.

<sup>221</sup> See Prabhakar, *supra* note 34 (“[T]he better-off who earlier paid to have high-quality cinema systems at home are no longer interested in poor quality (pirated) copies.”).

<sup>222</sup> See Filloux, *supra* note 213 (noting that many consumers prefer avoiding “the painstaking task of finding the right torrent file, hoping that it is not bogus, corrupted, or worse, infected by a virus”).

<sup>223</sup> Interview with Pavan Duggal, *supra* note 160; see also Nirmal Bang, *The Dynamics of Indian Film Production Have Changed a Great Deal*, STOCK MARKETS REVIEW (Oct. 1, 2011, 7:18 AM GMT), [http://www.stockmarketsreview.com/extras/the\\_dynamics\\_of\\_indian\\_film\\_production\\_have\\_changed\\_a\\_great\\_deal\\_20111001\\_170678/](http://www.stockmarketsreview.com/extras/the_dynamics_of_indian_film_production_have_changed_a_great_deal_20111001_170678/), archived at <http://perma.law.harvard.edu/0KHj8D154uA> (“There are many aspects of filmmaking today that ensure that the money that is invested is recovered even before a film is released. Syndicate deals such as music rights, television and satellite rights, overseas rights and, quite recently, two new concepts: part-production and post-production sharing of money are being signed.”).

<sup>224</sup> John, *supra* note 49, at 124.

<sup>225</sup> *Id.*

To coincide with a movie launch, it floods file-sharing sites with fake files of roughly the size of a full-length movie with authentic sounding file names. The idea is to frustrate users; few have the patience, to say nothing of bandwidth, to download multiple torrents to check if even one is the actual movie.<sup>226</sup>

The other part of this effort focuses on the supplier. Specifically, Indian filmmakers have employed watermarking in order to trace and cut off the source of pirated goods. As Nirmal John explains, in addition to facilitating greater distribution, digitization has enabled filmmakers to embed their movies with “invisible forensic watermarks . . . . When pirated DVDs [of films that have been so embedded] are analysed in the studio, the[se] watermarks become visible, providing all sorts of data including the name of the theatre it was shown in and the time of the show.”<sup>227</sup> Though producers can use this information as the basis for legal action,<sup>228</sup> more frequently they simply threaten to withhold future releases from theaters where the camcording occurred.<sup>229</sup> As John notes, “Often, the mere threat of withholding future films is enough to make movie hall owners more vigilant.”<sup>230</sup> By increasing the vigilance of movie theaters, filmmakers are able to make pirated prints more difficult to obtain, and resultantly more expensive to purchase or distribute.

### C. Education Campaigns

Lastly, in recognition of the fact that it will likely be impossible to eradicate piracy completely, Indian filmmakers have decided to appeal directly to consumers. According to a recent report prepared by accounting firm Ernst & Young, there is a substantial “lack of consumer awareness about [the] implications of copyright infringement” within India.<sup>231</sup> To rectify this unawareness, filmmakers have sought to engage in education campaigns that leverage the massive star power of India’s biggest actors.<sup>232</sup> Shortly after learning that the *Ra.One* musical album had been posted to the internet, for instance, Shah Rukh Khan and others who had worked on the

---

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 122.

<sup>228</sup> *See, e.g.,* Prabhakar, *supra* note 34 (“In 2008, a pirated DVD of the film Tashan was traced back to an April 25 show at a single-screen theatre in Bilimora, a small town in Gujarat . . . . The theatre was raided and the camcorder racket busted.”).

<sup>229</sup> Interview with Pavan Duggal, *supra* note 160.

<sup>230</sup> John, *supra* note 49, at 122.

<sup>231</sup> ERNST & YOUNG, *supra* note 143, at 9.

<sup>232</sup> Interview with Pavan Duggal, *supra* note 160.

film “[took] to micro blogging site Twitter and appeal[ed] to his millions of fans to obtain the album through legal means.”<sup>233</sup> Aamir Khan, another Bollywood megastar, recently took to the airwaves as well, asking his fans “not to succumb to piracy” and explaining that profits from illegal sales end up funding other “nefarious activities.”<sup>234</sup> Stars from the regional cinemas have engaged in similar campaigns. For instance, after the Tamil film *Jag-gubhai* was posted online before it was even released in theaters, a number of Bollywood actors who were not even in the film, including megastar Rajinikanth, got together to condemn the piracy and call on viewers to take action.<sup>235</sup>

Although these campaigns are relatively recent, it appears that they have had some success. Not only have reports emerged of consumers refusing to purchase or download illegal copies in response to the pleas by stars,<sup>236</sup> but it also appears that the education campaigns may have even mobilized fans to take direct action against camcorders. As John reports, in Tamil Nadu:

It’s almost impossible [that] a Rajinikanth movie will be copied illegally in the first 10 days of its release in the state. Dilli Rajini president of the Rajinikanth Fan Club in Chennai, says that on the day of the release, the fan club asks the city commissioner of police for extra security inside movie halls. If that does not deter pirates, the fans themselves step in and stop anyone from using recording devices.<sup>237</sup>

Despite anecdotal successes of this sort, there is no empirical evidence to support the proposition that these non-legal strategies are the reason why the industry is growing in the face of massive piracy. Nonetheless, the success of these strategies is consistent with the situation on the ground. Unlike the measures discussed in PART IV and the provisions of the Copyright Act, the non-legal efforts by and large do not seek to eradicate piracy, but simply draw consumers away from infringing copies. As such, the existence of widespread piracy does not demonstrate that these strategies have been ineffective. Rather, the continued success of the film industry and the simultaneous existence of pervasive piracy may indicate the precise opposite.

---

<sup>233</sup> Rai, *supra* note 17.

<sup>234</sup> *Handsome Aamir Khan Speaks About Piracy*, YOUTUBE (Feb.16, 2011), <http://www.youtube.com/watch?v=sTdW4opoMiU>, *archived at* <http://perma.law.harvard.edu/0bCnbkY7HS5>.

<sup>235</sup> *Sara-Radhika in Tears: Stars Support*, INDIAGLITZ.COM (Jan. 5, 2010), <http://www.indiaglitz.com/channels/tamil/article/53274.html>, *archived at* <http://perma.law.harvard.edu/0x5LvdPN3Dv>.

<sup>236</sup> See, e.g., *Bollywood Movie: ‘Ra.One’ Team’s Fight Against Piracy*, *supra* note 16.

<sup>237</sup> John, *supra* note 49, at 121.

## VI. AN ALTERNATIVE EXPLANATION: INDIA'S THEATRICAL CULTURE

Nonetheless, there is no clear proof that these non-legal measures have been successful. Some within the industry, moreover, have suggested that the continued growth of the Indian film industry in the face of piracy has nothing to do with anything that Indian filmmakers have done.<sup>238</sup> Rather, these individuals say, the resilience of the Indian film industry is due to something unique about Indian film culture.<sup>239</sup> Specifically, they argue that watching an Indian film in an Indian movie theater is a fundamental cultural experience that pirated VCDs or DVDs simply cannot replicate.<sup>240</sup>

The notion that there is something irreplaceable about the Indian theater-going experience has found support in academic literature. Lakshmi Srinivas, a professor of Sociology at University of Massachusetts Boston, has observed that film watching in much of India is often not about seeing a specific movie. Many Indian consumers actually find Bollywood and regional movies to be “‘silly’, ‘stupid’, [and] ‘all the same.’”<sup>241</sup> Rather, viewing films for many Indian consumers is about having the theatrical experience.<sup>242</sup> As Srinivas explains, the experience of watching an Indian film in an Indian theater “is very different from the emotional experience which contemporary Western audiences of Hollywood films encounter and expect.”<sup>243</sup> Instead of silently watching a movie to its conclusion, Indian “theater habituées [sic] expect to interact with their fellow viewers.”<sup>244</sup> They go into the theater planning to “[exchange] views, discuss[ ] the film and the stars, or simply hav[e] everyday conversations in the theater.”<sup>245</sup> In addition, filmgoers expect to interact “with on-screen events.”<sup>246</sup> Alongside fellow fans, viewers will applaud the star’s dramatic entrance, loudly caution the main characters to run faster during chase scenes, sing along during performances of songs, and throw coins at the screen to express approval of certain actions.<sup>247</sup> The interactive nature of the theatrical experience is so

---

<sup>238</sup> Interview with Uday Singh, *supra* note 110.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Lakshmi Srinivas, *Active Viewing: An Ethnography of the Indian Film Audience*, 11 VISUAL ANTHROPOLOGY 323, 328 (1998), archived at <http://perma.law.harvard.edu/0Jpfaa5xJ7o>.

<sup>242</sup> *Id.* at 330.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 336-37, 341.

pronounced that Srinivas describes it as more akin “to watching folk performances of myths” than to viewing a movie in a Western cinema.<sup>248</sup>

It goes without saying that social and interactive experiences of this sort cannot easily be replicated by watching a VCD or DVD at home. There is, moreover, some empirical evidence to support the view that the irreplaceability of the Indian theatrical experience may be responsible for the continued resilience of the film industry. First, although Indian filmmakers have explored alternative media, box office receipts remain a massive portion of film revenues. As journalist Binoy Prabhakar has noted, the “box office contribut[es] up to 80% of a movie’s gross collections in recent times.”<sup>249</sup> This statistic seems to confirm Srinivas’s contention that film watching for many Indian consumers is inextricably tied to the theatrical experience.

Second, foreign films make up a much larger part of the pirated market than the legal one. As an Ernst & Young report notes:

The film entertainment market in India is dominated by the regional film market . . . . The share of foreign films in the legal market is only 3%. However, in the pirated market, the share of regional films is only 62% while the balance is shared between foreign films (23%) and other films (15%).<sup>250</sup>

These figures suggest that viewers are much less interested in buying pirated versions of Indian content than they are of foreign content. This is consistent with the idea that the theatrical experience plays a role in the industry’s continued success because most Western movies do not contain the aspects of Indian films, such as pre-released songs and structured intermissions, that facilitate interactive and communal viewing.<sup>251</sup> As such, their entertainment values are likely not as tied to theatrical viewing as those of Indian films. Indeed, when I mentioned to my host in India the possibility of purchasing *Dabangg 2* at the pirate store, he indicated that doing so would be foolish because we could watch the film in the theater.

Finally, the music and gaming industries have suffered more from piracy than the film industry in recent years. As the Ernst & Young report notes, “Music is one of the worse hit industries due to piracy with 64% of the market estimated to be pirated.”<sup>252</sup> The same report notes that “[t]he gaming industry in India is a currently a [sic] very small market; however, it

---

<sup>248</sup> *Id.* at 336.

<sup>249</sup> Prabhakar, *supra* note 34.

<sup>250</sup> ERNST & YOUNG, *supra* note 143, at 10.

<sup>251</sup> *See, e.g.*, Srinivas, *supra* note 241, at 327-28.

<sup>252</sup> ERNST & YOUNG, *supra* note 143, at 12.

is one of the worst hit due to rampant optical disc piracy.”<sup>253</sup> Though there could be other explanations, a potential reason why these industries may be suffering from piracy while the film industry remains strong is that they are not tied to theaters the way that Indian movies are. Thus, it may be the case that the continued resilience of the Indian film industry has nothing to do with filmmakers’ specific efforts, but is due to the unique place of the movie theater within Indian society and the inability of pirated films to replicate the theatrical experience.

## VII. CONCLUSION

In May 2012, Shah Rukh Khan confirmed circulating rumors that he would make a sequel to *Ra.One*.<sup>254</sup> Khan has said that he hopes the sequel will be “[b]igger and better” than the original.<sup>255</sup> While some commentators have insinuated that this effort may be risky considering the negative reviews faced by the original, no one has seriously contended that piracy will threaten the film’s success.<sup>256</sup>

This paper has sought to explore why Shah Rukh Khan and other Indian filmmakers do not need to worry about piracy, and why they can make the innovative films they envision without serious concern that copyright infringement will prevent them from recouping their costs and turning a profit. Although the robustness of India’s copyright regime initially seems like a plausible explanation, the law’s utter lack of enforcement discredits this possibility. And while Indian filmmakers have sought to rectify the enforcement problems by hiring private agencies and pursuing innovative John Doe orders, these efforts do not appear to be sufficiently successful, recent, or widespread enough to offer much explanatory force. The most likely explanation for the continued success of the industry may therefore be that the non-legal measures that filmmakers have employed have managed

---

<sup>253</sup> *Id.* at 16.

<sup>254</sup> Sonali Joshi, *SRK’s Second Shot at the Box Office with Ra.One Sequel*, DAILY MAIL (May 15, 2012, 2:39 PM EST), <http://www.dailymail.co.uk/indiahome/indianews/article-2144922/SRK-s-second-shot-BO-Ra-One-sequel.html> archived at <http://perma.law.harvard.edu/0XzYohLWJUz>.

<sup>255</sup> Roshmila Bhattacharya, *Shah Rukh Khan Game for Ra.One Sequel*, HINDUSTAN TIMES (Mar. 10, 2012), <http://www.hindustantimes.com/Entertainment/Bollywood/Shah-Rukh-Khan-game-for-RA-One-sequel/Article1-823234.aspx>, archived at <http://perma.law.harvard.edu/0K21Tc5A5za>.

<sup>256</sup> See, e.g., *Shahrukh Khan Confirms Ra.One Sequel*, ONE INDIA ENTERTAINMENT (May 14, 2012, 10:07 AM IST), <http://entertainment.oneindia.in/bollywood/news/2012/shahrukh-khan-ra-one-sequel-095640.html>, archived at <http://perma.law.harvard.edu/082QXwgvMYW>.

both to diminish the demand for pirated copies and increase the appeal of legitimate versions. It is equally possible, though, that the industry's resilience has nothing to do with these efforts. Instead, the continued growth of the industry may be due to the unique place of theater going in Indian cinematic culture and the inability of pirated prints to replicate the theatrical experience.

Whichever the explanation, this paper has sought to offer some possible lessons for those grappling with piracy in other contexts. First, the Indian experience demonstrates that strict intellectual property laws do not automatically reduce piracy. The law is often only as effective as the enforcement regime supporting it. Second, efforts to improve the enforcement machinery of a given state may not be the most efficient, cost-effective, or societally beneficial way of diminishing the impact of piracy. Rather, the most effective way of dealing with piracy may be by increasing distribution, appealing to consumers, attacking the piracy supply chain, or engaging in other efforts that make legitimate products more attractive. Lastly, a society's cinematic culture should not be ignored. Those hoping to ameliorate piracy in various markets must understand why individuals in those markets watch movies and consider possible means of offering those features in ways that pirates cannot duplicate.

