



Volume 5, Number 2  
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## Faculty Advisor's Introduction

*Professor Peter Carfagna*

Former Covington Burling Distinguished Visitor and  
Visiting Lecturer on Sports Law  
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It is my great pleasure to welcome you to this year's two-volume edition of Harvard Law School's Journal of Sports and Entertainment Law.

Since JSEL's inception and first publication in 2009, it has been my distinct honor and privilege to serve as the Faculty Supervisor for this exciting HLS extracurricular opportunity that allows so many students to get involved at the grass roots level of seeking and vetting for publication the very best in cutting-edge articles in the ever-expanding areas of Sports and Entertainment Law.

This year was no exception. Under the outstanding leadership of Editor in Chief Kelly Donnelly and her Executive Editors Kim Miner, Kyle Schneider, and Albert Zhu, I can confidently assure our readers that the quality and quantity both of the submissions and of the Articles ultimately accepted and published by JSEL represent the finest volume of work ever achieved by any JSEL staff. Special thanks are also owed to Submissions Chair Jay Cohen; Online Chair Jaimie McFarlin; Technical Chairs Daniel Ain and Joo-Young Rognlie; Article Editors Tim Fleming, Eitan Ulmer and Jeremy Winter; and all of the other staff members for their contributions to these editions.

For that reason, I especially want to thank Kelly, Kim, Kyle and Albert for their diligent work throughout the academic year and for maintaining a very strong line of communication with me throughout the publication process.

So, with their continuing assistance, I proudly include a brief description of the Articles that JSEL has published this year, as described below:

Volume 5.1 included an article by Russell T. Gorkin examining the sorts of antitrust claims that can be brought against NFL teams in the context of disputes with players, along with the various defenses available to ownership against such claims, and a brief discussion of these issues as they relate to the decision in *Brady v. National Football League*. This edition also included a piece by Lisa Milot probing the increasingly glaring dissonance between government and athletic governing bodies' attempts to regulate performance-enhancing substances, public perception, and the actual athletes' use of such substances. Milot examines the current regulatory regime and its success or lack thereof, then draws on economic and

psychological research to suggest modifications to the current regime. Finally, this volume concluded with a piece by Brandon Hammer '13 exploring the surging success of Indian cinema in the face of massive digital piracy. After examining current Indian intellectual property law and its effectiveness in curbing piracy, Hammer looks at creative ways Indian producers have sought to protect their creative works, both in cooperation with and external to the legal system. The unique status of cinema within Indian culture is then considered as a possible contributing factor to the enduring profitability of the industry.

Volume 5.2 included several sports-focused pieces, including an article by Mark Grabowski analyzing mediation in the context of the 2012-13 National Hockey League labor strike, arguing that it should be used more often across professional sports in disputes between management and athletes. Darren A. Heitner and Richard Bogart contributed a piece using the recent controversy surrounding Richie Incognito's alleged bullying of Jonathan Martin to examine the concepts of "conduct detrimental to the league" and "conduct detrimental to the team" as they appear in the National Football League's newest collective bargaining agreement, exploring the impact of the CBA's use of these concepts on players' rights. Megan E. Boyd contributed an article chronicling the use of sports metaphors in judicial opinions, from the most popular borrows from Americans' favorite sports to more obscure uses. Finally, Russell Yavner '14 rounds out this volume's pieces with a thorough look at both the history of Minor League Baseball's antitrust exemption and related rules and infrastructure surrounding the development of professional talent, arguing that the resultant system is a net positive contributor to the merits of Minor League Baseball.

In closing, I would like to thank Kelly again for her relentless dedication to ensuring that JSEL's publications continued to improve this year, as she most certainly did in 2013-14. She has now set a very high bar for next year's Co-Editors in Chief Kim Miner and Kyle Schneider to aim at. Nonetheless, it will be my pleasure to continue to work with Kim and Kyle to attempt to achieve even loftier goals in 2014-15, as JSEL begins to take its place among the most respected journals of its kind in both of its targeted law school and practitioner communities.





## Both Sides Win: Why Using Mediation Would Improve Pro Sports

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### ABSTRACT

Mediation, a type of alternative dispute resolution that utilizes a neutral outsider to facilitate a resolution for a conflict between two parties, is seldom used in American professional sports disputes. But the unique nature of such disputes, along with mediation’s success in ending the 2012-13 National Hockey League labor lockout, indicate that mediation should be used much more often, as opposed to the commonly used resolution methods of arbitration, litigation, and protracted negotiations. Mediation offers a fast, cost-saving method for settling virtually any kind of conflict. Its confidential nature promotes open communication between the parties, which helps preserve, if not enhance, their working relationships. Although mediation will not fix every sports related dispute, it could improve player management relations as well as player performance, thereby bolstering fans’ confidence in pro sports.

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<sup>1</sup> Mark Grabowski is an assistant professor of communication at Adelphi University in Long Island. He previously worked as a lawyer and a sports journalist. He holds a J.D. from Georgetown Law. The author would like to thank Robert C. Bordone, director of the Harvard Negotiation and Mediation Clinic, in helping to develop this paper.

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## I. INTRODUCTION

In January 2013, the National Hockey League (NHL) was on the brink of canceling its entire season due to gridlock between team owners and players over a new collective bargaining agreement (CBA).<sup>2</sup> Part of the season had already been canceled after team owners, led by NHL commissioner Gary Bettman, declared a lockout of the members of the players' union after an agreement for a new CBA could not be reached before the old CBA expired in September 2012.<sup>3</sup> The two sides were nearly \$200 million apart on the proper percentages of revenue sharing and seemed unwilling to even talk with each other.<sup>4</sup> "[T]he majority of both in-the-know experts and on-the-sidelines fans have lost confidence in the system . . . . compromise between these two increasingly bitter foes seems impossible," a media report lamented.<sup>5</sup> Canceling the entire season would not be unprecedented, as league officials had canceled the 2004-05 season due to a similar dispute, from which "the NHL never really recovered."<sup>6</sup> Another season cancellation could jeopardize the dwindling fan base, demoting pro hockey from a major American sport to a fringe sport.<sup>7</sup> Despite this risk, neither side seemed

<sup>2</sup> See Jeff Z. Klein, *N.H.L. Moves Closer to Canceling Season*, N.Y. TIMES, Dec. 21, 2012, at B14, archived at <http://perma.cc/RX98-YCE2>.

<sup>3</sup> See Jeff Z. Klein, *As N.H.L. Lockout Begins, So Does a Likely Exodus of Players to Europe*, N.Y. TIMES, Sept. 17, 2012, at D2, archived at <http://perma.cc/WGJ2-YZCG>.

<sup>4</sup> See Kevin Allen, *Answering Pressing Questions About the NHL Lockout*, USA TODAY, Nov. 23, 2012, archived at <http://perma.cc/MZ85-2JJG>.

<sup>5</sup> Mark Jones, *NHL Lockout: How Mediation Could Save the 2012-2013 Season*, BLEACHER REP. (Nov. 29, 2012), <http://bleacherreport.com/articles/1426327-nhl-lockout-how-mediation-could-save-the-2012-2013-season>, archived at <http://perma.cc/SDS3-WS4D>.

<sup>6</sup> Justin A. Cohn, *NHL Mess Has Soured This Season-Ticket Holder*, THE JOURNAL GAZETTE (Sept. 3, 2012, 3:00 AM), <http://www.journalgazette.net/article/20120903/SPORTS0204/309039948/1019/sports0204>, archived at <http://perma.cc/FA4U-LKTA>.

<sup>7</sup> See *id.* (stating that the NHL was "in danger of losing [its] identity or existence because of a collective bargaining agreement.").

willing to budge. After negotiations between both sides broke down for the umpteenth time and with “less than a week to reach a new [CBA] to save” the season from outright cancellation<sup>8</sup>, federal government officials offered to help resolve the conflict.

Owners and players agreed to mediation, a form of alternative dispute resolution (ADR) in which an impartial third party—a mediator—attempts to find common ground between two parties that will end the impasse.<sup>9</sup> In voluntary mediation such as this, each side must agree to mediation and either side may walk away from the process at any time.<sup>10</sup> The mediator may offer ideas and identify issues that the parties may have overlooked, but settlement ultimately rests with the disputants themselves.<sup>11</sup> Hockey fans were skeptical that this approach would work<sup>12</sup>—and for good reason. Mediation is seldom utilized in major American professional sports leagues, voluntarily or otherwise.<sup>13</sup> But with time running out, Scot L. Beckenbaugh, a mediator from the U.S. Federal Mediation and Conciliation Service (FMCS), quickly made progress. After spending approximately twelve hours shuttling back and forth between the league offices in Manhattan and a nearby players’ union hotel suite, the mediator got representatives from both the team owners and players’ union to meet face-to-face at the union’s hotel suite.<sup>14</sup> Overnight, media reports went from negative to “optimistic” and

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<sup>8</sup> Ira Podell, *NHL Lockout 2012: Mediator Gets League, Union Back Together*, WASH. TIMES, Jan. 5, 2013, archived at <http://perma.cc/V3QL-KU7T>.

<sup>9</sup> See Richard M. Calkins, *Mediation: A Revolutionary Process That is Replacing the American Judicial System*, 13 CARDOZO J. CONFLICT RESOL. 1, 15 (2011).

<sup>10</sup> See *id.* at 6.

<sup>11</sup> See Lance K. Tanaka, *AAA Guide to Using ADR to Resolve Collegiate, Professional and Sports-Business Disputes*, AMERICAN ARBITRATION ASSOCIATION (Oct. 21, 2011), [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_020405](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_020405), archived at <http://perma.cc/LX68-DRD3>.

<sup>12</sup> See Jones, *supra* note 5 (featuring a sidebar with an online poll asking, “Will mediation lead to a CBA?”, and 53 percent of 903 total votes responding “No”).

<sup>13</sup> See ADAM EPSTEIN, *SPORTS LAW* 262 (2003) (stating “Mediation is not often used by the major professional sport leagues in the United States”); Timothy J. Bucher, *Inside the Huddle: Analyzing the Mediation Efforts in the NFL’s Brady Settlement and its Effectiveness for Future Professional Sports Disputes*, 22 MARQ. SPORTS L. REV. 211, 212 (2011), archived at <http://perma.cc/DW28-QHRP> (stating that “parties in American sporting disputes have utilized mediation on only a few occasions.”).

<sup>14</sup> See Jeff Z. Klein, *N.H.L. Meeting Yields Optimism Even as Players Vote on Whether to Renew a Threat*, N.Y. TIMES, Jan. 5, 2013, archived at <http://perma.cc/K8YB-86NT>.

even “downright giddy.”<sup>15</sup> Following sixteen additional hours of negotiating, players and owners hammered out a deal, thus saving the NHL season.<sup>16</sup>

Beckenbaugh was praised by journalists, hockey players, team owners, and federal officials alike for helping the NHL end its 113-day lockout. Journalists bandied about words like “savior” and “hero.”<sup>17</sup> FMCS Director George H. Cohen issued a statement commending the new ten-year labor deal between players and team owners and crediting it to Beckenbaugh’s “herculean assistance of the highest caliber.”<sup>18</sup> NHL players and management were equally thankful.<sup>19</sup> As one sports journalist wrote:

[W]hen everyone looks back on this tenuous time in the history of the game, the name of United States federal mediator Scot L. Beckenbaugh will likely be the one to be remembered most fondly. Acting as the buffer between the two sides through the marathon 16-hour negotiation that began on Saturday, carried through Sunday and ended with a tentative agreement, Beckenbaugh has received a hero’s praise for his involvement in the dispute.<sup>20</sup>

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<sup>15</sup> Travis Hughes, *NHL Lockout Update: Mediator Scot Beckenbaugh Inching Closer to Hero Status*, SB NATION (Jan. 5, 2013, 1:49 PM), <http://www.sbnation.com/nhl/2013/1/5/3839678/nhl-lockout-update-scot-beckenbaugh-mediator-progress>, archived at <http://perma.cc/V58E-E27Z> (citing tweets from various journalists following the situation).

<sup>16</sup> See Ira Podell, *Mediator Turns Final Two Days Into NHL Labor Deal*, ASSOCIATED PRESS (Jan. 6, 2013, 5:33PM), <http://bigstory.ap.org/article/mediator-turns-final-2-days-nhl-labor-deal>, archived at <http://perma.cc/E8UH-78HT>.

<sup>17</sup> See, e.g., Sports Network, *Tentative Deal in Place to End NHL Lockout*, FOX NEWS (Jan. 6, 2013) <http://www.foxnews.com/sports/2013/01/06/tentative-deal-in-place-to-end-nhl-lockout/>, archived at <http://perma.cc/7FM5-L42E> (stating that Beckenbaugh “could be considered the savior for the talks and [a] new CBA.”); Rich Chere, *If NHL Lockout Ends Soon, Mediator Scot Beckenbaugh Will Be the Hero*, NJ.com (Jan. 5, 2013, 8:50 PM), [http://www.nj.com/devils/index.ssf/2013/01/if\\_nhl\\_lockout\\_ends\\_soon\\_media.html](http://www.nj.com/devils/index.ssf/2013/01/if_nhl_lockout_ends_soon_media.html), archived at <http://perma.cc/X35V-2XSV>.

<sup>18</sup> News Release, *Statement by FMCS Director George H. Cohen On NHL-NHLPA Labor Negotiations*, Federal Mediation and Conciliation Service (Jan. 6, 2013), archived at <http://perma.cc/VX52-64R5>.

<sup>19</sup> See Podell, *supra* note 16 (quoting NHL Commissioner Gary Bettman and multiple NHL players on their appreciation for Beckenbaugh).

<sup>20</sup> Matt Brigidi, *NHL Lockout Over: Mediator Credited for ‘Extraordinary Contribution’ to New Deal*, SB Nation (Jan. 6, 2013, 7:33 AM), <http://www.sbnation.com/nhl/2013/1/6/3841846/nhl-lockout-over-ends-mediator>, archived at <http://perma.cc/VFJ8-JKP7>.

In light of mediation's success in resolving recent disputes for the NHL and other leagues,<sup>21</sup> pro sports would be wise to start viewing mediation as a valuable tool in negotiations. As in hundreds of private-sector industries, labor negotiations in pro sports fall under the National Labor Relations Act, a 1935 law which gives private sector employees, including professional athletes, the right to form labor unions, engage in collective bargaining for better contract terms and work conditions, and take collective action such as striking.<sup>22</sup> It provides unions and management many options for resolving contract disputes, including mediation.<sup>23</sup> However, "parties in American pro sporting disputes have utilized mediation on only a few occasions," despite the sports world being riddled with opportunities, including labor disputes, disciplinary disputes, and broadcast disputes.<sup>24</sup> There are many reasons for the lack of mediation in pro sports, including the existence of CBAs that require negotiations and arbitration, owners' fear of making more concessions, and a lack of understanding of what effects mediation might have on sports.<sup>25</sup> The purpose of this paper, however, is to explain the wisdom of using mediation in pro sports employment disputes, as it seems to be a particularly good fit in both CBAs and individual contracts.

## II. WHY MEDIATION?

Sports disputes are unique "specifically, [in regards to] how extraneous factors—such as the media, the legal process, and monetary gain—affect the parties' motivations and strategies."<sup>26</sup> Cohen, who has mediated opera, aviation and federal worker disputes, agrees that sports confrontations are especially hard to resolve through negotiations.<sup>27</sup> He explained:

Among the important differences between sports negotiations and others is you have the two parties, the union and team owners, then you have the commissioner representing the league as a third party. And then, behind

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<sup>21</sup> This paper goes on to explain how mediation has benefited the National Football League, Major League Soccer, New York Yankees, Big 12 Conference, and Western Athletic Conference.

<sup>22</sup> See generally, National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012), archived at <http://perma.cc/D2XT-ZG4M> (listing negotiations, labor strikes, lock-outs, mediation and other methods available to parties in contract talks).

<sup>23</sup> See *id.*

<sup>24</sup> Bucher, *supra* note 13, at 211.

<sup>25</sup> See Peter B. Kupelian & Brian R. Salliotte, *The Use of Mediation for Resolving Salary Disputes in Sports*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 383, 385 (1999).

<sup>26</sup> Bucher, *supra* note 13, at 212.

<sup>27</sup> See Steven Greenhouse, *Mediator in N.B.A. Talks Has Strong Sports Pedigree*, N.Y. TIMES, Oct. 20, 2011, at B12, archived at <http://perma.cc/9TSP-3YN5>.

the scenes, you have a fourth party, the agents who are representing individual players, and they have a voice that is being heard in the process. And then there are the interests of the fans.<sup>28</sup>

Unlike other methods of dispute resolution, the characteristics of mediation provide solutions for many of the problems plaguing players and management today. Mediation is a fast, cost-effective method for resolving many kinds of disputes.<sup>29</sup> Its confidential nature promotes open communication between the parties, which preserves, or even enhances, their working relationships.<sup>30</sup> It can “save face” for the side that is more reluctant to compromise and help preserve fans’ confidence.<sup>31</sup> Best of all, mediation allows the parties to have more control over their own fate, rather than put the outcome in the hands of a judge or arbitrator. Depending on the type of mediation used, the parties have the ability to control the following: (1) the selection of a mediator; (2) the scheduling and duration of the sessions; (3) the topics to be discussed; and (4) confidentiality of the sessions and related negotiations, among other things.<sup>32</sup> The parties cannot be forced to settle or agree with anything they are uncomfortable with,<sup>33</sup> and they may end the mediation at any time.<sup>34</sup>

It is true that arbitration, another form of ADR, offers many of these same benefits, including a neutral third party, quick results, and confidentiality.<sup>35</sup> All major American pro sports—football, baseball, basketball and

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<sup>28</sup> *Id.*

<sup>29</sup> See Karin S. Hobbs, *Attention Attorneys! How to Achieve the Best Results in Mediation*, 54 DISP. RESOL. J. 43, 43 (1999) (stating that “[m]ediation, in comparison, is less expensive, significantly faster, and provides a solution that both sides agree upon.”).

<sup>30</sup> See *id.* at 47 (stating that through mediation, “Personal or professional relationships may be restored, the emotional drain of the lawsuit or the fear of testifying is over, and the participants can move forward with their life.”).

<sup>31</sup> See Sam Carchidi, *Timing is Key in NHL Mediation, Expert Says*, PHILLY.COM (Nov. 29, 2012) [http://articles.philly.com/2012-11-29/sports/35437083\\_1\\_mediation-nhl-commissioner-gary-bettman-bettman-and-fehr](http://articles.philly.com/2012-11-29/sports/35437083_1_mediation-nhl-commissioner-gary-bettman-bettman-and-fehr), archived at <http://perma.cc/B4RD-JREX>.

<sup>32</sup> See JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW 315–21 (2005).

<sup>33</sup> See Roger J. Peters & Deborah Bovarnick Mastin, *To Mediate or Not To Mediate: That Is the Question*, 62 DISPUTE RESOLUTION JOURNAL 43, 45–46 (May/July 2007), archived at <http://perma.cc/9NLF-KCMY>.

<sup>34</sup> ADAM EPSTEIN, SPORTS LAW, 410 (2011) (stating that “[t]he parties in a mediation are virtually in complete control of the process and may walk away at any time.”).

<sup>35</sup> See Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, AMERICAN BAR ASSOCIATION, (March 2012), <http://www.americanbar.org/>

hockey—offer arbitration, and they have frequently used it in recent years.<sup>36</sup> In fact, the arbitration term “baseball” describes a common type of arbitration that was originally derived from Major League Baseball (MLB).<sup>37</sup> Both mediation and arbitration are arguably preferable to the much more public alternatives: protracted negotiations, which often result in work stoppages and fan dissatisfaction, or litigation, which can be an expensive and long process. “Arbitration and mediation are usually more efficient, less costly and more effective than litigation. Mediation is certainly more confidential,” said Adam Epstein, who teaches ADR and sports law courses at Central Michigan University.<sup>38</sup> Mediation is preferable to arbitration for a few other reasons as well. In arbitration, as with litigation, it is a win-lose situation, with only one party emerging victorious.<sup>39</sup> Mediation, by contrast, is arguably win-win. At the very least, it provides disputants more control over the process and prevents a resolution from being imposed upon the party. “The major difference between arbitration and mediation is that in arbitration an arbitrator is a decision-maker, whereas in a mediation session the mediator plays the role of settlement-facilitator,” explains Epstein.<sup>40</sup> Participants in mediation control their outcomes, albeit sharing that control with each other, whereas participants in arbitration and litigation are subject to the control and decisions of others, namely arbitrators, judges, or juries.<sup>41</sup> Arbitration decisions often face the risk of appeals, whereas mediation agreements do not.<sup>42</sup> Another significant distinction is that arbitration

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content/dam/aba/publications/dispute\_resolution\_magazine/March\_2012\_Sussman\_Wilkinson\_March\_5.authcheckdam.pdf, *archived at* <http://perma.cc/M6YK-S8Z6> (stating that arbitration “has significant advantages over litigation in court, such as party control of the process, typically lower cost and shorter time to resolution, flexibility, privacy, awards which are fair, final and enforceable, decision makers who are selected by the parties on the basis of desired characteristics and experience, and broad user satisfaction.”).

<sup>36</sup> See Tanaka, *supra* note 11, at 2.

<sup>37</sup> See Josh Chetwynd, *Play Ball? An Analysis of Final-Offer Arbitration, Its Use in Major League Baseball and Its Potential Applicability to European Football Wage and Transfer Disputes*, 20 MARQ. SPORTS L. REV. 109, 110 (2009).

<sup>38</sup> *Id.* at 424.

<sup>39</sup> See Charles Hunt, *Mediate, Arbitrate or Litigate?*, 5 GRAZIADIO BUS. REV., at 3 (2002), *archived at* <http://perma.cc/K47C-MYKW>.

<sup>40</sup> Epstein, *supra* note 13, at 257.

<sup>41</sup> See Joshua J. Campbell & Rodney A. Max, *Formal Mediation in Professional Sports*, 1 AM. J. MEDIATION 17, 21 (2007), *archived at* <http://perma.cc/PGP9-FPMX>.

<sup>42</sup> See Sheri Qualters, *Survey Says Corporate Counsel Prefer Mediation*, NAT'L LAW JOURNAL (April 27, 2007), <http://www.cpradr.org/Portals/0/Resources/Articles/Survey%20Says%20Corporate%20Counsel%20Prefer%20Mediation%20%28NLJ>

and litigation focus on the “rights” of the parties, whereas mediation focuses on the “interests” of the parties.<sup>43</sup> Finally, going through mediation helps educate parties in avoiding disputes by familiarizing them with the obstacles to resolution, so that they know what to avoid in the future.

Mediation’s success rate alone makes it a worthwhile endeavor. Overall, in disputes ranging from divorce to multi-million dollar contract disputes, “mediations end in agreement 70 to 80 percent of the time,” according to the American Bar Association.<sup>44</sup> Not surprisingly, a 2011 study found that it is “far and away the preferred ADR process” among Fortune 1,000 companies.<sup>45</sup> “There were numerous reasons for this preference, most notably perceptions that mediation offered potential cost and time savings, enabled parties to retain control over issue resolution, and was generally more satisfying both in term of process and outcomes,” wrote the study’s authors.<sup>46</sup> In addition, in recent years mediation has been implemented as a formal process in a majority of state courts, federal district courts, and many appellate court systems, both state and federal.<sup>47</sup> Mediation has also been implemented as a formal process within state and federal government agencies.<sup>48</sup> It appears to be paying dividends. The State of California conducted a study of five court-annexed civil mediation programs that operated in California trial courts between 2000 and 2003 and found that attorneys whose cases settled at mediation estimated savings of more than sixty percent in litigant costs, for total estimated savings of nearly fifty million dollars.<sup>49</sup> A 2006 study of the U.S. Federal District Court of Nebraska found that mediation

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%29.pdf, archived at <http://perma.cc/4R4C-DU3K> (stating “For arbitration, both corporate counsel and law firm lawyers . . . both harbored reservations about the quality of the results and the potential for challenges.”).

<sup>43</sup> See *What to Do About Personnel Problems*, BUS. & LEGAL REP. (Sep. 2002), <http://www.jamsadr.com/files/Uploads/Documents/Articles/Roscoe-Mediation-Arbitration-2002-09.pdf>, archived at <http://perma.cc/4NFQ-MTAV>.

<sup>44</sup> Denise A. Davenport & Lisa A. Stegink, *Should You Try Mediation Instead of Filing Suit?*, Comment to *Associations Now*, CENTER FOR ASS’N LEADERSHIP (July 2011), <http://www.asacenter.org/Resources/ANowDetail.cfm?ItemNumber=98679>, archived at <http://perma.cc/BD8H-BNJP>.

<sup>45</sup> Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, HARV. NEGOT. L. REV. (forthcoming 2014) at 10, Feb. 19, 2013, archived at <http://perma.cc/Q4S9-U66L>.

<sup>46</sup> *Id.*

<sup>47</sup> See Campbell, *supra* note 41, at 19–20.

<sup>48</sup> See *id.* at 20.

<sup>49</sup> See Heather Anderson & Ron Pi, EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS, at xxi (2004), <http://www.courts.ca.gov/documents/empprept.pdf>, archived at <http://perma.cc/98MU-YAWE>.

saved parties an average of almost ninety-five hours of litigation time.<sup>50</sup> Studies have also shown mediation to be quicker and less expensive than arbitration.<sup>51</sup> For example, a 2012 analysis by the Mediation Research & Education Project, a non-profit organization founded by Northwestern University Law School professor Stephen Goldberg, found mediation costs about one-fifth the price of arbitration.<sup>52</sup>

Given the millions of dollars of player salaries, broadcasting revenues, and ticket sales at stake in pro sports if settlements are not reached quickly, it is only sensible to seriously consider mediation. Fans of each major American sports league have witnessed an erosion of trust between players and management in recent decades. A mediator who is trained in different mediation strategies could lessen this distrust, and help players and management reach a quick settlement. An objective mediator could also preserve and enhance the constructive communication that is so critical to successful negotiations. A quick settlement would allow pro athletes to focus more on their performances on the field, which is often not possible because they are emotionally involved in the dispute and, in some cases, may even be barred from playing with their team during this time. It would also free management to concentrate on the business and marketing aspects of sports. Resolving labor disputes without strikes or lockouts, and the accompanying rhetoric and breakdown of negotiations, ought to be the top priority for every pro sport.<sup>53</sup> The following analysis of the NHL's recent mediation illustrates why mediation is a particularly good fit for pro sports.

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<sup>50</sup> See U.S. DIST. OF NEB., REP. ON MEDIATION, at 13 (2006), <http://www.ned.uscourts.gov/internetDocs/mediation/reports/report-06.pdf>, archived at <http://perma.cc/77VW-PGAS>.

<sup>51</sup> See, e.g., Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12-3 NEGOTIATION JOURNAL 259 (July 1996) (A study of 449 cases administered by four major providers of ADR services showing that mediation costs far less than arbitration, takes less time, and was judged a more satisfactory process than arbitration).

<sup>52</sup> See Mediation Research and Education Project, 2012 MREP GRIEVANCE MEDIATION REPORT, archived at <http://perma.cc/NC7-X4FZ> (finding that the average cost of mediation in 2010-2011 was approximately \$906 per case, \$453 per party. According to FMCS arbitration statistics, the comparable costs for arbitration during the same period were approximately \$4,430, \$2,215 per party).

<sup>53</sup> See Kupelian & Salliotte, *supra* note 25, at 386-89.

## A. Preserves Working Relationships

A major benefit of mediation is that it preserves working relationships between players and their teams in individual contract negotiations.<sup>54</sup> While working relationships are important in all careers, bitter negotiations in sports disputes involving a player's performance can be especially problematic. Nowadays, coaches sometimes double as the general manager and negotiator of contracts—or, if they do not, at least have considerable input in personnel decisions.<sup>55</sup> Management has an interest in the player maintaining his confidence and not hearing comments about his weaknesses during negotiations or arbitration hearings, which are intended solely to deflate the agent's or arbitrator's perceived value of the athlete.<sup>56</sup>

In this regard, mediation is vastly superior to arbitration. Consider pro baseball arbitration, which the Associated Press has characterized as “the often acrimonious negotiating process that rankles baseball management every winter.”<sup>57</sup> Due to the fact that a team can refuse to arbitrate, a stand-off is created during the negotiating process. “The take-it-or-leave-it approach causes [teams] to release players for whom they might otherwise be willing to negotiate with more flexibility.”<sup>58</sup> For example, in 2003, the Atlanta Braves declined an arbitration hearing and instead released star pitcher Greg Maddux, who had amassed a Hall of Fame-caliber record with the

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<sup>54</sup> See SIMON GARDINER, SPORTS LAW 251 (3d ed. 2006).

<sup>55</sup> See, e.g., Shaun O'Hara, *Bill Belichick Addresses Aaron Hernandez Situation the Right Way*, NFL.COM (July 24, 2013, 3:44 PM), <http://www.nfl.com/news/story/0ap100000220384/article/bill-belichick-addresses-aaron-hernandez-situation-the-right-way>, archived at <http://perma.cc/R7DK-KVSH> (stating that New England Patriots' Head Coach Bill “Belichick took it a step further by acknowledging his accountability in the personnel decisions made by the Patriots”); Brad Wilson, *DeSean Jackson Departure Shows Once and for All Who's Running the Philadelphia Eagles Now: Chip Kelly*, THE EXPRESS-TIMES (April 1, 2014, 12:55 AM), [http://www.lehighvalleylive.com/brad-wilson/index.ssf/2014/03/desean\\_jackson\\_departure\\_shows\\_once\\_and\\_for\\_all\\_whos\\_running\\_the\\_philadelphia\\_eagles\\_now\\_chip\\_kelly.html](http://www.lehighvalleylive.com/brad-wilson/index.ssf/2014/03/desean_jackson_departure_shows_once_and_for_all_whos_running_the_philadelphia_eagles_now_chip_kelly.html), archived at <http://perma.cc/QTK3-VR3T> (stating that “This is Chip Kelly's show now. Any doubt who was calling the shots for the Philadelphia Eagles on personnel matters disappeared in a terse statement issued today that the Eagles have ‘parted ways’ with explosive but high-maintenance wide receiver DeSean Jackson.”).

<sup>56</sup> See Kupelian & Salliotte, *supra* note 25, at 391.

<sup>57</sup> The Associated Press, *Willis Files for Arbitration*, SALT LAKE TRIBUNE (Jan. 14, 2006, 12:55 AM), [http://www.sltrib.com/sports/ci\\_3401828](http://www.sltrib.com/sports/ci_3401828), archived at <http://perma.cc/RX2X-AD29>.

<sup>58</sup> Campbell, *supra* note 41, at 28.

club.<sup>59</sup> Maddux seemed stunned, remarking, “You’d think after 11 years . . . to not be offered arbitration or even a contract, I’m a little surprised by it. But it is the nature of the game now.”<sup>60</sup> The Braves’ general manager at the time, John Schuerholz, said he had no choice, claiming that “[w]ith the economic circumstances we find ourselves in, we just weren’t in position to go to arbitration with these players, because that’s such an uncertain process.”<sup>61</sup> Players and management alike have lamented baseball’s arbitration process because it creates bad blood. As John Coppolella, director of baseball operations for the Atlanta Braves explained:

Anything’s fair game, but here’s the thing: you need to live with that player for the next three years. You need to go through hearings with him. And if you like Johnny Shortstop, and you want to sign him long term, and you bring [criticisms] up in front of a court hearing, that’s not too good. It’s tough, and it’s a fine line to walk. Really, arbitration is a process that is very difficult and very painful for all parties involved, and when you bring stuff up like that, it makes it even worse.<sup>62</sup>

Indeed, a 2012 analysis by Baseball Prospectus, a media outlet that conducts sabermetric analyses of the MLB, found that players who went through arbitration were less likely to re-sign long-term deals with their teams.<sup>63</sup> Further, another study of MLB statistics from 2001-04 found that sixty-two percent of players who went through arbitration performed “worse” or “substantially worse” compared to the previous season. Of those who performed better, many had switched teams. The study’s authors concluded:

While such results can be related to other factors, these statistics certainly do not support the notion that negotiation-to-arbitration is a constructive sequence that produces positive long term results. Certainly, the adversarial process controlled by third party neutrals inherent to arbitration, violates the modern understanding and appreciation of sports psychology.<sup>64</sup>

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<sup>59</sup> See Tim Evaritt, *Atlanta Braves: The Day After the Arbitration Deadline*, THE CHATTANOOGAN (Dec. 9, 2003), <http://www.chattanooga.com/2003/12/9/44316/Atlanta-Braves-The-Day-After-The.aspx>, archived at <http://perma.cc/5SQC-AC8X>.

<sup>60</sup> *Id.*

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

<sup>62</sup> Ben Lindbergh, *Overthinking It: Does Arbitration Drive Players Away?*, BASEBALL PROSPECTUS (July 3, 2012), <http://www.baseballprospectus.com/article.php?articleid=17566>, archived at <http://perma.cc/DC9X-QVF3>.

<sup>63</sup> *See id.*

<sup>64</sup> *Id.* at 31.

Interestingly, in 2013, there were no arbitration hearings.<sup>65</sup> Perhaps the league is ready for a new approach to salary disputes.

During the mediation process, an experienced mediator can avoid the acrimony common in arbitration through the use of “private caucuses” in which the mediator talks with each party confidentially, away from the other side.<sup>66</sup> Usually, these caucuses will go back and forth, a process known as “shuttle diplomacy,” until the separated parties can reach an agreement.<sup>67</sup> This enables the mediator to soften management’s tone in criticizing the player, and prevents the player from directly hearing such negative commentary. Even if joint sessions involving both parties become emotional, “a skilled mediator can monitor the exchanges, maintain civility in the negotiation process, and promote a better working relationship once the agreement is reached.”<sup>68</sup>

During the recent NHL mediation, the mediator shuttled between both sides all day long. Beckenbaugh knew he had to mend fences before he could put both sides in a room together to talk.<sup>69</sup> ESPN NHL analyst Pierre LeBrun observed that “[i]f anything should have been trending on Friday, it was the Beckenbaugh Shuffle. Talk about a workout: back and forth, back and forth, back and forth, all morning, all afternoon and all night long between the [union’s] hotel and the NHL offices a couple of blocks apart.”<sup>70</sup> It worked. ESPN reporter Scott Burnside said, “when two sides are as prickly with each other as these two have been in the past . . . this shuttle diplomacy is the only way to move the sides forward.”<sup>71</sup>

### B. Protects Privacy

The private caucuses also provide confidentiality to the parties and help the mediator fashion a potential resolution. In addition to intra-party pri-

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<sup>65</sup> Tom Van Riper, *Baseball Pitches Arbitration Shutout in 2013*, FORBES (Feb. 21, 2013, 1:05 PM), <http://www.forbes.com/sites/tomvanriper/2013/02/21/baseball-pitches-arbitration-shutout-in-2013/>, archived at <http://perma.cc/W89Q-93TX>.

<sup>66</sup> See Epstein, *supra* note 34, at 410.

<sup>67</sup> See *id.*

<sup>68</sup> Kupelian & Salliotte, *supra* note 25, at 389.

<sup>69</sup> See Keith Lutz, *Dispute Resolution, NHL Style*, HARVARD LAW SCHOOL PROGRAM ON NEGOTIATION DAILY BLOG (Feb. 12, 2013), <https://www.pon.harvard.edu/daily/dispute-resolution/dispute-resolution-nhl-style/>, archived at <http://perma.cc/KE55-KE3T>.

<sup>70</sup> Pierre LeBrun & Scott Burnside, *Debate: Will Shuttle Diplomacy Get It Done?*, ESPN (Jan. 4, 2013, 11:44 PM), [http://espn.go.com/blog/nhl/post/\\_id/21135/debate-will-shuttle-diplomacy-get-it-done](http://espn.go.com/blog/nhl/post/_id/21135/debate-will-shuttle-diplomacy-get-it-done), archived at <http://perma.cc/G2V8-DVCU>.

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

vacy, mediation can provide privacy in the proceedings themselves and in subsequent litigation.

First, a mediator can listen to concerns raised by one party and agree not to divulge any sensitive information until permission is received from that party.<sup>72</sup> This process could be particularly useful for sensitive financial information about a team or player, health problems of a player, or potential transactions involving the player. Knowing such information, a mediator can formulate a resolution that meets the actual goals, needs, and desires of both management and player.<sup>73</sup>

The law also provides an extra layer of privacy. In order to facilitate frank settlement discussions between the parties, several states have enacted the Uniform Mediation Act, which creates a mediation privilege for most mediation communications and prevents their use in subsequent legal proceedings.<sup>74</sup> Such process, creativity and protection is not possible in a professional sports dispute when the general manager and player's agent are placed in a room or conduct negotiations by phone without the assistance of a neutral third party.<sup>75</sup>

Instead, all too often, one or both parties will use the media to air their dispute. Even pro sports agent Drew Rosenhaus, who represented National Football League (NFL) star Terrell Owens in his infamous contract dispute with the Philadelphia Eagles, has conceded that this is a bad approach:

The only thing that happens when you use the media is that you [tick] the team off and embarrass them. By making the negotiations public, the team becomes tougher because they don't want to look bad in the public eye. Obviously, I have learned . . . that holding a player out and using the media in negotiations is not a good idea.<sup>76</sup>

Ironically, Rosenhaus made that statement in his book back in 1997—well before the Owens-Philadelphia saga. But, surely, any reasonable outside observer now recognizes that the PR crisis was bad for both the player and the team. Owens demanded a new contract just one year after agreeing to a seven-year, \$49 million dollar deal.<sup>77</sup> After threatening to sit out the season if a new agreement could not be reached, Owens reported to training camp but brought with him a large chip on his shoulder. The battle between the

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<sup>72</sup> See Kupelian & Salliotte, *supra* note 25, at 393.

<sup>73</sup> See *id.*

<sup>74</sup> See Peters & Mastin, *supra* note 33, at 46.

<sup>75</sup> See Kupelian & Salliotte, *supra* note 25, at 393.

<sup>76</sup> DREW ROSENHAUS, *A SHARK NEVER SLEEPS* 8 (1997).

<sup>77</sup> Chick Ludwig, *Bengals Visit Team Turmoil; Eagles' Soap Opera Filled with Squabbles, Injuries, T.O.'s Antics*, DAYTON DAILY NEWS, Aug. 26, 2005, at C5.

All Pro wideout and the Eagles deteriorated to the point that Owens was released from the team. The Eagles' locker room became divided over the issue and the team missed the playoffs after advancing to the Super Bowl the previous season.<sup>78</sup> Meanwhile, Owens lost out on millions of dollars in salary<sup>79</sup> and was scorned by a once-adoring public.<sup>80</sup>

Likewise, during the NHL lockout, owners and players initially made the mistake of airing their grievances in the press. There had been three months of "ugly press release exchanges and mood-dampening news leaks."<sup>81</sup> The mediator put an end to the media circus by implementing "a news blackout on the proceedings, the location of which was kept quiet."<sup>82</sup> The NHL and players' union complied with the gag order.<sup>83</sup> The next time the public received an official update from either side, a settlement had been reached. Now that both sides have learned that attempting to negotiate a new CBA through the media is harmful as opposed to helpful, perhaps they will insist on confidential talks when discussing future agreements.

### C. Better for Public Relations

Because mediation enables greater privacy, it could significantly help pro sports leagues protect their reputation and image. Public relations and consumer opinion are important in any business, and pro sports seem especially dependent on it.<sup>84</sup> A professional league's inability to gauge public

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<sup>78</sup> See *Eagles' McNabb Takes His Chance to Fire Shots Back at Owens*, TUSCALOOSA NEWS, July 22, 2006, at 5C, archived at <http://perma.cc/9Z3K-38XP>.

<sup>79</sup> *Eagles' Effort to Recover Portion of Bonus Backed by Arbitrator*, ESPN (Jan. 29, 2008, 7:14 PM), <http://sports.espn.go.com/nfl/news/story?id=3220008>, archived at <http://perma.cc/CE38-F6FS> (stating the Eagles withheld about \$1 million in salary from Owens and an arbitrator ordered Owens to forfeit an additional \$1.7 million from his contract signing bonus).

<sup>80</sup> See Les Bowen, *Expect Eagles Fans to Give T.O. a Raucous Reception*, PHILADELPHIA DAILY NEWS, Oct. 6, 2006, at 4 (in which Eagles' player Jeremiah Trotter assesses Eagles' fans view of Owens as, "When you're on their team, they love you, and when you're off their team, they hate you.").

<sup>81</sup> Jones, *supra* note 5.

<sup>82</sup> See Kevin Allen, *NHL, Players Meet with Mediators, Plan to Talk Again*, USA TODAY (Nov. 28, 2012, 8:10 PM), available at <http://www.usatoday.com/story/sports/nhl/2012/11/28/nhl-mediation-labor-talks/1731793/>, archived at <http://perma.cc/MMV2-DF2D>.

<sup>83</sup> See *id.*

<sup>84</sup> See, e.g., Jane Summers & Melissa Morgan Johnson, *More Than Just The Media: Considering the Role of Public Relations in The Creation of Sporting Celebrity and the Management of Fan Expectations*, 34-2 PUBLIC RELATIONS REVIEW 176 (2008) (stating, "in the cultural and ideological world of sport, PR has a much more sophisti-

reaction can cause a spiraling negative effect that must be reversed as soon as possible to stop irreparable harm and loss of fans' support. Too often, sports are slow to react to such public outcries. It is easy to document the phenomenon of damage caused. For example, MLB has suffered due to skyrocketing salaries, rampant use of performance enhancing drugs and public displays of embarrassing conduct.<sup>85</sup> All of these well-documented phenomena are chipping away at the once lofty position of baseball as the national pastime.<sup>86</sup> Similarly, the NHL's cancellation of its 2004-05 season due to a labor impasse between team owners and the players' union caused both a missed opportunity to increase its popularity and perhaps even a decline in overall fan interest. As a result of the incident, players and team owners both lost a year's worth of income and many fans and corporate sponsors are so disgusted that they may never return.<sup>87</sup> NHL legend Wayne Gretzky, who is a former managing partner of the Phoenix Coyotes, conceded as much: "In [the Canadian cities of] Toronto, Montreal, Vancouver and in places like that people are going to be mad but eventually they will come back."<sup>88</sup> He added, "Our project now is in places like Phoenix, Miami and Los Angeles where we've been on the back burner. Where we've worked so hard to build a foundation and we've disappointed a lot of fans and . . . a lot of corporate

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cated role to play. In the event of either positive or negative media attention, a sporting celebrity is subjected to unprecedented scrutiny and the increasingly high expectations of fans."); MARIA HOPWOOD ET AL., *SPORT PUBLIC RELATIONS AND COMMUNICATION* 106 (2010) (stating, "Unlike other businesses, for sports organisations public relations (rather than advertising) serves as the central hub for integrated marketing communications. It is not just that sport can be news; it is that sport's significance to its audience depends on it being news. Sports organisations require a high profile – one which suggests not merely that sport is important, but one which demonstrates its ongoing value to people and their communities. This is why successful sports organisations maintain a proactive public relations unit"); Paige Niewerth, *PR's Game Plan for the Sports Industry*, PLATFORM MAGAZINE (Sept. 24, 2010, 9:41 AM) archived at <http://platformmagazine.org/2012/01/prs-game-plan-for-the-sports-industry/> (stating, "Public relations is an essential aspect in the sports industry and has been especially noticeable during the past few years.").

<sup>85</sup> See Chris Jenkins, *Baseball Starting Off 2005 in Foul Territory*, SAN DIEGO UNION-TRIB., Apr. 3, 2005, at C1, archived at <http://perma.cc/W8JD-E7LU> (stating that MLB suffered "its most turbulent and embarrassing offseason" and listing as examples allegations of steroid use against prominent players, such as Barry Bonds, and unconvincing testimony at a congressional hearing given by record-setting slugger Mark McGwire).

<sup>86</sup> See, e.g., Peter Barzilai & John Follaco, *What's the Problem with Baseball?*, USA TODAY, Jul. 15, 2003, at 1C, archived at <http://perma.cc/92WG-5PB9>.

<sup>87</sup> See *NHL Cancels Season Amid Labor Dispute; Last-Minute Talks Fail to Break Impasse*, Facts On File, World News Digest, Feb. 17, 2005.

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

sponsorship. Only time will tell how we're going to win those people back."<sup>89</sup>

In those unusual cases where sports disputes, such as salary issues, cannot be solved by mediation quickly, mediation is still of significant value for its ability to keep the dispute out of the public eye. Mediation would offer hope that such disputes could be resolved earlier with much less public display of the greed and pettiness that turns off fans and sponsors. Even though mediation may not solve contract disputes immediately, ground rules would be established for maintaining confidentiality during mediation, which may be conducted during several sessions over a period of time. For instance, although the mediation process may not resolve the salary issues, perhaps an agreement may be made to avoid public statements about the dispute. As a result, the negative public reaction that invariably follows public commentary on pro sports disputes, particularly in this era of social media, would be avoided.<sup>90</sup>

During the 2012-13 NHL dispute, for example, both sides employed a "plethora of PR ploys and press-conference duels."<sup>91</sup> Personal attacks were made by players and owners alike.<sup>92</sup> The result was that both sides came out looking bad in fans' eyes. A rigorous brand analysis study conducted during the lockout found that the dispute was more damaging to the NHL's brand than the 2010 Gulf of Mexico oil spill was to BP.<sup>93</sup> "We found damage at levels we have not seen. It's quite alarming, really," said David Kincaid, head of the firm conducting the study.<sup>94</sup> Mediation stopped the bleeding by moving the dispute out of the court of public opinion. Both sides no longer needed to engage in posturing that might further alienate fans. Instead, negotiations could take place in private through a neutral third party. With no one else watching the negotiations, the two sides could abandon hard line stances, reach a compromise, and save face. "The mediation-made-me-do-it syndrome can work in their favor," Temple University professor Joseph Fol-

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<sup>89</sup> *Id.*

<sup>90</sup> See Kupelian & Salliotte, *supra* note 25, at 391.

<sup>91</sup> Jones, *supra* note 5, at 4.

<sup>92</sup> See Steve Silverman, *NHL Lockout: NHL Puts on More Pressure as Mediation Fails*, BLEACHER REP. (Nov. 29, 2012), <http://bleacherreport.com/articles/1427347-nhl-lockout-nhl-puts-on-more-pressure-as-mediation-fails>, archived at <http://perma.cc/3YYZ-7KZ7>.

<sup>93</sup> See Roy MacGregor, *NHL Lockout Doing 'Alarming' Damage to Brand*, THE GLOBE AND MAIL (Dec. 17, 2012, 11:00 PM), <http://www.theglobeandmail.com/sports/hockey/nhl-lockout-doing-alarming-damage-to-brand/article6500907/>, archived at <http://perma.cc/AV2F-B9EK>.

<sup>94</sup> *Id.*

ger, a mediator who teaches conflict resolution courses, explained.<sup>95</sup> The party that makes the biggest concessions can “save face by implying it was pressure from the mediator that caused it. It wasn’t that they caved, but they went with something the mediator [suggested].”<sup>96</sup>

In college sports, the Big 12 Conference and Western Athletic Conference used mediation to resolve issues surrounding the departure of member schools—and both achieved a settlement within a month of initiating the process.<sup>97</sup> Litigating such matters in court would have required significant time and resources. Moreover, mediation provided the conferences and member schools the opportunity to resolve matters quickly and confidentially. By contrast, the Big East Conference recently went through a very messy public breakup that lasted “an arduous four months” and resulted in a \$110 million settlement, according to conference officials.<sup>98</sup> The road to recovery could be a long one. As one sports columnist cautioned, “[T]he Big East brand has undoubtedly suffered lately due to conference realignment, instability among member institutions and generally bad press.”<sup>99</sup>

#### D. Offers Neutrality

Mediators help bring about a settlement by providing an environment of neutrality rather than judgment—which is invariably present when disputes are aired through legal proceedings, arbitration, or the court of public opinion. To help ensure fair and impartial proceedings, mediation organizations such as the American Arbitration Association (AAA) require their members to adhere to an ethics code.<sup>100</sup> They are also required to complete mandatory training and continued skills development courses.<sup>101</sup> Mediators from the AAA, federal government, and other professional organizations

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<sup>95</sup> Carchidi, *supra* note 31.

<sup>96</sup> *Id.*

<sup>97</sup> See Tanaka, *supra* note 11, at 2.

<sup>98</sup> See Ralph D. Russo, *Big East Completes Football-Basketball Breakup*, ASSOCIATED PRESS (Mar. 8, 2013, 5:52 PM), <http://bigstory.ap.org/article/big-east-completes-football-basketball-breakup>, archived at <http://perma.cc/77FK-N6WM>.

<sup>99</sup> Nicholas Hall, *The Big East is Dead . . . Long Live the Big East!*, CARTERET COUNTY NEWS-TIMES (March 8, 2013, 11:50 AM), [http://www.carolinacoastonline.com/news\\_times/sports/article\\_ab0789f6-8806-11e2-9259-001a4bcf887a.html](http://www.carolinacoastonline.com/news_times/sports/article_ab0789f6-8806-11e2-9259-001a4bcf887a.html), archived at <http://perma.cc/NW4T-T2NP>.

<sup>100</sup> See generally *Model Standards for Mediation Certification Programs*, ASSOCIATION FOR CONFLICT RESOLUTION (Oct. 10, 2011), <http://www.acrnet.org/uploadedFiles/Practitioner/ModelStandardsCertification.pdf>, archived at <http://perma.cc/V8H-EZYQ>.

<sup>101</sup> See *id.*

have experienced significant success in disputes involving multiple parties and issues much more complex than that of an athlete's continued employment with a team.<sup>102</sup> Even disregarding such successes, the mere addition of a neutral facilitator into the formula can be all it takes to make a difference in resolving such a dispute.<sup>103</sup> Experienced general managers and players' agents often "have history in negotiating with each other and, [where this history] is negative, they might bring [. . .] excess baggage with them to contract talks."<sup>104</sup> This bitter history can prevent negotiations from progressing or even happening. In the MLB, for example, several teams have bypassed on selecting some highly-regarded prospects in the draft or signing coveted free agent players because they did not want to have to deal with their agent Scott Boras, who has a reputation of being difficult to negotiate with.<sup>105</sup>

Mediators, however, are trained to focus on parties' issues and interests, not their personalities and positions.<sup>106</sup> To achieve this focus, they may initially spend considerable time meeting in private caucuses before bringing the parties together to prevent negotiations from deteriorating. Similarly, the mediator will take charge in scheduling meetings and follow-up with letters, phone calls, or e-mails where necessary.<sup>107</sup> They will also facilitate

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<sup>102</sup> See Tom Arnold, *Why is ADR the Answer?*, THE COMPUTER LAWYER, July 1998, at 13, 17 (describing the author's own mediation experiences involving patent infringement, which offered significant savings in litigation costs despite the complexity of the subject matter).

<sup>103</sup> See DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* 28-29 (1996) (explaining that the perception of neutrality facilitates resolution based on the complex psychologies associated with adversaries within a dispute, and the mediator's ability to make suggestions that will not damage either party's position).

<sup>104</sup> Kupelian & Salliotte, *supra* note 25, at 394.

<sup>105</sup> Patrick Languzzi, *Is Scott Boras Really Good for Major League Baseball?*, BLEACHER REP. (Jul. 30, 2011), <http://bleacherreport.com/articles/785328-mlb-is-scott-boras-really-good-for-major-league-baseball>, archived at <http://perma.cc/EDE6-3VN4> (stating that "[s]maller market teams often avoid Boras draft clients because of the high-dollar contracts often sought after for players who've never played in the minor leagues."); PON Staff, *Hardball Tactics from a Major Leaguer*, HARVARD LAW SCHOOL PROGRAM ON NEGOTIATION DAILY BLOG (Oct. 25, 2011), <http://www.pon.harvard.edu/daily/business-negotiations/hardball-tactics-from-a-major-leaguer/>, archived at <http://perma.cc/WUY6-S928> (stating that "Some teams, including the Chicago White Sox, dislike Boras's tactics so much that they refuse to negotiate with his clients.").

<sup>106</sup> See *Mediation Skills in Conflict Resolution*, FED. MEDIATION AND CONCILIATION SERVICE at 19, (Oct. 10, 2011), [http://www.iafc.org/files/lmiConf11\\_Mediation-SkillsinConflictResolution.pdf](http://www.iafc.org/files/lmiConf11_Mediation-SkillsinConflictResolution.pdf), archived at <http://perma.cc/8VDX-K435> (stating the principles of mediation).

<sup>107</sup> See Kupelian & Salliotte, *supra* note 25, at 394.

communications between the parties and ensure that they are at least talking, which is often one of the biggest impediments to resolving disputes.<sup>108</sup> Typically, a player's agent has several clients and the team's general manager has many personnel issues to deal with on a daily basis. The mediator can help keep the parties' attention on addressing their dispute by preventing procrastination.<sup>109</sup>

All of these benefits were demonstrated during the NHL mediation, in which Beckenbaugh skillfully "diffus[ed] a time bomb that could have exploded."<sup>110</sup> Neither the players nor the owners had fully "recovered from the poisoned atmosphere caused by the 2004-05 lockout."<sup>111</sup> Throughout the dispute, "each accused the other of not being serious and acting in bad faith."<sup>112</sup> Team owners "complained that the players failed to respond to proposals when they promised to do so" and that they delayed or canceled scheduled meetings.<sup>113</sup> The players' union thought owners were trying to renege on "previously-agreed points when they tabled new proposals with undisclosed changes."<sup>114</sup> The mediator stopped the stalling tactics and offered impartial motivation to get a deal done. He helped both sides realize their shared interest of keeping the NHL thriving and abandon self-interest in favor of compromise.

Mediation has even had success in overcoming difficult agents like Boras. In 2007, Boris encountered a stalemate with New York Yankees' owner George Steinbrenner while negotiating a new contract for his client, Yankees baseball player Alex Rodriguez.<sup>115</sup> Both sides had issued ultimatums and balked at each other's demands.<sup>116</sup> As a result, both sides felt insulted and believed the other side was not interested in maintaining their

<sup>108</sup> See Golann, *supra* note 103, at 43 (suggesting that once a mediator gets both parties focused on the dispute, settlement is likely to result).

<sup>109</sup> See *id.* (noting how parties have a natural tendency to procrastinate).

<sup>110</sup> Hughes, *supra* note 15.

<sup>111</sup> Michael Erdle, *Mediator Saves NHL & Players From Themselves*, SLAW (Feb. 4, 2013), <http://www.slaw.ca/2013/02/04/mediator-saves-nhl-players-from-themselves/>, archived at <http://perma.cc/7AXT-L8W3>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See generally Jack Curry & Tyler Kepner, *For Rodriguez and Yankees, It's All but Over*, N.Y. TIMES, Oct. 29, 2007, archived at <http://perma.cc/6C3M-KU7J>.

<sup>116</sup> See Joan Stearns Johnsen, *Alternative "Deal" Resolution: The Facilitated Negotiation of Transactions*, 30 WINDSOR REV. LEGAL & SOC. ISSUES 193, 200-01 (2011), (stating that, "The stalemate arose after Boras demanded that the Yankees begin discussions with an offer of \$350 million, but this was rejected. Steinbrenner had stated that he would not negotiate with Rodriguez were he to exercise [the opt-out provision of his contract and become a free agent].").

relationship.<sup>117</sup> Despite indications otherwise, Rodriguez wanted to remain a Yankee because he was a native New Yorker and his wife preferred the city.<sup>118</sup> Consequently, he reached out to business magnate Warren Buffet, who suggested using Goldman Sachs managing directors John Mallory and Gerald Cardinale as intermediaries.<sup>119</sup> Despite his public position of being prepared to let Rodriguez leave, it turned out that Steinbrenner wanted to keep the All Star slugger, who was on the verge of breaking MLB's homerun record.<sup>120</sup> The mediators were able to overcome damage that had occurred in the relationship, uncover underlying interests and resurrect a deal.<sup>121</sup> Given this result, perhaps management would be less reluctant to pursue players represented by challenging agents like Boras if their league's CBA required mediation when contract talks broke down.

#### E. Keeps Negotiations Going

When talks have stalled or broken down, as with the NHL dispute, moving beyond the impasse can be difficult because the parties are strategically reluctant to make the next contact, preventing talks from resuming.<sup>122</sup> As a neutral party who is trained to deal with these types of situations, the mediator can help break through these stalemates.<sup>123</sup>

The NHL talks "knew plenty of trouble and breakdowns and mistrust . . . . Beckenbaugh was there to fix the holes and get negotiations back on track," the Associated Press reported.<sup>124</sup> "At times during the final hours of talking, Beckenbaugh waited in the background while the sides continued to work. Negotiations kept going without him, but the bargaining was buoyed because the NHL and the union knew he was there if trouble arose

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<sup>117</sup> See *id.* (stating that, "There were perceived insults on both sides. Parties did not believe their opens were interested in maintaining their existing relationship.").

<sup>118</sup> *Id.*

<sup>119</sup> See Danielle Sessa, *Buffet Told Rodriguez to Call Yankees on Contract, Person Says*, BLOOMBERG NEWS (Nov. 18, 2007), <http://bloom.bg/1rSsWVS>, archived at <http://perma.cc/9HFL-6Q9D>.

<sup>120</sup> See Johnsen, *supra* note 116.

<sup>121</sup> *Id.* (stating that, "In the end, the Third Party Neutrals were able to work past these disagreements to neutralize personal conflicts and hard feelings.").

<sup>122</sup> See Golann, *supra* note 103, at 41-44 (discussing how procrastination can be an obstacle to reaching a timely settlement and the mediator's role is eliminating this obstacle).

<sup>123</sup> See *id.*

<sup>124</sup> Podell, *supra* note 16.

again.”<sup>125</sup> As Dan Oldfield, lead negotiator for the Canadian Media Guild, explained it:

You can bet he constantly reminded them how close they were. You can bet he reminded them of what was at stake, what they owed the fans and each other. And you can bet he offered lots and lots of suggestions. But primarily he kept them at the task. When he realized the parties were close to a deal he brought them together and there was no way they were getting out of that room without one.<sup>126</sup>

Winnipeg Jets defenseman Ron Hainsey said:

[The mediator] was in the room and the process continued to move forward. It wasn't a smooth ride. When it got to points where you didn't know what to do next—it might upset the other side—you could go to him, talk to him about it, and there was a way to work your ideas through a third party who was able to really help the process.<sup>127</sup>

Phoenix Coyotes captain Shane Doan agreed: “The mediator . . . kind of kept us going, and that was huge.”<sup>128</sup>

Similarly, a mediator helped get negotiations back on track during NFL's 2011 labor dispute between team owners and players. NFL owners had locked out players after the two sides were unable to agree on a new CBA. The players' union filed suit, seeking to force owners to resume football operations. A court upheld the lockout and mandated both sides to undergo mediation. The first thing the mediator did was huddle NFL commissioner Roger Goodell and NFL Players Association chief DeMaurice Smith together for lunch, away from the microphones and cameras of the nosy press. He found a quiet place for the three of them to grab a bite to eat and they talked about their families and background—everything but football. Goodell and Smith went on to regularly break bread with the mediator, a practice that built trust and eventually led to an agreement.<sup>129</sup> “Part of the

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<sup>125</sup> *Id.*

<sup>126</sup> Dan Oldfield, *Oldfield: Mediator Scot Beckenbaugh for NHL MVP?*, CBC SPORTS (Jan. 7, 2013), <http://www.cbc.ca/sports/hockey/nhl/oldfield-mediator-scot-beckenbaugh-for-nhl-mvp-1.1306900>, archived at <http://perma.cc/EGF4-Z9X6>.

<sup>127</sup> Mark Zwolinski, *NHL Lockout: U.S. Mediator MVP of Final Bargaining Session*, TORONTO STAR, Jan. 6, 2013, archived at <http://perma.cc/ZG4S-RFCS>.

<sup>128</sup> Steve Zipay, *NHL, Players Reach Tentative Deal; Ratification Would End Lockout*, NEWSDAY (January 6, 2013), <http://www.newsday.com/sports/hockey/nhl-players-reach-tentative-deal-ratification-would-end-lockout-1.4412276>, archived at <http://perma.cc/B2LB-DKZ6>.

<sup>129</sup> Thomas Lee, *Chief Magistrate Judge Arthur Boylan Broke the NFL Labor Stalemate*, STAR TRIBUNE, Sep. 7, 2013, archived at <http://perma.cc/LH6W-Q6LR>.

whole thing about mediation is finding common ground, even if it's something unrelated. You can find camaraderie in anything," said the mediator, Arthur Boylan.<sup>130</sup> The two sides eventually worked out an agreement and the NFL lockout ended after 136 days.<sup>131</sup> Although the dispute was ultimately settled through negotiations, mediation provided a framework for the bargaining process to happen. "Eventually, the risk of uncertainty associated with relying too heavily on the courts to 'solve' their differences . . . outweigh[ed] the utility of litigation to improve bargaining position," said mediator Michael Petruzzi, who blogged about the case. "In the final, both sides kn[ew] they [we]re partners in a very profitable enterprise and they [were] forced to bargain with one another to keep it thriving."<sup>132</sup>

### III. LIMITATIONS OF MEDIATION

Mediation does not have a perfect record, of course, and it has been unsuccessful when used in some pro sports disputes. For example, Beckenbaugh unsuccessfully attempted to mediate the NHL's labor dispute during its 2004-05 season.<sup>133</sup> During the most recent labor lockout, he initially made an unsuccessful attempt to resolve the dispute in November 2012, before getting it done during a second attempt in January 2013.<sup>134</sup> Beckenbaugh attributed the earlier failures to the sides being too far apart.<sup>135</sup> Because there was too significant a gap in demands between the disputants and neither side seemed willing to compromise, mediation was unproductive.<sup>136</sup>

<sup>130</sup> Mike Halford, *Former NFL Labor Mediator on NHL Lockout: "I'd Volunteer to Do it For Free*, NBC SPORTS (Nov. 15, 2012), <http://prohockeytalk.nbcsports.com/2012/11/15/former-nfl-labor-mediator-on-nhl-lockout-id-volunteer-to-do-it-for-free/>, archived at <http://perma.cc/ZS24-6ZX7>.

<sup>131</sup> *Id.*

<sup>132</sup> Michael Petruzzi, *NFL Lockout: How Mediation is Helping*, OVAL OPTIONS BLOG (May 2011), <http://ovaloptions.com/blog/2011/05/nfl-lockout-how-mediation-is-helping/>, archived at <http://perma.cc/3PKM-FVB2>.

<sup>133</sup> Erdle, *supra* note 111.

<sup>134</sup> Podell, *supra* note 16.

<sup>135</sup> *See id.*

<sup>136</sup> *Cf.* Chris Johnston, *Owners, Players May Go it Alone at Talks*, THE CHRONICLE HERALD (Nov. 30, 2012, 5:16 AM), <http://thechronicleherald.ca/sports/205203-owners-players-may-go-it-alone-at-talks>, archived at <http://perma.cc/TXR7-G2RK> (quoting a statement from NHL deputy commissioner Bill Daly that said "After spending several hours with both sides over two days, the presiding mediators concluded that the parties remained far apart, and that no progress toward a resolution could be made through further mediation at this point in time. We are disappointed that the mediation process was not successful.").

Mediation is likely to fail if the dispute contains high levels of conflict and low commitment to mediate. “ADR is not a perfect system and presumes, especially in mediation, that both parties wish to explore a compromise. [P]articularly in mediation, settlement can only be reached if the parties are sincere in their commitment to reach an agreement,” concedes Professor Epstein.<sup>137</sup> In contract disputes, the alternative to settling, of course, is that no deal is reached and the player or, perhaps, the entire league does not play. Temple University’s Folger said, “It’s all about the timing when mediation is involved. [It can work i]f both sides are at a place where they realize the alternative is much worse than compromising.”<sup>138</sup> While that apparently was not the attitude of either side during the 2004-05 NHL dispute, perhaps the unfortunate outcome of that dispute helped both sides realize the need for compromise during the 2013 labor dispute.

Although mediation does not guarantee a settlement, it does increase the probability of reaching a resolution. William B. Gould IV, a former chairman of the National Labor Relations Board and a professor emeritus at Stanford Law School, said, “If the parties [say] they don’t want to go to mediation, that would be downright discouraging. So the fact they’re willing to do it, that they have some things to discuss, is in itself hopeful.”<sup>139</sup> While mediation may open the door for resolution, it cannot work miracles.<sup>140</sup> “Mediation means nothing without effort” from the conflicting parties, said one hockey reporter who covered the NHL’s labor dispute.<sup>141</sup> “The federal mediator can be as skilled as possible, but no mediator can make these sides want to negotiate. Until they want to negotiate, we’ll still be sitting here with no NHL hockey and little hope of seeing any this season.”<sup>142</sup>

Finally, participants should keep in mind that while mediation often speeds up settlement, it nevertheless does require patience on their part. After mediation initially did not result in a quick fix of the most recent NHL dispute, Oldfield said:

There [were] both participants and observers who repeatedly questioned the involvement of a mediator; some even suggesting efforts to mediate

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<sup>137</sup> Epstein, *supra* note 34, at 424.

<sup>138</sup> Carchidi, *supra* note 31.

<sup>139</sup> Jeff Z. Klein, *Federal Mediators Will Oversee Negotiations on Lockout*, N.Y. TIMES, Nov. 26, 2012, at B13, *archived at* <http://perma.cc/AJ5Z-R6SS>.

<sup>140</sup> See Bruce Ciskie, *NHL Lockout 2012: Mediation Means Nothing Without Effort*, SB NATION (Nov. 27, 2012, 1:16 PM), <http://www.sbnation.com/nhl/2012/11/27/3697002/nhl-lockout-2012-mediation>, *archived at* <http://perma.cc/NG23-GD35>.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

had failed. That view is understandable if you assume that success has to be measured against the outcome of every meeting between the parties. But, as I've said before . . . , negotiations are a process—not an event.<sup>143</sup>

Regardless of the outcome, mediation is arguably never a waste of time. By going through the process, if properly conducted, key issues could be identified that, in turn, could eventually lead to a resolution. The communication and open discussion of issues may also lead to a better working relationship. Alternatively, mediation may help both parties realize sooner rather than later that their relationship should be terminated, and that it is better for both sides to agree to a trade, release or other player transaction.<sup>144</sup> Participation in mediation also helps educate parties in avoiding disputes.<sup>145</sup> Namely, parties learn to deal with disputes early, listen to grievances and evaluate their own case weaknesses. Thus, parties gain long-term skills that help prevent disputes—saving future time and cost.

#### IV. PROPOSAL

Despite all of its benefits and the limited drawbacks, “mediation has not yet been regularly utilized by the NFL, NHL, NBA, MLB, or MLS.”<sup>146</sup> Perhaps that should not be surprising given the language and terms of the existing CBAs in major American pro sports leagues. While the CBAs of the four major American sports all have several pages outlining the use of arbitration, there is no mention of mediation, even though it is a no-obligation, no-pressure option.<sup>147</sup> Mediation in pro sports, thus far, has been only on a rare and informal basis. In the case of the recent NHL dispute, for example, neither side sought mediation. Rather, federal mediators reached out and offered their assistance.<sup>148</sup>

Pro sports should be more proactive about seeking mediation. By the time a mediator gets involved it is often too late.<sup>149</sup> Relationships may have

<sup>143</sup> Oldfield, *supra* note 126.

<sup>144</sup> See Kupelian & Salliotte, *supra* note 25, at 391.

<sup>145</sup> See John P. Madden, *Mediation Saves: Time, Money and Business Relationships*, COM. MEDIATION ASS'N, U. OF DUBLIN 7, Mar. 6, 2009, archived at <http://perma.cc/3DVH-65CC>.

<sup>146</sup> Kendall D. Isaac, *Employment ADR and the Professional Athlete*, 12 APPALACHIAN J. L. 167, 170 (2013).

<sup>147</sup> See *id.*

<sup>148</sup> See Klein, *supra* note 139.

<sup>149</sup> See Isaac *supra* note 146, at 171 (stating, “. . .it would be more productive to engage in mediation in a timely and proactive manner, as opposed to mere weeks before the expiration of the CBA.”).

soured irreparably and both sides may have become more stubbornly committed to their positions even when it results in self-sabotage. Perhaps this is why fans expected mediation to fail in the recent NHL dispute.<sup>150</sup> As one sports journalist warned when Beckenbaugh initially got involved, “mediation seems to be the last resort that never works.”<sup>151</sup> Ideally, mediation should occur in the early stages of a dispute, and not be used as a last-second Hail Mary pass, as is usually the case.<sup>152</sup> For example, Major League Soccer used mediation in 2010 as a preventative measure rather than waiting for a breakdown in negotiations and using it as a reactive measure.<sup>153</sup> Because a mediator got involved early in the labor negotiations process, team owners and players reached a CBA before any players’ strike occurred.<sup>154</sup>

In order to encourage management and players to seek out mediators, future CBAs should integrate a provision for mediation in contract dispute resolution clauses as a preliminary step or precondition for arbitration or litigation. Specifically, the clause should send matters not resolved through negotiations to mediation; or, if parties do not wish to negotiate, provide mediation in advance of arbitration. Such a provision neither eliminates nor limits the arbitration processes that have been adopted in all pro sports leagues. Rather, it provides a non-binding alternative that gives the parties the opportunity to have more control over the process before having a conclusion imposed on them.

## V. CONCLUSION

America’s long history of pro sports disputes and their negative effect on player morale and public opinion evince the need to adopt a speedy, cost effective and diplomatic resolution technique. Mediation would offer a remedy by establishing a forum for open communication, which is currently missing in many sports negotiations. It would provide both parties with

<sup>150</sup> See Jones, *supra* note 5.

<sup>151</sup> Joseph Kuchie, *NHL Lockout 2012: Why Federal Mediators Won’t Help Save the 2012-2013 NHL Season*, BLEACHER REP. (Dec. 11, 2012), <http://bleacherreport.com/articles/1442129-nhl-lockout-2012-why-federal-mediators-wont-help-save-the-2012-2013-nhl-season>, archived at <http://perma.cc/4JB4-FTCM>.

<sup>152</sup> See Isaac, *supra* note 146, at 187 (stating that using mediation as a last resort “tends to result in last minute negotiation processes that are rarely resolved in time and result in lost games and seasons.”).

<sup>153</sup> See L.E. Eisenmenger, *MLS and Players Union Reach Agreement in Principle, Avert Strike*, EXAMINER (Mar. 20, 2010), <http://www.examiner.com/article/mls-and-players-union-reach-agreement-principle-avert-strike>, archived at <http://perma.cc/3B9N-VGGJ>.

<sup>154</sup> See *id.*

confidentiality, which can be used to strengthen their working relationship and keep problems out of news headlines. The neutral environment that comes with mediation would be very helpful in resolving even contentious disputes. Adopting mediation in CBAs would be financially and emotionally beneficial to athletes and management alike. As a result, public confidence in pro sports could be strengthened.



## Personal Foul: Conduct Detrimental to the Team. Penalty Declined?

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### ABSTRACT

This article discusses a recent bullying case in the National Football League (NFL) between Richie Incognito (Incognito) and Jonathan Martin (Martin). The incident raises questions regarding the fairness of the “conduct detrimental to the league” and “conduct detrimental to the team” clauses (detrimental conduct clauses) of the new Collective Bargaining Agreement (CBA).<sup>1</sup> Specifically, this article explores whether these detrimental conduct clauses are overly broad and considers whether the appeals process sufficiently protects the rights of NFL players.

Part I discusses what is currently known about the Incognito incident. Part II, in order to explore some legal implications of the incident, provides a brief history of the laws surrounding freedom of speech in the workplace. Part III delves into the NFL’s most recent CBA and is divided into four

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<sup>1</sup> Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association 2011–2020, art. 42, §1(a)(xv) (2011), *available at* <http://perma.cc/S9RU-R886> [hereinafter NFL CBA].

subsections, which discuss how the detrimental conduct clause is used in the NFL, what detrimental conduct is, how NFL players have been disciplined for detrimental conduct, and the appeal process that is available for players. Part IV discusses how similar clauses are utilized in the NBA and in television contracts. Part V proposes several arguments for and against having such broad and ill-defined clauses. Finally, Part VI discusses the litany of possible outcomes in the Incognito case under the detrimental conduct clause of the NFL CBA.

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#### I. THE INCOGNITO INCIDENT

The precise facts of the incident between Incognito and Martin are in dispute, but certain details have been confirmed. In October 2013, second year offensive lineman for the Miami Dolphins, Jonathan Martin, left the team after wrestling with emotional issues.<sup>2</sup> In the days that followed it was

<sup>2</sup> *Timeline of Dolphins' Alleged Bullying Saga Between Richie Incognito and Jonathan Martin*, USA TODAY (December 17, 2013, 12:34 PM), <http://perma.cc/N8TE-QBX9>.

discovered that Martin had accused ninth year offensive lineman Richie Incognito of harassment.<sup>3</sup> As additional evidence emerged connecting Incognito to the harassment charges, the Dolphins suspended Incognito based on what the organization considered to be conduct detrimental to the team.<sup>4</sup> The incriminating evidence included several text messages containing racial slurs sent from Incognito (who is white), to Martin (who is half African-American).<sup>5</sup> The most incriminating piece of evidence is an extremely vulgar voicemail, which Incognito admitted to leaving on Martin's phone.<sup>6</sup> The message said:

“Hey wassup you half-n\*\*\*\*\* piece of (expletive). I saw you on Twitter, you been training ten weeks. Want to (expletive) in your (expletive) mouth. I'm going to slap your (expletive) mouth. Going to slap your real mother across the face. (laughter). You're still a rookie. I'll kill you.”<sup>7</sup>

Interestingly, the inciting incident that allegedly caused Martin to leave the team was not directly related to the messages delivered by Incognito. Instead, it was a cafeteria prank where several teammates, including Incognito, got up from the dining table when Martin sat down.<sup>8</sup> Several Dolphins' players said the prank was a running joke, which had been played on many other teammates over the years.<sup>9</sup> After the cafeteria prank, Martin told Incognito his departure had nothing to do with him.<sup>10</sup> However, Martin later revealed he feared for himself and his family because of Incognito's bullying, which ultimately led to Incognito's suspension.<sup>11</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> NFL CBA, *supra* note 1, art. 42, §1(a)(xv).

<sup>5</sup> Jason La Canfora, *Dolphins Harassment Case: Text from Incognito to Martin Used Racial Slur*, CBS SPORTS (Nov. 4, 2013, 11:35 AM), <http://perma.cc/W2GJ-WFBY> (describing one text message where Incognito called Martin a half-n\*\*\*\*\* and another where Incognito threatened to kill Martin's entire family).

<sup>6</sup> Jay Glazer, *Richie Incognito: I Am Not a Racist*, FOX SPORTS (Nov. 11, 2013, 8:44 PM), <http://perma.cc/7JSV-GA3Z>.

<sup>7</sup> *Id.*

<sup>8</sup> Anwar S. Richardson, *Former Dolphins Lineman Lydon Murtha Explains Jonathan Martin Events, Defends Richie Incognito*, YAHOO SPORTS (Nov. 7, 2013, 11:51 AM), <http://perma.cc/ET2L-FZMQ>.

<sup>9</sup> Lydon Murtha, *Incognito and Martin: An Insider's Story*, SPORTS ILLUSTRATED (Nov. 7, 2013), <http://perma.cc/GC66-L6QB> (The joke was played on players who were suffering from an injury or illness. The crux of the joke was that other players did not want to catch “the bug” from the injured or sick player. In this case, it is rumored that Martin was feeling under the weather).

<sup>10</sup> *Id.*

<sup>11</sup> Stephen Mansfield, *Men and Mission: A Lesson from the Incognito Affair*, HUFFINGTON POST (Dec. 30, 2013, 3:39 PM), <http://perma.cc/66N7-G4FR>.

The amount of media attention surrounding the incident may be surprising; however, there are real world implications at stake. The 30-year-old Incognito lost \$252,941 for each game he was suspended.<sup>12</sup> The maximum Incognito (or any other NFL player) can be suspended under the conduct detrimental to the team clause is four games, which is equivalent to about \$1,000,000 of his annual salary.<sup>13</sup> Incognito and the team ultimately reached a deal where he would only forfeit two games' pay, approximately \$500,000, on the condition that he would agree to sit the remainder of the 2013-2014 season.<sup>14</sup> Per the agreement, Incognito must wait for the NFL to finish its investigation before he can begin the appeal process.<sup>15</sup>

As of January 2014, it was still unclear whether Incognito's behavior should be deemed malicious bullying worthy of the massive fine or a mere overreaction from an overly sensitive teammate. In order to put the incident in perspective it is helpful to consider Incognito's checkered history. In 2002, as a freshman at the University of Nebraska, Incognito bullied his teammate Jack Limbaugh to the point where he stormed off the field.<sup>16</sup> During the same season Incognito was suspended one game for an on-the-field fight against a Penn State player, and he was suspended again in the spring for unspecified reasons.<sup>17</sup>

In 2004, Incognito was convicted of misdemeanor assault stemming from a fight at a party.<sup>18</sup> As a result of the fight, Nebraska again suspended Incognito. In response, Incognito transferred to Oregon where he was kicked off the team for violating team conditions.<sup>19</sup> In 2005, Incognito declared for the NFL Draft and was selected by the St. Louis Rams, despite the obvious concerns surrounding his character.<sup>20</sup> Incognito ultimately enjoyed success

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<sup>12</sup> Tom Pelissero, *NFL Players Association Will Support 'All Players' in Dolphins Mess*, USA TODAY (Nov. 5, 2013, 11:19 AM), <http://perma.cc/5WMY-7UFG/>.

<sup>13</sup> NFL CBA, *supra* note 1, at art. 42, §1(a)(xv) (stating that the maximum fine is an amount equal to one week's salary and/or suspension without pay for a period not to exceed four (4) weeks).

<sup>14</sup> Tom Pelissero, *Richie Incognito Back on Dolphins' Payroll*, USA TODAY (Nov. 29, 2013, 6:59 PM), <http://perma.cc/3E5T-JEC6>.

<sup>15</sup> *Id.* (the appeal process for players punished under the detrimental conduct clause will be discussed in detail later in this article).

<sup>16</sup> Eric Edholm, *Richie Incognito's Troubled Timeline Dates Back to Early College Days*, YAHOO SPORTS (Nov. 5, 2013, 5:46 PM), <http://perma.cc/47TP-XYGS>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

on the field as an offensive lineman<sup>21</sup>, but his character issues continued to trouble him. During his four seasons with the Rams, Incognito was fined \$85,000 by the league for several on-the-field incidents ranging from striking another player to making inappropriate comments to a referee.<sup>22</sup>

In comparison, Martin has no blemishes on his record. A graduate of Stanford University, Martin is described by teammates as an introvert.<sup>23</sup> There is no evidence that Martin has ever been accused of being a troublemaker. Based on Incognito's checkered history, it is fair to assume that the incident was just another example of his disruptive behavior. However, the most important fact in dispute is whether Miami Dolphins coaches may have known about or even coerced Incognito into bullying Martin in order to "toughen him up."<sup>24</sup>

A few weeks after his suspension, Incognito said he did not realize his actions were hurting Martin; although he also acknowledged that what he considered commonplace teasing may have gone too far.<sup>25</sup> Perhaps Incognito believed his blatantly over-the-top and vulgar comments were commonplace, because that sort of behavior is condoned in most NFL locker rooms.<sup>26</sup> Lydon Murtha, a Miami Dolphin's offensive lineman from 2009 to 2012, wrote an article describing how rampant bullying is in the NFL.<sup>27</sup> He said, "[t]he coaches know who's [*sic*] getting picked on and in many cases call for that player to be singled out. Any type of denial on that side is ridiculous."<sup>28</sup>

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<sup>21</sup> Peter Berkes, *2013 Pro Bowl: Richie Incognito Earns 1st Appearance*, SB NATION (Jan. 21, 2013, 8:22 AM), <http://perma.cc/GZ7J-HSR4> (describing how Incognito was considered a hot-head early in his career, but did not receive any personal foul penalties in 2012, while starting in all 16 games for the Miami Dolphins).

<sup>22</sup> Tim Kephart, *Incognito Has Troubled History In Football*, CBS MIAMI (Nov. 4, 2013, 3:27 PM), <http://perma.cc/EPA4-LF4R>.

<sup>23</sup> Chris Perkins, *Dolphins Players Like Martin, but Love Incognito*, SUN SENTINEL (Nov. 5, 2013), <http://perma.cc/QGP4-HPVS> (stating that Incognito is "the resident funny guy, the cut-up, the class clown, the crazy one who keeps everyone laughing," while "Martin is reserved, quiet, and much more of an introvert").

<sup>24</sup> Omar Kelly, *Sources: Dolphins Coaches Asked Incognito to Toughen up Martin*, SUN SENTINEL (Nov. 5, 2013), <http://perma.cc/T36J-UHHU> (stating that Miami Dolphins coaches asked player Richie Incognito, who was the offensive line's undisputed leader, to toughen up teammate Jonathan Martin after he missed a voluntary workout last spring).

<sup>25</sup> Jay Glazer, *Richie Incognito: I Am Not a Racist*, FOX SPORTS (Nov. 11, 2013, 8:44 PM), <http://perma.cc/49TS-HXEN>.

<sup>26</sup> Lydon Murtha, *Incognito and Martin: An Insider's Story*, SPORTS ILLUSTRATED (Nov. 7, 2013), <http://perma.cc/DQ7J-BFM4>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

The Incognito incident raises questions regarding how NFL teams and current NFL Commissioner Roger Goodell discipline players for off-the-field comments by utilizing the detrimental conduct clause. This article will explore how the NFL and other organizations, including the National Basketball Association (NBA) and television networks, punish employees for comments made outside the workplace. Additionally, this article discusses possible changes to the NFL's detrimental conduct clause to make it more conducive to players' rights, while concurrently providing NFL management power to control its employees. Finally, this article will discuss the potential ramifications faced by Incognito depending on the various possible outcomes of the NFL's investigation (still pending in January 2014). Because the focal point of this article is misconduct involving a player's off-the-field comments, it is important to understand some of the underlying concepts of how freedom of speech can be limited in the workplace.

## II. FREEDOM OF SPEECH IN THE WORKPLACE

Some commentators have argued that Richie Incognito should not be punished by the NFL because his comments were protectable free speech under the First Amendment.<sup>29</sup> There are several problems with this argument, the first being that free speech is not an absolute right. Free speech can be limited in several ways; for example, child pornography is not protected,<sup>30</sup> true threats are not protected,<sup>31</sup> and most importantly for Incognito, not all comments in the workplace are protected.<sup>32</sup> Workplace harassment law has become one of the broadest speech restrictions and has been used to suppress political statements, sexual jokes, and even religious comments.<sup>33</sup> More importantly, First Amendment free speech protection does not extend to private entities.<sup>34</sup> Thus, private employers, such as NFL-affiliated organizations, are allowed to terminate their employees based on

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<sup>29</sup> Jay Busbee, *Shutdown Corner Mailbag: Richie Incognito, bullying, and free speech*, Yahoo Sports, (Nov. 7, 2013), <http://perma.cc/K3NX-RMF5>.

<sup>30</sup> See *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>31</sup> See *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>32</sup> Lisa B. Bingham, *Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions*, 55 Ohio St. L.J. 341, 341(1994) (stating how a private-sector employer in the United States may fire an employee for the employee's political views).

<sup>33</sup> Eugene Volokh, *Freedom of Speech vs. Workplace Harassment Law — A Growing Conflict*, U.C.L.A. Law School, <http://perma.cc/KT72-MVZV> (last visited April 17, 2014).

<sup>34</sup> *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (First Amendment applies only to government speech restrictions).

speech they deem harmful to their business.<sup>35</sup> As a result, there is nothing unconstitutional about the NFL using the detrimental conduct clause as a tool to suppress comments made by NFL players.

In some respects, the NFL handles detrimental conduct by its employees in a more lenient fashion than most private businesses. In many occupations an employee would be immediately terminated for the sort of workplace harassment that allegedly occurred as part of the Incognito incident. However, the NFL workplace is different from most occupations. Unlike most workplace environment, the NFL is well-known as a raucous environment where uncouth comments are made on a daily basis.<sup>36</sup>

Another difference between NFL teams and most employers is that if a player is terminated by an NFL organization there is nowhere else the player can be paid a comparable salary to play football. The Canadian Football League (“CFL”), which is a common second choice for players who cannot make it in the NFL, has an average player salary of \$80,000 per year compared to the NFL’s average salary of \$1.9 million per year.<sup>37</sup> The NFL has a veritable monopoly on the sport of football. However, the NFL (like any workplace) is allowed to implement policies to restrict some behavior and speech. Regardless of the legality or constitutionality of the NFL’s conduct policy, with so much money on the line it is important to determine if there are better alternatives to the current system. The next section will explain the intricacies of the current conduct policy system.

### III. THE NFL CBA & THE DETRIMENTAL CONDUCT CLAUSE

#### A. *Introduction to the NFL CBA*

The NFL CBA is the most influential agreement in the NFL; however, it is just one agreement made between the National Football League Players Association (NFLPA<sup>38</sup>) and NFL Management Council.<sup>39</sup> There are several

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<sup>35</sup> *Id.*

<sup>36</sup> See Michael David Smith, *Richard Sherman calls NFL banning the N-word “an atrocious idea”*, NBCSports, (Mar. 3, 2014). <http://perma.cc/Y59N-HKGV> (explaining how the N-word is used frequently on the field by NFL players).

<sup>37</sup> Adriana Valente, *Average CFL Player Makes Only \$80,000 Per Year*, The Richest (Nov. 25, 2013) <http://perma.cc/RF5W-4HSP>.

<sup>38</sup> See NFL Players Association Constitution, Article 1.03 (March 2007) (describing how the National Football Players Association was established in part to protect the player’s interests and provide formal representation during collective bargaining agreement negotiations), available at <http://perma.cc/WZJ4-D5LN> (last visited April 17, 2014).

other contracts that dictate the power between players and management such as Uniform Player Contracts (UPC) and the NFL Constitution and Bylaws.<sup>40</sup> What makes the CBA so influential is it contains a supremacy clause stating that it supersedes the UPC and NFL Constitution and Bylaws.<sup>41</sup> In 2011 there was a lockout by the owners of the players due to a dispute over the terms of a contemplated new NFL CBA, which had players, owners, and fans pleading for the NFL Management Council and the NFLPA to come to an agreement. Before the 2011 lockout, the NFL was operating under the provisions of a CBA that was last amended in 2006.<sup>42</sup> When the 2011 CBA was ratified it contained much of the same language regarding detrimental conduct as the 2006 CBA did.<sup>43</sup> In August 2011, the lockout ended and the NFL and the NFLPA entered into the new CBA.<sup>44</sup> One of the most contentious issues was whether Commissioner Goodell would retain his disciplinary power, which empowers the Commissioner to make judgment calls on what off-the-field incidents should be considered conduct detrimental to the league, regardless of the legality of the conduct.<sup>45</sup>

Under the new CBA there are two types of detrimental conduct: (1) conduct that is detrimental to the team; and (2) conduct detrimental to the league.<sup>46</sup> Each of the thirty-two NFL teams may have their own definition of conduct detrimental to the team because there is no exact definition in the CBA.<sup>47</sup> In comparison, conduct detrimental to the league is decided by the Commissioner.<sup>48</sup> Any punishment the commissioner imposes upon a player for conduct detrimental to the league precludes or supersedes team punishment for such conduct.<sup>49</sup>

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<sup>39</sup> Benjamin Leibovitz, *Unnecessary Roughness? A Review of the NFL Commissioner's On-The-Field Disciplinary Powers*, 20 Sports Law. J. 187, 191 (2013).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 191–92. See also NFL CBA *supra* note 1 at art. 2, §1.

<sup>42</sup> Leibovitz, *supra* note 39, at 200.

<sup>43</sup> See Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association, art. 8 (2006), available at <http://perma.cc/MUN7-RBBE>.

<sup>44</sup> Howard Fendrich, *NFL Lockout Over: Owners, Players, Agree to a Deal*, HUFFINGTON POST (July 25, 2011, 10:20 PM), <http://perma.cc/3SVP-7KE3>.

<sup>45</sup> Louis Bien, *CBA Hung up on Roger Goodell's Control of Personal Conduct Policy*, SB NATION (Aug. 3, 2011, 8:14 PM), <http://perma.cc/4M2K-43F2>.

<sup>46</sup> NFL CBA, *supra* note 1.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at art. 46, §1.

<sup>49</sup> *Id.* at art. 42, §3(b).

Many players feel the Commissioner acts as judge, jury, and executioner in all cases concerning off-the-field incidents.<sup>50</sup> It is unclear whether players are motivated by a desire for greater separation of powers, a personal vendetta against Commissioner Goodell for past fines, or have another reason to oppose the Commissioner's power. Regardless of the players' concerns, Goodell retained his power.<sup>51</sup> The next section discusses how to navigate the complicated detrimental conduct clauses.

### B. *Navigating the Detrimental Conduct Clause*

The detrimental conduct clause appears in several sections of the 2011 NFL CBA, including two sample contracts attached as appendices. The first contract in Appendix A is a sample NFL player contract, which is a template for contracts the players sign.<sup>52</sup> The clause located under the subheading "integrity of the game" states:

"When a player is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract."<sup>53</sup>

This exact language also appears in Appendix J, which is a sample contract for a player on a team's practice squad.<sup>54</sup>

Similar language also appears in Article 46 of the CBA, which addresses how fines and suspensions may be levied against players by the commissioner, "for conduct detrimental to the integrity of, or public confidence in, the game of professional football."<sup>55</sup> This broad language could apply to a litany of harmless acts where a player hypothetically is fined millions of

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<sup>50</sup> Josh Alper, *Ryan Clark Toning Down his Comments Toward the League*, NBC SPORTS (Aug. 21, 2011, 10:59 AM), <http://perma.cc/8SQU-9QDV> (discussing Ryan Clark, a defensive back and the NFLPA representative for the Pittsburgh Steelers, and his involvement in the decision to vote against the new CBA because it handed Goodell the power to play judge, jury, and executioner when it comes to player discipline).

<sup>51</sup> Joel Thorman, *NFL Lockout: Roger Goodell Retains Power to Discipline in New CBA*, SB NATION (Aug. 4, 2011, 10:11 AM), <http://perma.cc/EH7B-W5K7>.

<sup>52</sup> NFL CBA, *supra* note 1, at app. A.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at app. J.

<sup>55</sup> *Id.* at art. 46 (excluding from the definition of conduct detrimental to the league unnecessary roughness and unsportsmanlike penalties that occur in games,

dollars for making controversial comments regarding sexual orientation, politics, or the game of football itself.<sup>56</sup> Under this broad definition there is virtually no limit as to what the Commissioner may consider as conduct detrimental to the league.

Additionally, there exists similarly broad language in Article 42 of the CBA referring to conduct detrimental to the team or club.<sup>57</sup> This broad leeway essentially means NFL teams have their own personal conduct policies, which apply to all players on those teams.<sup>58</sup> The Incognito case is an example of a club, the Miami Dolphins, utilizing this power.<sup>59</sup> As stated above, a player cannot be penalized by both his team and the Commissioner; however, if the Commissioner decides to penalize a player the Commissioner's disciplinary action will supersede any action taken by the club.<sup>60</sup>

There are limitations on how severely a player can be punished by his team. Article 42 of the CBA describes the penalties that may be enforced upon a player who is found to have been involved in conduct detrimental to the club.<sup>61</sup> The key provision says:

“Conduct detrimental to Club—maximum fine of an amount equal to one week’s salary and/or suspension without pay for a period not to exceed four (4) weeks. This maximum applies without limitation to any deactivation of a player in response to player conduct (other than a deactivation in response to a player’s on-field playing ability), and any such deactivation, even with pay, shall be considered discipline subject to the limits set forth in this section. The Non-Injury Grievance Arbitrator’s decision in *Terrell Owens* (Nov. 23, 2005) is thus expressly overruled as to any Club decision to deactivate a player in response to the player’s conduct.”<sup>62</sup>

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which are punishable by someone appointed by the league commissioner, as opposed to by Roger Goodell himself).

<sup>56</sup> Several examples of players being fined and suspended by teams for just these reasons will be described in the section “Past Examples of Conduct Detrimental to the Team.”

<sup>57</sup> NFL CBA *supra* note 1, at art. 42, §1(a)(i)–(xv).

<sup>58</sup> *Id.* at art. 42, §2(a).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at art. 42, §3(b).

<sup>61</sup> *Id.* at art. 42, §1(a)–(xv).

<sup>62</sup> *Id.* at art. 42, §1(xv). (The Terrell Owens case, which was expressly overruled in the 2011 CBA held the Philadelphia Eagles could suspend Owens for the maximum four games, as well as not permit him to play or practice after those four games, due to the nature of his conduct and its destructive and continuing threat to the team. Under the new CBA the Eagles would have had to release Owens or allow him to play after the four week suspension. Thus, the maximum penalty is a four-game suspension without pay, there can be no further penalties such as not allowing

An NFL season consists of seventeen weeks and NFL players are paid 1/17th of their salary each week.<sup>63</sup> Thus, there is a lot of money at stake<sup>64</sup> when up to roughly twenty-five percent of that salary can be deducted for conduct detrimental to the club.

In comparison, there does not appear to be the same limitation on the Commissioner's power to punish a player in excess of a four-week pay deduction. As stated above, NFL player contracts state that the Commissioner has the power to fine players a reasonable amount; to suspend a player for a certain period or indefinitely; and/or to terminate their contract. Thus, the Commissioner could hypothetically suspend players without pay for an entire year or even ban a player from the league, potentially costing the player millions of dollars.

Incognito was suspended by the Dolphins for conduct detrimental to the club and had the potential to lose a maximum four game checks, which totaled approximately \$1,000,000 based on his guaranteed salary before he took the deal forfeiting \$500,000 and agreeing to sit the rest of the season. However, as the investigation continued, the Commissioner had the power to impose a different, harsher penalty, which under the CBA would supersede the penalty levied by the Miami Dolphins. If the Commissioner decided to suspend Incognito for the entire year he would have essentially fined Incognito the remainder of his \$4,000,000 guaranteed contract. This leads to the difficult question of what exactly is detrimental conduct.

### C. *What is Detrimental Conduct?*

The CBA states that a team can fine and suspend players for conduct detrimental to the club; however, detrimental conduct is not appropriately defined.<sup>65</sup> To determine what the CBA considers detrimental conduct, it is helpful to understand what conduct the CBA does not include under the detrimental conduct umbrella. The CBA specifies the maximum penalties for players who are overweight, absent or late from meetings, lose their playbook, get ejected from a game, throw a football into the stands, and

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the player to practice or play after the four-games, instead the player must be released or allowed back on the team).

<sup>63</sup> Rob Demovsky, *Players Get Paid in Playoffs, Too*, ESPN: NFL NATION (Jan. 1, 2014, 11:30 AM) <http://perma.cc/4RTA-TNR3>.

<sup>64</sup> Monte Burke, *Average Player Salaries in the Four Major American Sports Leagues*, FORBES, (Dec. 07, 2012 15:29 EST), <http://perma.cc/SU4B-MLWJ>.

<sup>65</sup> See NFL CBA, *supra* note 1; see also Darren Heitner, *Should Richie Incognito Appeal His Suspension By The Miami Dolphins*, FORBES (Nov. 13, 2013), <http://perma.cc/3G26-WKGL>.

several other infractions.<sup>66</sup> Thus, these acts are not detrimental conduct because they are listed separately from conduct detrimental to the club clause.

Another area rife with potential for misconduct that is explicitly excluded from the detrimental conduct definition is on-the-field conduct. Article 46 states:

“All disputes involving a fine or suspension imposed upon a player for conduct on the playing field (other than as described in Subsection (b) below) or involving action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football, will be processed exclusively as follows:”<sup>67</sup>

Subsection (b) refers to the process for determining whether players should be fined for unnecessary roughness and unsportsmanlike conduct on the playing field.<sup>68</sup> Article 46 carves out three separate offenses: unnecessary roughness and unsportsmanlike conduct, other conduct on the playing field, and conduct detrimental to the integrity of, or public confidence in, the game of professional football (conduct detrimental to the league). This distinction demonstrates conduct that occurs on the playing field should also be considered separately from detrimental conduct. One example of misconduct provided in the CBA is associating with gamblers or gambling activity, regardless of whether the gambling is related to the NFL.<sup>69</sup> Additionally, the NFL player contract in the CBA prohibits using or providing stimulants or other drugs used to enhance on-the-field performance.<sup>70</sup> Then the player contract broadly defines detrimental conduct as, “any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League.” This broad statement opens up Pandora’s Box as to what may be considered detrimental conduct.

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<sup>66</sup> NFL CBA, *supra* note 1, at art. 42, §1(a)(i)–(xv).

<sup>67</sup> *Id.* at art. 46, §1(a).

<sup>68</sup> *Id.* at art. 46, §1(a)-(c). (describing how fines for unnecessary roughness and unsportsmanlike conduct shall be determined initially by a person appointed by the Commissioner after consultation concerning the person being appointed with the Executive Director of the NFLPA, as promptly as possible after the event(s) in question. Such person will send written notice of his action to the player, with a copy to the NFLPA. Within three (3) business days following such notification, the player, or the NFLPA with his approval, may appeal in writing to the Commissioner. Additionally, the Commissioner or person appointed by the Commissioner must consult with the Executive Director of the NFLPA when fining players for \$50,000 or more).

<sup>69</sup> NFL CBA, *supra* note 1, at app. A. §15.

<sup>70</sup> *Id.*

The one definition of detrimental conduct explicitly provided in Article 42 says any curfew violation the night before a club's game can be considered conduct detrimental to the club.<sup>71</sup> In sum, conduct detrimental to the club encompasses any off-the-field conduct not listed in other areas of the CBA, as well as curfew violations. In comparison, conduct detrimental to the league appears to encompass the same conduct, except curfew violations, which is explicitly left for team discipline. This roundabout way of defining detrimental conduct is a result of the lack of an overt definition within the CBA.

What type of off-the-field conduct is considered detrimental? Interestingly, many off-the-field criminal acts such as domestic violence have largely been ignored by the NFL and are rarely considered detrimental conduct.<sup>72</sup> In an effort to specify the type of off-the-field conduct that is considered detrimental it is helpful to look at past examples where players have been fined for violating the detrimental conduct clause. The problem that arises is that teams have inconsistently determined what conduct necessitates the hefty fines associated with violating the clause, particularly in the realm of free speech. Players have been fined (or not fined) for comments that are political, derogatory, or even references to a player's treatment by his team. Below are a few examples of how teams have reacted to player comments.

#### *D. Past Examples of Conduct Detrimental to the Team*

##### *i. Rashard Mendenhall*

In response to Osama Bin Laden's death and the subsequent celebratory acts in the United States, Pittsburgh Steelers running back Rashard Mendenhall took to Twitter and posted several controversial tweets.<sup>73</sup> One tweet said, "[w]hat kind of person celebrates death? It's amazing how people can HATE a man they have never even heard speak. We've only heard one side."<sup>74</sup> The more scandalous tweet stated, "[w]e'll never know what really happened. I just have a hard time believing a plane could take a skyscraper down demolition style."<sup>75</sup> The latter tweet refers to the preposterous con-

<sup>71</sup> *Id.* at art. 42, §1(a)(xiv).

<sup>72</sup> Bethany P. Withers, *The Integrity of the Game: Professional Athletes and Domestic Violence*, 1 HARV. J. SPORTS & ENT. L. 145, 146 (2010).

<sup>73</sup> *Steeler Questions Accounts of 9/11*, FOX SPORTS (May 3, 2011), <http://perma.cc/364F-BCQ5>.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

spiracy theory that the September 11th attacks were the result of an inside job by the United States government.

In response to the tweets, the Steelers president issued a statement regarding the Steelers' support for the troops.<sup>76</sup> At no time did the NFL overtly threaten or imply that Mendenhall's controversial comments amounted to conduct detrimental to the league. This is one example where a team and the league were willing to let controversial comments fly under the radar.

## ii. Larry Johnson

In comparison to the Mendenhall case, former Kansas City Chiefs running back Larry Johnson faced a public firestorm after making controversial comments via Twitter.<sup>77</sup> His comments included the use of a three-letter homophobic slur, the belittling of a fan for making less money than him, and mocking his coach Todd Haley's lack of playing experience.<sup>78</sup> Unlike Mendenhall, Johnson was severely reprimanded under the conduct detrimental to the team clause. Johnson's two week suspension cost him approximately \$600,000 in lost wages.<sup>79</sup>

Despite the litany of comments made by Johnson, the real catalyst in his suspension appears to be his use of homosexual slurs.<sup>80</sup> The offensive commentary by Mendenhall and Johnson both brought a barrage of criticism from fans and the media. Another similarity is that both players' tweets can be construed as controversial political or religious opinions. Mendenhall's tweet showed support for the highly divisive 9/11 "truth" group, which often cites Muslim discrimination and the Bush Administration to support their conspiracy theory that the September 11th attacks were an inside job.<sup>81</sup> In comparison, Johnson's homophobic remarks may have been based on a religious or political opinion that opposes homosexuality. The biggest difference in the two cases is that Johnson personally attacked a fan while Mendenhall was making more general political statements. In the end, Mendenhall was not reprimanded while Johnson was fined approximately

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<sup>76</sup> *Id.*

<sup>77</sup> Judy Battista, *As Johnson's Suspension Ends, So Does His Time With the Chiefs*, NEW YORK TIMES (Nov. 9, 2009), available at <http://perma.cc/3C59-862P>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Johnson Suspended Until Nov. 9*, ASSOCIATED PRESS (Oct. 29, 2009), <http://perma.cc/X9Y9-TA6F>.

<sup>81</sup> See 911TRUTH.ORG, <http://www.911truth.org/> (last visited Apr. 11, 2014).

\$600,000. When teams fine players for controversial comments it raises speculation about why teams punish some players but not others.

iii. Kellen Winslow

Another player fined significant amounts of money for mere comments was Cleveland Browns tight end Kellen Winslow.<sup>82</sup> Winslow contracted a dangerous staph infection from the Browns locker room, which led to his hospitalization.<sup>83</sup> After being treated, Winslow was outspoken regarding his unhappiness with how the Browns organization was handling a virtual outbreak of staph among players.<sup>84</sup>

As a result, Winslow was suspended for one game costing him \$235,294 under the conduct detrimental to the team clause. This case is particularly troubling because it shows a team fining a player for trying to protect the health of himself and his teammates. Winslow utilized the expedited appeal process and the Browns eventually dropped the suspension.<sup>85</sup> The CBA's appeal process allows players to appeal charges of detrimental conduct to a board of neutral arbitrators.<sup>86</sup> This incident shows how even if the detrimental conduct clause is overly broad the appeals process can protect player's rights in some situations.

iv. Riley Cooper

A 2013 incident involving Philadelphia Eagles wide receiver Riley Cooper sheds more light on what type of conduct an NFL organization may consider detrimental to the team.<sup>87</sup> At a Kenny Chesney concert a fellow concertgoer captured video of Cooper stating he would "fight any n\*\*\*\*\* here."<sup>88</sup> This prompted a media and fan frenzy demanding that Cooper be

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<sup>82</sup> James Walker, *Browns Suspend Winslow One Game Over Critical Comments*, ESPN (Oct. 22, 2008), <http://perma.cc/JNE5-F432>.

<sup>83</sup> *Id.*

<sup>84</sup> James Walker, *Winslow Reveals Reason for Hospital Stay, Upset with Browns GM Savage* ESPN (Oct. 20, 2008), <http://perma.cc/3CNH-78XC> (explaining Winslow's staph infection was the sixth known infection in the Brown's organization in the past few seasons).

<sup>85</sup> ESPN, *Browns TE Winslow: Both Sides Know Where Each Was Coming From*, ESPN (Oct. 27, 2008), <http://perma.cc/935J-YZDS>.

<sup>86</sup> NFL CBA, *supra* note 1 at art. 43, §4. (The appeal process will be discussed in detail later in this article).

<sup>87</sup> Dan Hanzus, *Eagles Fine Riley Cooper for Insensitive Comment*, NFL.COM (July 31, 2013), <http://perma.cc/J8X8-FT4Z>.

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

punished.<sup>89</sup> Cooper was not suspended, but was fined an undisclosed amount, which he referred to as “a good amount of money.”<sup>90</sup> Commissioner Goodell said he would not punish Cooper further because he felt the Eagles had acted swiftly and to his satisfaction.<sup>91</sup>

Cooper realized the heinous nature of his comments and wisely chose to apologize for his conduct, as opposed to seeking an appeal or any other form of redress. The Incognito incident is another case involving a white person uttering racial slurs. Hypothetically, had Incognito not used a racial slur it is likely that his comments would still be considered harassment or bullying. However, had Incognito not used a racial slur, would he be punished to the same extent? Incognito has, for the most part, stated that he has not done anything wrong; however, the one thing he has apologized for is the use of the N-word.<sup>92</sup>

Based on the cases above, teams appear to be willing to use the detrimental conduct clause to punish players for racist or homophobic comments. However, racist and homophobic comments are frequently made by players without accompanying punishment. Regarding the N-word, Seattle Seahawk’s cornerback Richard Sherman stated, “It’s in the locker room and on the field at all times.”<sup>93</sup> This general atmosphere in which such comments are not punished may be why some players describe the Incognito incident as merely a case of a player making offensive comments,<sup>94</sup> as opposed to a bullying incident worthy of a \$500,000 fine.

Additionally, it appears the Commissioner is content letting teams discipline their own players when the problematic conduct amounts to offensive comments. Once a penalty is imposed, the next step for a penalized player is the appeal process, which will be briefly considered in the next section.

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<sup>89</sup> Mike Greger, *Riley Cooper: The Fallout*, METRO (Aug 1, 2013), <http://perma.cc/69D9-VTWR>.

<sup>90</sup> Hanzus, *supra* note 87, at 17.

<sup>91</sup> *Id.*

<sup>92</sup> Michael David Smith, *Richie Incognito: I'm Not a Racist, Don't Judge Me By That Word*, NBC SPORTS (Nov. 10, 2013), <http://perma.cc/ZZ4Y-MLPM>.

<sup>93</sup> Michael David Smith, *Richard Sherman Calls NFL Banning The N-word “An Atrocious Idea”*, NBCSPORTS, (Mar. 3, 2014), <http://perma.cc/QXS6-BYDH> (explaining a new rule the NFL proposed, which would make use of the N-word on the field subject to a 15-yard penalty).

<sup>94</sup> *Dolphins' Incognito Breaks Silence on Martin in First Interview Since Bullying Allegations Surfaced*, FOX NEWS (Nov. 11, 2013), <http://perma.cc/7R4P-24V7> (describing Incognito’s opinion that his words stemmed from a culture of locker room “brotherhood” rather than bullying).

### E. *The Appeal Process*

An Article 43 non-injury grievance is the exclusive procedure for resolving disputes regarding compliance with the terms and conditions of employment of NFL players.<sup>95</sup> A non-injury grievance can either be ordinary or expedited.<sup>96</sup> An ordinary non-injury grievance must be filed within fifty days from the date of the incident upon which the grievance is based.<sup>97</sup> When the non-injury grievance involves a suspension, the player will have the option to have a hearing expedited, which means a hearing with an arbitrator must be held within seven days.<sup>98</sup> Incognito used the expedited appeal option; however, Incognito later agreed to postpone the expedited appeal until the NFL completed its investigation.<sup>99</sup>

In comparison, Article 46 of the NFL CBA describes the appeal process for players penalized for conduct detrimental to the league, meaning the penalty was handed down by the Commissioner as opposed to the team.<sup>100</sup> Commissioner Goodell wields vast leverage in this appeal process, which makes it one of the more controversial aspects of the CBA.<sup>101</sup> On appeal the Commissioner appoints the hearing officers and can appoint himself, although he must consult with the Executive Director of the NFLPA.<sup>102</sup> Even after said consultation the Commissioner still has the discretion to serve as hearing officer.<sup>103</sup>

The Commissioner's power is limited in part by due process rights described in the CBA such as a player's right to counsel of his choice, right to notice of the detrimental conduct, and a right to appeal.<sup>104</sup> However, there is almost no limit as to what type of off-the-field conduct constitutes detrimental conduct, because detrimental conduct is poorly defined. This

<sup>95</sup> NFL CBA, *supra* note 1, at art. 43.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at art. 43, §2.

<sup>98</sup> *Id.* at art. 43, §4.

<sup>99</sup> Adam H. Beasley, *Richie Incognito Postpones Grievance Hearing Against Miami Dolphins, Wants to Return to Team*, MIAMI HERALD (Nov. 21, 2013), available at <http://perma.cc/4AVA-YU3H> (discussing how an independent arbitrator will be chosen under the CBA).

<sup>100</sup> *Id.* at art. 46.

<sup>101</sup> See *Saints Bounties: Jonathan Vilma Leaves Appeals Hearing with Roger Goodell, Calls it a Sham*, CBS NEWS (June 18, 2012), <http://perma.cc/BY4X-HZPK>.

<sup>102</sup> NFL CBA, *supra* note 1, at art. 46, §2(a) (There is no mention of whether the Executive Director of the NFLPA has any power to remove a hearing officer appointed by the Commissioner. It only says the Commissioner must consult with the Executive Director).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at art. 46, §§1-2.

makes the appeal process a key protection for a player facing discipline for detrimental conduct. The appeal process appears to be relatively neutral when a player is accused of conduct detrimental to the team, but not when a player is accused of conduct detrimental to the league. Before proposing some amendments to the NFL's detrimental conduct clause, it is helpful to discover how similar clauses are used in other sports and industries, when employees make controversial comments or harass other employees.

#### IV. DETRIMENTAL CONDUCT IN TELEVISION & THE NBA

##### A. *Morals Clauses in Television*

Morals clauses "generally allow companies employing talent to terminate an agreement when the talent's conduct is detrimental to the company's interests or otherwise devalues the performance due."<sup>105</sup> The detrimental conduct clause in the NFL CBA is an example of a morals clause. Morals clauses are commonly used by advertisers, movie studios, and television networks.<sup>106</sup> These companies are almost always looking to include a broad morals clause in contracts because that allows them to terminate talent for any potentially damaging conduct.<sup>107</sup>

A sample morals clause used in television reads as follows:

"Network will have the right to terminate this Agreement for cause, which includes, without limitation . . . insubordination, dishonesty, intoxication, resignation . . . failure to conduct Talent's self with due regard to social conventions or public morals or decency, participation in any "adult" media (as determined by Network in its sole discretion) or commission of any act (in the past or present) which degrades Talent, Program, or Network or Producer or brings Talent, Network, Producer or the Program into public disrepute, contempt, scandal or ridicule (provided that Network shall so terminate this Agreement within a reasonable period of time of such information becoming public or coming to Network's attention) . . . . Network's use of Artist's services after termination of this Agreement shall not be deemed a reinstatement or renewal of this Agreement without the written agreement of the parties hereto."<sup>108</sup>

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<sup>105</sup> Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 235 (2005).

<sup>106</sup> *Id.* at 239.

<sup>107</sup> Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares about Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 370 (2009).

<sup>108</sup> Kressler, *supra* note 105, at 252 (drafting of the sample clause was based on contracts negotiated by or in participation with Noah B. Kressler).

The sample clause above is exceptionally broad. NFL teams are limited to suspending a player (the talent) for up to four games before deciding whether to release the player. In the clause above, the television network can terminate the talent's contract outright as soon as the detrimental conduct is discovered. Additionally, the clause above does not include an appeal process for talent that may feel they have been wrongfully terminated.

As seen in the Incognito incident, the media attention can be relentless when a well-known individual is terminated for controversial comments. A few months after the Incognito incident, Phil Robertson, star of the A&E show *Duck Dynasty*, was suspended from the show for making comments deemed homophobic and racist.<sup>109</sup> The controversy stemmed from remarks Robertson made in an interview with GQ magazine, where he compared homosexuality to bestiality and suggested that African-Americans were happier before the civil rights movement.<sup>110</sup> In response, A&E suspended Robertson.<sup>111</sup>

It is safe to assume (and some evidence suggests) that Robertson was suspended under a morals clause found within his contract with A&E.<sup>112</sup> Petitions sprang up on social media both in favor and against Robertson's suspension. From one side there was an outcry over his freedom of speech and constitutional right to voice his faith and beliefs; on the other side, gay and civil rights groups cheered the suspension.<sup>113</sup> One petition garnered over 260,000 signatures opposing Robertson's suspension.<sup>114</sup>

"In the end, A&E chose profits over African-American and gay people," according to gay rights group GLAAD, by reinstating Robertson to the show.<sup>115</sup> *Duck Dynasty* is one of the most popular shows on cable televi-

<sup>109</sup> Scott Collins, '*Duck Dynasty*': A&E warned Phil Robertson about speaking out too much, LA TIMES (Dec. 20, 2013, 4:55 PM), <http://perma.cc/4LQJ-PHNN>.

<sup>110</sup> *Id.*

<sup>111</sup> Ethan Sacks, Don Kaplan, et al., '*Duck Dynasty*' star Phil Robertson anti-gay video emerges as A&E beefs up security amid threats, NY DAILY NEWS (Dec. 21, 2013, 3:11 AM), <http://perma.cc/7XPD-CLE8>.

<sup>112</sup> Hollie McKay, '*Duck Dynasty*' Family Members Contractually Bound to A&E, *Source Says*, FOX NEWS (Dec. 23, 2013), <http://perma.cc/Y4CM-KFJE>.

<sup>113</sup> *Groups Start Petitions Demanding A&E Reinstate Phil Robertson on 'Duck Dynasty'*, FOX NEWS (Dec. 19, 2013), <http://perma.cc/HG7Y-KCUB> (discussing how the gay rights group GLAAD and many others have praised A&E for its quick action in indefinitely suspending Robertson for his remarks).

<sup>114</sup> Liz Raftery, *Petition Creators Claim Credit for Phil Robertson's Return to Duck Dynasty, Challenge A&E*, TV GUIDE (Dec. 29, 2013, 11:11 AM), <http://perma.cc/YQP6-MG67>.

<sup>115</sup> Michael Rothman & Gillian Mohny, *GLAAD Slams A+E for Returning Phil Robertson to 'Duck Dynasty'*, ABC NEWS (Dec. 28, 2013), <http://perma.cc/4DYZ-65QS>.

sion and sells an estimated \$400 million of product tie-ins, including duck calls and hunting rifles.<sup>116</sup> Suspending Robertson risked alienating the show's gigantic fan-base.

The Miami Dolphins, like the A&E show *Duck Dynasty*, is a major business earning millions of dollars in profits.<sup>117</sup> Interestingly, there were no petitions or similar support from the general public when Incognito was suspended. One possible reason for the difference in public support is that Robertson's comments arose in-part from his religious views, while Incognito's had no tie to religion or politics. Additionally, Robertson's comments were directed at a class of individuals, while Incognito's were directed at one specific individual. Another potential reason is Robertson was the face of *Duck Dynasty*, while Incognito performs in one of the most underappreciated positions in sport. Had Incognito been the Miami Dolphins' quarterback the public outcry may have been much stronger. Whatever the reason, both Incognito and Robertson experienced the power of broad morals clauses in their contracts.

#### B. Detrimental Conduct in the NBA

In the wake of the Incognito incident, the NBA disseminated a memorandum reminding players that bullying and hazing in any form will not be tolerated.<sup>118</sup> However, the NBA and NFL have different locker room cultures that disparately affect the amount of bullying that occurs within. One major distinction between NFL and NBA locker rooms is that NFL players experience a wait-your-turn, earn-your-stripes sort of mentality; while, in the NBA coaches are more invested in their players making an immediate impact.<sup>119</sup> Thus, the young players in the NBA often enjoy some of the larger contracts and more playing time, moving them up in the pecking order.<sup>120</sup> However, bullying and controversial off-the-court comments remain issues that NBA teams and the NBA Commissioner have the power to discipline.

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<sup>116</sup> Clare O'Connor, *Duck Dynasty Family's New Gun Line Is A Warning Shot To A&E*, FORBES (Jan. 3, 2014, 6:27 AM), <http://perma.cc/F59Y-ZGKD>.

<sup>117</sup> *Miami Dolphins*, FORBES (Aug. 2013), <http://perma.cc/M33T-LCAC> (calculating the August 2013 value of the Miami Dolphins based on their current stadium deal, without deduction for debt other than stadium debt, at over \$1 billion).

<sup>118</sup> Ric Bucher, *Bullying in the NBA? Don't Hold Your Breath Waiting for That Scandal*, BLEACHER REPORT (Nov. 12, 2013), <http://perma.cc/3EWR-XXLT>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

NBA organizations, like NFL teams, have the power to punish players for conduct detrimental to the team.<sup>121</sup> Similarly, the NBA Commissioner has the power to discipline players for detrimental conduct, and the Commissioner's disciplinary action will preclude or supersede disciplinary action by any NBA team for the same act or conduct.<sup>122</sup> The detrimental conduct clause in the NBA CBA regarding the Commissioner's power to discipline off-the-court conducts states:

“. . . action taken by the Commissioner (or his designee) concerning the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball and resulting in a financial impact on the player of \$50,000 or less, shall not give rise to a Grievance, shall not be subject to a hearing before, or resolution by, the Grievance Arbitrator, and shall not be determined by arbitration.”<sup>123</sup>

There is an appeal process, but the appeal must be filed by the National Basketball Players Association (NBPA) and the outcome of the appeal is still determined by the Commissioner. The process is the same when a player is fined more than \$50,000, except the Grievance Arbitrator applies an even more stringent, arbitrary and capricious standard of review.<sup>124</sup> Similarly, the NFL's conduct detrimental to the league clause states the NFL Commissioner must consult with the NFLPA Executive Director before levying a fine over \$50,000; however, the NFL Commissioner still has full discretion to impose the fine.<sup>125</sup>

To see how the detrimental conduct clause functions in the NBA it is helpful to look at a few examples. Former Cleveland Cavaliers center Andrew Bynum was suspended for conduct detrimental to the team following an incident at the team's practice.<sup>126</sup> The suspension cost Bynum one game check of \$111,000.<sup>127</sup> In another scenario, New York Knicks player J.R. Smith was fined \$25,000 for tweeting that he would send his “street homies [*sic*]” after NBA player Brandon Jennings.<sup>128</sup> The NBPA did not appeal the

<sup>121</sup> Collective Bargaining Agreement Between the NBA and the NBA Players Association December 8, 2011, *available at* <http://perma.cc/CZ2L-UHRX> [hereinafter NBA CBA].

<sup>122</sup> *Id.* at art. 6, §10.

<sup>123</sup> *Id.* at art. 31, §9(a).

<sup>124</sup> *Id.* at art. 31, §9(b).

<sup>125</sup> NFL CBA *supra* note 1 at art. 46, §(1)(c).

<sup>126</sup> Brian Windhorst, *Cavs' Andrew Bynum on 'Paid Leave'*, ESPN (Dec. 29, 2013, 2:51 PM), <http://perma.cc/U82Q-QVAK>.

<sup>127</sup> *Id.*

<sup>128</sup> Roger Groves, *Athlete Tweetability: The NBA Ruling Against J.R. Smith and Its Implications*, FORBES (Nov. 16, 2013, 12:11 AM), <http://perma.cc/5P5H-CTXX>

Commissioner's decision to fine J.R. Smith, leaving him out of options under the CBA.

In sum, the NBA and NFL CBAs both provide broad provisions that allow punishments and sanctions for inappropriate actions or detrimental conduct to the league, club, or the reputation of the professional athletes themselves. To determine whether such broad clauses are assailable, drafters must balance the problems of articulating all possible misconduct with the benefit of providing clarity in the CBA. The next two sections debate what, if any, changes should be made to the broad detrimental conduct clause utilized in the NFL.

#### V. PROS & CONS TO A BROAD DETRIMENTAL CONDUCT CLAUSE

One argument supporting a broad detrimental conduct clause is NFL teams and the Commissioner should have the power to promote lawful, ethical, and responsible conduct among players.<sup>129</sup> Having this power serves the interests of the NFL, the players, and the fans by protecting everyone involved.<sup>130</sup> Bullying, such as what allegedly occurred in the Incognito incident, can be dangerous and deterring that sort of claimed behavior is arguably for the betterment of society.<sup>131</sup> Thus, if bullying were not punished it would send the wrong message to impressionable fans that idolize many professional athletes as role models, and could even lead a player to commit suicide.<sup>132</sup>

Another argument in favor of a broad detrimental conduct clause is the great difficulty in defining every form of conduct the NFL desires to deter. For example, it is very difficult to define bullying, which is evident in the

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(stating that J.R. Smith's tweet was a retaliation to Brandon Jennings tweeting about how Smith's brother should not be in playing in the NBA).

<sup>129</sup> Casinova O. Henderson, *How Much Discretion Is Too Much for the NFL Commissioner To Have over the Players' Off-the-Field-Conduct?*, 17 SPORTS LAW. J. 167, 170 (2010).

<sup>130</sup> *Id.*

<sup>131</sup> Amy Dardashtian, *Jonathan Martin's Polite, Suicide-Free Society*, HUFFINGTON POST (Nov. 18, 2013, 5:42 PM), <http://perma.cc/JS9-MFLX> (discussing the massive amounts of publicity in recent years of teens committing suicide as a result of bullying).

<sup>132</sup> Young Shin Kim & Bennett Leventhal, *Bullying and Suicide: A Review*, 20 INT'L J. ADOLESC. MED. & HEALTH 133 (2008) (showing how almost all of the studies found connections between being bullied and suicidal thoughts among children).

numerous attempts to create bullying statutes.<sup>133</sup> The most specific bullying statutes define bullying based upon the “intent of the perpetrator, the reasonableness of his actions, or the effect that it has on another student.”<sup>134</sup> If the NFL were to adopt a definition of detrimental conduct that relies on determining the *mens rea* of the player, the reasonableness of the player’s actions, or the effect on the victim, the investigation process would become significantly more burdensome in order to prove any or all of those elements.

One argument that can work in favor or against a broad detrimental conduct clause revolves around whether the clause is lawful. Under labor law, it is permissible for employers to implement employee conduct rules to protect their business interests.<sup>135</sup> However, there are limits as to how vague an employer’s conduct policy can be. In May 2012, the National Labor Relations Board (NLRB) released a memorandum discussing ways employers may legally regulate social media and other aspects of free speech.<sup>136</sup>

In the report, the NLRB cites a case where it found that portions of the employer’s policy were overly broad.<sup>137</sup> The NLRB determined that the first section of the policy, restricting employees from publicly posting information about the company, was an unlawful restriction of freedom of speech.<sup>138</sup>

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<sup>133</sup> Susan Hanley Kosse & Robert H. Wright, *How Best To Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?* 12 DUKE J. GENDER L. & POL’Y 53, 62 (2005).

<sup>134</sup> *Id.* at 62–63.

<sup>135</sup> Robert Ambrose, Note, *The NFL Makes It Rain: Through Strict Enforcement of Its Conduct Policy, the NFL Protects Its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL L. REV. 1069, 1089 (2008).

<sup>136</sup> OFFICE OF THE GENERAL COUNSEL, NLRB, MEMO. OM 12-59, REPORT FROM ACTING GENERAL COUNSEL CONCERNING RECENT SOCIAL MEDIA CASES (2012), available at <http://perma.cc/U7HU-AYNA/>.

<sup>137</sup> *Id.* at 12–13 (quoting the clause, which said “Employees are prohibited from posting information regarding [Employer] on any social networking sites (including, but not limited to, Yahoo finance, Google finance, Facebook, Twitter, LinkedIn, MySpace, LifeJournal and YouTube), in any personal or group blog, or in any online bulletin boards, chat rooms, forum, or blogs (collectively, ‘Personal Electronic Communications’), that could be deemed material nonpublic information or any information that is considered confidential or proprietary. Such information includes, but is not limited to, company performance, contracts, customer wins or losses, customer plans, maintenance, shutdowns, work stoppages, cost increases, customer news or business related travel plans or schedules. Employees should avoid harming the image and integrity of the company and any harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home and on home computers”).

<sup>138</sup> *Id.*

This is similar to the Kellen Winslow case where the Cleveland Browns suspended Winslow under the detrimental conduct clause for being outspoken regarding the team's staph infection outbreak.<sup>139</sup> The NLRB would likely find the NFL's detrimental conduct clause overly broad for being used against Winslow in such fashion. However, this is a moot point because the fine against Winslow was reversed on appeal.<sup>140</sup>

In comparison, the NLRB determined the second portion of the employer's policy prohibiting online bullying and harassment was lawful.<sup>141</sup> Here, the NLRB cited *Tradesman International*, which held a rule prohibiting slanderous or detrimental statements about the company, sexual harassment, or racial statements were lawful.<sup>142</sup> The Incognito incident is arguably not online bullying because it involved cellphones, voicemails, and face-to-face confrontations. However, it involved potentially slanderous statements and racial harassment,<sup>143</sup> which the NLRB has determined as activity that can lawfully be prohibited by employers. Thus, the NLRB would likely support the broad detrimental conduct clause as applied in the Incognito incident.

Additionally, it is important to note that labor laws protect the rights of employees by allowing employee unions, such as the NFLPA, to collectively bargain with sports leagues, such as the NFL, to reach agreements that govern terms of employment.<sup>144</sup> Thus, the current detrimental conduct clause in the CBA, as negotiated by the NFL and the NFLPA, would most likely be upheld under current law.

However, there are still several arguments against a broad detrimental conduct clause. For example, further defining what constitutes detrimental conduct would provide clarity to NFL players. Additionally, players ought to know when they are breaking the rules if they are threatened with potentially facing severe penalties upwards of \$1,000,000 in some cases.<sup>145</sup> A *mens rea* and reasonableness requirement would help clarify what is meant by bullying. One way to define and enforce bullying in the NFL could be, when a player intentionally and unreasonably harasses another NFL employee with his comments or actions he will be subject to a fine of "X". Another opportunity to provide clarity to players would be to explicitly state that racist

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<sup>139</sup> See *supra* Part III(D)(iii).

<sup>140</sup> *Id.*

<sup>141</sup> OFFICE OF THE GENERAL COUNSEL, NLRB, *supra* note 136, at 13–14.

<sup>142</sup> *Tradesmen Int'l*, 338 N.L.R.B. 460, 462.

<sup>143</sup> Glazer, *supra* note 6 (describing how Incognito left a voicemail on Martin's phone referring to Martin as a half-n\*\*\*\*\*).

<sup>144</sup> NLRA 29 U.S.C. §§ 151-169.

<sup>145</sup> Pelissero, *supra* note 12 (discussing how if Incognito is suspended the full four games his maximum loss would be \$1,176,470).

and/or homophobic comments are punishable if made in a public forum like Twitter.

Another way to amend the detrimental conduct clause in the CBA would be to set maximum fine limits for all NFL players. Such fines have proven to be successful for players who are overweight.<sup>146</sup> There is also a maximum fine of \$25,000 for players ejected from football games.<sup>147</sup> In comparison, NFL players who are disciplined for conduct detrimental to the team lose up to four game checks, which can total millions of dollars. Perhaps it would be better to set a ceiling of \$50,000 for detrimental conduct penalties.<sup>148</sup> Penalties could be scaled to increase in increments of \$25,000 for repeat offenders.

Opponents of such a theoretical policy may argue \$50,000 is not a large enough fine to deter players such as Incognito who make millions of dollars per year. However, \$50,000 is still a considerable amount of money, even for NFL players. Additionally, many affluent NFL players end up bankrupt after retirement,<sup>149</sup> demonstrating that some athletes may not be able to afford the exorbitant fines currently accompanying detrimental conduct suspensions. The financial problems many NFL players face also show players may be deterred by a potential \$50,000 fine.<sup>150</sup>

Another argument against the current system applies to cases where a player violates the conduct detrimental to the league clause. As stated above,<sup>151</sup> the appeal process for conduct detrimental to the league is basically controlled by the NFL Commissioner, while players appealing conduct detrimental to the team face a more neutral process.<sup>152</sup> Thus, players have been more outspoken regarding the appeal process when a player's conduct is considered detrimental to the league.

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<sup>146</sup> NFL CBA, *supra* note 1, at art. 42, §1(a)(i).

<sup>147</sup> *Id.* at art. 42, §1(a)(xiii).

<sup>148</sup> *Id.* at art. 46, §1(c) (discussing how the maximum fine the commissioner can levy without consulting the NFLPA is \$50,000).

<sup>149</sup> Pablo S. Torre, *How (and Why) Athletes Go Broke*, Sports Illustrated (Mar. 23, 2009). (discussing how by the time they have been retired for two years, 78% of former NFL players have gone bankrupt or are under financial stress because of joblessness or divorce).

<sup>150</sup> See generally Jack Behta, *Ten Reasons Why NFL Players Go Broke*, NATIONAL FOOTBALL POST (May 30, 2012, 4:00 PM), <http://perma.cc/3DR5-SR9V> (citing careers shortened by injury, poor financial counseling, and bad investments as some of the top reasons NFL players end up in financial straits despite their large contracts on paper).

<sup>151</sup> Part III(E).

<sup>152</sup> Part III(D).

In the New Orleans Saints bounty gate scandal Commissioner Goodell punished Saints linebacker Jonathan Vilma for conduct detrimental to the league for allegedly accepting money as consideration for attempting to injure on opposing players during games.<sup>153</sup> The Commissioner imposed the initial penalties and presided over the appeal hearing. In response, Vilma left the hearing, which he felt was unfair because the Commissioner was acting as, “judge, jury, and executioner”.<sup>154</sup> A possible fix to the unfairness of the appeal process is to implement the appeal process used for conduct detrimental to the team for all detrimental conduct cases in the NFL. Now that the arguments for and against amending the detrimental conduct clause and its related processes have been presented, this article will focus on the potential ramifications facing Richie Incognito.

## VI. PREDICTING THE OUTCOME OF THE INCOGNITO INCIDENT

There are several ways the outcome of the Incognito incident may turn depending on the facts that are revealed in the ongoing investigation. The evidence may reveal that Miami Dolphins coaches actually encouraged Incognito’s behavior in an attempt to toughen up the younger Martin. If coaches were involved, it is possible they would be disciplined under the NFL’s Personal Conduct Policy, which is separate from the NFL CBA and applies to coaches as well as players who commit conduct detrimental to the integrity and public confidence of the NFL.<sup>155</sup> In the New Orleans Saints bounty gate scandal, the Commissioner punished Saints coach Sean Payton for awarding money to players for making vicious and dangerous hits on opposing players during games, under the NFL’s Personal Conduct Policy.<sup>156</sup> While not completely on par, a coach paying players to hit opponents is similar to a coach encouraging a player to verbally assault teammates.

Another way the Incognito case could turn is if the investigation turns up no evidence of encouragement from coaches. Incognito will then have the choice of putting this incident behind him or appealing the penalty. The appeal process for conduct detrimental to the team, which Incognito was

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<sup>153</sup> CBS News, *supra* note 101.

<sup>154</sup> *Id.*

<sup>155</sup> NFL Personal Conduct Policy, (2013) (applying the policy to players, coaches, other team employees, owners, game officials and all others privileged to work in the National Football League).

<sup>156</sup> CBS News, *supra* note 101.

disciplined for violating, is undoubtedly fairer than the appeal process for conduct detrimental to the league charges.<sup>157</sup>

The Commissioner could still punish Incognito more than the Miami Dolphins already have for conduct detrimental to the league, although if no coaches were involved then a league action seems unlikely considering Goodell's track record of letting teams discipline their own players for conduct amounting to inappropriate comments. On the other hand, the Incognito incident has bullying aspects, which differentiates it from the cases discussed previously where players were mostly punished for inappropriate comments.

In the end, the NFL is setting a major precedent for how players should treat one another. Locker room culture from high school to the NFL consists of positive aspects like building camaraderie and negative aspects such as bullying. Hazing, particularly of young NFL players, is commonplace around the NFL and considered just another aspect of locker room culture.<sup>158</sup> Incognito has admitted that the way he and others communicate on the offensive line is vulgar.<sup>159</sup> Thus, the 24-year-old Martin has been accused by some NFL players of violating the code of the locker room for bringing grievances against Incognito. Miami Dolphins players have stepped up in defense of Incognito, exclaiming "this is the way of the locker room."<sup>160</sup>

If acting in the manner that Incognito allegedly did towards Martin is as commonplace as many players seem to suggest, then there is a potential for many more incidents like the Incognito incident to arise in the future. Goodell has even mentioned that the Incognito incident could lead to new workplace rules.<sup>161</sup> One idea would be for Goodell to define locker room bullying and make it apply to all NFL teams, so that there are not thirty-two different definitions of bullying in the NFL. Additionally, Goodell could impose a maximum fine for players who are disciplined for bullying, as opposed to basing the fine on how much the players make, to avoid excessive fines. With the amount of activity that can be construed as bullying in

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<sup>157</sup> NFL CBA, *supra* note 1, at art. 43, §6 (discussing how appeal process involves the appointment of arbitrators.).

<sup>158</sup> Erik Brady, Jim Corbett & Lindsay H. Jones, *Blame the Victim? Some Players Criticize Jonathan Martin*, USA TODAY (Nov. 5, 2013, 11:52 PM), <http://perma.cc/8R22-J6Q4>.

<sup>159</sup> Glazer, *supra* note 6.

<sup>160</sup> Stephen Mansfield, *Incognito Scandal's Manly Men*, USA TODAY (Dec. 22, 2013, 4:39 PM), <http://perma.cc/738-ZFNX>.

<sup>161</sup> Ken Belson, *Goodell Says Miami Case May Lead to New Workplace Rules*, NY TIMES (Dec. 11, 2013), <http://perma.cc/B3DX-5VQQ>.

locker room culture, a broad clause with harsh penalties like the detrimental conduct clause is not the best way to enforce bullying.

## VII. EPILOGUE: THE TED WELLS REPORT

After a thorough investigation, the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP issued a final report on the Incognito incident on February 14, 2014.<sup>162</sup> The Ted Wells Report (the “Report”), issued on Valentine’s Day, certainly did not conjure up thoughts of love, but hopefully it can act as a catalyst to generate a more caring and respectful workplace environment throughout the NFL.

The Report clarified and confirmed several key points regarding the Incognito incident. First, the entirety of the Report confirmed that Incognito’s behavior was, by most standards, unacceptable. While Martin also engaged in vulgar communications with Incognito, Martin’s comments were comparatively innocuous.<sup>163</sup> The Report also confirmed that the cafeteria prank was the breaking point that led to Martin’s departure from the team.<sup>164</sup> However, evidence demonstrated that Martin’s departure was also based on other incidents occurring on the same day, as well as a buildup of over a year of harassment by Incognito and other Miami Dolphins teammates.<sup>165</sup> The Report also made a pivotal clarification when it concluded Incognito’s behavior towards Martin was not expressly encouraged by Dolphins’ coaches.<sup>166</sup>

The Report revealed a pattern of harassment including vulgar comments regarding Jonathan Martin’s sister, which seemed to cause Martin

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<sup>162</sup> Mike Chiari, *Jonathan Martin-Richie Incognito Investigation Report Released*, Bleacher Report (Feb. 14, 2014), <http://perma.cc/4QGV-U2M7>.

<sup>163</sup> Theodore V. Wells, Jr. et al., *Report to the National Football League Concerning Issues of Workplace Conduct at the Miami Dolphins* 25 (2014) (revealing a text message where Martin begins by saying to Incognito, “You F\*\*\* that b\*\*\*\*?”).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 24 (stating how earlier in the day and in the cafeteria, Incognito referred to Martin as a “stinky Pakistani” in front of several other players).

<sup>166</sup> *Id.* at 44-45 (discussing how Incognito claimed coach Jeff Ireland and General Manager Brian Gaine each took him aside and told him to take responsibility for making Martin physically tougher and stronger. Media reports speculated that the coaches may have told Incognito to toughen Martin up by treating him inappropriately, but Incognito denied this in the report. Regardless, both Gaine and Ireland were fired after the Incognito story broke, but before the Ted Wells Report was released).

considerable anguish.<sup>167</sup> However, arguably some of its most disturbing passages did not include the vulgar insults, but instead offered a glimpse into Martin's mental suffering, as revealed through private text messages with his parents.<sup>168</sup> In these messages Martin reveals he contemplated suicide.<sup>169</sup> The report compared his psychological state to that of a victim of domestic abuse who out of fear remains close with his tormentor.<sup>170</sup> Yet, throughout this period of torment, the Report found Martin did not adequately express to his teammates or coaches the pain and depression that the comments were causing him.<sup>171</sup>

In the wake of the Report many players and executives have been galvanized to make NFL locker rooms a more respectful and professional work environment.<sup>172</sup> This sentiment for change is largely based on the scathing report, which revealed a level of taunting and bullying by Incognito and other players worse than many expected. Highly esteemed Philadelphia Eagles wide receiver Jason Avant told Commissioner Goodell in a recent meeting, “[w]e need you to set standards. We need you to make it black and white. We need standards, and if we don’t meet them, we shouldn’t be here.”<sup>173</sup> Goodell has been meeting with players and coaches to try and determine what those standards should be.<sup>174</sup>

Additionally, Goodell still has the power under the CBA to levy harsher penalties on Incognito and other players and/or coaches named in the Report. Article 46 states, “[t]he Commissioner and a Club will not both discipline a player for the same act or conduct. The Commissioner’s disciplinary action will preclude or supersede disciplinary action by any Club for

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<sup>167</sup> *Id.* at 10 (explaining how Martin was particularly offended by these crude comments about his sister and that his transparent discomfort only increased the frequency and intensity of the insults).

<sup>168</sup> *Id.* at 16 (referring to his reaction to the bullying Martin was enduring, Martin texted his mother, “I’m never gonna change. I got punked again today. Like a little bitch. And I never do anything about it. I was sobbing in a rented yacht bathroom earlier Whether or not Incognito, Jerry [offensive lineman John Jerry], and Pouncey [offensive lineman Mike Pouncey] fully appreciated the effect.”).

<sup>169</sup> *Id.* at 96.

<sup>170</sup> *Id.* at 93 (explaining that consulting expert Dr. Berman found Martin’s reaction to Incognito’s harassment as consistent with a person who is trapped in an abusive situation and that attempting to develop a close, friendly relationship with the abuser is a common coping mechanism).

<sup>171</sup> *Id.* at 37.

<sup>172</sup> Peter King, *The NFL’s Wake Up Calls*, MONDAY MORNING QUARTERBACK (Feb. 17, 2014), <http://perma.cc/UM9V-UWRK>.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* (discussing how Goodell has met with 30 players in 60 days asking them how to make the locker room more tolerant).

the same act or conduct.”<sup>175</sup> The existence of this section means that while the Dolphins have already punished Incognito, Goodell has the power to render a decision which supersedes the disciplinary action taken by the Dolphins. Regardless of how Incognito or other players are punished, the most important decision Goodell will make is how to deter future bullying incidents.

Before the incident, Richie Incognito signed the Miami Dolphins’ workplace conduct policy which prohibited harassment including, “unwelcome contact; jokes, comments and antics, generalizations and put-downs.” This sort of workplace conduct policy would likely be supported if it applied to all NFL teams. The key would be incentivizing compliance with the policy. One way to do this would be to enforce strict fines on players who violate the policy.<sup>176</sup>

Historically, the NFL has turned a blind eye to players verbally abusing one another and accepted it as a part of locker room culture. The NFL was blindsided by the egregious nature of the Incognito incident and, as a result, tolerance for this sort of behavior is dwindling. In order for the NFL to put this terrible incident in its rearview mirror, Goodell must use his immense power as Commissioner to create a healthier and more professional locker room culture. In order to remind players that behavior like that exhibited by Incognito will not be tolerated, new guidelines must be implemented that have a league wide affect.

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<sup>175</sup> Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association 2011–2020, art. 46, §4 (2011), *available at* <http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

<sup>176</sup> Wells Report, *supra* note 163, at 2.



# Riding the Bench—A Look at Sports Metaphors in Judicial Opinions

Megan E. Boyd\*

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## INTRODUCTION

*Sports is human life in microcosm.*

— Howard Cosell

“Sports play a major, if sometimes unappreciated, role in the lives of Americans.”<sup>1</sup> The vast majority of Americans play sports, watch sports, or read articles about sports — a whopping 96.3 percent.<sup>2</sup> It is unsurprising, then, that sports metaphors abound in judicial opinions. After all, the adversarial nature of the court system in this country mirrors the very nature of

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<sup>1</sup> ROBERT L. SIMON, FAIR PLAY: SPORTS, VALUES, AND SOCIETY 2 (1991).

<sup>2</sup> *Id.*

competitive sports.<sup>3</sup> Sports analogies are everywhere in the law, and because Americans love and understand sports, sports metaphors in judicial opinions just make sense.

In fact, some of the most common legal terms and phrases are sports analogies. Courts use a sports metaphor to explain one of our bedrock Constitutional principles of personal jurisdiction: A court may not exercise personal jurisdiction over a person or entity unless doing so comports with traditional notions of “fair play and substantial justice.”<sup>4</sup> Often, a decision about whether to present certain evidence or call a certain witness to testify is a “game-time” decision. Lawyers and dissenting judges express frustration when a court “punts” on an issue. One party may seek to “level the playing field” in a discovery dispute, while another litigant might complain that the other party’s changing position forces the litigant to “shoot at a moving target.” Metaphors provide easy-to-understand, vibrant depictions of often confusing fact scenarios and legal arguments.<sup>5</sup>

This Article is not intended as a serious analysis of metaphor and the law — there are other, far more qualified writers who have undertaken that challenging task.<sup>6</sup> Rather, this Article is a lighthearted look at the often humorous ways courts have utilized sports metaphors in their written opinions. I have endeavored to do more than simply list the metaphors — I have also provided the context in which they were used in order to show the reader why the metaphors are particularly apt.

## I. BOXING

The best sports metaphor, of course, is one that is apropos to the case. I once represented a defendant in a case involving a famous boxer. I filed a motion to dismiss, and could not help asking the court to “knock out” the boxer’s claims, which the court kindly did. Other courts like boxing analo-

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<sup>3</sup> See *State v. Myers*, 536 P.2d 280, 290 (N.M. Ct. App. 1975); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39, 51 (1985).

<sup>4</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

<sup>5</sup> See Michael J. Yelnosky, *If You Write It, (S)he Will Come: Judicial Opinions, Metaphors, Baseball, and “The Sex Stuff”*, 28 CONN L. REV. 813, 818 (1996).

<sup>6</sup> See, e.g., Linda L. Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS’N LEGAL WRITING DIRECTORS 169 (2004); Bernard J. Hibbits, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229 (1994); James E. Murray, *Understanding Law as Metaphor*, 34 J. LEGAL EDUC. 714 (1984); Elizabeth G. Thornburg, *Metaphors Matter: How Images of Battle, Sports, and Sex Shape the Adversary System*, 10 WIS. WOMEN’S L.J. 225 (1995).

gies, too. The Third Circuit Court of Appeals has described a boxing promoter's appeal as an attempt to "recover from the District Court's knockout punch" on the enforceability of an agreement between the promoter and a professional boxer.<sup>7</sup>

As one court has observed, "[l]itigation and boxing are not so different. Some fights are won after a long, drawn-out battle that leaves both parties bruised and battered," and others "are won after one knockout punch that ends the match just as it begins."<sup>8</sup> Many courts have compared lengthy, highly litigious cases to boxing matches. One court described a party's efforts to get approval to build its church as a "fruitless three-year-long shadowboxing match" in which the city's "combination of uppercuts, hooks, crosses, and jabs coupled with [its] bobbing and weaving . . . ensured that [the church] was always facing a moving target."<sup>9</sup> In determining the propriety of a defendant's motion for summary judgment, another court recognized that the motion "land[ed] decisive blows" to some, but not all, of the plaintiff's claims, thereby enabling the plaintiff to "fight another round."<sup>10</sup> And a party that secured a reversal of a trial court's "knockdown" was deemed to have been "saved by the [appellate] bell."<sup>11</sup>

Courts often recommend that litigants in civil cases "throw in the towel" by terminating litigation. Despite one court's imposition of sanctions to compel the plaintiffs to "throw in the towel," the plaintiffs instead "reenter[ed] the ring in [a] tax dispute," attempting to make the case a "fifteen round bout."<sup>12</sup> The court again imposed sanctions and delivered what it deemed a "knockout punch" to the plaintiffs' case.<sup>13</sup> The Seventh Circuit Court of Appeals described how litigation costs may force a small defendant to "throw in the towel, agreeing to a settlement favorable to the [plaintiffs] even if the defendant has an excellent defense."<sup>14</sup>

In addition to civil cases, "towel" analogies appear frequently in criminal opinions. One court upheld a jury's verdict where the trial judge had

<sup>7</sup> *Echols v. Pelullo*, 377 F.3d 272, 273 (3d Cir. 2004).

<sup>8</sup> *Burgett v. Troy-bilt LLC*, No. 1225ART, 2012 WL 5384702, at \*1 (E.D. Ky. Nov. 1, 2012).

<sup>9</sup> *Reaching Hearts Int'l, Inc. v. Prince George's Cnty*, 584 F. Supp. 2d 766, 784 (D. Md. 2008).

<sup>10</sup> *Burgett*, 2012 WL 5384702, at \*1.

<sup>11</sup> *Nat'l Indus., Inc. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1270 (9th Cir. 1982).

<sup>12</sup> *Stelly v. Comm'r of Internal Revenue*, 804 F.2d 868, 868 (5th Cir. 1986) (internal quotation marks omitted).

<sup>13</sup> *Id.*

<sup>14</sup> *Hughes v. Kore of Indiana Enterprise, Inc.*, 731 F.3d 672, 678 (7th Cir. 2013).

refused to “give up and throw in the towel” unless the jury members were certain they could not reach a verdict.<sup>15</sup> With respect to whether a guilty plea was involuntary, the First Circuit Court of Appeals noted: “Even if a defendant’s misapprehension of the strength of the government’s case induces him to throw in the towel, that misapprehension . . . cannot form the basis for a finding of involuntariness” with respect to his guilty plea.<sup>16</sup> In discussing federal sentencing guidelines, the Seventh Circuit Court of Appeals has noted: “The fact that a defendant having done everything he could to obstruct justice runs out of tricks, throws in the towel, and pleads guilty does not make him a prime candidate for rehabilitation.”<sup>17</sup>

Courts dislike litigants who attempt to “hit below the belt,” and the Virginia Supreme Court of Appeals has explained its role as follows: “Law is your umpire; it must not go into the ring until one or the other opponent hits below the belt.”<sup>18</sup> In dismissing a defendant’s contentions that the plaintiff’s lawyer’s opening and closing statements were inappropriate, the First Circuit Court of Appeals noted that “[t]here is a critical difference between a lawyer who hits hard and a lawyer who hits below the belt.”<sup>19</sup> Another court admonished a party for filing post-verdict motions that were an “attempt to hit below the belt.”<sup>20</sup>

## II. BASEBALL

Baseball is known as America’s pastime and has existed in its current form — more or less — since at least the mid-19th century.<sup>21</sup> Baseball analogies are probably the most popular sports analogies in judicial opinions.

The Chief Justice of the Supreme Court, John Roberts, utilized a baseball analogy during his opening statement before the Senate Judiciary Committee in 2005 when he stated: “Judges are like umpires. Umpires don’t make the rules; they apply them . . . I will remember that it’s my job to call balls and strikes and not to pitch or bat.”<sup>22</sup> Justice Roberts was not the first

<sup>15</sup> *State v. Griffith*, 312 S.W.3d 413, 420 (Mo. Ct. App. 2010).

<sup>16</sup> *Ferrara v. United States*, 456 F.3d 278, 291 (1st Cir. 2006).

<sup>17</sup> *United States v. Buckley*, 192 F.3d 708, 711 (7th Cir. 1999).

<sup>18</sup> *Reaves Warehouse Corp. v. Commonwealth*, 126 S.E. 87, 91 (Va. 1925).

<sup>19</sup> *Muniz v. Rovira*, 373 F.3d 1, 6 (1st Cir. 2004).

<sup>20</sup> *United States v. Balistrieri*, 577 F. Supp. 1532, 1547 (E.D. Wis. 1984).

<sup>21</sup> *February 2, 1876: National League of Baseball is Founded*, HISTORY, <http://www.history.com/this-day-in-history/national-league-of-baseball-is-founded> (last visited Apr. 22, 2014), archived at <http://perma.cc/RQA8-CM8>.

<sup>22</sup> Associated Press, *Text of John Roberts’ Opening Statement*, USA TODAY (Sept. 12, 2005, 4:31 PM), <http://usatoday30.usatoday.com/news/washington/2005-09-12->

to use this umpire analogy — it appeared in opinions at least as early as 1906: “[W]here there is a difference of opinion between counsel[,] the presiding judge is the proper umpire.”<sup>23</sup>

As every baseball fan knows, “[i]n baseball, after three strikes the batter is out.”<sup>24</sup> Unsurprisingly, “three strikes” analogies are popular when a party has been given at least three chances to do something or where the party is asking for a third opportunity. In allowing a pro se plaintiff another chance to amend the complaint to allege a claim, one court noted “there is much wisdom in [the] traditional [three strikes] American limit, and . . . after three strikes there is a greater burden of persuasion to convince us that the same batter deserves more pitches.”<sup>25</sup> A dissenting judge in another case analyzed the “three strikes” analogy in a different way. In discussing whether a veterinary examinee should be entitled to take the licensure exam more than three times, the dissenting judge noted, “even in baseball, a batter is allowed more than three swings because a foul ball, which normally counts as a strike, does not count when it occurs on the third strike. Thus a batter may swing at several pitches before getting a hit, and it is no less a hit than if it had occurred on the first or second swing.”<sup>26</sup>

Grand slam analogies are prevalent as well. One court described a party’s suspect arguments as a “wild swing for a grand-slam home run.”<sup>27</sup> Another declined to follow dicta in prior precedent when the dicta seemed to be “inserted to complete a grand-slam where the game was already over.”<sup>28</sup> In a case where attorneys sought fees constituting nearly ninety percent of the total amount recovered on behalf of the client, a bankruptcy court denied the full fee request, describing it as a “grand slam for counsel while the [client] is left with a pop-up bunt.”<sup>29</sup> And the Fourth Circuit Court of Appeals, in analyzing whether the admission of a “grand slam” confession was harmless error, concluded that there was no error because

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roberts-fulltext\_x.htm (last visited Apr. 22, 2014), *archived at* <http://perma.cc/N574-NX8C>.

<sup>23</sup> *State v. Rodriguez*, 40 So. 438, 443 (La. 1906) (Land, J., concurring).

<sup>24</sup> *Wilbert v. City of Chicago*, 768 F. Supp. 253, 254 (N.D. Ill. 1991).

<sup>25</sup> *Sarpolis v. Bd. of Trs. of Univ. of Ill.*, No. 97-CC-3911, 2000 WL 33593158, at \*3 (Ill. Ct. Cl. Feb. 29, 2000); *see also Wilbert v. City of Chicago*, 768 F. Supp. 253, 254 (N.D. Ill. 1991) (utilizing a “three strikes” analogy in analyzing whether plaintiff should be permitted to file third amended complaint).

<sup>26</sup> *Linton v. Mo. Veterinary Med. Bd.*, 988 S.W.2d 513, 520 (Mo. 1999) (Wolff, J. dissenting).

<sup>27</sup> *In re Jordan*, 91 B.R. 673, 681 (Bankr. E.D. Pa. 1988).

<sup>28</sup> *Barrett v. Catacombs Press*, 64 F. Supp. 2d 440, 447 (E.D. Pa. 1999).

<sup>29</sup> *In re Smith*, No. 05-55819, 2007 WL 1406913, at \*4 (Bankr. E.D. Ky. May 9, 2007).

even if the confession had not been admitted, “the remaining 10-0 score would still have left the jury’s verdict the same.”<sup>30</sup>

Home run analogies are also popular. In analyzing whether it could exercise personal jurisdiction over a defendant pursuant to diversity of citizenship, one federal district court considered the possibility that the plaintiff would “hit a home run on damages.”<sup>31</sup> Another court described contingency fee contracts in baseball terms: “Accepting employment on a contingency fee basis may result in situations where counsel sometimes hits a home run and at other times just dribbles the ball down the first base line.”<sup>32</sup> In a criminal case, an appellate court explained that relevant testimony need not be self-sufficient and may be considered in conjunction with all other evidence: “[E]very witness does not have to hit a home run.”<sup>33</sup> The Louisiana Court of Appeals used a funny metaphor in analyzing a doctor’s testimony about whether a plaintiff’s injury was caused by an accident. The court described the doctor’s testimony as “like the late major league baseball announcer, Harry Carey’s signature comment, that ‘it could be, it might be,’ but the [d]octor can’t say, ‘it is a home run.’”<sup>34</sup> And a bankruptcy court described compliance with a lien perfection statute as similar to hitting a home run: “It assures a score, but there are other ways to be safe at home.”<sup>35</sup>

Courts have even employed home run metaphors in jury instructions. The United States District Court for the Southern District of New York found no error in a trial court’s sports-themed instruction on circumstantial evidence, which charged the jury that “a spectator at a baseball game who does not see a batter swing the bat but sees the batter ‘slowly rounding all the bases’ could properly infer that the batter hit a home run.”<sup>36</sup>

Analogies involving strikeouts, bunts, and pop-ups are less common, but still exist. In describing the distinction between the weight and admissibility of evidence in a criminal case, a court noted that a defendant may argue to the jury that a witness “‘struck out’ or ‘popped up’ but [the defendant] [cannot] keep [the witness] from having her time at bat.”<sup>37</sup> Another court likened a police officer who testified that conduct he observed was

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<sup>30</sup> *Cooper v. Taylor*, 103 F.3d 366, 370 (4th Cir. 1996).

<sup>31</sup> *Wheeler v. Farmers Ins. Exchange*, No. 13-CV-0951, 2013 WL 4432097, at \*4 (W.D. La. Aug. 16, 2013).

<sup>32</sup> *In re Smith*, 2007 WL 1406913, at \*4.

<sup>33</sup> *State v. Hampton*, 855 P.2d 621, 623 n.8 (Or. 1993) (citations omitted).

<sup>34</sup> *Williams v. State Farm Mut. Auto. Ins. Co.*, 830 So.2d 379, 383 (La. Ct. App. 2002).

<sup>35</sup> *In re Brosnahan*, 312 B.R. 220, 224 (Bankr. W.D.N.Y. 2004).

<sup>36</sup> *Trinidad v. Senkowski*, WL 60418, at \*4 (S.D.N.Y. Apr. 11, 1991).

<sup>37</sup> *State v. Lerch*, 677 P.2d 678, 687 n.16 (Or. 1984).

consistent with drug trafficking to a “trained observer on the baseball diamond . . . point[ing] out the bunt sign among an array of otherwise meaningless scratches and touches by the third base coach.”<sup>38</sup>

Finally, some California courts deem settlements to have been made in good faith if they are in the “ballpark” of what might be awarded if the case were to be tried.<sup>39</sup>

### III. FOOTBALL

Metaphors from another one of America’s favorite sports, football, also appear frequently in judicial opinions. The Supreme Court has even gotten in on the popular “punt” metaphor — in *Morse v. Frederick*, commonly known as the “Bong Hits 4 Jesus” case, Justice Stevens expressed frustration that the majority “punt[ed]” on an issue of importance and decided the case on completely different grounds.<sup>40</sup>

Courts presiding over cases involving the National Football League (“NFL”), the National Football League Players’ Association (“NFLPA”), and professional teams seem to especially love to throw football analogies into their written opinions. Following an arbitration between the NFLPA and the Washington Redskins, the team sought to “make an end run around the arbitrator’s decision” by filing a lawsuit.<sup>41</sup> The court described the team as “behind on the scoreboard and buried in its own territory with less than a minute to play,” and compared the arbitrator’s finding to a “referee’s pass interference call,” where “the key is not necessarily the correctness of the decision, but its finality.” According to the court, “[w]ithout a final resolution of the matter, play cannot proceed.”<sup>42</sup>

In another NFL case, Cincinnati Bengals season ticket holders sued over private seat licenses at the Bengals’ Paul Brown Stadium. In its opinion, the Ohio Court of Appeals had great fun with football references. The court described how the trial court “punted the case to binding arbitration,” thereby forcing the appellate court to “reverse the call made on the field.”<sup>43</sup> The plaintiffs claimed the Bengals committed an “illegal pass” by changing

<sup>38</sup> *United States v. Johnson*, 488 F.3d 690, 698 (6th Cir. 2007).

<sup>39</sup> *N. Cnty. Contractors Ass’n v. Touchstone Ins. Servs.*, 27 Cal. App. 4th 1085, 1091 (Cal. Ct. App. 1994).

<sup>40</sup> 551 U.S. 393, 441 (2007) (Stevens, J., dissenting).

<sup>41</sup> *Nat’l Football League Players Ass’n v. Pro-Football, Inc.*, 857 F. Supp. 71, 74–75 (D.D.C. 1994), *vacated*, 56 F.3d 1525 (D.C. Cir. 1995)).

<sup>42</sup> *Id.*

<sup>43</sup> *Dunkelman v. Cincinnati Bengals, Inc.*, 821 N.E.2d 198, 199 (Ohio Ct. App. 2004).

the rules “midgame.”<sup>44</sup> Conversely, the Bengals argued that the plaintiffs had agreed to the seat license “gameplan.”<sup>45</sup> The court ultimately determined that the plaintiffs were not required to arbitrate their claims and “return[ed] the trial court’s punt.”<sup>46</sup>

After the Los Angeles Rams moved to St. Louis in 1995, season ticket holders brought suit, alleging breach of contract and fraud. The California Court of Appeals described the plaintiffs’ oral motion to recuse one of the appellate judges as an “ironic audible,” but declined to send the judge “from the bench to the showers,” suggesting instead that counsel should “huddle with more experienced teammates before attempting such a ‘Hail Mary’ in the future,” or, at the very least, consult the California Supreme Court’s “playbook.”<sup>47</sup>

Touchdown analogies appear to be the most popular football-themed analogies in judicial opinions. One court explained the burden of proof in a criminal matter in touchdown terms: “[T]he State’s evidence must be persuasive enough to almost make a touchdown; reaching the midfield is never enough to meet the ‘beyond a reasonable doubt’ standard.”<sup>48</sup> In describing how a court determines whether hearsay evidence will be admitted, another held: “On the legal grid that is hearsay in criminal law, the right of confrontation is the goal line which must be crossed to score the touchdown of admissibility.”<sup>49</sup>

In a case about whether Wisconsin’s school financing system creates equal educational opportunities for all children, the dissenting justice noted that while many children are “handed the ‘educational’ ball on the twenty yard line, a significant number are handed this ball on the one yard line with a three-hundred pound lineman on their back.”<sup>50</sup> The Wisconsin constitution, according to the justice, requires that “everyone on the playing field have an equal opportunity” to score that educational touchdown.<sup>51</sup>

The First Circuit Court of Appeals ruminated on the importance of legal research in touchdown terms. It passed on a party’s “attempt to score

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<sup>44</sup> See *id.* at 200–01.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 204.

<sup>47</sup> *Charpentier v. Los Angeles Rams Football Co., Inc.*, 75 Cal. App. 4th 301, 304 n.1 (Cal. Ct. App. 1999).

<sup>48</sup> *Brooks v. State*, 323 S.W.3d 893, 923 (Tex. Crim. App. 2010).

<sup>49</sup> *United States v. Hughes*, 48 M.J. 700, 725 (1998).

<sup>50</sup> *Kukor v. Grover*, 436 N.W.2d 568, 588 (Wis. 1989).

<sup>51</sup> *Id.*

a touchdown by selective perusal of legislative history,” and concluded the attempt “put[ ] no points on the board.”<sup>52</sup>

One court even analogized a criminal defendant’s conduct to a touchdown celebration. The court described a defendant in a drug-smuggling operation as being involved in a “game” with federal authorities in which the defendant taunted authorities like “[t]he football player who, after scoring a touchdown, holds the ball in the air to taut [sic] his opponent.”<sup>53</sup>

Hail Mary analogies are popular in cases where parties have — often unwisely — made tenuous arguments in attempting to salvage their cases. One court characterized a party’s suspect argument as a “[H]ail-Mary” pass that fell “short of the endzone.”<sup>54</sup> And another court likened a party’s motion for reconsideration filed nine months after the bench trial of the case to an “attempt to score on a Hail Mary pass after the game has ended.”<sup>55</sup>

Hail Mary analogies seem particularly prevalent in criminal cases. One appellate court classified a defendant’s claim that the trial court interfered with his ability to present a complete defense as a “Hail Mary pass” that the court would “not catch.”<sup>56</sup> In discussing the reasons a motion for a new trial would have been fruitless, another court held that the motion would have been the equivalent of a “‘Hail Mary pass’ in the last second of the fourth quarter with the losing team on its own five-yard line.”<sup>57</sup>

<sup>52</sup> *Stowell v. Sec. of Health and Human Servs.*, 3 F.3d 539, 542 (1st Cir. 1993).

<sup>53</sup> *United States v. Archbold-Newball*, 554 F.2d 665, 674 n.13 (5th Cir. 1977).

<sup>54</sup> *Tenor Opportunity Master Fund, Ltd. v. Oxygen Biotherapeutics, Inc.*, No. 11 Civ. 06067, 2012 WL 2849384, at \*8 (S.D.N.Y. July 11, 2012); *see also* *Nyunt v. Chairman, Broadcasting Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (characterizing party’s claim that a court can review agency action for statutory violations where statute precludes review as a “Hail Mary pass,” an attempt that in court, as in football, “rarely succeeds”); *In re Dunn*, 399 B.R. 909, 910 (Bankr. W.D. Wash. 2009) (finding debtors’ request to sell their property immediately, rather than maintain the property and continue to make mortgage payments, as “a Hail Mary . . . thrown in hopes of salvaging something out of a grim . . . real estate market and a stringent economy”); *Newdow v. Rio Linda Union School Dist.*, 597 F.3d 1007, 1070 (9th Cir. 2010) (Reinhardt, J., dissenting) (expressing frustration that majority’s opinion was based on a ground that no party mentioned, briefed, or argued, calling it a “Hail Mary argument”).

<sup>55</sup> *Wallace v. NCL (Bahamas) Ltd.*, 891 F. Supp. 2d 1334, 1336 (S.D. Fla. 2012).

<sup>56</sup> *In re Lucas C.*, No. G040926, 2010 WL 1534217, at \*4 (Cal. Ct. App. Apr. 19, 2010); *see also* *Reis v. Hazelet Strip-Casting Corp.*, 28 A.3d 442, 478 (Del. Ch. 2011).

<sup>57</sup> *Ken v. State*, 267 P.3d 567, 577 (Wyo. 2011) (Golden, J., concurring in part and dissenting in part).

Appellate courts love to remind litigants that the courts generally cannot engage in Monday morning quarterbacking. In outlining a habeas corpus petitioner's burden to demonstrate ineffective assistance of counsel, one court explained that it could not act as a "Monday morning quarterback" in reviewing [trial counsel's] tactical decisions."<sup>58</sup> Similarly, in determining whether a police officer's conduct complied with the requirements of the Fourth Amendment, another court refused to act as a "Monday morning quarterback," holding that the officer's conduct need only fall within a range of objective reasonableness.<sup>59</sup>

One court used the Monday morning quarterback analogy in a civil case to explain that a factfinder must determine whether information provided by an applicant for insurance is material, such that an insurer would be able to void the policy for material misrepresentation. According to the court, any other finding "would give the insurers power to play 'Monday morning quarterback,' potentially voiding all policies that prove to have been bad gambles for them."<sup>60</sup>

Other football analogies have also found their way into judicial opinions. In explaining why a police officer's Fourth Amendment blunder was unintentional and not fatal to the government's case, a court noted that if the officer were playing in the Super Bowl, he "would have been penalized five yards for being offside, not forty yards for pass interference."<sup>61</sup> In a 1949 opinion, the Georgia Court of Appeals described the state's efforts as finding "a hole in the line through which [the State] could carry the ball for a touchdown of conviction of the defendant," but ultimately held that the State had "fumbled."<sup>62</sup>

In comparing a defendant's intent to force a mistrial with a defensive football player's intentional foul for pass interference, another court stated: "The defense knows that by performing the illegal act that constitutes the foul, he will probably be caught and his team penalized. Nevertheless, the

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<sup>58</sup> *Davis v. McEwen*, No. 2:09-cv-03510, 2012 WL 4510940, at \*10 (E.D. Cal. Sept. 28, 2012).

<sup>59</sup> *Powell v. Johnson*, 855 F. Supp. 2d 871, 876 (D. Minn. 2012); *see also* *Shultz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) (discussing the reasonableness of a police officer's conduct in shooting the plaintiff, and indicating that while the officer could have acted differently, "the Fourth Amendment does not allow this type of 'Monday morning quarterback' approach" to judging the officer's conduct).

<sup>60</sup> *Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 567 (11th Cir. 1990) (quoting *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 674 F. Supp. 354, 359 (D.D.C. 1987)).

<sup>61</sup> *United States v. Hoffman*, 677 F. Supp. 589, 599 (E.D. Wis. 1988).

<sup>62</sup> *Steed v. State*, 80 Ga. App. 360, 366, 56 S.E.2d 171, 176 (Ga. App. 1949).

offender prefers to take the penalty rather than give up the touchdown that most likely would occur were the foul not committed.”<sup>63</sup>

The Eleventh Circuit Court of Appeals even got in on the football fun when it reviewed a trial court’s finding that a beer maker had infringed on the University of Georgia’s service mark by selling its product in a red and black can featuring a beer-swigging bulldog. The Eleventh Circuit described the beer maker’s hope that his Battlin’ Bulldog beer would “pile up yardage and score big points” in the beer market,<sup>64</sup> “kick[ed] off” its discussion by noting it would only be deciding whether the district court properly applied the Lanham Act,<sup>65</sup> and concluded that while the beer maker had a clever “entrepreneurial game plan,” the University of Georgia was able to hold it to “little or no gain.”<sup>66</sup>

The sometimes-controversial booth review has even made its way into judicial opinions. One dissenting judge compared the majority’s review of potential juror misconduct to “a booth review of instant replay” and recommended that the court make the parties “[r]eplay fourth down.”<sup>67</sup>

Some metaphors more ambiguously draw on not only American football, but possibly other sports like soccer, rugby, or lacrosse. For example, in reviewing the fair use factors for defending against a copyright infringement claim, the Second Circuit Court of Appeals noted that, where a defendant “shut[s] out” the plaintiff on the four fair use factors, “victory on the fair use playing field is assured.”<sup>68</sup> Additionally, in explaining the reasons a party is not permitted to re-litigate a lost motion on different grounds, the United States District Court for the Northern District of New York explained that allowing that type of re-litigation would be equivalent to “mov[ing] the goalposts” on the party that prevailed.<sup>69</sup>

<sup>63</sup> *Lee v. State*, 423 A.2d 267, 370 (Md. Ct. Spec. App. 1980).

<sup>64</sup> *Univ. of Georgia Athletic Ass’n v. Laite*, 756 F.2d 1535, 1537, 1539 1547 (11th Cir. 1985).

<sup>65</sup> *Id.* at 1539.

<sup>66</sup> *Id.* at 1547.

<sup>67</sup> *People v. Crosby*, No. F056070, 2010 WL 1532686, at \*10 (Cal. Ct. App. Apr. 19, 2010) (Gomes, J., dissenting). Judge Gomes’s point is that booth review is not a *de novo* review—it’s actually more akin to review for abuse of discretion. In the National Football League for example, booth reviewers must uphold the call made on the field unless they find there is “indisputable visual evidence” that the call on the field was incorrect. See Chad M. Oldfather and Matthew M. Fernholz, *Comparative Procedure on a Sunday Afternoon: Instant Replay in the NFL as a Process of Appellate Review*, 43 *IND. L. REV.* 45, 49–52 (2009).

<sup>68</sup> *Arica Inst., Inc. v. Palmer*, 970 F.2d 1067, 1079 (2d Cir. 1992).

<sup>69</sup> *Trudeau v. Bockstein*, No. 05-cv-1019, 2008 WL 541158, at \*2 (N.D.N.Y. Feb. 25, 2008) (citations omitted).

## IV. BASKETBALL

“Slam dunk” analogies are probably the most popular of the basketball analogies. A strong case is frequently described as a “slam dunk.” For example, the Fourth District Court of Appeals of California noted that a defendant would have a “slam-dunk claim of ineffective assistance of counsel” if counsel had failed to object to a sentence that potentially violated double jeopardy.<sup>70</sup> A weaker case, however, was described by the Fifth District of Illinois as far from a “slam-dunk.”<sup>71</sup> And, oddly, another court used the slam dunk analogy in the opposite way, holding that the defendant’s argument was a “slam dunk loser.”<sup>72</sup>

A North Carolina appellate court reviewing a defendant’s murder conviction acknowledged that the state’s case was not a “slam dunk” but was, at the least, an “uncontested lay-up.”<sup>73</sup> In a trademark action between Converse and Reebok, the court characterized Converse’s decision not to comply with the local rules as a “technical foul,” and said compliance was necessary because the filings were “not the result of a last minute fast break to the courthouse” (i.e., they were not an emergency that would have excused non-compliance).<sup>74</sup>

The “full court press” basketball analogy is also common. A party that filed numerous motions and other documents was described as engaging in a “full court press.”<sup>75</sup> The Eighth Circuit Court of Appeals explained the prosecution’s evidentiary burden at a pre-trial hearing in those same terms, holding that the prosecution is “not required to put on a full court press on the evidence at a pretrial motion hearing.”<sup>76</sup> Another court analogized the discovery process to a basketball game: “Whether the game is played at a slow pace or a full court press . . . is not going to affect the [c]ourt’s decisions, the ultimate goals of which are to avoid overtime.”<sup>77</sup>

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<sup>70</sup> *People v. Castillo*, No. E056490, 2013 WL 4774542, at \*1 (Cal. Ct. App. Sept. 6, 2013).

<sup>71</sup> *People v. Morris*, No. 5-10-0015, 2012 WL 7059867, at \*6 (Ill. App. Ct. July 25, 2012).

<sup>72</sup> *Smith v. United States*, No. 2:06-CR-01206, 2013 WL 3422031, at \*4 (D.S.C. July 8, 2013).

<sup>73</sup> *State v. Stevenson*, 710 S.E.2d 304, 307 (N.C. Ct. App. 2011).

<sup>74</sup> *Converse, Inc. v. Reebok Int’l Ltd.*, 328 F. Supp. 2d 166, 174 (D. Mass. 2004) (internal quotation marks omitted).

<sup>75</sup> *See Mitchell v. Brennan*, No. G042296, 2011 WL 810747, at \*5 n.4 (Cal. Ct. App. Mar. 9, 2011).

<sup>76</sup> *United States v. McCarther*, 596 F.3d 438, 442 (8th Cir. 2010).

<sup>77</sup> *PIC Group, Inc. v. Landcoast Insulation, Inc.*, No. 1:09CV662-KS-MTP, 2010 WL 4791710, at \*14 n.6 (S.D. Miss. Nov. 18, 2010).

Opinions contain a number of other basketball analogies that are varied and not easily characterized. An “air ball” is a shot so errant it fails to even hit the rim. A court considering a defamation claim filed by a woman who allegedly had an affair with Michael Jordan described her claim as an “air ball.”<sup>78</sup> In addressing the reasons a retired professional basketball player’s claim that he timely appealed a tax assessment failed, the Court of Appeals of Michigan noted: “While the Petitioner may have graced the basketball court with many game-saving jump shots, in the tax court his attempt came after the final buzzer.”<sup>79</sup>

Judge Kozinski of the Ninth Circuit Court of Appeals has noted that “there are no free-throws in criminal trials”; that is, if the defense offered testimony that the defendant was peaceable, the prosecutors would get to question that witness about the defendant’s prior misdeeds.<sup>80</sup> And, in a hilarious but accurate criticism, one court found that a party’s argument was “as errant as a typical Shaquille O’Neal free throw.”<sup>81</sup>

Every now and again, a mixed sports metaphor will slip into a judicial opinion. One trial court noted that its finding of admissibility was a “slam dunk” while the defendant’s argument to the contrary was “not even in the ballpark.”<sup>82</sup>

## V. GOLF

In golf, shooting “below par” is a good thing because the golfer’s objective is to shoot the round in the smallest number of strokes.<sup>83</sup> If something is “par for the course,” however, it is usual or expected, like the number of strokes golfers should require to complete a hole. The Supreme Court used this analogy to describe the “subjective and individualized” nature of employment decisions, where “treating seemingly similarly situated

<sup>78</sup> *Knafel v. Chicago Sun-Times, Inc.*, 413 F.3d 637, 640 (7th Cir. 2005).

<sup>79</sup> *Kelser v. Dep’t of Treasury*, 421 N.W.2d 558, 560 (Mich. Ct. App. 1988).

<sup>80</sup> *Pinholster v. Ayers*, 590 F.3d 651, 707 (9th Cir. 2009) (Kozinski, J., dissenting), *rev’d*, 131 S.Ct. 1388 (2011).

<sup>81</sup> *City of Seattle v. Professional Basketball Club, LLC*, No. C07-1620RSM, 2007 WL 3217556, at \*4 (W.D. Wash. Oct. 2, 2007). In his professional career, O’Neal made only 52.7 percent of his free throw shots. *Shaquille O’Neal Stats*, ESPN, [http://espn.go.com/nba/player/stats/\\_id/614/shaquille-oneal](http://espn.go.com/nba/player/stats/_id/614/shaquille-oneal) (last visited Apr. 22, 2014), *archived at* <http://perma.cc/LZ5Y-VXB6>.

<sup>82</sup> *People v. Hamilton*, Nos. C068430 and C069220, 2013 WL 3961167, at \*4 (Cal. Ct. App. July 31, 2013).

<sup>83</sup> *See generally* UNITED STATES GOLF ASS’N, RULES OF GOLF R. 2-1 (Jan. 1, 2012), *archived at* <http://perma.cc/45UL-FFMK>.

individuals differently . . . is par for the course.”<sup>84</sup> Another court described “[d]etailed, time consuming, contentious discovery issues” as “par for the course in many civil actions.”<sup>85</sup> And one judge expressed frustration with a party’s numerous filings, which protracted the litigation, by describing the party’s futile motion for reconsideration as “[p]ar for the course.”<sup>86</sup>

Judicial opinions offer other interesting golf analogies. In a bankruptcy action to set aside an allegedly fraudulent transfer of a golf course, the judge indicated he would “tee it up, take a swing and see where the issues now before [him] land.”<sup>87</sup> Similarly, another court discussed the methods available to a party to “tee up” an agency’s decision for judicial review.<sup>88</sup>

Where a party’s new counsel attempted to undo mistakes of prior counsel, one court held that “[e]ven though a newly assigned counsel may not have personally dropped the proverbial ball, the arrival of replacement counsel cannot afford a party a ‘Mulligan.’”<sup>89</sup>

In determining the propriety of police conduct in entering a defendant’s apartment without a warrant, the Western District of Wisconsin found that exigent circumstances permitted the entry, and the police were “not required to acquiesce to the equivalent of an assessed penalty stroke by [waiting for a warrant and] allowing [the defendant] an opportunity to deep-six” evidence.<sup>90</sup>

Another court analogized the requirements of the Magnuson-Moss Warranty Act with a golf course sand trap or water hazard. According to that court, the warranty required by the Act “is simply a feature that the player must accept in playing the game.”<sup>91</sup>

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<sup>84</sup> Engquist v. Or. Dep’t of Agric., 553 U.S. 591, 604 (2008).

<sup>85</sup> McNeil v. Hayes, No. 1:10-CV-01746-AWI-SKO PC, 2013 WL 2434702, at \*1 (E.D. Cal. June 4, 2013).

<sup>86</sup> Madura v. BAC Home Loans Servicing L.P., No. 8:11-CV-2511-T-33TBM, 2012 WL 3656449, at \*2 (M.D. Fla. Aug. 23, 2012); *see also* Nufrio v. Quintavella, No. 11-CV-3232, 2012 WL 458437, at \*4 (D.N.J. Feb. 10, 2012) (imposing sanctions for plaintiff’s filing of a document “without regard to the objective reasonableness or truth of his utterances” when such filings were “par for the course”).

<sup>87</sup> *In re Grandote Country Club Co.*, 208 B.R. 218, 220 (Bankr. D. Colo. 1997).

<sup>88</sup> Medical Waste Inst. & Energy Recovery Council v. EPA, 645 F.3d 420, 428 (D.C. Cir. 2011).

<sup>89</sup> Carlson v. Carmichael, No. 10-3579, 2013 WL 3778356, at \*3 (E.D. Pa. July 19, 2013) (footnote omitted).

<sup>90</sup> United States v. High, No. 07-CR-091-C, 2007 WL 5555947, at \*7 (W.D. Wis. Nov. 5, 2007).

<sup>91</sup> Ann Sacks Tile & Stone, Inc. v. Dep’t of Revenue, No. TC 4879, 2011 WL 5967187, at \*5 (Or. Tax. Reg. Div. Nov. 29, 2011).

VI. POKER<sup>92</sup>

Poker metaphors are surprisingly popular in judicial opinions. Kenny Rogers' famous song, *The Gambler*,<sup>93</sup> has been quoted by a number of courts for the proposition that litigants must learn when to "hold 'em" by moving forward with a suit and when to "fold 'em" by taking a settlement.<sup>94</sup>

The elusive royal flush<sup>95</sup> is less elusive in judicial opinions. In describing a defendant who reached a plea agreement and then appealed the sentence imposed, the Ninth Circuit Court of Appeals noted that the defendant may "bet on the possibility of winning the appeal and then winning an acquittal, just as a poker player has the right to hold the ten and queen of hearts, discard three aces, and pray that when he draws three cards, he gets a royal flush."<sup>96</sup> Another court used poker terms to explain why a defendant who waited until after he obtained discovery to seek to enforce an arbitration clause was not entitled to arbitration — according to the court, the defendant's discovery "forced the plaintiffs to reveal their hand," and whether the plaintiff's discovery disclosures "consisted of a royal flush . . . or a pair of twos," the prejudice lay in the disclosure itself, not the specific content.<sup>97</sup>

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<sup>92</sup> ESPN considers card playing to be a sport, and because of the interesting poker-influenced metaphors found in judicial opinions, I have included it here.

<sup>93</sup> *The Gambler* is itself meant to be a metaphor for life:

You've got to know when to hold 'em  
 Know when to fold 'em  
 Know when to walk away and  
 Know when to run  
 You never count your money  
 When you're sittin' at the table  
 There'll be time enough for countin'  
 When the dealin's done

KENNY ROGERS, *THE GAMBLER* (United Artists 1978).

<sup>94</sup> *In re Lehman Bros. Sec. & Erisa Litig.*, No. 09 MD 2017(LAK), 2012 WL 1563879, at \*1 (S.D.N.Y. May 3, 2012); *Grine v. Colburn's Air Conditioning & Refrigeration*, No. 09-11, 2009 WL 2634179, at \*15 (W.D. Pa. Aug. 25, 2009).

<sup>95</sup> A royal flush occurs when a player obtains the ace, king, queen, jack, and ten in a single suit. See *Royal Flush*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/royal%20flush> (last visited Apr. 22, 2014), archived at <http://perma.cc/8WPX-RM2M>. The probability of being dealt a royal flush in any suit in a five-card hand is 1 in 649,740 or .00015 percent. See Natasha Glydon, *Gambling and the Odds*, MATH CENTRAL, <http://mathcentral.uregina.ca/beyond/articles/Gambling/Odds> (last visited Apr. 22, 2014), archived at <http://perma.cc/WXZ7-EFAU>.

<sup>96</sup> *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1199 (9th Cir. 2005).

<sup>97</sup> *Martin v. Rundquist*, No. H028060, 2005 WL 1668863, at \*6 (Cal. Ct. App. July 15, 2005) (alterations omitted) (citation omitted).

Courts have also used poker terms to explain the need for litigants to disclose their cases during the litigation process. For example, one court explained what plaintiffs must do to survive a motion to dismiss. “Just as you cannot win a game of poker by telling your opponents that somewhere within the fifty-two cards lurks a winning Royal Flush, [plaintiffs] must do more than append raw data and say, find it, it’s in there somewhere; some selection and arrangement is necessary.”<sup>98</sup> Similarly, in determining that a party was required to turn over discovery, another court noted that, in discovery, each party may be ordered to “lay his cards down,” and while a party “may have the winning hand, . . . he may not take the pot by simply reassuring the Court that he has an ace in the hole.”<sup>99</sup>

Appellate courts have also used poker terms like “royal flush” and “ace in the hole” to explain their ability to rule on issues not properly raised in earlier proceedings. The Supreme Court of Utah has considered whether a litigant’s failure to raise an error below absolutely prohibits the appellate court from reversing that decision when the appellate court “holds in its hand an argument that is tantamount to the legal royal flush.”<sup>100</sup> Another court explained the necessity of the claim preclusion doctrine to prevent a party from “reserv[ing] and preserv[ing] . . . [an] unrepresented fact or theory as an ‘ace in the hole’ to be used as a ground for a second lawsuit based on such ground.”<sup>101</sup> In general, counsel must object to comments by a trial judge that he believes are inappropriate when those comments are made, and cannot “wait until after the conclusion of the matter to silently preserve the event as an ace in the hole to be used in the event of an adverse decision.”<sup>102</sup> And appellate courts generally refuse to consider arguments not made below, because to do so would “encourage a party to sandbag at the district court level, only then to play his ace in the hole before the appellate court.”<sup>103</sup>

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<sup>98</sup> *Bowers v. Crystal Valley, R.V.*, No. 95 C 7527, 1996 WL 169415, at \*1 (N.D. Ill. Apr. 9, 1996).

<sup>99</sup> *Perry v. Hunt*, No. 9:10-CV-1033 (LEK/TWD), 2012 WL 4106459, at \*3 (N.D.N.Y. Sept. 18, 2012).

<sup>100</sup> *State v. Robison*, 147 P.3d 448, 452 (Utah 2006).

<sup>101</sup> *Regions Fin. Corp. v. Marsh USA, Inc.*, 310 S.W.3d 382, 396 (Tenn. Ct. App. 2009) (quoting *McKinney v. Widner*, 746 S.W.2d 699, 706 (Tenn. Ct. App. 1987)).

<sup>102</sup> *James v. James*, 344 S.W.3d 915, 918 (Tenn. Ct. App. 2010) (citations omitted) (internal quotation marks omitted).

<sup>103</sup> *Campbell v. Davol, Inc.*, 620 F.3d 887, 892 (8th Cir. 2010) (quoting *Pub. Water Supply Dist. No. 3 of Laclede Cnty, Mo. v. City of Lebanon*, 605 F.3d 511, 524 (8th Cir. 2010)) (internal quotation marks omitted).

In poker, a sandbagger is someone who has a strong hand but bets conservatively to lull other players into staying in the game, thereby raising the pot the sandbagger will win.<sup>104</sup> Many courts have used the term “sandbagging” to refer to the late disclosure of evidence or arguments in an attempt to surprise the opposing party. For example, courts have noted that Rule 37 of the Federal Rules of Civil Procedure, which allows a trial court to exclude evidence that was not timely disclosed to the opposing party, is designed to “prevent the practice of sandbagging an adversary with new evidence.”<sup>105</sup> And some appellate courts, including the Court of Appeals for the D.C. Circuit, require appellants to “raise all arguments in the opening brief to prevent ‘sandbagging’ of appellees . . . and to provide opposing counsel the chance to respond.”<sup>106</sup>

## VII. OTHER SPORTS

Noteworthy analogies from other sports appear in judicial opinions as well. The “hat trick”<sup>107</sup> analogy has made its way into several opinions. One appellate court described a case that implicated doctrines of standing, mootness, and ripeness as a “rare justiciability hat trick.”<sup>108</sup> Another dismissed a criminal defendant’s claim that the prosecution “effected a hat trick of violations” by suppressing material evidence.<sup>109</sup>

In a billiards analogy, the Seventh Circuit Court of Appeals explained that a lawyer’s failure to follow the local rules put his client “behind the eight ball” when a judge disregarded her factual assertions.<sup>110</sup> Another

<sup>104</sup> See *Sandbagging in Poker*, <http://www.fairpoker.info/Sandbagging-in-Poker.html> (last visited Apr. 22, 2014), *archived at* <http://perma.cc/HXY6-U67A>. Golfers also use the term “sandbagger” to refer to a player who intentionally plays below his skill level to obtain a higher handicap and give himself a better chance to win a future tournament. *The History of Sandbaggers*, <http://www.golftripper.com/the-history-of-sandbaggers/> (last visited Apr. 22, 2014), *archived at* <http://perma.cc/BBA9-E6YB>.

<sup>105</sup> *Ventra v. United States*, 121 F. Supp. 2d 326, 332 (S.D.N.Y. 2000) (citations omitted).

<sup>106</sup> *Corson and Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990); *see also Cleary v. Boeing Co. Emp. Health and Welfare Benefit Plan (Plan 503)*, No. 11-CV-00403, 2013 WL 3943633, at \*12 n.8 (D. Colo. July 31, 2013) (“The Court will not consider arguments raised for the first time in a reply brief; such tactics sandbag the opposing party and prevent the argument from being fully briefed.”).

<sup>107</sup> Hat tricks occur in several sports, including hockey and soccer.

<sup>108</sup> *Worth v. Jackson*, 451 F.3d 854, 855 (D.C. Cir. 2006).

<sup>109</sup> *United States v. Faulkenberry*, 614 F.3d 573, 589 (6th Cir. 2010).

<sup>110</sup> *Day v. N. Ind. Pub. Serv. Corp.*, 164 F.3d 382, 383 (7th Cir. 1999).

court used the same eight ball analogy in a case in which a screwdriver malfunctioned while the plaintiff was attempting to assemble a pool table. That court's subheadings reflect its holding that the plaintiff was "[b]ehind the [e]ight [b]all" in notifying the manufacturer of the plaintiff's breach of warranty claim and that both parties' appeals were without merit and, therefore, "[s]nookered."<sup>111</sup>

In a dissenting opinion, one judge used a tennis analogy to describe the "bouncing burden of proof" in an admiralty action over damage to goods transported by a sea vessel.<sup>112</sup> According to the dissenting judge, the plaintiff "served the ball in bounds" by proving the goods were uncontaminated when loaded, the defendant hit a "return shot" by proving the contamination was caused by an incident over which the defendant had no control, but the plaintiff "drove the ball into the net" when it failed to produce evidence the defendant was negligent.<sup>113</sup>

Quiet title actions often involve many parties with divergent interests, and one court characterized a contentious quiet title action as a rugby "scrum."<sup>114</sup> Another noted the difficulties faced by the board of directors of a closely held company who "struggle[d] to act in [the company's] best interest in the midst of a familial rugby scrum that greatly impede[d] their efforts."<sup>115</sup>

The "home stretch" analogy from track and field is also popular. One court declined to allow a defendant to implead another party because the case was in the "home stretch" when the defendant filed its motion.<sup>116</sup> Meanwhile, a bankruptcy court permitted a Chapter 11 debtor to enter into a loan agreement because disallowing the loan would have counterproductively "cut off the debtor's ability to function when [they were] just reaching the home stretch of [the] reorganization."<sup>117</sup>

<sup>111</sup> *Castro v. Stanley Works*, 864 F.2d 961, 962–63 (1st Cir. 1989).

<sup>112</sup> *PPG Indus., Inc. v. Ashland Oil Co.*, 592 F.2d 138, 153 (3d Cir. 1978) (Rosenn, J., dissenting).

<sup>113</sup> *Id.*

<sup>114</sup> *Deane v. United States*, 329 F. App'x. 809, 816 (10th Cir. 2009). A scrum occurs when players from both teams come together in a close formation and attempt to gain possession of the ball. *See Scrum*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/scrum> (last visited Apr. 22, 2014), archived at <http://perma.cc/4D8W-F5NK>.

<sup>115</sup> *Demoulas v. Demoulas Super Mkts., Inc.*, No. 033741BLS, 2004 WL 1895052, at \*18 (Mass. Super. Ct. Aug. 2, 2004).

<sup>116</sup> *Botkin v. Tokio Marine & Nichido Fire Ins. Co., Ltd.*, 956 F. Supp. 2d 795, 808 (E.D. Ky. 2013).

<sup>117</sup> *In re Catholic Bishop of N. Alaska*, No. F08-00110-DMD, 2008 WL 8652366, at \*1 (Bankr. D. Alaska Nov. 26, 2008).

Analogies from wrestling, which might be the world's oldest sport, have also made their way into judicial opinions. In analogizing a doctor's refusal to testify as to the definitive cause of the plaintiff's injuries, an appellate court compared the attorneys' efforts to those of an "Olympic wrestler attempting a takedown of his opponent and failing to succeed."<sup>118</sup>

Surprisingly, even cricket analogies have made their way into American judicial opinions. A "sticky wicket" occurs when the playing surface of a cricket field becomes wet or otherwise uneven, and the term commonly refers to a difficult situation.<sup>119</sup> The First Circuit Court of Appeals has described the statutory framework of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") as creating a "sticky wicket" for parties that choose not to settle early in the litigation.<sup>120</sup>

In motor car racing, the pole position is the first or most advantageous position. In a case involving a violent offender, the trial court's consideration of protecting the public in determining the offender's sentence took "pole position."<sup>121</sup> The "pit stop" is another common racing analogy used in judicial opinions. In explaining that a Chapter 11 reorganization can take an extended time where a company has "latent problems lurking under its hood," the Fifth Circuit Court of Appeals noted that those latent problems can turn "what was expected to be a pit-stop into a lengthy reorganization process."<sup>122</sup> And many courts have noted that in certain types of lawsuits, such as patent actions, parties frequently race to the courthouse to be the first to file. For example, one court determined that to exercise jurisdiction over the plaintiff's declaratory judgment action while the defendant was prosecuting a separate patent infringement action against the plaintiff would be to "discourage attempts at settlement and wave the checkered flag in front of races to the courthouse."<sup>123</sup>

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<sup>118</sup> *Williams v. State Farm Mut. Auto Ins. Co.*, 830 So.2d 379, 383 (La. Ct. App. 2002).

<sup>119</sup> See *Wicket*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/wicket](http://www.oxforddictionaries.com/us/definition/american_english/wicket) (last visited Apr. 22, 2014), archived at <http://perma.cc/L39T-U653>.

<sup>120</sup> *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 92 (1st Cir. 1990).

<sup>121</sup> *State v. Mayek*, 776 N.W.2d 101, at \*1 (Wis. Ct. App. 2009) (unpublished table decision).

<sup>122</sup> *In re ASARCO, LLC*, 702 F.3d 250, 264 (5th Cir. 2012).

<sup>123</sup> *Aeroflex USA, Inc. v. Armacell Enter. GmbH*, No. 3:13-CV-485-TAV-CCS, 2014 WL 652912, at \*5 (E.D. Tenn. Feb. 20, 2014); see generally *Cellectis S.A. v. Precision Biosciences, Inc.*, 881 F. Supp. 2d 609, 611 (D. Del. 2012) (summarizing the parties' litigation history as "a series of races to the courthouse on nearly a dozen patents").

One of the best uses of apropos sports metaphors comes from a dissenting opinion in a contract case involving a raceway. The dissenting opinion is replete with race-themed idioms and analogies. The dissenting judge admonished the majority for attempting to dispose of the case “by a quick drop of the checkered flag called summary judgment.”<sup>124</sup> He explained that he disagreed with the majority’s “swerves, twists and turns” that failed to acknowledge settled jurisprudence and follow the “rules of the road.”<sup>125</sup> The opinion contains other clever uses of race-related words and themes, including “frame,” “body,” “fuel,” “fender rubbing,” “bumping and hitting,” “pits,” “final turn,” “mileage,” “caution flag,” and “bumper to bumper,” among many others.

#### VIII. CONCLUSION

Whether they are returning a lower court’s punt or knocking out a party’s claims, courts use sports metaphors in a variety of contexts to explain a myriad of legal principles and factual scenarios. These metaphors have been employed at all judicial levels from state trial court judges to the Supreme Court justices. There is no sign courts intend to rein in their use of sports metaphors either. And why should they? As long as Americans continue to love sports, courts will continue to use these metaphors to illuminate our understanding of legal concepts. So, whether you are a football fanatic or a golfing guru, there is something for every sports fan in these judicial opinions.

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<sup>124</sup> *Fry Racing Enters., Inc. v. Chapman*, 497 S.E.2d 541, 547 (W. Va. 1997) (Starcher, J., dissenting).

<sup>125</sup> *Id.* at 545.



Minor League Baseball and the Competitive Balance: Examining the Effects of Baseball’s Antitrust Exemption

Russell Yavner<sup>1</sup>

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## I. INTRODUCTION

On Sunday, October 1, 2006, the Tampa Bay Rays lost their final game of the season to the Cleveland Indians by a score of 6 to 3.<sup>2</sup> The loss was the Rays' one hundred and first of the season, giving them the worst record in Major League Baseball.<sup>3</sup> As a result, they were awarded the first overall pick in the 2007 Draft.<sup>4</sup> Since their first season, as an expansion club in 1998, the Rays had never finished a season with more than 70 wins.<sup>5</sup> With the number one pick, the Rays chose an athletic, six-foot-five-inch left-handed pitcher from Vanderbilt University named David Price.<sup>6</sup> Price made his major league debut on September 14, 2008, and since then has won 72 games for the Rays, was named an All-Star in 2010, 2011 and 2012, and won the 2012 Cy Young Award.<sup>7</sup> Relying on Price and other players they drafted and developed in their minor league system, the Rays have won 90 games in every season but one since 2007.<sup>8</sup> The Rays' success would not have been possible without Minor League Baseball's antitrust exemption.

Minor League Baseball has been exempt from the nation's antitrust laws since 1922.<sup>9</sup> As a result, Minor League Baseball is immune from antitrust suits challenging any of its agreements or practices.<sup>10</sup> After discussing the creation and scope of baseball's exemption, this paper examines the effects of Minor League Baseball's antitrust immunity on minor league players, clubs, fans, communities, and parent clubs. This paper examines both

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<sup>2</sup> 2006 *Tampa Bay Devil Rays - Schedules, Box Scores, and Splits*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/teams/TBD/2006-schedule-scores.shtml> (last visited Dec. 17, 2013), *archived at* <http://perma.cc/6PZE-4KTE>.

<sup>3</sup> *MLB Standings - 2006*, ESPN.COM, [http://espn.go.com/mlb/standings/\\_/year/2006](http://espn.go.com/mlb/standings/_/year/2006) (last visited Dec. 17, 2013), *archived at* <http://perma.cc/CPG7-GMMK>.

<sup>4</sup> *1st Round of the 2007 MLB June Amateur Draft*, BASEBALL-REFERENCE.COM, [http://www.baseball-reference.com/draft/?query\\_type=year\\_round&year\\_id=2007&draft\\_round=1&draft\\_type=junreg](http://www.baseball-reference.com/draft/?query_type=year_round&year_id=2007&draft_round=1&draft_type=junreg) (last visited Dec. 17, 2013), *archived at* <http://perma.cc/LT7W-S3G8>.

<sup>5</sup> *Tampa Bay Rays - Team History & Encyclopedia*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/teams/TBD/> (last visited Dec. 17, 2013), *archived at* <http://perma.cc/XWH2-2ENF>.

<sup>6</sup> *David Price, lhp, Devil Rays*, BASEBALL AMERICA (June 7, 2007), <http://www.baseballamerica.com/online/draft/news/2007/263974.html>, *archived at* <http://perma.cc/59YT-VSTZ>.

<sup>7</sup> *David Price Player Page*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/p/priceda01.shtml> (last visited Dec. 17, 2013), *archived at* <http://perma.cc/YX3G-RU4N>.

<sup>8</sup> See *Tampa Bay Rays - Team History & Encyclopedia*, *supra* note 5.

<sup>9</sup> See *infra* Part II.B.

<sup>10</sup> See *infra* Part II.D.

the benefits and the disadvantages of Minor League Baseball's antitrust exemption, specifically analyzing the First-Year Player Draft, international amateur free agency rules, the minor league reserve system, college baseball's inability to replace Minor League Baseball, the minor league minimum salary, the minor league drug-testing program, and Minor League Baseball's contributions to Major League Baseball's competitive balance.

## II. MINOR LEAGUE BASEBALL'S ANTITRUST EXEMPTION

### A. *The Antitrust Prohibition: The Sherman Antitrust Act and the Rule of Reason*

United States federal law prohibits unreasonable restraints on trade.<sup>11</sup> Section 1 of the Sherman Antitrust Act, enacted in 1890, proscribes, "[e]very 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."<sup>12</sup>

Read literally, Section 1 is extremely restrictive, as it would seem to prohibit all interstate private contracting.<sup>13</sup> Private contracting inherently entails restraint, and Section 1 outlaws every contract that restrains interstate trade.<sup>14</sup> To prevent this extreme result, the Supreme Court has interpreted Section 1 in a manner that avoids this problem.<sup>15</sup> The Court's gloss on Section 1, known as the Rule of Reason analysis, gives the Sherman Antitrust Act more flexibility.<sup>16</sup> The key inquiry under the Rule of Reason analysis is whether a particular restraint on trade promotes competition or unreasonably suppresses it.<sup>17</sup> The Rule of Reason analysis requires courts to conduct a three-step process to determine whether a restraint violates Sec-

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<sup>11</sup> 15 U.S.C.A. § 1 (West 2004). See also *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007).

<sup>12</sup> 15 U.S.C.A. § 1 (West 2004).

<sup>13</sup> See *Nat'l Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 687–88 (1978).

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

<sup>15</sup> See *id.* at 688.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 691 ("From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade*, to the Court opinion written by Mr. Justice Powell in *Continental T. V., Inc.*, the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.").

tion 1.<sup>18</sup> First, the plaintiff must prove the restraint produces significant anticompetitive effects in the relevant product and geographic markets.<sup>19</sup> If the plaintiff can establish this, the burden shifts to the defendant, who must prove that the restraint also produces pro-competitive effects and that these pro-competitive effects outweigh the restraint's anticompetitive effects.<sup>20</sup> If the defendant meets his burden, the burden then shifts back to the plaintiff who, to prevail, must prove that the restraint's legitimate objectives can be achieved in a substantially less restrictive manner.<sup>21</sup> This Rule of Reason analysis is the standard that courts use to judge antitrust suits brought against professional sports leagues, except professional baseball.<sup>22</sup>

*B. The Creation of Professional Baseball's Antitrust Exemption:  
The Supreme Court*

Professional baseball is unique in that it is exempt from the Sherman Antitrust Act's proscription against unreasonable restraints on trade.<sup>23</sup> That is, with one small exception, professional baseball is immune from antitrust suits challenging its agreements or actions.<sup>24</sup> Professional baseball's anti-

<sup>18</sup> See *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003) (citations omitted).

<sup>19</sup> *Id.* (citing *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

<sup>20</sup> *Id.* See also *Cont'l Television, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977) ("The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences.").

<sup>21</sup> *Plymouth Whalers*, 325 F.3d at 718 (citations omitted). See also *Leegin*, 551 U.S. at 885 (The court "weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.") (quoting *Cont'l T. V.*, 433 U.S. at 49).

<sup>22</sup> Courts consistently use the Rule of Reason analysis where the challenged restraint involves an industry in which some restraint is necessary to ensure the availability of the industry's product. *Plymouth Whalers*, 325 F.3d at 719 ("[C]ourts consistently have analyzed challenged conduct under the rule of reason when dealing with an industry in which some horizontal restraints are necessary for the availability of a product such as sports leagues.") (quoting *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998)). Professional sports leagues make up one such industry, where some restraints on trade are necessary to produce their product, professional sporting events. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010) (In professional sports leagues, "restraints on competition are essential if the product is to be available at all.") (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984)).

<sup>23</sup> *Flood v. Kuhn*, 407 U.S. 258, 282–83 (1972).

<sup>24</sup> See *infra* Part II.D.

trust exemption is rooted in three Supreme Court decisions and is defined today by a number of lower court decisions and the Curt Flood Act.

Professional baseball's antitrust exemption was created by the Supreme Court in its 1922 decision, *Federal Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs*.<sup>25</sup> The plaintiff in *Federal Baseball* was a professional baseball club from Maryland that was a member of the Federal League, a professional league comprised of eight teams that was attempting to compete with Major League Baseball.<sup>26</sup> The plaintiff sued Major League Baseball under the Sherman Antitrust Act, alleging that Major League Baseball conspired to monopolize the business of professional baseball by buying a number of the Federal League clubs and inducing the league's other clubs to leave the Federal League as well.<sup>27</sup>

In a unanimous and rather cryptic decision written by Justice Holmes, the Supreme Court held that the entire business of professional baseball is exempt from the Sherman Antitrust Act because professional baseball does not entail interstate commerce.<sup>28</sup> Specifically, the Court stated that the baseball games are the essential aspect of the professional baseball business, as they are what the paying public consumes.<sup>29</sup> Further, the Court stated that even though these games are played by clubs from different states, the games themselves are purely state affairs.<sup>30</sup> According to the Court, even though the games require the professional baseball clubs to pay to transport their players across state lines, transporting players is merely incidental to the games and is not the essence of the business of baseball.<sup>31</sup> Thus, the mere transportation of players across state lines does not itself transform the professional baseball business into one that entails interstate commerce.<sup>32</sup>

It was not until 1953 that the Supreme Court reexamined the professional baseball antitrust exemption.<sup>33</sup> In *Toolson v. New York Yankees, Inc.*, a one paragraph, per curiam opinion, the Court affirmed *Federal Baseball* and the existence of professional baseball's antitrust exemption.<sup>34</sup> The court provided four reasons for affirming *Federal Baseball*: (1) Congress was aware for

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<sup>25</sup> 259 U.S. 200 (1922).

<sup>26</sup> *Id.* at 207. At the time, Major League Baseball consisted of sixteen teams, eight in the American League and eight in the National League. *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 208.

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

<sup>30</sup> *Id.* ("The business is giving exhibitions of base ball, which are purely state affairs.").

<sup>31</sup> *Id.* at 208–09.

<sup>32</sup> *Id.* at 209.

<sup>33</sup> *Piazza v. Major League Baseball*, 831 F. Supp. 420, 434 (E.D. Pa. 1993).

<sup>34</sup> *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953).

over three decades of baseball's antitrust exemption created by *Federal Baseball*, yet did not enact contrary legislation to negate it; (2) Congress let professional baseball develop for over three decades with the understanding that baseball was not subject to the antitrust laws; (3) overruling *Federal Baseball* would produce the unwanted consequence of retroactive effect; and (4) the Court wanted any change to baseball's exemption to be made by legislation rather than by the Court.<sup>35</sup> Justices Burton and Reed dissented, arguing that the revenue sources of and circumstances surrounding professional baseball in 1953 did not warrant the exemption.<sup>36</sup>

The Court next reexamined<sup>37</sup> baseball's exemption in 1972, in *Flood v. Kuhn*.<sup>38</sup> In *Flood*, the Court once again affirmed baseball's exemption, specifically with regard to baseball's reserve clause.<sup>39</sup> The plaintiff in that case, Curtis Flood, was a professional baseball player who played for the St. Louis Cardinals for twelve years, from 1958 to 1969.<sup>40</sup> In October of 1969, the Cardinals traded him to the Philadelphia Phillies.<sup>41</sup> Flood did not want to play for the Phillies and requested free agency.<sup>42</sup> The Commissioner denied Flood's request, so Flood decided to sit out the 1970 season.<sup>43</sup> Flood sued the Commissioner of Major League Baseball, the Presidents of the National and American Leagues, and the twenty-four Major League Baseball clubs, challenging Major League Baseball's reserve clause.<sup>44</sup> Major League Baseball's reserve clause in 1972 stated that a player was confined to the club that had him under contract, that clubs could freely assign their players' contracts, and that clubs could annually renew their players' contracts unilaterally subject to a minimum salary.<sup>45</sup> Flood claimed that baseball's reserve clause violated the federal antitrust laws.<sup>46</sup>

The Court began its opinion by stating that professional baseball in 1972 was engaged in interstate commerce and that baseball's exemption was "an exception and an anomaly . . . an aberration confined to baseball," as professional basketball, football, and hockey were (and still are) subject to

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 364–65.

<sup>37</sup> *Piazza*, 831 F. Supp. at 435.

<sup>38</sup> *Flood*, 407 U.S. at 258.

<sup>39</sup> *Id.* at 285.

<sup>40</sup> *Id.* at 264.

<sup>41</sup> *Id.* at 265.

<sup>42</sup> *Id.* at 265–66.

<sup>43</sup> *Id.* The Phillies sold Flood's rights to the Washington Senators after the 1970 season; Flood played for the Senators during his final season, in 1971. *Id.* at 266.

<sup>44</sup> *Id.* at 265–66.

<sup>45</sup> *Id.* at 259 n.1.

<sup>46</sup> *Id.* at 265.

the Sherman Antitrust Act.<sup>47</sup> Nevertheless, the Court affirmed baseball's exemption with regard to baseball's reserve clause, explaining that the exemption had been in effect for fifty years and was entitled to stare decisis.<sup>48</sup> The Court justified its holding with reasoning similar to that in *Toolson*: Congress could have, but did not, enact legislation amending baseball's exemption; if the Court were to overturn the exemption, it would produce retroactivity problems; and if the exemption were to be amended, the Court felt it should be done via legislative, not judicial, action.<sup>49</sup> Because it failed to clearly do so itself, this holding left for the lower courts to decide how to further define the outer limits of baseball's exemption.

*C. Defining the Scope of Professional Baseball's Antitrust Exemption:  
The Lower Courts*

Since the 1972 decision in *Flood*, the Supreme Court has been silent on the issue of baseball's exemption. As a result, until the passage of the Curt Flood Act<sup>50</sup> in 1998, which, arguably, implicitly defined the reach of baseball's exemption,<sup>51</sup> the lower courts were left to decide the scope of the exemption. *Flood* affirmed the existence of baseball's exemption, but did so expressly only with regard to baseball's reserve system.<sup>52</sup> As a result, lower court decisions following *Flood* have grappled with whether or not baseball's exemption extends beyond the reserve system to other aspects of professional baseball, including Minor League Baseball, franchise relocation, contraction, the Commissioner's authority to act "in the best interests of baseball," radio broadcasting, and clubs' relationships with umpires.

The Ninth Circuit considered whether baseball's exemption extends to Minor League Baseball in 1974 in *Portland Baseball Club, Inc. v. Kuhn*.<sup>53</sup> In 1968, two expansion clubs joined Major League Baseball, the Seattle Pilots and San Diego Padres.<sup>54</sup> Because these two expansion clubs were in cities located in the territory of the minor league Pacific Coast League (PCL), the

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<sup>47</sup> *Id.* at 282.

<sup>48</sup> *Id.* at 283–84 (“We continue to be loath, 50 years after Federal Baseball and almost two decades after Toolson, to overturn those cases . . . Accordingly, we adhere once again to Federal Baseball and Toolson and to their application to professional baseball.”).

<sup>49</sup> *Id.*

<sup>50</sup> 15 U.S.C.A. § 26b (West 2002).

<sup>51</sup> See *infra* Part II.d.

<sup>52</sup> *Flood*, 407 U.S. at 259 (“The Court is asked specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust laws.”).

<sup>53</sup> *Portland Baseball Club, Inc. v. Kuhn*, 491 F.2d 1101 (9th Cir. 1974).

<sup>54</sup> *Id.* at 1102.

PCL clubs were compensated pursuant to Major League Baseball's procedures at the time.<sup>55</sup> The owner of the Portland Beavers, one of the PCL clubs, was unsatisfied with the compensation the PCL received and sued the Commissioner of Major League Baseball alleging antitrust violations.<sup>56</sup> The Ninth Circuit rejected the plaintiff's argument, holding that Minor League Baseball falls within baseball's antitrust exemption.<sup>57</sup>

On the issue of franchise relocation, the courts have split with regard to whether it falls within baseball's exemption. In *Piazza v. Major League Baseball*, the plaintiffs, comprised of a group of investors, sued Major League Baseball after the major league owners rejected the plaintiffs' bid to purchase the San Francisco Giants and move the franchise to Tampa Bay, Florida.<sup>58</sup> The District Court for the Eastern District of Pennsylvania held that baseball's exemption is limited to baseball's reserve system and thus franchise relocation falls outside of baseball's exemption.<sup>59</sup> In *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, which arose out of the same facts as *Piazza*, the Florida Supreme Court deferred to *Piazza*, holding that franchise relocation is not covered by baseball's exemption.<sup>60</sup>

By contrast, the Minnesota Supreme Court examined the issue of franchise relocation in 1999 in *Minnesota Twins Partnership v. State ex rel. Hatch* and reached the opposite conclusion.<sup>61</sup> In 1997, the owner of the Minnesota Twins announced that he had reached a deal to sell the Twins to a group of investors from North Carolina.<sup>62</sup> The investors planned to move the Twins to North Carolina if the Minnesota legislature failed to pass legis-

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1102-03.

<sup>57</sup> *Id.* at 1103 (citing *Flood*, 407 U.S. at 258).

<sup>58</sup> *Piazza v. Major League Baseball*, 831 F. Supp. 420, 422-23 (E.D. Pa. 1993). The Giants owner subsequently sold the Giants to a group of investors from San Francisco. *Id.* at 423.

<sup>59</sup> *Id.* at 440-41 (asking whether the market for ownership interests in baseball franchises is central to professional baseball and thus exempt; answering, no, due to stare decisis, but noting that franchise relocation could relate to essential matters of professional baseball).

<sup>60</sup> *Butterworth v. Nat'l League of Prof'l Baseball Clubs*, 644 So. 2d 1021, 1025 (Fla. 1994) ("[W]e come to the same conclusion as the *Piazza* court: baseball's antitrust exemption extends only to the reserve system."). Florida Attorney General Robert Butterworth issued antitrust civil investigative demands regarding the sale of the Giants. *Id.* at 1022. The focus of Attorney General Butterworth's investigation was whether "[a] combination or conspiracy in restraint of trade in connection with the sale and purchase of the San Francisco Giants baseball franchise" occurred. *Id.*

<sup>61</sup> 592 N.W.2d 847 (Minn. 1999).

<sup>62</sup> *Id.* at 849.

lation authorizing funding for a new stadium in Minnesota.<sup>63</sup> The legislature did not authorize the funding, but Major League Baseball rejected the sale to the investors.<sup>64</sup> The Minnesota Attorney General served the Twins with civil investigative demands as part of his investigation into possible state antitrust violations.<sup>65</sup> The Minnesota Supreme Court, unlike the courts in *Piazza* and *Butterworth*, held that franchise sale and relocation does fall within baseball's exemption.<sup>66</sup>

In *Major League Baseball v. Butterworth*, the District Court for the Northern District of Florida answered the question of whether Major League Baseball's decision to contract some of its clubs falls within the exemption.<sup>67</sup> That case arose out of Major League Baseball's announcement that it would contract two Major League Baseball clubs, later revealed to be the Montreal Expos and Minnesota Twins,<sup>68</sup> and would reduce Major League Baseball from thirty to twenty-eight teams for the 2002 season.<sup>69</sup> The district court held that Major League Baseball's decision to contract its clubs falls within the exemption, explaining that, "[i]t is difficult to conceive of a decision more integral to the business of major league baseball than the number of clubs that will be allowed to compete."<sup>70</sup>

In 1978, the Seventh Circuit examined the issue of whether the Commissioner's authority to "act in the best interests of baseball" falls within

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 856 ("We choose to follow the lead of those courts that conclude the business of professional baseball is exempt from federal antitrust laws. Further, we conclude that the sale and relocation of a baseball franchise, like the reserve clause discussed in *Flood*, is an integral part of the business of professional baseball and falls within the exemption.").

<sup>67</sup> *Major League Baseball v. Butterworth*, 181 F. Supp. 2d 1316, 1318 (N.D. Fla. 2001) *aff'd on other grounds*, *Major League Baseball v. Crist*, 331 F.3d 1177 (11th Cir. 2003).

<sup>68</sup> Associated Press, *Yep it Was Them - Twins, Expos Were Only Teams Targeted for Contraction*, SI.COM (Jan. 28, 2002, 10:57 PM), [http://sportsillustrated.cnn.com/baseball/news/2002/01/28/contraction\\_twinsexpos\\_ap/](http://sportsillustrated.cnn.com/baseball/news/2002/01/28/contraction_twinsexpos_ap/) (last visited April 2, 2014).

<sup>69</sup> *Major League Baseball v. Butterworth*, 181 F. Supp. 2d at 1318.

<sup>70</sup> *Id.* at 1332. The district court noted that it did not rely on the Curt Flood Act, passed in 1998, to decide the case because, according to the district court's interpretation of the Act, the Act did not change the application of the antitrust laws to any components of professional baseball except major league employment terms. *Id.* at 1331 n.16 ("[T]he business of baseball is exempt; the exemption was well established long prior to adoption of the Curt Flood Act and certainly was not repealed by that Act."). See also *infra* Part II.D.

baseball's exemption.<sup>71</sup> In *Charles O. Finley & Co., Inc. v. Kuhn*, the owner of the Oakland Athletics sued Major League Baseball, alleging federal antitrust law violations after the Commissioner voided the Athletics' sale of three players to other major league clubs on the grounds that the sale was "inconsistent with the best interests of baseball, the integrity of the game and the maintenance of public confidence in it."<sup>72</sup> The Seventh Circuit broadly defined the exemption's scope and held that the Commissioner's authority to act "in the best interests of baseball" falls within the exemption, as the exemption covers the entire business of baseball.<sup>73</sup>

The District Court for the Southern District of Texas took up the issue of radio broadcasting in 1982 in *Henderson Broad. Corp. v. Houston Sports Ass'n, Inc.*<sup>74</sup> The plaintiff in *Henderson*, a Houston radio station, sued the Houston Astros after the Astros cancelled their contract with the plaintiff to broadcast their games and instead signed an agreement granting exclusive rights to another Houston radio station.<sup>75</sup> The district court denied the defendant's motion to dismiss, adopting a narrow view of baseball's exemption and holding that radio broadcasting agreements are not covered by baseball's exemption.<sup>76</sup>

In 1992, the District Court for the Southern District of New York answered the question of whether professional baseball clubs' relationships with umpires are covered by baseball's exemption.<sup>77</sup> In *Postema v. Nat'l League of Prof'l Baseball Clubs*, the district court held that clubs' relationships with umpires are not covered by the exemption, reasoning that these relationships, unlike the reserve system, are not unique nor essential to professional baseball.<sup>78</sup> This decision, together with the other lower court decisions above, defined the outer limits of baseball's exemption until the passage of the Curt Flood Act in 1998.

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<sup>71</sup> *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978).

<sup>72</sup> *Id.* at 531.

<sup>73</sup> *Id.* at 541.

<sup>74</sup> 541 F. Supp. 263, 264 (S.D. Tex. 1982).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 271 (The court explained its holding: "The issue in the case is not baseball but a distinct and separate industry, broadcasting. Defendant, HSA, is sued in its capacity as a 'network.' The reserve clause and other 'unique characteristics and needs' of the game have no bearing at all on the questions presented.")

<sup>77</sup> *Postema v. Nat'l League of Prof'l Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992) *rev'd*, 998 F.2d 60 (2d Cir. 1993).

<sup>78</sup> *Id.* ("The Court concludes that Defendants have not shown any reason why the baseball exemption should apply to baseball's employment relations with its umpires. Unlike the league structure or the reserve system, baseball's relations with non-players are not a unique characteristic or need of the game.")

D. *Professional Baseball's Antitrust Exemption Today:  
The Curt Flood Act of 1998*

In 1998, Congress finally addressed baseball's exemption when it passed the Curt Flood Act.<sup>79</sup> The Curt Flood Act narrows baseball's exemption, albeit very slightly, and arguably in the process more clearly defines the scope of the exemption.<sup>80</sup> The purpose of the Curt Flood Act is to carve out an exception to baseball's exemption. Specifically, it authorizes major league players to bring antitrust suits against Major League Baseball regarding matters directly affecting their employment. However, the Act limits this power to the extent that players in other professional sports are able to bring antitrust suits regarding matters directly affecting their employment.<sup>81</sup> As such, this is a rather narrow exception,<sup>82</sup> since players in other professional sports leagues are limited in their ability to sue regarding their employment terms.<sup>83</sup> The other professional sports leagues are immune from antitrust liability relating to their respective collective bargaining processes because each league's players' association must decertify before it can pursue any antitrust action.<sup>84</sup>

More important than granting this limited exception to baseball's exemption, according to many commentators, the Curt Flood Act better defines the scope of baseball's exemption, albeit implicitly.<sup>85</sup> The Act proclaims that it does not "chang[e] the application of the antitrust laws" regarding, nor "create, permit or imply a cause of action by which to challenge under the antitrust laws," any components of baseball other than major league employment terms.<sup>86</sup> The Act goes on to list a number of

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<sup>79</sup> 15 U.S.C.A. § 26b (West 2002).

<sup>80</sup> *See id.*

<sup>81</sup> *Id.* ("[T]he conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce."). *See also Major League Baseball v. Butterworth*, 181 F. Supp. 2d at 1331 n.16.

<sup>82</sup> Sarah A. Padove, *Topps Gets Exclusive License, Leaving Upper Deck on the Bench: An Analysis of Major League Baseball's Antitrust Exemption in the Modern Era*, 22 MARQ. SPORTS L. REV. 235, 244 (2011).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *See infra* note 91 and accompanying text.

<sup>86</sup> 15 U.S.C.A. § 26b (West 2002) ("No court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements other than [Major League Baseball players' employ-

categories to which it cautions it does not subject the antitrust laws: Minor League Baseball, the reserve system, the First-Year Player Draft, the Professional Baseball Agreement,<sup>87</sup> Major League Baseball franchise expansion, location, relocation and ownership issues, marketing or sales of professional baseball's entertainment product and licensing of intellectual property rights, issues protected by the Sports Broadcasting Act of 1961, umpires, and issues between professional baseball and persons not in professional baseball.<sup>88</sup>

This language in the Act can be interpreted in two different manners. One possibility is that Congress only spoke regarding major league employment terms, and was agnostic regarding all other components of professional baseball, wishing to leave the scope of the exemption as it existed in 1998. This is the plain meaning of the Act's language, and the one adopted by the District Court for the Northern District of Florida in its 2001 decision, *Major League Baseball v. Butterworth*.<sup>89</sup>

Another possible interpretation is that the Act excludes major league employment terms from baseball's exemption, but implicitly affirms the exemption for all other components of professional baseball. This is the position adopted by many commentators, including Stanley Brand, the Vice President of Minor League Baseball.<sup>90</sup> It is also the position adopted by two

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ment terms] . . . this section does not create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to, any conduct, acts, practices, or agreements that do not directly relate to or affect employment of major league baseball players to play baseball at the major league level[.]”).

<sup>87</sup> This is the agreement between Major League Baseball clubs and their minor league affiliates.

<sup>88</sup> 15 U.S.C.A. § 26b (2002).

<sup>89</sup> *Major League Baseball v. Butterworth*, F. Supp. 2d at 1331 n.16 (“Plaintiffs assert that the Curt Flood Act[,], adopted in 1998, constitutes an endorsement by Congress of the exemption of the business of baseball. I disagree.”).

<sup>90</sup> See Stanley M. Brand & Andrew J. Giorgione, *The Effect of Baseball's Antitrust Exemption and Contraction on Its Minor League Baseball System: A Case Study of the Harrisburg Senators*, 10 VILL. SPORTS & ENT. L.J. 49, 67 n.92 (2003) (“[The Curt Flood Act states that] franchise expansion, location or relocation, franchise ownership issues, and relationship between Office of Commissioner and franchise owners continue to enjoy protection from any antitrust action.”). See also J. Gordon Hylton, *Why Baseball's Antitrust Exemption Still Survives*, 9 MARQ. SPORTS REV. 391 (1999) (“Although the Curt Flood Act technically limits professional baseball's antitrust immunity, the statute actually reconfirms the sport's seventy-five year old exemption to the federal antitrust laws. By abrogating only that part of the immunity that applies to labor relations at the major league level, the statute implicitly (and explicitly) leaves intact the remainder of the immunity.”) (footnote omitted); James T. Masteralexis & Lisa P. Masteralexis, *If You're Hurt, Where Is Home? Recently*

courts, the District Court for the Middle District of Florida in 1999,<sup>91</sup> and the District Court for the Northern District of California in 2013.<sup>92</sup> An argument supporting this position is that in passing the Act, Congress examined baseball's exemption and chose only to exclude major league employment terms. If Congress had wanted to subject any other component of professional baseball to the antitrust laws, it could have excluded that component in the Act as well. However, the response to this argument is that Congress also could have explicitly affirmed the exemption with regard to professional baseball's other components, but did not.

Either way, there is uniform agreement that Minor League Baseball is covered by baseball's exemption.<sup>93</sup> The remainder of this paper examines

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*Drafted Minor League Baseball Players Are Compelled to Bring Workers' Compensation Action in Team's Home State or in Jurisdiction More Favorable to Employers*, 21 MARQ. SPORTS L. REV. 575, 590 f.106 (2011) (“[T]he Curt Flood Act . . . reinforced that minor league baseball players were exempt from antitrust laws.”); Padove, *supra* note 82, at 252 (“Congress expressed its intent that the exemption should continue to apply to other components of the business of baseball.”); Gary R. Roberts, *A Brief Appraisal of the Curt Flood Act of 1998 from the Minor League Perspective*, 9 MARQ. SPORTS REV. 413, 428 (1999) (“The second and clearly more reasonable way to interpret [the Curt Flood Act] is that it denies antitrust standing to any plaintiff other than major league players who must rely in any way on the Act as a basis for defeating a Federal Baseball/Flood defense.”).

<sup>91</sup> See *Morsani v. Major League Baseball*, 79 F. Supp. 2d 1331, 1335 n.12 (M.D. Fla. 1999) (“[T]he Curt Flood Act . . . explicitly preserved the exemption for all matters ‘relating to or affecting franchise expansion, location or relocation, franchise ownership issues, including ownership transfers[.]’”) (quoting 15 U.S.C.A. § 26b (West 2002)).

<sup>92</sup> See *City of San Jose v. Office of Comm’r of Baseball*, C-13-02787 RMW, 2013 WL 5609346 (N.D. Cal. Oct. 11, 2013) (“The Curt Flood Act provides further support for the Court’s holding in *Flood* that Congress does not intend to change the longstanding antitrust exemption for “the business of baseball” with respect to franchise relocation issues.”).

<sup>93</sup> See, e.g., 15 U.S.C.A. § 26b (West 2002); *Portland*, 491 F.2d at 1103; Brand & Giorgione, *supra* note 90, at 50; Stanley M. Brand, *The Case for the Minor League Baseball Antitrust Exemption*, ANTITRUST, Spring 2000, at 31; Nathaniel Grow, *Defining the “Business of Baseball”: A Proposed Framework for Determining the Scope of Professional Baseball’s Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557, 610 (2010) [hereinafter Grow, *Defining the “Business of Baseball”*]; Nathaniel Grow, *In Defense of Baseball’s Antitrust Exemption*, 49 AM. BUS. L.J. 211, 244 (2012) (“minor league players were excluded from the protections of the Curt Flood Act”) [hereinafter Grow, *In Defense of Baseball’s Antitrust Exemption*]; Hylton, *supra* note 90, at 402; Padove, *supra* note 82, at 250; Roberts, *supra* note 90, at 420 (“Everyone involved in the [Curt Flood Act’s] negotiations believed that the only reasonable interpretation of [the Act’s] language . . . would exclude from the Act’s coverage [ ] everything associated with minor league baseball[.]”); Martin M. Tomlinson, *The Commissioner’s*

the effects of Minor League Baseball's exemption, including Minor League Baseball's immunity from antitrust suit, the First-Year Player Draft, international amateur free agency rules, the minor league reserve system, college baseball, the minor league minimum salary, the minor league drug-testing program, and Major League Baseball's competitive balance.

### III. MINOR LEAGUE BASEBALL'S IMMUNITY FROM ANTITRUST SUIT

Due to baseball's antitrust exemption created by the Supreme Court and modified by the lower courts and the Curt Flood Act, Minor League Baseball is immune from antitrust suits challenging any of its agreements or practices.<sup>94</sup> Thus, minor league players lack standing to bring antitrust challenges to the First-Year Player Draft, minor league reserve system, international amateur free agency rules, minor league minimum salary, minor league drug-testing program, or any other practice they believe is unfair. While Minor League Baseball's immunity slightly disadvantages minor league players, it is unlikely that minor leaguers would be better off if they were able to bring antitrust suits against Minor League Baseball.

If Minor League Baseball was subject to the antitrust laws, a minor league player could bring an antitrust suit challenging any aspect of Minor League Baseball that he believes disadvantages him. For example, a player could challenge the First-Year Player Draft or minor league reserve system if he thinks it unfairly limits his employment options, negotiating leverage, or control over his career.<sup>95</sup> He could contest the international amateur free agency rules or minor league minimum salary if he believes they arbitrarily limit the amount of money he can earn.<sup>96</sup> He could also oppose the minor league drug-testing program if he considers its terms unfair.<sup>97</sup> But, because Minor League Baseball is exempt from the antitrust laws, minor leaguers are unable to bring any of these suits.

Nevertheless, minor league players are likely no worse off under the current exemption than they would be if they could bring these antitrust suits against Minor League Baseball. Even if a minor leaguer could bring any of the above suits, it would be very costly for him to do so. The cost of

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*New Clothes: The Myth of Major League Baseball's Antitrust Exemption*, 20 ST. THOMAS L. REV. 255, 296 (2008); Garrett R. Broshuis, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 HARV. J. SPORTS & ENT. L. 51, 96 (2013).

<sup>94</sup> See *supra* Part II.D.

<sup>95</sup> See *infra* Parts IV, VI.

<sup>96</sup> See *infra* Parts V, VIII.

<sup>97</sup> See *infra* Part IX.

such a suit to any one minor leaguer would likely outweigh its benefits to him. The suit would likely cost the player significant time and money unless it were taken pro bono. In addition, the suit could jeopardize the player's career if his parent club decides he is not worth the distraction.<sup>98</sup> There is also no guarantee that the player would prevail. A court would determine the legality of the challenged practice under the Rule of Reason analysis,<sup>99</sup> and it is possible that the court would find that the pro-competitive benefits of Minor League Baseball's restrictive practices, individually and as a group, outweigh their anticompetitive effects,<sup>100</sup> and that the benefits cannot be achieved in a less restrictive manner.<sup>101</sup> Furthermore, minor leaguers have never formed a players' union despite the probable benefits of collective bargaining,<sup>102</sup> so it is unlikely they would bring an antitrust suit,

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<sup>98</sup> Grow, *In Defense of Baseball's Antitrust Exemption*, *supra* note 93, at 245.

<sup>99</sup> See *supra* Part II.A. Under the Rule of Reason analysis, if the plaintiff-minor leaguer could show the challenged restraint produces anticompetitive effects, Minor League Baseball would have to prove that the pro-competitive benefits of the restraint outweigh its anticompetitive effects. If Minor League Baseball could meet its burden, to prevail, the minor leaguer would have to prove that the restraint's legitimate objectives could be achieved in a substantially less restrictive manner. See *supra* Part II.A.

<sup>100</sup> Minor League Baseball certainly believes this. The legislative history of the Curt Flood Act bears out that Minor League Baseball and the Members of Congress who represented communities with minor league clubs (successfully) lobbied for a carve out for Minor League Baseball in the Curt Flood Act. See Brand & Giorgione, *supra* note 90, at 53.

<sup>101</sup> See *infra* Parts IV (explaining the benefits and anticompetitive effects of the Draft); V (doing the same for international free agency rules); VI (minor league reserve system); VIII (minor league minimum salary); IX (minor league drug-testing program); and X (Minor League Baseball's importance to the competitive balance at the big league level).

<sup>102</sup> Many reasons have been posited as to why minor leaguers have never formed a union. Most likely, it is due to a number of factors, including the high rate of turnover of players — 1,238 players were drafted in 2012 and close to that same number were released; the large geographic area over which minor leaguers are spread, including Canada, the U.S., and Mexico; the disparity in talent levels between triple-A and rookie-league players; the sheer number of minor leaguers playing at one time — there are nearly 8,000 active minor league players each year; the manner in which minor leaguers view themselves — many players do not see themselves as minor leaguers, they see themselves as future major leaguers; the fear of becoming known for the wrong reasons while trying to get called-up; and, most fundamentally, the competition between minor leaguers for promotions — minor leaguers are competing and not cooperating with each other. See, e.g., Michael Baumann, *How 18 Teams Passed on Michael Wacha*, ESPN.COM (Oct. 30, 2013, 10:23 AM), [http://espn.go.com/blog/sweetspot/post/\\_id/41964/how-18-teams-passed-on-michael-wacha](http://espn.go.com/blog/sweetspot/post/_id/41964/how-18-teams-passed-on-michael-wacha) (last visited Apr. 2, 2014); MLB.com *Frequently Asked Questions - Web-*

the benefits of which are more uncertain, if given the opportunity.<sup>103</sup>

If a minor leaguer did bring an antitrust suit, the suit would threaten Minor League Baseball's survival, and as a result, it would destabilize the minor leaguer's employment, regardless of which party prevailed. Even if Minor League Baseball won, its litigation costs to defend against the suit would threaten its stability.<sup>104</sup> According to Minor League Baseball's Vice President, Stanley Brand, Minor League Baseball's revenue<sup>105</sup> and cash flows are insufficient to cover these litigation expenses.<sup>106</sup> If the minor leaguer prevailed and the challenged restraint was judged to be in violation of the antitrust laws, Minor League Baseball's removal of the restraint would likely destabilize Minor League Baseball's structure, threatening the employment of all minor leaguers, including the plaintiff.

In addition to benefiting minor league players in the aggregate, Minor League Baseball's immunity from antitrust suit protects the minor league structure. As Part X explains, this structure enables small-market clubs to develop inexpensive major league talents and is thus crucial to the continued competitive balance in Major League Baseball.<sup>107</sup> The sections that follow discuss the different aspects of Minor League Baseball's structure and examine their individual costs and benefits.

#### IV. THE FIRST-YEAR PLAYER DRAFT

One of the pillars of Minor League Baseball's structure is the First-Year Player Draft (the "Draft"), one of the two primary channels through which amateur talent enters the minor league system. Major League Baseball institutes the Draft every June; major league clubs select, sign, and assign to their minor league affiliates amateur players from the United States, Canada,

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*site Questions*, MiLB.COM, <http://www.milb.com/milb/info/faq.jsp?mc=website> (last visited Dec. 17, 2013). In addition, there is little incentive for a parent union to get involved and organize minor leaguers into a union because there is too little money available in the minors. Lily Rothman, *Emancipation of the Minors*, SLATE.COM (Apr. 3, 2012, 11:08 AM), [http://www.slate.com/articles/sports/sports\\_nut/2012/04/minor\\_league\\_union\\_thousands\\_of\\_pro\\_baseball\\_players\\_make\\_just\\_1\\_100\\_per\\_month\\_where\\_is\\_their\\_cash\\_chavez.html](http://www.slate.com/articles/sports/sports_nut/2012/04/minor_league_union_thousands_of_pro_baseball_players_make_just_1_100_per_month_where_is_their_cash_chavez.html) (last visited April 2, 2014).

<sup>103</sup> See Grow, *In Defense of Baseball's Antitrust Exemption*, *supra* note 93, at 246.

<sup>104</sup> See Brand & Giorgione, *supra* note 90, at 51–52.

<sup>105</sup> Revenue is generated from sources such as television deals, ticket sales and stadium signage. See Brand & Giorgione, *supra* note 90, at 52.

<sup>106</sup> See Brand & Giorgione, *supra* note 90, at 51–52.

<sup>107</sup> See *infra* Part X.

and Puerto Rico.<sup>108</sup> The Draft falls within baseball's exemption and thus cannot be challenged on antitrust grounds.<sup>109</sup> While amateur players selected in the Draft are arguably worse off than if there were no Draft, the Draft contributes to the major league competitive balance.

The Draft limits a player's employment options and negotiating leverage. When a major league club selects an amateur player in the Draft, the club owns his draft rights, and the player can negotiate only with that one club.<sup>110</sup> Without the Draft, an amateur player could negotiate with multiple clubs and choose whichever club he wishes, perhaps the club that offers the best deal or the club with whom, because of their current roster, the player believes he can reach the major leagues in the shortest amount of time.<sup>111</sup>

In practice however, the Draft does not significantly disadvantage amateur players in this manner. First, even with the Draft, it is likely that the major league club that places the highest value on an amateur player and is thus willing to offer the player the best deal will select him in the Draft.<sup>112</sup> In addition, if a minor league player's path to the majors is blocked in his current organization and it is likely that he could reach the majors in less time in another organization, the current system has a solution for him: the Rule 5 Draft. In the Rule 5 Draft, major league clubs can select and keep other major league clubs' eligible minor league players.<sup>113</sup> Minor leaguers eligible to be selected in the Rule 5 Draft include players signed at nineteen or older who have played professional baseball for four years and players who signed at eighteen and have played professional baseball for five years.<sup>114</sup>

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<sup>108</sup> *About the Rule 5 Draft*, MiLB.COM, <http://www.milb.com/milb/events/rule5draft.jsp> (last visited Dec. 17, 2013).

<sup>109</sup> See *supra* Part II.D.

<sup>110</sup> *MiLB.com Frequently Asked Questions — Minor Leagues On-the-Field*, MiLB.COM, <http://www.milb.com/milb/info/faq.jsp?mc=onfield> (last visited Dec. 17, 2013). However, if the player was drafted as a senior in high school, he may decline the contract offer from the team that selects him, attend college and play baseball there, and after three years of college be eligible to be drafted again by any major league club.

<sup>111</sup> See Joseph A. Kohm, Jr., *Baseball's Antitrust Exemption: It's Going, Going . . . Gone!*, 20 NOVA L. REV. 1231, 1252 (1996).

<sup>112</sup> This is especially true with the new Draft bonus pool caps instituted by the 2012 Basic Agreement, which limit spending on draftees.

<sup>113</sup> See *About the Rule 5 Draft*, *supra* note 108. Clubs draft in the reverse order of how they finished in the previous season's regular season standings, with the worst team drafting first. *Id.* The Rule 5 Draft takes place every December. *Id.*

<sup>114</sup> *Id.* All minor leaguers on a big league club's 40-man roster are "protected" and ineligible for the Rule 5 Draft. *Id.*

For instance, suppose the Royals have two first basemen on their major league roster signed to long-term deals. Further suppose that the Royals have a minor league first baseman, Juan Gonzalez, who is ready to play in the majors. Gonzalez's path to the majors is blocked in the Royals organization. But, if Gonzalez is eligible for the Rule 5 Draft, another team could select Gonzalez from the Royals' minor league system in the Rule 5 Draft. That team would be required to pay the Royals \$50,000,<sup>115</sup> and would then have to keep Gonzalez on their 25-man major league roster for the entirety of the next season.<sup>116</sup> If Gonzalez does not remain on that team's 25-man roster, the team must offer him back to the Royals for \$25,000.<sup>117</sup> Notable players who were selected in the Rule 5 Draft and given an opportunity to reach the majors with another organization include Roberto Clemente, Johan Santana, Dan Uggla, and Josh Hamilton.<sup>118</sup>

The First-Year Player Draft also limits the amount of money that players selected in the Draft can earn in a signing bonus. This limit is dictated not by what the market or the selecting club is willing to pay for their talents, but rather arbitrarily by the 2012 Basic Agreement.<sup>119</sup> Before the 2012 Basic Agreement, clubs could spend as much as they wanted on their draftees' signing bonuses.<sup>120</sup> The 2012 Basic Agreement limited the amount clubs can spend on signing bonuses by placing a cap on the aggregate amount (i.e. the "pool") of bonuses that each major league club may spend on its draftees' signing bonuses in any one First-Year Player Draft.<sup>121</sup> The cap covers all bonuses paid to players selected in the first ten rounds, and any bonus paid to players selected in rounds 11 through 40 that exceeds

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<sup>115</sup> *Id.* After the Padres select Gonzalez, he is automatically placed on the Padres' 40-man roster. *See id.*

<sup>116</sup> *See id.*

<sup>117</sup> *See id.*

<sup>118</sup> *See id.* Interestingly, Russell Wilson, the Seattle Seahawks star quarterback, was selected by the Texas Rangers from the Colorado Rockies' system in the 2013 Rule 5 Draft. Wilson was drafted in the fourth round by the Rockies and played two seasons in their minor league system before beginning his NFL career. *See* Richard Justice, *Rangers Pick NFL QB Wilson in Rule 5 Draft*, MLB.COM (Dec. 12, 2013, 11:37 AM), [http://mlb.mlb.com/news/article/mlb/rangers-pick-nfl-qb-russell-wilson-in-rule-5-draft?ymd=20131212&content\\_id=64621900&vkey=news\\_mlb](http://mlb.mlb.com/news/article/mlb/rangers-pick-nfl-qb-russell-wilson-in-rule-5-draft?ymd=20131212&content_id=64621900&vkey=news_mlb) (last visited Dec. 17, 2013).

<sup>119</sup> *See* Adam Kilgore, *New Rule for MLB Draft Include a Cap on Player Bonuses*, WASH. POST, (June 3, 2012), [http://articles.washingtonpost.com/2012-06-03/sports/35462523\\_1\\_draft-order-stephen-strasburg-washington-nationals](http://articles.washingtonpost.com/2012-06-03/sports/35462523_1_draft-order-stephen-strasburg-washington-nationals). (last visited Dec. 17, 2013).

<sup>120</sup> *See id.*

<sup>121</sup> *See id.*

\$100,000.<sup>122</sup> Every year, each club is given its own cap, which is determined by its win-loss record in the previous season.<sup>123</sup> The team with the worst record receives the highest cap.<sup>124</sup>

Although the cap is not technically a hard cap, it is in effect because the penalties for exceeding it are so severe. The penalty for a club that exceeds its cap by 0 to 5 percent is a tax of 75 percent on the excess.<sup>125</sup> However, the penalty for a club exceeding its cap by more than a mere 5 percent is so steep that no club can justify exceeding the cap by this amount. A team that exceeds its cap by more than 5 percent and up to 10 percent is taxed at the same 75 percent rate on the excess, but it also loses its first round pick in the following year's First-Year Player Draft.<sup>126</sup> The penalties only grow more severe the more a club exceeds its bonus pool cap.<sup>127</sup>

These bonus pool caps have had a significant effect on the bonuses offered to draftees, and thus on the amount draftees have earned. The 2012 First-Year Player Draft was the first in which clubs were limited by their capped bonus pools in the bonuses they could offer their draftees.<sup>128</sup> Signing bonuses in the 2012 Draft were 11 percent lower than the 2011 Draft, when teams had no limit on the bonuses they could offer to their draftees.<sup>129</sup>

However, although the caps seem to disadvantage draftees, on the whole, they benefit Major League Baseball. The caps significantly contribute to the competitive balance at the big league level. The caps help the worst major league clubs<sup>130</sup> improve, since the clubs with the worst records are assigned the highest caps,<sup>131</sup> which makes it easier for these clubs to sign their draft picks, relative to better clubs with lower caps. The caps also help

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<sup>122</sup> Jim Callis, *Draft Bonus Pools Rise 8.2 Percent*, BASEBALL AMERICA (Apr. 2, 2013), <http://www.baseballamerica.com/draft/draft-bonus-pools-rise-8-2-percent/> (last visited Dec. 17, 2013).

<sup>123</sup> *See id.*

<sup>124</sup> *See id.* For instance, the Astros finished with the worst record in 2012 and were awarded the largest bonus pool cap for the 2013 First-Year Player Draft, \$11,698,800, while the Nationals, who finished with the best record in 2012 were awarded a cap of \$2,737,200 for the 2013 Draft. *See id.* *See also MLB Standings - 2012*, ESPN.COM, [http://espn.go.com/mlb/standings/\\_/year/2012](http://espn.go.com/mlb/standings/_/year/2012) (last visited Dec. 17, 2013).

<sup>125</sup> Callis, *supra* note 122.

<sup>126</sup> *See id.*

<sup>127</sup> *See id.*

<sup>128</sup> *See id.*

<sup>129</sup> Associated Press, *Spending Drops 11 Percent in MLB Draft*, THE DAILY NEWS (July 19, 2012, 12:43 AM), [http://thedailynewsonline.com/sports/article\\_54902e5e-d15c-11e1-999e-0019bb2963f4.html](http://thedailynewsonline.com/sports/article_54902e5e-d15c-11e1-999e-0019bb2963f4.html) (last visited Dec. 17, 2013).

<sup>130</sup> I.e. those that finished the previous season with the worst record.

<sup>131</sup> *See Callis, supra* note 122.

small-market teams sign their top draft picks by modifying the negotiating leverage and framework of these clubs and their draftees. With clubs capped, draftees are less likely to demand incredibly large bonuses since they know the clubs that drafted them are limited in the amount they can spend.

## V. INTERNATIONAL AMATEUR FREE AGENCY RULES

Another one of the pillars of Minor League Baseball's structure are the international amateur free agency rules, the second of the two primary channels through which amateur talent enters the minor league system. Major league clubs may sign amateur players from outside of the U.S., Canada and Puerto Rico as free agents, outside the confines of the First-Year Player Draft.<sup>132</sup> Prior to 2012, Major League Baseball did not regulate the signing bonuses to which major league clubs could sign international free agents.<sup>133</sup> However, like it did with the Draft, the 2012 Basic Agreement placed caps on the total amount of bonuses to which each club can sign international amateur free agents during each signing period.<sup>134</sup> These caps contribute to the competitive balance in Major League Baseball and make international amateur free agents only slightly worse off than they would be without a cap.

Like the new Draft bonus pool caps, each club's international free agency bonus pool cap is determined by the club's winning percentage during the previous year.<sup>135</sup> For the 2013-2014 signing period, caps ranged

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<sup>132</sup> See T.J. Quinn, *Concern Over MLB Rule in Latin America*, ESPN.COM (Mar. 1, 2012, 12:17 PM), [http://espn.go.com/espn/otl/story/\\_/page/MLB-rule-change/major-league-baseball-rule-change-free-agent-pay-causes-concern-dominican-republic-venezuela](http://espn.go.com/espn/otl/story/_/page/MLB-rule-change/major-league-baseball-rule-change-free-agent-pay-causes-concern-dominican-republic-venezuela), archived at <http://perma.cc/FZ3A-QZPC>.

<sup>133</sup> See, e.g., Jim Callis, *MLB's Amateur Attitude is Baffling*, BASEBALL AMERICA (July 13, 2011), <http://www.baseballamerica.com/online/prospects/column/2011/2612097.html>, archived at <http://perma.cc/U5CK-AEWB>; Quinn, *supra* note 132.

<sup>134</sup> See, e.g., Ben Badler, *International Bonus Pools for 2013-14*, BASEBALL AMERICA (Apr. 9, 2013), <http://www.baseballamerica.com/international/international-bonus-pools-for-2013-14/>, archived at <http://perma.cc/P9M-9QPK>; Quinn, *supra* note 132; Jesse Sanchez, *Allotment for International Signings Vital to Clubs*, MLB.COM (Apr. 30, 2013, 12:22 PM), [http://mlb.mlb.com/news/article.jsp?ymd=20130430&content\\_id=46192310&vkey=news\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20130430&content_id=46192310&vkey=news_mlb&c_id=mlb), archived at <http://perma.cc/9TD2-5UGL>; *Summary of Major League Baseball Player Associations - Major League Baseball Labor Agreement*, MLB.COM 5, [http://mlb.mlb.com/mlb/downloads/2011\\_CBA.pdf](http://mlb.mlb.com/mlb/downloads/2011_CBA.pdf) (last visited Dec. 17, 2013), archived at <http://perma.cc/W7UP-CGXX>. The cap does not apply to players who previously signed a contract with a major or minor league club, nor to players who are at least 23 years old and have played professionally for five years. Sanchez, *supra*.

<sup>135</sup> See Sanchez, *supra* note 134.

from \$4.94 million for the Astros, who had the lowest winning percentage in 2012, to \$1.85 million for the Nationals, who had the highest winning percentage.<sup>136</sup> Also like the Draft bonus pool cap, the bonus pool cap for international amateur free agents is technically soft, but hard in practice. This is because the penalties are severe for clubs that exceed their cap. A club that exceeds its cap by 0 to 5 percent is taxed at a 75 percent rate on the excess.<sup>137</sup> But a club that exceeds its cap by more than a mere 5 percent is taxed at a 75 percent rate on the excess and is restricted to signing only one international amateur free agent to a bonus over \$500,000 in the following year's international amateur free-agent signing period.<sup>138</sup> A club that exceeds its cap by 10 percent is taxed at a 100 percent rate on the excess and may not sign any international free agent to a bonus over \$500,000 in the following year's international amateur free-agent signing period.<sup>139</sup> The Rays, who exceeded their cap by 28 percent for the 2012-2013 international amateur free-agent signing period, were taxed on the overage at 100 percent and were prohibited from signing any international amateur free agent to a bonus over \$250,000 during the 2013-2014 signing period.<sup>140</sup>

These caps, like the Draft caps, benefit Major League Baseball by contributing to the competitive balance. The international free-agent bonus pool caps prevent large-market clubs from consistently outbidding their small-market counterparts for the best international amateur talent. However, in theory, these caps hurt international amateur players. These players are now limited in the amount they can earn via their signing bonus. Major

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<sup>136</sup> See *id.*

<sup>137</sup> *Summary of Major League Baseball Player Associations - Major League Baseball Labor Agreement*, *supra* note 134.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 4.

<sup>140</sup> Ben Badler, *International Reviews: Tampa Bay Rays*, BASEBALL AMERICA (Feb. 11, 2013), <http://www.baseballamerica.com/today/prospects/international-affairs/2013/2614691.html>, archived at <http://perma.cc/3JH6-PUCR>; see also Ben Badler, *Penalties for Exceeding Pools Depend on International Draft*, BASEBALL AMERICA (Apr. 9, 2013), <http://www.baseballamerica.com/international/penalties-for-exceeding-pools-depend-on-international-draft/>, archived at <http://perma.cc/3JDX-HXFY>. The Cubs also exceeded their cap by more than 15 percent during the 2012-2013 international amateur free-agent signing period, and suffered the same penalties as the Rays. See Phil Rogers, *Cubs Ignore Stop Sign on International Signings*, CHI. TRIB., July 4, 2013, [http://articles.chicagotribune.com/2013-07-04/sports/ct-spt-0705-rogers-cubs-chicago-20130705\\_1\\_erling-moreno-gleyber-torres-jed-hoyer](http://articles.chicagotribune.com/2013-07-04/sports/ct-spt-0705-rogers-cubs-chicago-20130705_1_erling-moreno-gleyber-torres-jed-hoyer), archived at <http://perma.cc/GJD8-QBZT>. The Cubs incurred these penalties strategically, believing that the crop of international talent available during the 2012-2013 signing period was far superior to that which will be available during the 2013-2014 signing period. *Id.*

league clubs are no longer able to offer each player the amount the club believes the player is worth. A club that does not want to incur the penalty for exceeding its cap will offer players smaller bonuses than it otherwise would have without the cap.

However, in practice, the cap will only slightly affect amateur free agents. While the cap has significantly reduced the amount of money that a few clubs can spend on international free-agent bonuses, the cap has had little to no effect on the amount that most clubs can spend on these free agents. Figure 1 compares the average amount each club spent on international free-agent bonuses during the 2010-2011 and 2011-2012 signing periods, the two signing periods before the cap was implemented when clubs were not limited in the amount of bonuses to which they could sign international free agents, to the amount clubs may spend during the 2013-2014 signing period under their respective caps.

Figure 1					
International Free-Agent Bonus Pool Caps (all amounts in U.S. dollars, millions)					
	A	B	C	D	E
Team	2010-2011 <sup>141</sup>	2011-2012 <sup>142</sup>	Average of A and B	2013-2014 <sup>143</sup>	D - C
Rangers	3.57	12.83	8.20	1.94	-6.26
Mariners	6.47	6.67	6.57	2.58	-3.99
Blue Jays	4.18	7.57	5.88	2.82	-3.06
Yankees	5.27	2.93	4.10	1.88	-2.22
Pirates	5.00	4.09	4.55	2.43	-2.12
Royals	2.70	6.80	4.75	2.99	-1.76
Athletics	4.73	1.22	2.98	1.93	-1.05
Braves	3.28	2.49	2.89	1.89	-1.00
Tigers	2.53	3.03	2.78	2.01	-0.77
Padres	2.75	3.48	3.12	2.50	-0.62
Cardinals	2.47	2.63	2.55	2.06	-0.49
Reds	1.56	1.98	1.77	1.86	0.09
Cubs	4.16	4.54	4.35	4.56	0.21
Rays	1.73	1.79	1.76	1.98	0.22
Mets	1.69	2.86	2.28	2.67	0.39
Phillies	1.49	2.05	1.77	2.29	0.52
Giants	0.85	1.81	1.33	1.91	0.58
Indians	2.47	3.58	3.03	3.64	0.61
Brewers	1.39	1.63	1.51	2.23	0.72
Red Sox	1.64	3.25	2.45	3.18	0.73
Orioles	1.18	1.02	1.10	1.96	0.86
Nationals	0.85	1.12	0.99	1.85	0.86
Angels	0.62	1.35	0.99	1.99	1.00
Diamondbacks	1.42	0.88	1.15	2.36	1.21
Astros	5.13	2.12	3.63	4.94	1.31
Twins	2.54	2.31	2.43	3.91	1.48
White Sox	0.35	0.78	0.57	2.17	1.60
Dodgers	0.31	0.18	0.25	2.11	1.86
Marlins	1.19	1.38	1.29	3.40	2.11
Rockies	1.96	1.45	1.71	4.21	2.50

<sup>141</sup> *International Spending by Team - 2010*, BASEBALL AMERICA (Mar. 2, 2011), <http://www.baseballamerica.com/today/prospects/international-affairs/2011/2611345.html>, archived at <http://perma.cc/5KJ6-2T7H>.

<sup>142</sup> *International Spending by Team - 2011*, BASEBALL AMERICA (Mar. 15, 2012), <http://www.baseballamerica.com/today/prospects/international-affairs/2012/2613090.html>, archived at <http://perma.cc/6LAX-Q37D>.

<sup>143</sup> Sanchez, *supra* note 134.

As Figure 1 demonstrates, the cap requires eleven clubs to spend less than they spent before they were capped. Under their respective caps, each of these eleven clubs has less money to spend on international free-agent bonuses during the 2013-2014 signing period than the average amount they spent in the last two signing periods before they were capped. Of those eleven clubs, only a handful are being forced to significantly reduce the amount they can spend. The other nineteen clubs may spend as much money under their respective caps during the 2013-2014 signing period as they spent when they were not capped. As these numbers attest, the new international free-agent bonus pool caps have not affected the spending of the majority of clubs on international free agents, and likely will not significantly affect the amount that international amateur free agents will earn in the future. As such, these caps make international amateur free agents only slightly worse off than they would be without the caps.

#### VI. MINOR LEAGUE BASEBALL'S RESERVE SYSTEM

A third pillar of Minor League Baseball's structure is the minor league reserve system, the mechanism that keeps amateur talent in the minor league system. When an amateur player signs a professional contract with the club that selects him in the First-Year Player Draft, the contract must be seven years in length.<sup>144</sup> This is what is known as the minor league reserve system. While the reserve system may slightly disadvantage some minor leaguers, it is necessary for the continued existence of Minor League Baseball, and thus benefits minor league players, clubs, fans, communities, and parent clubs overall.

Due to the minor league reserve system, minor league players have little control over their careers after they are drafted and sign a minor league contract. Upon signing a minor league contract with a big league club, for the seven-year duration of the contract, the club may unilaterally call-up,

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<sup>144</sup> Major League Rule 3(b). This assumes the draftee signs a minor league contract, which is required by the 2012 Basic Agreement. See *Summary of Major League Baseball Player Associations - Major League Baseball Labor Agreement*, *supra* note 134, at 4. Even before it was required, prior to the 2012 Basic Agreement, it was very rare for a club to sign a draftee to a major league contract. See *infra* note 196. After a player's initial seven-year contract expires, the player becomes a minor league free agent and may sign with any club. Major League Rule 55. However, four years after signing his initial contract, the player may be eligible to be selected by another major league club in the Rule 5 Draft. See *supra* Part IV.

send-down, trade, or release the player.<sup>145</sup> Without the reserve system, an amateur player would be free to sign a short-term minor league contract with the club that drafts him. This could prove advantageous for the player. After that contract expires, the player would be free to sign with whichever team offered him the best deal. If the minor leaguer had a productive season in the last year of his initial contract, he could benefit by being the subject of a bidding war between major league clubs. Furthermore, even if the drafted player does sign a long-term, seven-year initial contract, he would probably receive greater consideration from the club signing him.<sup>146</sup>

Interestingly, major league players, who are unionized and enjoy the benefits of collective bargaining, are nonetheless subject to their own major league reserve system.<sup>147</sup> The major league reserve system requires every major league player to play for the club with which he is under contract for six seasons before he is eligible to sign with another club as a free agent.<sup>148</sup> Minor leaguers, who are not unionized, must wait only one more year than major leaguers before attaining free agency and, unlike their major league counterparts, are eligible to be selected by another organization after four years via the Rule 5 Draft.<sup>149</sup>

Without the minor league reserve system, however, Minor League Baseball would fall apart. Under the current system, major league clubs invest a significant amount of money in their minor league affiliates.<sup>150</sup> Spe-

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<sup>145</sup> Broshuis, *supra* note 93, at 64. While the player may choose to retire, once he retires, he may not sign another professional baseball contract, even internationally, until his seven-year contract expires. Broshuis, *supra* note 93, at 64.

<sup>146</sup> Masteralexis & Masteralexis, *supra* note 90, at 596.

<sup>147</sup> See Grow, *In Defense of Baseball's Antitrust Exemption*, *supra* note 93, at 245-46.

<sup>148</sup> See Grow, *In Defense of Baseball's Antitrust Exemption*, *supra* note 93, at 245-46.

<sup>149</sup> See *supra* Part IV.

<sup>150</sup> The majority of minor league clubs are independently owned, although several minor league clubs are owned by their major league parent clubs, including the Tampa Yankees, Springfield Cardinals, and Gwinnett Braves. *MiLB.com Frequently Asked Questions - The Business of MiLB*, MILB.COM, <http://www.milb.com/milb/info/faq.jsp?mc=business> (last visited Dec. 17, 2013), *archived at* <http://perma.cc/HS23-N9FJ>. Notable minor league owners include billionaires Robert E. Rich Jr. who owns the Buffalo Bisons and Herb Simon who co-owns the Reno Aces. Chris Smith, *How Billionaires Like Warren Buffett Profit from Minor League Baseball Ownership*, FORBES (June 8, 2012, 12:40 PM), <http://www.forbes.com/sites/chris-smith/2012/06/08/billionaires-like-warren-buffett-profit-from-minor-league-baseball-ownership/>, *archived at* <http://perma.cc/5WQP-D9AL>; *see also* Sean Pendergast, *Not So Minor League*, DALL. OBSERVER, July 4, 2013, <http://www.dallasobserver.com/2013-07-04/news/not-so-minor-league/>, *archived at* <http://perma.cc/PGR7-9QXD>. Warren Buffet owned a 25 percent stake in the Omaha Storm Chasers, the Triple-A affiliate of the Kansas City Royals, for twenty-one years until he sold his ownership

cifically, under the Professional Baseball Agreement, a major league club must pay for the salaries of its minor league players; minor league coaches; minor league managers and minor league trainers; health insurance for its minor league players, coaches and managers; equipment for its minor leaguers; five dozen baseballs for every game played by one of its minor league affiliates; and minor league spring training costs.<sup>151</sup> In 2007, major league clubs spent an average of over \$20 million on their farm systems, including an average of \$11.5 million, or 6.2 percent of the revenue they generated, to pay the salaries of their minor league players.<sup>152</sup>

In exchange for its investment in its minor league system, a major league club receives a number of benefits. Most importantly, the major league club receives multiple venues to develop its minor league players, the ultimate goal of which is to produce productive major league players.<sup>153</sup> In

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stake in 2012. *Warren Buffett Announces New Storm Chasers Owners*, KETV OMAHA (June 20, 2012, 8:23 AM), <http://www.ketv.com/sports/Warren-Buffett-announces-new-Storm-Chasers-owners/-/9674600/15157146/-/hnapw9/-/index.html>, archived at <http://perma.cc/927S-BPP5>. A minor league club owner hires a front office staff to manage the club's business, while the major league club controls the minor league players, including their signings, assignments, promotions, demotions, and releases. Broshuis, *supra* note 93, at 62. Minor league clubs do not share the revenue they generate with their parent club, except for revenue generated from ticket sales, of which they must share a small percentage with their parent club. Robert J. Chalfin, *The Economics of Minor League Baseball*, WHARTON ENTREPRENEURSHIP BLOG (Aug. 19, 2013), <http://beacon.wharton.upenn.edu/entrepreneurship/2013/08/the-economics-of-minor-league-baseball/>, archived at <http://perma.cc/8V2V-FUB6>.

<sup>151</sup> See, e.g., S. REP. NO. 105-118, at 10 (1995) (Antitrust Subcommittee hearing, testimony of James F. Rill, former Assistant Attorney General for the Antitrust Division of the United States Department of Justice); Kohm, *supra* note 111, at 1251-52; Bill Pennington, *Baseball; Minor Leagues Hit the Mark*, N.Y. TIMES, July 28, 2002, <http://www.nytimes.com/2002/07/28/sports/baseball-minor-leagues-hit-the-mark.html?pagewanted=all&src=pm>, archived at <http://perma.cc/ZTP3-YJBP>.

<sup>152</sup> Andrew Zimbalist, *There's More Than Meets the Eye in Determining Players' Salary Shares*, SPORTS BUSINESS JOURNAL (Mar. 10, 2008), <http://www.sportsbusiness-daily.com/Journal/Issues/2008/03/20080310/Opinion/Theres-More-Than-Meets-The-Eye-In-Determining-Players-Salary-Shares.aspx>, archived at <http://perma.cc/8FC9-EZ9T>.

<sup>153</sup> Even the highest-rated prospects spend time developing in the minor leagues before reaching the big leagues. There are very few exceptions, including most recently Mike Leake, who became the twenty-first player since the First-Year Player Draft began in 1965 to play in the majors without appearing in a minor league game. *Mike Leake - Player Page*, MiLB.COM, [http://www.milb.com/milb/stats/stats.jsp?sid=milb&t=p\\_pbp&pid=502190](http://www.milb.com/milb/stats/stats.jsp?sid=milb&t=p_pbp&pid=502190) (last visited Dec. 17, 2013), archived at <http://perma.cc/PY5V-3YJN>. Leake was selected by the Cincinnati Reds in the first round, eight overall, of the 2009 Draft out of Arizona State University and was

addition, a major league club's minor league affiliates help spread the parent club's fan base geographically and build fan interest in the parent club's minor league prospects (who will, if all goes according to plan, eventually play for the big league club), in the parent club itself, and in professional baseball more generally.<sup>154</sup> Minor league clubs also provide their parent club with a venue where injured big league players can rehabilitate from an injury and return to form.<sup>155</sup> A minor league club, especially one at the triple-A level, also provides its parent club with backup players whom the parent club can call-up to the major leagues to replace major league players who are injured or performing below expectations.

For instance, in 2012, the Boston Red Sox major league roster was ravaged by injury.<sup>156</sup> Over the course of that season, the Red Sox called up twenty-three different players from their minor league affiliates, primarily from Triple-A Pawtucket, to replace their injured big leaguers.<sup>157</sup> Some of the players the Red Sox called up were top prospects who would have been eventually called up even had the injuries not occurred. This group included Will Middlebrooks and Ryan Kalish.<sup>158</sup> However, most of the players called up to replace the injured Red Sox were career minor leaguers whom the Red Sox had signed and stashed in the minors just for the purpose of providing protection in case of injury at the major league level. This group included, among others, Daniel Nava, Aaron Cook, Mauro Gomez, and Pedro Ciriaco.<sup>159</sup>

However, without the minor league reserve system, major league clubs would have little incentive to continue investing in their minor league affiliates.<sup>160</sup> If draftees were not required to sign seven-year contracts, major league clubs would have little guarantee of a return, i.e. big league produc-

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on Cincinnati's opening day roster in 2010. *Id.* Former New York Yankee pitcher Jim Abbott and former Toronto Blue Jay first baseman John Olerud are two other notable former players who never played in the minor leagues. Kohm, *supra* note 111, at 1253 n.152.

<sup>154</sup> See Andrew Zimbalist, *Baseball Economics and Antitrust Immunity*, 4 SETON HALL J. SPORT L. 287, 304 (1994).

<sup>155</sup> See *id.*

<sup>156</sup> Joe McDonald, *Red Sox Got Help From Below*, ESPNBOSTON.COM (Sep. 4, 2012, 2:46 PM), [http://espn.go.com/boston/mlb/story/\\_/id/8334674/pawtucket-helped-boston-red-sox-made-postseason](http://espn.go.com/boston/mlb/story/_/id/8334674/pawtucket-helped-boston-red-sox-made-postseason), archived at <http://perma.cc/LX2N-EG3Z>.

<sup>157</sup> *Id.*

<sup>158</sup> See *id.*

<sup>159</sup> See *id.*

<sup>160</sup> S. REP. NO. 105-118, at 10 (1995) (Antitrust Subcommittee hearing, testimony of James F. Rill, former Assistant Attorney General for the Antitrust Division of the United States Department of Justice).

tion, on their investment in their minor league players, as it takes years for minor leaguers to fully develop their skills in order to reach the big leagues.<sup>161</sup> Thus, without the minor league reserve system, major league clubs would invest significantly less money than they currently do in their minor league affiliates.<sup>162</sup>

If major league clubs stopped investing in their minor league affiliates, many minor league clubs would fold, most likely those at the lower-levels of the minor leagues and those in small, rural towns across America.<sup>163</sup> On its own, without the subsidy that their parent club currently pays them, the revenue these minor league clubs generate is inadequate to cover their operating costs.<sup>164</sup> Thus, the availability of Minor League Baseball in many towns and cities would be eliminated. This would negatively affect the defunct clubs' baseball fans and communities for the following reasons.

In 2013, Minor League Baseball contained fifteen leagues comprised of 230 total teams,<sup>165</sup> 176 of which charged admission.<sup>166</sup> These clubs provide live, community-based, family-friendly, affordable professional baseball to over 175 cities across America. In 2013, more than 41.5 million fans attended a minor league game.<sup>167</sup> Illustrative of the magnitude of the minor league fan base are the Indianapolis Indians, the triple-A affiliate of the Pittsburgh Pirates.<sup>168</sup> The Indians led all minor league clubs in total at-

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<sup>161</sup> See *id.*

<sup>162</sup> See Brand, *supra* note 93, at 31–32 (citation omitted).

<sup>163</sup> Brand & Giorgione, *supra* note 90, at 50–51.

<sup>164</sup> Minor league clubs' revenue sources include: ticket sales, luxury suites, parking, stadium sponsorships, stadium naming rights, advertising, concessions, merchandise and stadium leases (which enable clubs to generate revenue from non-baseball events, e.g. concerts). See, e.g., Chalfin, *supra* note 150; Smith, *supra* note 150.

<sup>165</sup> See *Teams By Name*, MiLB.COM, <http://www.milb.com/milb/info/teams.jsp> (last visited Dec. 17, 2013), archived at <http://perma.cc/V8A5-EYUL>.

<sup>166</sup> See *Tribe Named Triple-A Freitas Winners*, MiLB.COM (Dec. 6, 2013, 10:18 AM), [http://www.milb.com/news/article.jsp?ymd=20131206&content\\_id=64442770&fext=.jsp&vkey=news\\_1117&sid=1117](http://www.milb.com/news/article.jsp?ymd=20131206&content_id=64442770&fext=.jsp&vkey=news_1117&sid=1117), archived at <http://perma.cc/CQ86-VLPU>.

<sup>167</sup> Blake Arlington, *MiLB Attendance Exceeds 41.5 Million*, MiLB.COM (Sep. 17, 2013, 12:35 PM), [http://www.milb.com/news/article.jsp?ymd=20130917&content\\_id=60849022&fext=.jsp&vkey=news\\_t422&sid=t422](http://www.milb.com/news/article.jsp?ymd=20130917&content_id=60849022&fext=.jsp&vkey=news_t422&sid=t422), archived at <http://perma.cc/LLC9-B29Y>. This total was an increase of 275,000 from 2012. *Id.* Minor League Baseball attendance has exceeded 41 million in each of the last nine years, and has increased in 25 of the last 32 seasons. *Id.*

<sup>168</sup> *Indianapolis Indians - Homepage*, MiLB.COM, <http://www.milb.com/index.jsp?sid=t484> (last visited Dec. 17, 2013), archived at <http://perma.cc/QX92-CVY3>.

tendance in 2013 with 637,579 total attendees,<sup>169</sup> which is more than eight NBA teams<sup>170</sup> and eight NHL teams<sup>171</sup> drew during their most recent full seasons. Another example of the popularity of minor league baseball are the Dayton Dragons, the single-A affiliate of the Cincinnati Reds.<sup>172</sup> The Dragons currently boast the longest consecutive sellout streak for any professional sports franchise, 983 games.<sup>173</sup>

Many of these baseball fans who attended minor league games in 2013 would have no other opportunity to watch live professional baseball.<sup>174</sup> Some fans are limited geographically; but for many, it is the cost of attending a major league game that is prohibitive. The average minor league ticket in 2013 cost \$7,<sup>175</sup> almost four times less than the average major league ticket price of \$27. Further, the ticket price is but one aspect of the total cost of attending a game. As measured by the Fan Cost Index, the total cost of attending a major league game, including the prices of two adult tickets, two child tickets, four hot dogs, four sodas, two beers, a program or scorecard, and parking, was \$207.80 in 2013.<sup>176</sup> By stark contrast, the Fan Cost Index of attending a minor league game in 2013 was \$62.52

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<sup>169</sup> *MiLB Attendance Exceeds 41.2 Million*, MiLB.COM (Sep. 17, 2013, 7:00 AM), [http://www.milb.com/news/article.jsp?ymd=20130917&content\\_id=60843450&fext=.jsp&vkey=pr\\_milb&sid=mil](http://www.milb.com/news/article.jsp?ymd=20130917&content_id=60843450&fext=.jsp&vkey=pr_milb&sid=mil), archived at <http://perma.cc/Y2FP-NWVY>. The Columbus Clippers led all domestic clubs in average attendance at 9,212 per game. *Id.* The Monterrey Sultans of the Mexican League led all minor league clubs in average attendance at 11,145 per game. *Id.*

<sup>170</sup> See *NBA Attendance Report - 2013*, ESPN.COM, [http://espn.go.com/nba/attendance/\\_/year/2013/sort/homeTotal](http://espn.go.com/nba/attendance/_/year/2013/sort/homeTotal) (last visited Dec. 17, 2013), archived at <http://perma.cc/5EEH-6LPJ>. The teams were Phoenix, Charlotte, Indiana, Atlanta, Milwaukee, Detroit, New Orleans and Sacramento, during the 2012-2013 season. *Id.*

<sup>171</sup> See *NHL Attendance Report - 2011-12*, ESPN.COM, [http://espn.go.com/nhl/attendance/\\_/year/2012/sort/homeTotal](http://espn.go.com/nhl/attendance/_/year/2012/sort/homeTotal) (last visited Dec. 17, 2013), archived at <http://perma.cc/NWZ5-2E56>. These teams were Colorado, New Jersey, Winnipeg, Anaheim, Columbus, Dallas, New York Islanders and Phoenix, in 2011-2012. *Id.* The 2011-2012 season was the last full NHL season; the 2012-2013 NHL season was shortened by a lockout.

<sup>172</sup> *Dayton Dragons - Homepage*, MiLB.COM, <http://www.milb.com/index.jsp?sid=t459> (last visited Dec. 17, 2013), archived at <http://perma.cc/4T26-JL6A>.

<sup>173</sup> *MiLB Attendance Exceeds 41.2 Million*, *supra* note 169.

<sup>174</sup> S. Rep. No. 105-118, at 10 (1995).

<sup>175</sup> *Id.*

<sup>176</sup> Jon Greenberg, *MLB Fan Cost Index 2013*, FAN COST EXPERIENCE (Apr. 3, 2013), <http://www.fancostexperience.com/>, archived at <http://perma.cc/X98V-R4N8>. The top three clubs in Fan Cost Index in 2013 were the Boston Red Sox (\$336.99), New York Yankees (\$324.30) and Chicago Cubs (\$298.20). *Id.* The Arizona Diamondbacks had the lowest Fan Cost Index, at \$122.53. *Id.*

and included all the same amenities.<sup>177</sup> From these figures it is clear that Minor League Baseball is the only affordable live professional baseball for many fans.

Beyond reducing the availability of live professional baseball, eliminating minor league clubs would also threaten the stability of the local economies and infrastructures of many of their towns.<sup>178</sup> Many cities with minor league clubs have developed their downtown infrastructure around the ballpark.<sup>179</sup> With the team gone, many local businesses, such as restaurants, pubs, hotels, shops, and parking facilities, which depend on the thousands of fans traveling by their establishments on game days, would lose vital sources of revenue and likely be financially devastated as a result. Thus, repealing the minor league reserve system would threaten the existence of Minor League Baseball and would devastate minor league players, clubs, fans, communities, and parent clubs. Furthermore, as Part X explains, by mandating that players contract with their clubs for seven years, the reserve system gives clubs the time they need to fully develop inexpensive major league talent and in this way significantly contributes to the competitive balance at the major league level.<sup>180</sup>

## VII. COLLEGE BASEBALL

The minor league system, composed of the Draft, international amateur free agency and the reserve system, serves a unique talent-development function and is irreplaceable. College baseball could not function as an adequate replacement for Minor League Baseball.<sup>181</sup> While the NBA and NFL indirectly utilize the NCAA to develop their athletes, the NCAA cannot serve the same function for Major League Baseball.<sup>182</sup> Colleges are unable to train and develop baseball players as well as minor league teams.<sup>183</sup> Even if they could, most players need more time to develop than the four years they have in college.<sup>184</sup> Before reaching the major leagues, even the best college

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<sup>177</sup> *Family of Four Can See Ballgame for \$62*, MILB.COM (Apr. 24, 2013, 2:00 PM), [http://www.milb.com/news/article.jsp?ymd=20130424&content\\_id=45660354&vkey=pr\\_&fext=.jsp&sid=](http://www.milb.com/news/article.jsp?ymd=20130424&content_id=45660354&vkey=pr_&fext=.jsp&sid=), archived at <http://perma.cc/BUP2-N7TH>.

<sup>178</sup> Brand, *supra* note 93, at 31–32.

<sup>179</sup> *See id.*

<sup>180</sup> *See infra* Part X.

<sup>181</sup> *See* Brand & Giorgione, *supra* note 90, at 58–60.

<sup>182</sup> *See id.*

<sup>183</sup> *See id.*

<sup>184</sup> *See id.*

baseball players spend a number of years in the minors after leaving college to further develop their skills.<sup>185</sup>

Additionally, many professional baseball players are foreign born<sup>186</sup> and do not speak English well enough to attend an American university. College baseball is not a viable option for these players. Furthermore, the college baseball season is relatively short and consequently does not allow for the same amount of player development as a minor league season.<sup>187</sup> The college baseball season extends for only three months, during which time teams typically play three games per week.<sup>188</sup> By contrast, the typical minor league regular season extends for five months and during that time, teams play almost every day.<sup>189</sup> Due to university scheduling restraints, specifically the summer break, extending the college baseball season is unlikely.<sup>190</sup> However, players need the length of a minor league season to fully develop their skills.<sup>191</sup> While many elite college baseball players compete during the summer in one of the premier collegiate summer leagues such as the Cape Cod League, the competition in the summer leagues is too insubstantial and their seasons are too short to serve any significant developmental purpose.<sup>192</sup> If the summer leagues were expanded in an attempt to replace Minor League Baseball to include more teams and thus less skilled players to fill the rosters, the level of competition in these leagues would decline even further.<sup>193</sup>

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<sup>185</sup> See *id.*

<sup>186</sup> 28 percent (243 total) of all major leaguers on 2012 major league opening day roster were foreign born. *Opening Day Rosters Feature 243 Players Born Outside of the U.S.*, MLB.COM (Apr. 5, 2012, 1:16 PM), [http://mlb.mlb.com/news/article.jsp?ymd=20120405&content\\_id=27953108&vkey=pr\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20120405&content_id=27953108&vkey=pr_mlb&c_id=mlb), archived at <http://perma.cc/NR45-8N7C>.

<sup>187</sup> Brand & Giorgione, *supra* note 90, at 58–60.

<sup>188</sup> The University of Maryland's 2014 regular season, their last as members of the ACC, one of the premier college baseball conferences, extends from February 14, 2014, until May 13, 2014. *Maryland Baseball - 2014 Schedule*, UMTERPS.COM, [http://www.umterps.com/SportSelect.dbml?DB\\_OEM\\_id=29700&SPID=120725&SPSID=716381](http://www.umterps.com/SportSelect.dbml?DB_OEM_id=29700&SPID=120725&SPSID=716381) (last visited Dec. 17, 2013), archived at <http://perma.cc/J8LZ-CAX3>.

<sup>189</sup> The 2014 regular season schedule of the Pawtucket Red Sox, Boston's Triple-A affiliate and a member of the International League, extends from April 3, 2014, until September 1, 2014. *PawSox - 2014 Schedule*, MiLB.COM, <http://www.milb.com/schedule/index.jsp?sid=c533&m=04&y=2014> (last visited Dec. 17, 2013), archived at <http://perma.cc/JWD8-6BQR>.

<sup>190</sup> Brand & Giorgione, *supra* note 90, at 58–60.

<sup>191</sup> See *id.*

<sup>192</sup> See *id.*

<sup>193</sup> See *id.*

Moreover, the quality of college baseball coaches, facilities and competition are for the most part inferior to those in the minor leagues.<sup>194</sup> Lastly, in the absence of Minor League Baseball, if Major League Baseball increased its reliance on college baseball to develop baseball prospects, it is plausible that college baseball would be subjected to the scandals to which college basketball and football are accustomed.<sup>195</sup> College baseball would become more of a business, toxically mixing academics, athletics, and revenue-generating power, like college basketball and football, and college baseball players would face increased illicit pressure from agents and boosters. For all of these reasons, college baseball could not adequately replace Minor League Baseball.

#### VIII. MINOR LEAGUE BASEBALL'S MINIMUM SALARY

When major league clubs select amateur players in the First-Year Player Draft or sign them as international free agents, the clubs sign these players to minor league contracts, with few exceptions.<sup>196</sup> These contracts typically compensate players with a lump-sum signing bonus and then with a yearly salary. The salaries in minor league contracts are often the minor league minimum, which is quite low. For instance, the entry-level minor league minimum salary is \$1,100 per month, which is only paid for the five-month baseball season, for a total annual salary of \$5,500.<sup>197</sup> Most minor leaguers earn annual salaries of less than \$10,000.<sup>198</sup> Further, most minor leaguers are offered a small signing bonus that is inadequate to offset their annual minor league salary. Unlike high draft choices who are offered sign-

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<sup>194</sup> *See id.*

<sup>195</sup> *See id.*

<sup>196</sup> Clubs are no longer permitted to sign draftees to major league contracts. *See supra* note 144. Players who signed major league contracts with the club that selected them in the First-Year Player Draft, before the 2012 Basic Agreement prohibited it, include Stephen Strasburg, Bryce Harper and Mark Teixeira. *See Nationals Sign Bryce Harper for \$9.9M*, ESPN.COM (Aug. 17, 2010, 3:00 PM), <http://sports.espn.go.com/mlb/news/story?id=5468993>, archived at <http://perma.cc/65EU-C73U>. Recent amateur international free agents who signed major league contracts include Jose Iglesias and Yoenis Cespedes. Ken Rosenthal, *Cespedes Deal with A's a Head-Scratcher*, FOXSPORTS.COM (Feb. 14, 2012, 9:23 AM), <http://msn.foxsports.com/mlb/story/oakland-athletics-four-year-deal-with-cuban-player-yoenis-cespedes-raises-questions-021312>, archived at <http://perma.cc/YQ6C-ER5A>; Alex Speier, *For Jose Iglesias, a Long, Hard Road to Acceptance*, WEEI.COM (June 3, 2013, 7:27 AM), <http://www.weei.com/sports/boston/baseball/red-sox/alex-speier/2013/06/03/jose-iglesias-long-hard-road-acceptance>, archived at <http://perma.cc/QC5W-EPMY>.

<sup>197</sup> Broshuis, *supra* note 93, at 63.

<sup>198</sup> *Id.*

ing bonuses of hundreds of thousands or even millions of dollars, players drafted in the later rounds of the First-Year Player Draft typically are offered signing bonuses of only a few thousand dollars.<sup>199</sup> In exchange for this modest compensation, minor leaguers are required to spend most of their time during the season at work or traveling for work.

This Part first explains why minor leaguers could collectively bargain for a higher minimum wage if they unionized and if Minor League Baseball was subject to the antitrust laws—and why they would likely be successful. Then, this Part illustrates why, if Minor League Baseball was subject to the antitrust laws and the reserve system was abolished, but minor leaguers did not unionize, very few, if any, minor leaguers would earn more money than they currently do under the reserve system. Finally, this Part clarifies why, even with baseball's exemption, minor leaguers who are worth the money will earn it.

If Minor League Baseball was subject to the antitrust laws and minor league players were to unionize, it is likely the players could increase the minor league minimum salary. Minor league hockey players in the American Hockey League (AHL) and East Coast Hockey League (ECHL), who are unionized, are compensated with a significantly higher minimum salary than are minor league baseball players.<sup>200</sup> Professional hockey is subject to the antitrust laws, and through collective bargaining, minor league hockey players negotiated a higher minimum wage in exchange for granting the AHL and ECHL labor exemptions from antitrust liability.<sup>201</sup> The talent in the AHL relative to the NHL is comparable to that at the Triple-A level in baseball relative to the big leagues. The minimum salary in the AHL is \$41,500 for U.S. clubs and \$43,000 for Canadian clubs for the 2013-2014 season.<sup>202</sup> AHL players also receive a per diem of \$67.<sup>203</sup> The minimum salary for minor league baseball players in Triple-A is \$10,750 plus a \$25 per diem.<sup>204</sup> From this comparison, it seems that if Minor League Baseball was subject to the antitrust laws and its players unionized, they, like their

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<sup>199</sup> *Id.* at 63–64. See also Garrett Broshuis, *Playing for Peanuts*, BASEBALL AMERICA (Mar. 31, 2010), <http://www.baseballamerica.com/today/minors/season-preview/2010/269689.html>, archived at <http://perma.cc/JSD6-QLZ9> [hereinafter Broshuis, *Playing for Peanuts*].

<sup>200</sup> Masteralexis & Masteralexis, *supra* note 90, at 592–93.

<sup>201</sup> *Id.*

<sup>202</sup> *Agreements - AHL PHPA CBA*, PROF. HOCKEY PLAYERS' ASS'N, <http://www.phpa.com/index.php/site/agreements#Minimum%20Salary> (last visited Dec. 17, 2013), archived at <http://perma.cc/A3VV-3CQW>.

<sup>203</sup> *Id.*

<sup>204</sup> Broshuis, *supra* note 93, at 101.

hockey counterparts, could negotiate a higher minimum wage in exchange for granting their leagues labor exemptions from antitrust liability.

If Minor League Baseball was subjected to the antitrust laws and the minor league reserve system was removed, but minor leaguers did not unionize, it is possible but unlikely that some minor league baseball players would earn more money. This is due in large part to the fact that, without the reserve system, minor leaguers could negotiate minor league deals of any length they chose.<sup>205</sup> Players could sign short-term initial contracts with the club that drafts them, and then be eligible to sign a new deal with any club only a few years later. If the minor leaguer produced impressive statistics and showed promise during his initial contract, when that contract expired, he would have the leverage to demand a better deal from his current club, or leave and sign a deal with another club willing to offer him more money. On this open market, productive and promising minor league players could in theory earn significantly more than they would otherwise earn during the later years of their reserve system-mandated seven-year contract.<sup>206</sup>

One way to estimate how much more these minor leaguers could earn is to look to the recent contracts signed by young, high-risk, high-reward major leaguers. In recent years, a trend has emerged among major league clubs—they sign their best young major league stars to long-term deals soon after they reach the major leagues.<sup>207</sup> Although these players are somewhat unproven and thus slightly risky, they have high ceilings. These high-risk, high-reward deals benefit both the players and the clubs. The players contract away the risk that their talent will never materialize (perhaps as a result of injury or simply because their production never matches their talent), by guaranteeing themselves millions of dollars regardless of how they perform in the future. Clubs benefit by locking in their young stars at a certain dollar amount, which may turn out to be a bargain if the player reaches his full potential. These deals typically pay the player more money in the early years of the deal than they would otherwise earn via the major league minimum and via arbitration, but less money in the later years than

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<sup>205</sup> See *supra* Part VI.

<sup>206</sup> However, if a minor leaguer was only willing to sign a short-term deal with the club that drafts him, he would surely earn significantly less in his initial contract because the club would have no incentive to invest significant money in a player they were unsure they would be able to keep long enough to fully develop into a major league player.

<sup>207</sup> See Adam Berry, *Long-Term Deals for Young Players Rise Rapidly*, MLB.COM (Apr. 17, 2012, 10:00 AM), [http://mlb.mlb.com/news/article.jsp?ymd=20120417&content\\_id=28892156&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20120417&content_id=28892156&c_id=mlb), archived at <http://perma.cc/5YLG-F8V8>.

he might potentially have earned as a free agent on the open market. Figure 2 depicts some of these contracts.

Figure 2 <sup>208</sup>				
High-Risk, High-Reward Contracts				
Player	Club	Age	Duration of Contract <sup>209</sup>	Total Guaranteed Value of Contract
Anthony Rizzo	Cubs	23	7	\$41 million
Carlos Santana	Indians	26	5	\$21 million
Alcides Escobar	Royals	25	4	\$10.5 million
Salvador Perez	Royals	21	5	\$7 million
Jonathan Lucroy	Brewers	25	5	\$11 million
Jon Niese	Mets	25	5	\$25 million
Andrew McCutchen	Pirates	25	6	\$51.5 million
Cory Luebke	Padres	27	4	\$12 million
Cameron Maybin	Padres	25	5	\$25 million
Madison Bumgarner	Giants	22	5	\$35 million
Matt Moore	Rays	22	5	\$14 million
Derek Holland	Rangers	25	5	\$28 million
Sergio Santos	Blue Jays	28	3	\$8.25 million

To illustrate one such mutually beneficial contract, in May 2013, the Cubs signed Anthony Rizzo to a seven-year, \$41 million deal.<sup>210</sup> Under the deal, the Cubs paid Rizzo a \$2 million signing bonus, and \$750,000 in 2013 and \$1.25 million in 2014, when Rizzo would have otherwise been subject to the major league minimum,<sup>211</sup> which was \$490,000 in 2013.<sup>212</sup> In the four years when Rizzo would have otherwise been arbitration-eligible, the Cubs will pay Rizzo \$5 million annually in 2015 and 2016, and \$7

<sup>208</sup> *Id.* See also *Cubs, Anthony Rizzo Agree to Deal*, ESPNCHICAGO.COM (May 14, 2013, 2:27 AM), [http://espn.go.com/chicago/mlb/story/\\_id/9268539/chicago-cubs-lock-anthony-rizzo-7-year-41-million-deal](http://espn.go.com/chicago/mlb/story/_id/9268539/chicago-cubs-lock-anthony-rizzo-7-year-41-million-deal), archived at <http://perma.cc/7QKE-GCED>.

<sup>209</sup> In years.

<sup>210</sup> *Cubs, Anthony Rizzo Agree to Deal*, *supra* note 208.

<sup>211</sup> *Cubs, Anthony Rizzo Agree to Deal*, *supra* note 208; Charlie Wilmoth, *Cubs Extend Anthony Rizzo*, MLB TRADE RUMORS (May 13, 2013, 11:11 AM), <http://www.mlbtraderumors.com/2013/05/cubs-to-sign-anthony-rizzo-to-seven-year-extension.html>, archived at <http://perma.cc/4AUP-K3NJ>.

<sup>212</sup> *MLBPA Info - Frequently Asked Questions*, MLBPLAYERS.COM, <http://www.mlb.com/pa/info/faq.jsp#minimum> (last visited Dec. 17, 2013), archived at <http://perma.cc/W9BC-X5P4>.

million annually in 2017 and 2018.<sup>213</sup> In 2019, when Rizzo would have otherwise been eligible for free agency, the Cubs will pay him \$11 million.<sup>214</sup> The deal also gives the Cubs options for 2020 and 2021 worth \$14.5 million each.<sup>215</sup> Thus, this deal benefits Rizzo by contracting away his risk of injury and ineffectiveness and by increasing his compensation above what he likely would have otherwise earned in contract years one and two. It benefits the Cubs by locking in a rate of compensation for contract years three through seven that is likely less than Rizzo would have otherwise earned in arbitration and then in free agency even if Rizzo does not reach his full potential.

Without the reserve system, the most talented minor league prospects who perform well during a short-term initial contract might be offered deals more *similar* to those in Figure 2 than the deals to which they are currently signed. The minor leaguers' deals would never reach the *actual* level of the deals in Figure 2, because while these minor leaguers would have similar ceilings to the big leaguers signed to the deals in Figure 2, the minor leaguers would be less developed and thus significantly more risky to their clubs. Nevertheless, even if the minor leaguers signed deals for a small fraction of the deals in Figure 2, they would still earn much more than they currently do. For a top prospect minor league pitcher, even a deal for a fraction of the amount as those in Figure 2 might be desirable to contract away the risk of a career-threatening injury to his pitching-arm.

However, even in the absence of the reserve system, the number of minor leaguers who would sign larger deals than those to which they currently are signed would be very small since most minor league players are too risky to warrant lengthy, high-dollar contracts. Many clubs would be unlikely to sign even their best prospects to larger deals, as it is very common for even the most promising minor league prospects to never materialize. The Red Sox top 10 prospects in 2006 and 2007, depicted in Figure 3, are instructive. The Red Sox farm systems in 2006 and 2007 were some of their strongest ever. Even so, two of the Red Sox top ten prospects in 2007 never reached the majors while another two produced negative career WAR.<sup>216</sup> In fact, in 2006, when the Red Sox farm system was at its pinna-

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<sup>213</sup> *Cubs, Anthony Rizzo Agree to Deal*, *supra* note 208; Wilmoth, *supra* note 211.

<sup>214</sup> *Id.*

<sup>215</sup> *Cubs, Anthony Rizzo Agree to Deal*, *supra* note 208.

<sup>216</sup> All career WAR figures are from [fangraphs.com](http://www.fangraphs.com). WAR is a single statistic that measures a player's total contributions to his team. See generally *What is WAR?*, FANGRAPHS, <http://www.fangraphs.com/library/misc/war/> (last visited Dec. 18, 2013), archived at <http://perma.cc/YEL2-2GEB>.

cle, the Red Sox top-rated prospect was Andy Marte, who disappointingly turned out to be a below-average major leaguer.

Figure 3				
Boston Red Sox Top 10 Prospects				
Prospect Rank <sup>217</sup>	2006		2007	
1	Andy Marte	*	Jacoby Ellsbury	*****
2	Jon Lester	*****	Clay Buchholz	****
3	Jonathan Papelbon	*****	Michael Bowden	**
4	Craig Hansen	*	Daniel Bard	**
5	Dustin Pedroia	*****	Lars Anderson	*
6	Jacoby Ellsbury	*****	Dustin Pedroia	*****
7	Kelly Shoppach	***	Bryce Cox	-
8	Manny Delcarmen	**	Craig Hansen	*
9	Jed Lowrie	***	Kris Johnson	**
10	Clay Buchholz	****	Jason Place	-
-	never reached majors			
*	negative career WAR			
**	career WAR of 0-5			
***	career WAR of 6-10			
****	career WAR of 11-15			
*****	career WAR of 15+			

Baseball America's list of top ten prospects in 2006, shown in Figure 4, further illustrates that even many of the most highly-regarded minor league prospects never reach their potential and do not successfully transition into productive major leaguers. Thus, even they carry significant risk to their clubs. Of the top ten rated minor league prospects in all of baseball in 2006, two have produced a negative career WAR while two more have produced a WAR of less than five.<sup>218</sup> The fact is, nine out of ten players drafted

<sup>217</sup> Chip Buck, *A Look Back at Baseball America's Top Red Sox Prospects in 2006*, FIRE BRAND OF THE AMERICAN LEAGUE (May 23, 2013), <http://firebrandal.com/2013/05/23/a-look-back-at-baseball-americas-top-red-sox-prospects-in-2006/> (2006 top 10 prospects), archived at <http://perma.cc/ZM7F-RS3N>; Jim Callis, *Top 10 Prospects - Boston Red Sox*, BASEBALL AMERICA (Nov. 10, 2006), <http://www.baseballamerica.com/today/prospects/rankings/organization-top-10-prospects/2007/262814.html> (2007 top 10 prospects), archived at <http://perma.cc/BN25-S48N>.

<sup>218</sup> See *infra* figure 4.

never play in the big leagues;<sup>219</sup> of those who do, only one player out of every eight stays for six years or more.<sup>220</sup> Based on these statistics and cautionary tales, major league clubs would rather have many prospects under contract at low salaries<sup>221</sup> than a smaller and more selective pool of top prospects earning high salaries.

Figure 4			
Baseball America's Top 10 Prospect List: 2006			
Prospect Rank <sup>222</sup>	Prospect	Organization	Career WAR <sup>223</sup>
1	Delmon Young	Devil Rays	*
2	Justin Upton	Diamondbacks	*****
3	Brandon Wood	Angels	*
4	Jeremy Hermida	Marlins	**
5	Stephen Drew	Diamondbacks	****
6	Francisco Liriano	Twins	*****
7	Chad Billingsley	Dodgers	*****
8	Justin Verlander	Tigers	*****
9	Lastings Milledge	Mets	**
10	Matt Cain	Giants	*****
-	never reached majors		
*	negative career WAR		
**	career WAR of 0-5		
***	career WAR of 6-10		
****	career WAR of 11-15		
*****	career WAR of 15+		

Nevertheless, minor leaguers who are worth large investments will earn this money even under the current arrangement. Whether or not these play-

<sup>219</sup> Ben Reiter, *Three Days in June*, SPORTS ILLUSTRATED, Oct. 28, 2013, at 32. One major league club's scouting department analyzed every First-Year Player Draft since 1990 and found that if in a single Draft a club drafts nine future big league players, four future everyday major league players (those who make at least 1,500 major league plate appearances or who face 1,500 batters in the major leagues), or 3 above-average major league players (players who produce a WAR of a total of six in their six pre-free agency seasons in the majors), that club's Draft would rank in the 95th percentile. *Id.*

<sup>220</sup> Zimbalist, *supra* note 154, at 290.

<sup>221</sup> See Broshuis, *supra* note 93, at 62.

<sup>222</sup> 2006 Top 100 Prospects, BASEBALL AMERICA (Feb. 22, 2006), <http://www.baseballamerica.com/today/prospects/rankings/top-100-prospects/2006/26660.html>, archived at <http://perma.cc/KS2Q-LWGG>.

<sup>223</sup> All career WAR stats are from <http://www.fangraphs.com>.

ers received a large signing bonus when they were drafted or signed as an international free agent, as soon as they reach the majors, they shed the low salary dictated by their minor league contract. Upon reaching the majors, players earn the major league minimum,<sup>224</sup> which was \$490,000 in 2013.<sup>225</sup> And, once a player has three years of major league service time under his belt, he is eligible for salary arbitration,<sup>226</sup> through which he can receive a huge increase in pay.<sup>227</sup> For example, David Price made \$10.1 million as an arbitration-eligible player in 2013.<sup>228</sup> The minimum salary increases even for minor league players who get called-up and spend only a single day on a major league roster before being returned to the minors.<sup>229</sup> Upon returning to the minors, that player's minor league minimum salary increases to \$79,900 for 2013 and \$81,500 for 2014.<sup>230</sup> Even minor leaguers who never reach the big leagues may earn a significant increase upon becoming a minor league free agent when their seven-year initial contract expires. Minor league free agents<sup>231</sup> typically earn salaries between \$60,000 and

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<sup>224</sup> 2012-2016 *Basic Agreement*, MLB.COM 10–11, [http://www.mlb.com/pa/pdf/cba\\_english.pdf](http://www.mlb.com/pa/pdf/cba_english.pdf) (last visited Dec. 18, 2013), *archived at* <http://perma.cc/M8DL-UW39>.

<sup>225</sup> *Id.* at 11.

<sup>226</sup> *Id.* at 17–18. The term “arbitration eligible” is misleading; there were no arbitration hearings in 2013, as all of the 133 players who filed for arbitration settled with their clubs. *See* Associated Press, *Arbitration Ends with No Hearings*, ESPN.COM (Feb. 18, 2013, 2:26 PM), [http://espn.go.com/mlb/spring2013/story/\\_/id/8958928/mlb-players-pitch-first-arbitration-shutout-39-year-history](http://espn.go.com/mlb/spring2013/story/_/id/8958928/mlb-players-pitch-first-arbitration-shutout-39-year-history), *archived at* <http://perma.cc/H7N8-6DVH>.

<sup>227</sup> Major league players who are eligible for arbitration are players with three to six years of major league service time, and players with at least two but less than three years of major league service time who are in the top 22 percent of players by service time. *See* Associated Press, *Drew Storen Arbitration Eligible*, ESPN.COM (Oct. 23, 2012, 9:12 PM), [http://espn.go.com/mlb/story/\\_/id/8543736/drew-storen-washington-nationals-arbitration-players](http://espn.go.com/mlb/story/_/id/8543736/drew-storen-washington-nationals-arbitration-players), *archived at* <http://perma.cc/4CCL-YXX9>.

<sup>228</sup> Jerry Crasnick, *Rays Announce David Price's Deal*, ESPN.COM (Jan. 2, 2013, 3:41 PM), [http://espn.go.com/mlb/story/\\_/id/8800724/david-price-agrees-one-year-deal-tampa-bay-rays-avoids-arbitration](http://espn.go.com/mlb/story/_/id/8800724/david-price-agrees-one-year-deal-tampa-bay-rays-avoids-arbitration), *archived at* <http://perma.cc/4WPU-UDZC>.

<sup>229</sup> *See* 2012-2016 *Basic Agreement*, *supra* note 224, at 11.

<sup>230</sup> 2012-2016 *Basic Agreement*, *supra* note 224, at 11. If this minor leaguer had been playing at the Triple-A level in 2013, after spending only one day in the major leagues, upon returning to Triple-A his salary would increase from \$10,750 to \$79,900. *See* Broshuis, *supra* note 93, at 101.

<sup>231</sup> There were 630 minor league free agents following the 2013 season, including Doug Davis, Joel Pineiro, Andy LaRoche and even Brandon Wood (the number three ranked prospect in baseball in 2006, *see supra* figure 4). Andrew Simon, *Minor League Free Agents Can Fill Major Roles*, MLB.COM (Nov. 28, 2012, 9:58 AM), <http://>

\$125,000,<sup>232</sup> a significant increase from the \$5,500 minor league minimum.

As these numbers demonstrate, the current system allows minor league players to earn the money they are worth. Furthermore, because of the low success rate of prospects, shown above, the current system is necessary to enable clubs to have under contract the large number of prospects they need to ensure they develop and produce inexpensive major league talent. This is crucial to the competitive balance in the manner in which Part X elucidates.

#### IX. THE MINOR LEAGUE DRUG-TESTING PROGRAM

Because minor leaguers are not unionized, Major League Baseball can unilaterally formulate, implement and enforce new minor league drug-testing policies and procedures at any time.<sup>233</sup> For example, in July 2010, Major League Baseball unilaterally decided to begin conducting random blood testing for HGH in the minor leagues.<sup>234</sup> At the time, Major League Baseball could not also conduct such testing in the major leagues because the Major League Baseball Players' Association had not agreed to it.<sup>235</sup> The details of the minor league blood tests, including permissible and impermissible levels of HGH in a player's body and blood drawing procedures, were set by Major League Baseball in its sole discretion.<sup>236</sup> Minor leaguers were forced to comply with whatever Major League Baseball decided.<sup>237</sup>

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mlb.mlb.com/news/article.jsp?ymd=20121128&content\_id=40437190&vkey=news\_mlb&c\_id=mlb, archived at <http://perma.cc/L224-AUNP>.

<sup>232</sup> Broshuis, *Playing for Peanuts*, *supra* note 199.

<sup>233</sup> See Michael S. Schmidt, *Baseball Using Minor Leagues for a Drug Test*, N.Y. TIMES (July 22, 2010), available at [http://www.nytimes.com/2010/07/23/sports/baseball/23doping.html?\\_r=0](http://www.nytimes.com/2010/07/23/sports/baseball/23doping.html?_r=0), archived at <http://perma.cc/EBG4-8HPS>.

<sup>234</sup> See *id.*

<sup>235</sup> See *id.*

<sup>236</sup> See *id.*

<sup>237</sup> See *id.* 105 minor leaguers were suspended in 2012 for violating the minor league drug policy. *Minor League Suspensions in 2012*, MiLB.COM (Mar. 15, 2012, 7:00 PM), [http://www.milb.com/news/article.jsp?ymd=20120315&content\\_id=27309088&fext=.jsp&vkey=pr\\_milb](http://www.milb.com/news/article.jsp?ymd=20120315&content_id=27309088&fext=.jsp&vkey=pr_milb), archived at <http://perma.cc/3H2-FJBT>. See also Matt Eddy, *Minor League Drug Program Suspensions 2013*, BASEBALL AMERICA (Dec. 4, 2013), <http://www.baseballamerica.com/minors/minor-league-drug-program-suspensions-index/> (detailing all 2013 minor league suspensions for players violating the drug-testing program), archived at <http://perma.cc/96N2-BBMG>. See generally Maury Brown, *Rob Manfred on Minor League Drug Testing Program*, FANGRAPHS (Aug. 11, 2010), <http://www.fangraphs.com/blogs/rob-manfred-on-minor-league-drug-testing-program/> (explaining why minor leaguers violate the minor league drug-testing program), archived at <http://perma.cc/9YJ-DCSG>.

In addition, minor leaguers do not have access to the same grievance procedures regarding the drug-testing program that are available to major leaguers.<sup>238</sup> A major leaguer who tests positive for a banned substance can challenge the positive test on appeal to an independent panel of arbitrators on the grounds that the tester failed to follow testing protocol.<sup>239</sup> For example, in February 2012, Ryan Braun of the Milwaukee Brewers successfully appealed his positive test for elevated testosterone, when an arbitrator overturned Braun's test on the grounds that the tester failed to ship Braun's urine sample as soon as possible to the testing facility, which was required by the drug program.<sup>240</sup> Minor leaguers are entitled to no such luxury. A minor leaguer can only request that the second half of his sample be re-tested.<sup>241</sup>

As these examples illustrate, the minor league drug-testing program harms minor leaguers in the sense that they lack control over their own drug-testing and are denied access to grievance procedures to challenge positive test results. However, overall the program's benefits outweigh these harms. In addition to eradicating banned substances in the minor leagues, the minor league drug-testing program also serves as an experimental program to test the efficacy of new drug-testing procedures that Major League Baseball wants to implement in the major leagues.<sup>242</sup> As a result, many of the new drug-testing procedures implemented unilaterally by Major League Baseball in the minor leagues are later implemented in the major leagues, after the Major League Baseball Players' Association observes how the new procedures function in the minor leagues and agrees to adopt them in the major leagues.<sup>243</sup>

For instance, in November 2011, sixteen months after Major League Baseball began conducting random blood testing for HGH in the minor leagues, the Major League Baseball Players' Association agreed to expand the major league drug-testing program to include random blood testing for HGH.<sup>244</sup> This same phenomenon occurred in 2001, when Major League

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<sup>238</sup> Broshuis, *supra* note 93, at 92.

<sup>239</sup> *See id.*

<sup>240</sup> *Ryan Braun Wins Appeal of Suspension*, ESPN.COM (Feb. 24, 2012, 2:24 PM), [http://espn.go.com/mlb/story/\\_/id/7608360/milwaukee-brewers-ryan-braun-wins-appeal-50-game-suspension](http://espn.go.com/mlb/story/_/id/7608360/milwaukee-brewers-ryan-braun-wins-appeal-50-game-suspension), *archived at* <http://perma.cc/6Z9X-DE88>.

<sup>241</sup> Broshuis, *supra* note 94, at 92.

<sup>242</sup> *See* Schmidt, *supra* note 233.

<sup>243</sup> *See id.*

<sup>244</sup> *See* Michael S. Schmidt, *Baseball to Expand Drug-Testing Program*, N.Y. TIMES (Jan. 10, 2013), *available at* <http://www.nytimes.com/2013/01/11/sports/baseball/baseball-and-union-agree-to-in-season-blood-testing-for-hgh.html>, *archived at* <http://perma.cc/QH7L-HDEY>. The major league drug-testing program was further ex-

Baseball unilaterally began testing for steroids in the minor leagues.<sup>245</sup> One year later, the Major League Baseball Players' Association agreed to start the process of implementing steroid testing in the majors.<sup>246</sup> Thus, in addition to removing drugs from the minor leagues, the minor league drug-testing program helps expand the major league drug-testing program. Removing drugs from baseball benefits everyone: the leagues, the players, the owners, and the fans.

#### X. THE COMPETITIVE BALANCE IN MAJOR LEAGUE BASEBALL

Now more than ever, the minor league system in place, and by extension baseball's exemption from antitrust law, is essential to the competitive balance in Major League Baseball. This system includes the First-Year Player Draft and amateur international free agency, the channels through which players enter the system, as well as the minor league reserve system, the mechanism that keeps players in the system. Clubs in major markets, including New York, Boston, Los Angeles, Chicago, Philadelphia and San Francisco, routinely outspend clubs in small markets, such as Tampa Bay, Miami, Minnesota, Kansas City and Oakland, by huge margins on their major league payrolls. For instance, in 2013 the Yankees' opening day payroll was greater than the combined opening day payrolls of the Athletics, Rays, Marlins and Astros.<sup>247</sup> Yet, the Yankees did not make the playoffs in 2013, but the Athletics and Rays did.<sup>248</sup>

The Yankees, Athletics and Rays are part of much a larger phenomenon, where in recent years small-market teams, despite filling their rosters with substantially less-costly players, have met and even exceeded the performance of their large-market competitors.<sup>249</sup> The explanation for this phenomenon is well-known and easy to understand, but difficult to execute.<sup>250</sup> Small-market teams stock their major league rosters with players whose talent meets and even exceeds that of the more costly players who populate the rosters of large-market clubs, but who cost substantially less. These players

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panded in January 2013 to include random blood testing during the season for HGH and high levels of (synthetic) testosterone. *Id.*

<sup>245</sup> Schmidt, *supra* note 233.

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

<sup>247</sup> *See infra* figure 7.

<sup>248</sup> *See id.*

<sup>249</sup> *See id.*

<sup>250</sup> There are many reasons why highly drafted players fail to realize their potential, chief of which are injury and bad habits both on and off the field. Other highly drafted players simply are not as talented as the clubs that drafted them believed.

cost their teams less because they are in their pre-arbitration and arbitration years.<sup>251</sup> So, while these players' salaries are limited by the major league reserve system, their talent and production is unlimited.<sup>252</sup>

Small-market teams are able to compete with large-market teams for these inexpensive, productive players because the acquisition and development of these players is not dependent on how much money a team can spend. Instead, clubs primarily acquire these players in the First-Year Player Draft,<sup>253</sup> where large-market teams cannot outspend small-market teams.<sup>254</sup> Equally important is the minor league reserve system, through which clubs develop the talent they acquire in the Draft. Thus, small-market clubs are not constrained by their limited funds from drafting and developing talented players who, when they reach the big league level cost their clubs next to nothing. This strategy is known as "building [a major league roster] from within" and has proven so successful that in the past few years it has been nearly universally adopted by major league general managers, even those of large-market clubs.<sup>255</sup>

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<sup>251</sup> See *supra* notes 224-26.

<sup>252</sup> For example, the Angels' Mike Trout earned \$510,000 in both 2012 and 2013, \$20,000 above the major league minimum and significantly below the major league average of \$3.2 million, yet he produced a major league-leading WAR of 10.7 in 2012 and 9.2 in 2013. See, e.g., *2012 Major League Baseball Batting Leaders*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/leagues/MLB/2012-batting-leaders.shtml> (last visited Dec. 18, 2013), *archived at* <http://perma.cc/RV52-AWUR>; *2013 Major League Baseball Batting Leaders*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/leagues/MLB/2013-batting-leaders.shtml> (last visited Dec. 18, 2013), *archived at* <http://perma.cc/DRN3-V8G3>; Jay Jaffe, *Mike Trout's 2013 Salary in Perspective*, SPORTS ILLUSTRATED (Mar. 4, 2013), <http://mlb.si.com/2013/03/04/mike-trout-angels-salary/>, *archived at* <http://perma.cc/W49W-YXVR>; *Mike Trout - Stats - Batting*, ESPN.COM, [http://espn.go.com/mlb/player/stats/\\_id/30836/mike-trout](http://espn.go.com/mlb/player/stats/_id/30836/mike-trout) (last visited Dec. 18, 2013), *archived at* <http://perma.cc/9AR2-D3Y5>.

<sup>253</sup> Others are acquired via international amateur free agency.

<sup>254</sup> See *supra* Part IV (discussing the new bonus pool caps for the First-Year Player Draft).

<sup>255</sup> Red Sox Manager John Farrell, speaking about his opponent, the Cardinals, before the 2013 World Series, stated: "They're probably the blueprint of what many organizations aspire to. The number of homegrown players that they've drafted, developed - they're the epitome of what player development and scouting is." Brian MacPherson, *What the Red Sox Want To Be As an Organization, the Cardinals Already Are*, PROVIDENCE J. RED SOX BLOG (Oct. 22, 2013, 6:38 PM), <http://blogs.providencejournal.com/sports/red-sox/2013/10/what-the-red-sox-want-to-be-as-an-organization-the-cardinals-already-are.html>, *archived at* <http://perma.cc/466A-EHNB>. Likewise, Theo Epstein, the Chicago Cubs General Manager, echoed Farrell's sentiments while explaining where he went wrong in his previous job as General Man-

Over the past six years, the Tampa Bay Rays have been the small-market team that has employed this strategy of building from within with the most success. By building from within, the Rays have been able to consistently compete with, and beat, clubs who have spent substantially more money on their rosters. Since 2008, the Rays have made the playoffs four times,<sup>256</sup> the same number of times as the Yankees and once more than the Red Sox,<sup>257</sup> two of the Rays' free-spending divisional foes. As further proof, they have won 90 games five times in the last six years, more times than any other club during that period.<sup>258</sup> Yet, the Rays' opening day payrolls over the last six years, shown in Figure 5, have been some of the lowest in all of baseball. During that span, the Rays' payroll ranked second-to-last during two seasons, and never ranked higher than nineteenth.<sup>259</sup> In fact, the Rays' payrolls between 2008 and 2013 were on average \$39 million below the average major league payroll.<sup>260</sup>

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ager of the Red Sox: "Wouldn't it be great if we could just say, screw free agency altogether. We're going with a purely home-grown lineup. We're going with old-school, Branch Rickey-style, pre-free agency, pre-draft whatever? Middlebrooks at third, Lowrie or Iglesias at short, Pedroia at second, Rizzo at first, Lavarnway catching, Ellsbury in center, Reddick in right, Kalish in left . . . that might be a better team in some ways and resonate more with the fans than what we ended up with . . . When you make a mistake in the draft, you just keep drafting. You keep finding another player to develop. When you make a mistake in free agency, you're stuck with it for the duration of the deal and it can be a real impediment." Dan Shaughnessy, *Covering the Bases - In a Lengthy Interview, Theo Epstein Discusses the Challenge in Chicago and His Legacy in Boston*, BOS. GLOBE, June 14, 2012, [http://www.boston.com/sports/baseball/redsox/articles/2012/06/14/q\\_\\_a\\_with\\_theo\\_epstein\\_on\\_red\\_sox\\_and\\_cubs/?page=full](http://www.boston.com/sports/baseball/redsox/articles/2012/06/14/q__a_with_theo_epstein_on_red_sox_and_cubs/?page=full), archived at <http://perma.cc/4CEB-TCPL>.

<sup>256</sup> See *infra* figure 5.

<sup>257</sup> See MLB regular season standings for the years 2008 through 2013 on ESPN.COM. In fact, only three clubs have made as many playoff appearances as the Rays since 2008: the Yankees, Cardinals and Phillies, who have each made four playoff appearances. See also Jerry Crasnick, *What's Next for Tampa Bay?*, ESPN.COM (Oct. 9, 2013, 3:50 AM), [http://espn.go.com/mlb/playoffs/2013/story/\\_id/9795416/tampa-bay-rays-fall-short-boston-red-sox-2014-season-looks-promising](http://espn.go.com/mlb/playoffs/2013/story/_id/9795416/tampa-bay-rays-fall-short-boston-red-sox-2014-season-looks-promising), archived at <http://perma.cc/K7P5-C58B>.

<sup>258</sup> See *Tampa Bay Rays — Team History & Encyclopedia*, *supra* note 5.

<sup>259</sup> See *infra* figure 5.

<sup>260</sup> See *2013 Tampa Bay Rays Compensation*, BASEBALL PROSPECTUS, <http://www.baseballprospectus.com/compensation/?team=TBA> (last visited Dec. 18, 2013).

Figure 5				
Tampa Bay Rays: Success of Building from Within, 2008-2013				
Year	Opening Day Payroll <sup>261</sup>	Payroll Rank <sup>262</sup>	Regular Season Result <sup>263</sup>	Postseason Result <sup>264</sup>
2008	43.8	29	Won Division Title <sup>265</sup>	Lost in World Series to Phillies
2009	63.3	25	Missed Playoffs	-
2010	71.9	19	Won Division Title; Best Record in AL	Lost in LDS <sup>266</sup> to Rangers
2011	41.1	29	Won Wild Card	Lost in LDS to Rangers
2012	64.2	25	Missed Playoffs; Won 90 Games	-
2013	57.9	28	Won Wild Card	Lost in LDS to Red Sox

The key to the Rays' success has been utilizing the Draft and minor league and major league reserve systems to stock their major league roster with cheap, homegrown talent.<sup>267</sup> The Rays' 2013 starting rotation consisted of David Price, Matt Moore, Chris Archer, Alex Cobb and Jeremy Hellickson and was one of the best in baseball.<sup>268</sup> As shown in Figure 6, every single member of the Rays' 2013 starting rotation was developed by the Rays in their farm system, and all but one—Archer—was drafted by the Rays. Yet perhaps no other statistic better expresses the Rays' approach than this: Roberto Hernandez is the only pitcher acquired by the Rays via

<sup>261</sup> See *2012 MLB Salaries By Team*, USATODAY.COM (Apr. 5, 2014, 2:46 PM), <http://content.usatoday.com/sportsdata/baseball/mlb/salaries/team/>, archived at <http://perma.cc/8RLH-XJ95>. All payroll figures are in millions, U.S. dollars.

<sup>262</sup> See *id.*

<sup>263</sup> *MLB Team History — Tampa Bay Rays Season Results*, ESPN.COM, [http://espn.go.com/mlb/history/teams/\\_/team/tb](http://espn.go.com/mlb/history/teams/_/team/tb) (last visited Dec. 18, 2013), archived at <http://perma.cc/MW63-RWMU>.

<sup>264</sup> *Id.*

<sup>265</sup> The Rays play in the American League East division.

<sup>266</sup> League Divisional Series.

<sup>267</sup> Andrew Friedman, the Rays' General Manager, speaking about the 2011 First-Year Player Draft, said, "June 6, 7 and 8 will be among the most important days in the history of this franchise. Because young players are so important to us, we have a chance in this year's draft to impact our future in a way that's unprecedented." Erik Hahmann, *An Interview with Andrew Friedman*, SBNATION.COM (Feb. 14, 2011, 8:01 AM), <http://www.draysbay.com/2011/2/14/1992236/an-interview-with-andrew-friedman>, archived at <http://perma.cc/QZH8-EG2W>.

<sup>268</sup> Alex Kienholz, *2013 Top 5 Rotations: Tampa Bay Rays*, SBNATION.COM (Mar. 21, 2013, 10:00 AM), <http://www.beyondtheboxscore.com/2013/3/21/4130404/2013-top-5-rotations-tampa-bay-rays>, archived at <http://perma.cc/6XL9-N2JB>.

free agency to start a game for the Rays over the last eight years.<sup>269</sup> In that span, Tampa Bay starting pitchers had 1,207 games started by pitcher-spitcher acquired through means other than free agency.<sup>270</sup>

Figure 6			
2013 Tampa Bay Rays A.L. Wild Card Winner — Rank in Payroll: 28th			
Player	Acquisition by Tampa Bay <sup>271</sup>	2013 Salary <sup>272</sup>	2013 WAR <sup>273</sup>
Evan Longoria <sup>274</sup>	Drafted in 2006 in 1st Round (3rd overall)	\$2,500,018	6.3
Alex Cobb	Drafted in 2006 in 4th Round (109th overall)	\$502,200	4.0
Desmond Jennings	Drafted in 2006 in 10th Round (289th overall)	\$501,800	3.0
David Price	Drafted in 2007 in 1st Round (1st overall)	\$9,831,954	2.8
Matt Moore	Drafted in 2007 in 8th Round (245th overall)	\$1,100,000	2.6
Chris Archer	Traded for in 2011 from Cubs <sup>275</sup>	N/A <sup>276</sup>	2.2
Jeremy Hellickson	Drafted in 2005 in 4th Round (118th overall)	\$503,000	-0.8 <sup>277</sup>

Tampa Bay is not the only small-market club to remain competitive by building from within. Figure 7 shows the 2013 Opening Day payrolls of each club and notes which clubs made the playoffs. As Figure 7 attests, the clubs with the fifteen highest payrolls in 2013 fared no better as a group than did the clubs with the fifteen lowest payrolls. The same number of teams—five—made the playoffs from the fifteen clubs with the lowest payrolls as from the fifteen clubs with the highest payrolls. In fact, the clubs

<sup>269</sup> Tim Britton, *Red Sox Could Learn A Lot From the Rays About Cultivating Home-Grown Pitchers*, PROVIDENCE J., July 25, 2013, <http://www.providencejournal.com/sports/red-sox/content/20130725-red-sox-could-learn-a-lot-from-the-rays-about-cultivating-home-grown-pitchers.ece>, archived at <http://perma.cc/S475-DYEL>.

<sup>270</sup> *Id.*

<sup>271</sup> All acquisition information is from ESPN.COM.

<sup>272</sup> All salary figures are from ESPN.COM.

<sup>273</sup> All WAR figures are from ESPN.COM.

<sup>274</sup> In addition to their completely homegrown starting rotation, the Rays' best position player, by any metric, for the past six years has been Evan Longoria, who is likewise homegrown.

<sup>275</sup> *Chris Archer - Player Page*, MiLB.COM, [http://www.milb.com/milb/stats/stats.jsp?sid=milb&t=p\\_pbp&pid=502042](http://www.milb.com/milb/stats/stats.jsp?sid=milb&t=p_pbp&pid=502042) (last visited Dec. 18, 2013), archived at <http://perma.cc/3FEF-MN6N>. Originally drafted in 2006 in the 5th round (161st overall) by Cleveland; acquired from the Cubs for Matt Garza. *Id.*

<sup>276</sup> Archer presumably earned the major league minimum in 2013.

<sup>277</sup> Hellickson's WAR in 2012 was 2.9 and in 2011 was 3.5. *Jeremy Hellickson Stats - Pitching*, ESPN.COM, [http://espn.go.com/mlb/player/stats/\\_/id/30506/jeremy-hellickson](http://espn.go.com/mlb/player/stats/_/id/30506/jeremy-hellickson) (last visited Dec. 18, 2013), archived at <http://perma.cc/XST8-T5RN>.

ranked twenty-seventh (Oakland) and twenty-eighth (Tampa Bay) in payroll each made the playoffs.

Figure 7			
2013 Major League Playoff Teams by Payrolls Rank			
Payroll Rank <sup>278</sup>	Club	Payroll <sup>279</sup>	Playoff Teams <sup>280</sup>
1.	New York Yankees	\$228,835,490	
2.	Los Angeles Dodgers	\$216,597,577	x
3.	Philadelphia Phillies	\$165,385,714	
4.	Boston Red Sox	\$150,655,500	x
5.	Detroit Tigers	\$148,414,500	x
6.	San Francisco Giants	\$140,264,334	
7.	Los Angeles Angels	\$127,896,250	
8.	Chicago White Sox	\$119,073,277	
9.	Toronto Blue Jays	\$117,527,800	
10.	St. Louis Cardinals	\$115,222,086	x
11.	Texas Rangers	\$114,090,100	
12.	Washington Nationals	\$114,056,769	
13.	Cincinnati Reds	\$107,491,305	x
14.	Chicago Cubs	\$104,304,676	
15.	Baltimore Orioles	\$90,993,333	
16.	Atlanta Braves	\$89,778,192	x
17.	Arizona Diamondbacks	\$89,100,500	
18.	Milwaukee Brewers	\$82,976,944	
19.	Kansas City Royals	\$81,491,725	
20.	Pittsburgh Pirates	\$79,555,000	x
21.	Cleveland Indians	\$77,772,800	x
22.	Minnesota Twins	\$75,802,500	
23.	New York Mets	\$73,396,649	
24.	Seattle Mariners	\$72,031,143	
25.	Colorado Rockies	\$71,924,071	
26.	San Diego Padres	\$67,143,600	
27.	Oakland Athletics	\$60,664,500	x
28.	Tampa Bay Rays	\$57,895,272	x
29.	Miami Marlins	\$36,341,900	
30.	Houston Astros	\$22,062,600	

<sup>278</sup> *MLB Salaries - 2013 Team Payrolls*, CBSSPORTS.COM, <http://www.cbssports.com/mlb/salaries> (last visited Dec. 18, 2013), *archived at* <http://perma.cc/3QX4-LXPC>.

<sup>279</sup> *Id.*

<sup>280</sup> *MLB Standings - 2013*, ESPN.COM, <http://espn.go.com/mlb/standings> (last visited Dec. 18, 2013), *archived at* <http://perma.cc/W7ZM-AQDQ>.

Like the Rays, each of the other four clubs that made the playoffs despite ranking in the bottom fifteen in payroll in 2013 did so primarily by building from within. Each team had cheap, homegrown talent on its roster that made key contributions to the club's success. Figures 6, 8, 9, 10 and 11 detail the contributions, measured in WAR, produced by the homegrown talent of each of these five playoff teams. As these figures show, each of these clubs received substantial contributions from a number of inexpensive players whom the clubs drafted and developed. Furthermore, these figures only include fully-homegrown players and do not include the low-priced players whom these clubs traded for as minor leaguers and developed in their own farm system, but whom the clubs did not draft. These partially-homegrown players further contributed to the clubs' success.

The Braves won the National League (NL) East division title with an incredible nine players on their major league roster whom they drafted and developed and who produced a WAR of at least one.<sup>281</sup> Like the Rays, the majority of the Braves' 2013 starting rotation—Mike Minor, Kris Medlen and Julio Teheran—was homegrown.<sup>282</sup> In 2013, these three pitchers each produced WAR of at least 3.1<sup>283</sup> and started a total of 93 games, winning 42 of them.<sup>284</sup> Yet, the Braves paid Teheran and Minor less than \$1 million in combined salaries, while Medlen earned \$2.6 million, which by all measures were bargain salaries for their production. In addition, five of the Braves' eight everyday position players—Andrelton Simmons, Freddie Freeman, Jason Heyward, Brian McCann and Evan Gattis—also were drafted and developed from within.

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<sup>281</sup> See *infra* figure 8.

<sup>282</sup> See *Atlanta Braves Pitching Stats - 2013*, ESPN.COM, [http://espn.go.com/mlb/team/stats/pitching/\\_/name/atl/atlanta-braves](http://espn.go.com/mlb/team/stats/pitching/_/name/atl/atlanta-braves) (last visited Dec. 18, 2013), *archived at* <http://perma.cc/N5GZ-YB3J>.

<sup>283</sup> See *infra* figure 8.

<sup>284</sup> See *supra* note 283.

Figure 8			
2013 Atlanta Braves			
N.L. East Division Winner - Rank in Payroll: 16th			
Player	Acquisition by Atlanta <sup>285</sup>	2013 Salary <sup>286</sup>	2013 WAR <sup>287</sup>
Andrelton Simmons	Drafted in 2010 in 2nd Round (70th overall)	\$491,250	6.7
Freddie Freeman	Drafted in 2007 in 2nd Round (78th overall)	\$560,000	5.5
Jason Heyward	Drafted in 2007 in 1st Round (14th overall)	\$3,650,000	3.6
Craig Kimbrel	Drafted in 2008 in 3rd Round (96th overall)	\$655,000	3.3
Kris Medlen	Drafted in 2006 in 10th Round (310th overall)	\$2,600,000	3.3
Julio Teheran	Signed as non-drafted free agent in 2007	\$490,000	3.2
Mike Minor	Drafted in 2009 in 1st Round (7th overall)	\$505,000	3.1
Brian McCann	Drafted in 2002 in 2nd Round (64th overall)	\$12,000,000	2.2
Alex Wood	Drafted in 2012 in 2nd Round (85th overall)	N/A <sup>288</sup>	1.1
Evan Gattis	Drafted in 2010 in 23rd Round (704th overall)	\$490,000	0.6

The Pirates relied on the Draft and their minor league system to produce the core of their first team to reach the playoffs in 21 years.<sup>289</sup> Starling Marte,<sup>290</sup> Neil Walker,<sup>291</sup> Andrew McCutchen (the 2013 NL MVP),<sup>292</sup> and Pedro Alvarez,<sup>293</sup> the Pirates' first through fourth hitters in their lineup for most of 2013, and Gerrit Cole, one of their top starting pitchers who started

<sup>285</sup> All acquisition information is from ESPN.COM.

<sup>286</sup> All salary figures are from ESPN.COM.

<sup>287</sup> All WAR figures are from ESPN.COM.

<sup>288</sup> Wood presumably earned the major league minimum in 2013.

<sup>289</sup> Jay Jaffe, *A Look Back At the Last Pirates Teams to Reach the Postseason*, SPORTS ILLUSTRATED (Sep. 25, 2013), <http://mlb.si.com/2013/09/24/pirates-playoffs-barry-bonds-jim-leyland/>, archived at <http://perma.cc/SW5J-WZ56>.

<sup>290</sup> Associated Press, *Pirates Place Starling Marte on DL*, ESPN.COM (Aug. 24, 2013, 7:50 PM), [http://espn.go.com/mlb/story/\\_/id/9597666/pittsburgh-pirates-place-starling-marte-dl-bruised-hand](http://espn.go.com/mlb/story/_/id/9597666/pittsburgh-pirates-place-starling-marte-dl-bruised-hand), archived at <http://perma.cc/49ZT-M8XA>.

<sup>291</sup> *Cardinals 4, Pirates 3 - August 13, 2013 - Box Score*, ESPN.COM, <http://scores.espn.go.com/mlb/boxscore?gameId=330813124&teams=pittsburgh-pirates-vs-st.-louis-cardinals> (last visited Dec. 18, 2013), archived at <http://perma.cc/K7Z-QCVP>.

<sup>292</sup> *Id.*

<sup>293</sup> Tom Singer, *Hurdle Slots Alvarez at No. 6 in Batting Order*, MLB.COM, [http://mlb.mlb.com/news/article.jsp?ymd=20130904&content\\_id=59567924&notebook](http://mlb.mlb.com/news/article.jsp?ymd=20130904&content_id=59567924&notebook)

Game 5 of the 2013 NLDS,<sup>294</sup> were all drafted and developed by the Pirates.<sup>295</sup>

Figure 9			
2013 Pittsburgh Pirates N.L. Wild Card Winner - Rank in Payroll: 20th			
Player	Acquisition by Pittsburgh <sup>296</sup>	2013 Salary <sup>297</sup>	2013 WAR <sup>298</sup>
Andrew McCutchen	Drafted in 2005 in 1st Round (11th overall)	\$4,708,333	8.2
Starling Marte	Signed as non-drafted free agent in 2007	\$500,000	5.5
Neil Walker	Drafted in 2004 in 1st Round (11th overall)	\$3,300,000	3.9
Pedro Alvarez	Drafted in 2008 in 1st Round (2nd overall)	\$700,000	3.4
Gerrit Cole	Drafted in 2011 in 1st Round (1st overall)	N/A <sup>299</sup>	1.3

The Indians' 2013 WAR leader,<sup>300</sup> Jason Kipnis, was drafted and developed by the Indians. And, in addition to the homegrown players listed in Figure 10, the Indians received key contributions in 2013 from players who were homegrown in the sense that they spent a number of years developing in the Indians' minor league system but who were originally drafted or signed by other organizations. Carlos Santana, for instance, was originally signed as an international amateur free agent by the Dodgers in 2004, but he spent two and a half years developing in the Indians' minor league system

<sup>294</sup> [\\_id=59568954&vkey=notebook\\_pit&c\\_id=pit](http://perma.cc/7S5H-PVNE) (last visited Dec. 18, 2013), archived at <http://perma.cc/7S5H-PVNE>.

<sup>294</sup> Matt Snyder, *Pirates Name Gerrit Cole Game 5 Starting Pitcher*, CBSSPORTS.COM (Oct. 7, 2013, 6:38 PM), <http://www.cbssports.com/mlb/eye-on-baseball/24046075/pirates-name-gerrit-cole-game-5-starting-pitcher>, archived at <http://perma.cc/CB5-8ESE>.

<sup>295</sup> See *infra* figure 9.

<sup>296</sup> All acquisition information is from ESPN.COM.

<sup>297</sup> All salary numbers are from ESPN.COM.

<sup>298</sup> All WAR numbers are from ESPN.COM.

<sup>299</sup> Cole presumably earned the major league minimum in 2013.

<sup>300</sup> Indians - WAR Leaders, FANGRAPHS, <http://www.fangraphs.com/leaders.aspx?pos=all&stats=bat&lg=all&qual=0&type=6&season=2013&month=0&season1=2013&ind=0&team=5&roster=0&age=0&filter=&players=0> (last visited Dec. 18, 2013), archived at <http://perma.cc/53ZD-ZP64>.

after the Indians traded for him in 2008.<sup>301</sup> Santana finished second on the Indians in Offensive WAR in 2013.<sup>302</sup> Starting pitchers Corey Kluber and Zach McAllister were also developed by the Indians in their minor league system. Kluber was originally drafted by the Padres in 2007,<sup>303</sup> but was traded to the Indians in 2010,<sup>304</sup> after which he spent two plus years developing with the Indians' triple-A affiliate.<sup>305</sup> McAllister was originally drafted by the Yankees in 2006, and spent more than two seasons developing in the Indians' minor league system after being acquired from the Yankees in 2010.<sup>306</sup>

Figure 10			
2013 Cleveland Indians			
N.L. Wild Card Winner — Rank in Payroll: 21st			
Player	Acquisition by Cleveland <sup>307</sup>	2013 Salary <sup>308</sup>	2013 WAR <sup>309</sup>
Jason Kipnis	Drafted in 2009 in 2nd Round (63rd overall)	\$509,400	5.9
Lonnie Chisenhall	Drafted in 2008 in 1st Round (29th overall)	\$492,900	1.4
Cody Allen	Drafted in 2011 in 23rd Round (698th overall)	\$492,600	1.4
Danny Salazar	Signed as non-drafted free agent in 2006	N/A <sup>310</sup>	1.2

<sup>301</sup> Carlos Santana - Player Page, MiLB.COM, [http://www.milb.com/milb/stats/stats.jsp?sid=milb&t=p\\_pbp&pid=467793](http://www.milb.com/milb/stats/stats.jsp?sid=milb&t=p_pbp&pid=467793) (last visited Dec. 18, 2013), *archived at* <http://perma.cc/G5AY-PWJ3>.

<sup>302</sup> *Cleveland Indians Batting Stats - 2013*, ESPN.COM, [http://espn.go.com/mlb/team/stats/batting/\\_/name/cle/seasontype/2/cat/offWARBR/cleveland-indians](http://espn.go.com/mlb/team/stats/batting/_/name/cle/seasontype/2/cat/offWARBR/cleveland-indians) (last visited Dec. 18, 2013), *archived at* <http://perma.cc/6U9F-XB7G>.

<sup>303</sup> Corey Kluber Player Page, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/k/klubeco01.shtml#trans> (last visited Dec. 18, 2013), *archived at* <http://perma.cc/4BRG-X7XL>.

<sup>304</sup> *Id.*

<sup>305</sup> Corey Kluber - Player Page, MiLB.COM, [http://www.milb.com/milb/stats/stats.jsp?sid=milb&t=p\\_pbp&pid=446372](http://www.milb.com/milb/stats/stats.jsp?sid=milb&t=p_pbp&pid=446372) (last visited Dec. 18, 2013), *archived at* <http://perma.cc/Z5XT-EZRC>.

<sup>306</sup> Zach McAllister - Player Page, MiLB.COM, [http://www.milb.com/milb/stats/stats.jsp?sid=milb&t=p\\_pbp&pid=502083](http://www.milb.com/milb/stats/stats.jsp?sid=milb&t=p_pbp&pid=502083) (last visited Dec. 18, 2013), *archived at* <http://perma.cc/4YJH-PAX9>.

<sup>307</sup> All acquisition information is from ESPN.COM.

<sup>308</sup> All salary figures are from ESPN.COM.

<sup>309</sup> All WAR figures are from ESPN.COM.

<sup>310</sup> Salazar presumably earned the major league minimum in 2013.

Like the Rays and Braves, the Athletics filled their starting rotation with pitchers they drafted and developed. Three of the Athletics' five starting pitchers, Sonny Gray, A.J. Griffin and Dan Straily, who combined to make 69 starts for the Athletics in 2013,<sup>311</sup> were drafted and developed by the Athletics. The aggregate cost of these three pitchers to the Athletics in 2013 was less than \$1.5 million,<sup>312</sup> yet these three pitchers won a combined 29 games<sup>313</sup> and produced 4.9 total WAR for Oakland.<sup>314</sup>

Figure 11			
2013 Oakland Athletics			
N.L. West Division Winner - Rank in Payroll: 27th			
Player	Acquisition by Oakland <sup>315</sup>	2013 Salary <sup>316</sup>	2013 WAR <sup>317</sup>
A.J. Griffin	Drafted in 2010 in 13th Round (395th overall)	\$492,500	2.3
Yoenis Cespedes	Signed as international free agent in 2012	\$8,500,000	1.7
Sonny Gray	Drafted in 2011 in 1st Round (18th overall)	N/A <sup>318</sup>	1.4
Dan Straily	Drafted in 2009 in 24th Round (723rd overall)	\$492,500	1.2
Sean Doolittle	Drafted in 2007 in 1st Round (41st overall)	\$492,500	1.2

Figures 6, 8, 9, 10 and 11 show how five clubs, each of which spent less on their 2013 payrolls than the majority of clubs, nevertheless fielded better teams than many of the clubs that spent much more on their payrolls. These small-market clubs could not afford to pay the salaries demanded by high-priced veterans. So, instead, they filled their rosters with talented players whom they drafted and developed in their minor league systems. For this reason, the First-Year Player Draft, amateur international free agency and the minor league and major league reserve systems are vital to the continued competitive balance in Major League Baseball.

<sup>311</sup> *Oakland Athletics Pitching Stats - 2013*, ESPN.COM, [http://espn.go.com/mlb/team/stats/pitching/\\_/name/oak/year/2013/cat/gamesStarted/order/true/oakland-athletics](http://espn.go.com/mlb/team/stats/pitching/_/name/oak/year/2013/cat/gamesStarted/order/true/oakland-athletics) (last visited Dec. 18, 2013), archived at <http://perma.cc/G5KF-7XBQ>.

<sup>312</sup> See *infra* figure 11.

<sup>313</sup> See *supra* note 311.

<sup>314</sup> See *infra* figure 11.

<sup>315</sup> All acquisition information is from ESPN.COM.

<sup>316</sup> All salary figures are from ESPN.COM.

<sup>317</sup> All WAR figures are from ESPN.COM.

<sup>318</sup> Gray presumably earned the major league minimum in 2013.

## XI. CONCLUSION

On Wednesday, October 2, 2013, seven years after the Rays lost to the Indians to finish the 2006 season with the worst record in the majors, they once again faced the Indians in a game where a loss would end their season.<sup>319</sup> Only this time, the game was the AL Wild Card Game.<sup>320</sup> Alex Cobb, the Rays' 2006 fourth-round draft pick, pitched six scoreless innings and got the win, and Desmond Jennings, the Rays' 2006 tenth-round draft pick, doubled home two runs to advance the Rays to the ALDS to face the Red Sox.<sup>321</sup> Although the Rays would go on to lose to the Red Sox in four games,<sup>322</sup> the Rays' 2013 season was another milestone in their remarkable run of success.

As this paper explains, the Rays' success was made possible by the system that is protected from antitrust challenge by baseball's antitrust exemption. The First-Year Player Draft, amateur international free agency rules, the minor league and major league reserve systems, the minor league and major league minimum salaries, and even the minor league drug-testing program are essential to the continued competitive balance in Major League Baseball. Each of these components, individually and as a group, produces additional, wide-ranging effects, both positive and negative, on minor league players, clubs, fans, communities, and parent clubs. As this paper demonstrates, the system's benefits far outweigh its costs, as the system is necessary to the continued existence of Minor League Baseball, and in most cases its disadvantages are more substantial in theory than they are in practice.

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<sup>319</sup> Tampa Bay Rays - 2013 Schedule, ESPN.COM, [http://espn.go.com/mlb/team/schedule/\\_/name/tb/year/2013/tampa-bay-rays](http://espn.go.com/mlb/team/schedule/_/name/tb/year/2013/tampa-bay-rays) (last visited Dec. 18, 2013), *archived at* <http://perma.cc/CVC2-RZVX>.

<sup>320</sup> Associated Press, *Alex Cobb guides Rays past Indians, Into ALDS vs. Red Sox*, ESPN.COM, <http://espn.go.com/mlb/recap?id=331002105> (last visited Dec. 18, 2013), *archived at* <http://perma.cc/C57C-V8T5>.

<sup>321</sup> *Id.*

<sup>322</sup> *See supra* note 319.

