



Contents

Preface

Peter A. Carfagna & Paul C. Weiler

Editor's Note

Ashwin M. Krishnan

Articles

Judicial Erosion of Protection for Defendants in Obscenity

Prosecutions?: When Courts Say, Literally, Enough is
Enough and When Internet Availability Does Not Mean
Acceptance

Clay Calvert, Wendy Brunner, Karla Kennedy & Kara Murrbee

The NBA and the Single Entity Defense: A Better Case?

Michael A. McCann

Hardball Free Agency: The Unintended Demise of Salary

Arbitration in Major League Baseball

Eldon L. Ham & Jeffrey Malach

Wiki Authorship, Social Media and the Curatorial Audience

Jon M. Garon

The Integrity of the Game: Professional Athletes and Domestic

Violence

Bethany P. Withers

Case Comment

In re Dewey Ranch Hockey

Ryan Gauthier



Contents

Copyright © 2010 by the President and Fellows of Harvard College.

Preface	
<i>Peter A. Carfagna & Paul C. Weiler</i>	1
Editor's Note	
<i>Ashwin M. Krishnan</i>	3
Articles	
Judicial Erosion of Protection for Defendants in Obscenity Prosecutions?: When Courts Say, Literally, Enough is Enough and When Internet Availability Does Not Mean Acceptance	
<i>Clay Calvert, Wendy Brunner, Karla Kennedy & Kara Murrbee</i>	7
The NBA and the Single Entity Defense: A Better Case?	
<i>Michael A. McCann</i>	39
Hardball Free Agency: The Unintended Demise of Salary Arbitration in Major League Baseball	
<i>Eldon L. Ham & Jeffrey Malach</i>	63
Wiki Authorship, Social Media and the Curatorial Audience	
<i>Jon M. Garon</i>	95
The Integrity of the Game: Professional Athletes and Domestic Violence	
<i>Bethany P. Withers</i>	145
Case Comment	
<i>In re Dewey Ranch Hockey</i>	
<i>Ryan Gauthier</i>	181

Volume 1
Number 1
Spring 2010

Harvard Journal of Sports & Entertainment Law

EDITORIAL BOARD

Editor-in-Chief

Ashwin M. Krishnan

Submissions Editor
Josh Podoll

Managing Editor
Ryan Gauthier

Technical Editor
Abigail E. Hackler

Assistant Technical Editors

Matthew Greenfield
Kristina Katz
David Kiefer
Elizabeth Rich
Meredith Rovelli
Damir Valeev
Annie Villanueva
Leah Watson

Article Editors

Paul Anderson
Christopher Clark
Ashley Flucas
Benjamin Glicksman
Michael Mozes
Michael Saltzman
Bethany P. Withers
Peter Zuckerman

Comment Editors

Jeremy Campbell
Anne E. Smith

Outreach Editor
Tiffany Graddick

Online Editor
Brent Bernell

Production Editor
Elizabeth Rich

Editors

Robin Achen
Emilie Aguirre
Trisha Ananiades
Brent Bernell
Eduardo Casal

Sara Croll
Steven Eisenberg
Abraham Funk
Lawrence Horsburgh
Kevin Lewis
Alexander Marcus

Mary Mazzello
Katherine Miller
Zachary Rosenthal
Noah Weiss
David Zucker

Staff

Christina Causey
Robert Derivaux
Bridget Devoy
Mehdi Eddebbbarh
Jeremy Glapion
Tiffany Graddick

John Gulliver
Brent Herlihy
Russell Herman
Jason Krochak
Joseph LaBaw
James McGinnis

Jeffrey Monhait
Jenny Paul
Javier Peral
David Roth
Brent Speed
Chandler Tanner

Submissions Committee

Emilie Aguirre
Deepa Alagesan
Trisha Ananiades
Christopher M. Assise*
Jeremy Campbell
Katie Clemens
Brian Conlon*
Lynna Cobrall
Andrew Domer
Steven Eisenberg
Shaunicie Fielder
Abraham Funk
Jeremy Glapion

Brent Herlihy
Ramy Ibrahim
David Kiefer
Kevin Lewis
Joseph LaBaw
Eric Lopata
Moshe Mandel*
Mary Mazzello*
Joseph Meginnis*
Michael Mozes
Jenny Paul
Jennifer Parsigian
Javier Peral

Brian Reider*
Colleen Riley
William Roberts*
Zachary Rosenthal
Meredith Rovelli
Michael Saltzman
Anne E. Smith
Brent Speed
Kevin Valsi*
Matthew Vitton*
Annie Villanueva
Ryan Ward
David Zucker

* Submissions Committee Team Leader

Harvard Journal of Sports & Entertainment Law

Student Journals Office, Harvard Law School

1541 Massachusetts Avenue

Cambridge, MA 02138

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

www.harvardjsel.com

U.S. ISSN 2153-1323

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

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

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



Preface

Peter A. Carfagna* and Paul C. Weiler†

We cordially welcome readers to the first volume of the *Harvard Journal of Sports and Entertainment Law*. It is with great pride that we have worked with students of the Harvard Law School to create this journal, and, in the process, contribute to the broader debates about law and the sports and entertainment industries. As our years at the Harvard Law School have shown us, there is a high degree of enthusiasm for these subjects, and a realization among students and faculty that the sports and entertainment fields are rich topics, worthy of consideration in an academic journal.

The Harvard Law School has offered basic courses in sports and entertainment law for several years. General courses such as antitrust, international trade, labor, tort, copyright, and trademark law augmented these offerings. Over the years, courses have been given relating to the marketing and economics of sports and entertainment, both at the Law School and at other schools across Harvard University. Recently, a deeper interest in the fields has emerged, leading to two additional courses: “Representing the Professional Athlete” and “Advanced Contract Drafting.”

Students have also been involved for a long time in sports and entertainment law outside the classroom. Since the early 1980s, the Harvard Law School has had a Committee on Sports and Entertainment Law. The Committee has been instrumental in engaging the student body on these topics, holding symposia, bringing in alumni who have worked in the sports and entertainment fields, and advising students on their career choices.

Beginning in 2007, the Sports Law Clinic offered students another way to get involved in the field. The program has placed students in over thirty clinical placements within the head offices of various teams in the three major sports leagues, and with many other professional and amateur sports organizations. On the

* *Visiting Lecturer on Sports Law, Harvard Law School.*

† *Henry J. Friendly Professor of Law, Emeritus, Harvard Law School.*

entertainment side, the Recording Artists Project gives students a chance to provide pro bono legal work for musicians, record labels, and new media companies under the supervision of a practicing attorney, through the Transactional Practices Clinic.

Students over the years have taken advantage of these opportunities to move on to careers in the sports and entertainment industries. Whether as in-house counsel, members of law firms, professors, or even general managers of teams, these former students have utilized the skills honed at the Harvard Law School to advance in these industries and to have an impact on the evolution of sports and entertainment law. Notably, some Harvard Law School students have gone on to become professors of sports law, including one of the authors of an article in this inaugural issue, Michael McCann, LLM '05. With all the contributions that have been made by past students of the Harvard Law School, it is wonderful to see that current students share the same passion and that this has culminated in the creation of the *Harvard Journal of Sports and Entertainment Law*.

And a timely creation it is. At this moment, professional sports leagues are dealing with antitrust scrutiny of a kind that they have not faced in almost two decades, while up-and-coming sports are facing issues of regulation and legitimacy. The entertainment industry must cope with ever-shorter ratings cycles, while also trying to navigate the waters of what is and what is not acceptable in terms of content. But this is not all. The entertainment industry also faces rapid changes in technology, altering not only consumption of songs, movies, and books, but also raises concerns about authorship and intellectual property. In both industries, today's legal concerns impact both company and consumer alike.

The *Harvard Journal of Sports and Entertainment Law* will contribute to the debate and evolution of these concerns. It will examine elements of these issues today and into the future, tracking how the sports and entertainment industries adapt to new challenges and legal regimes.

The *Harvard Journal of Sports and Entertainment Law* will be a valuable addition to legal scholarship, and to the broader community of the Harvard Law School. The students who have worked tirelessly and enthusiastically on this inaugural issue are dedicated to publishing a journal of high quality. We hope that their successors will bring their unique talents and dedication to future volumes. Our understanding and the eventual shaping of the sports and entertainment industries will benefit from such an endeavor.



Editor's Note

Ashwin M. Krishnan*

Almost two years ago, a group of students at the Harvard Law School (“HLS”) embarked on a journey to bring sports and entertainment law to the forefront of the legal discourse on campus. This was a continuation of a quest beginning over three decades ago, originating in the work and dedication of Professor Paul C. Weiler. Professor Weiler not only put sports and entertainment law on the map, but also made Harvard a preeminent source of scholarship in these fields. Professor Weiler’s students over the years have gone on to become prominent executives and intellectual leaders in the sports and entertainment industries. While as students, these future leaders in sports and entertainment were able to take classes in these fields and hear from guest speakers, they were without an outlet to publish their own scholarship. In 2001, a group of students attempted to create a journal of sports and entertainment law. Although the timing was not right, their hard work and initiative laid the groundwork for the eventual approval of this journal. In preparing to launch this journal, we closely consulted the previous proposal and the people involved with that effort in order to understand the challenges they faced and sought their advice in accomplishing the task they set out on almost a decade ago. We simply would not have a journal today without their efforts in 2001, and the current and future staff of

* J.D., Harvard Law School, 2010; M.Phil., University of Cambridge, 2006; A.B., Harvard College, 2005. I would first like to thank my parents and brother, without whose constant love, support, and encouragement, I could not have taken on the daunting task of founding a journal and then putting in the time, energy, and effort necessary to complete the long and challenging journey to publication. I am also extremely grateful to my friends, members of the HLS community, and the HLS administration, who not only believed in my potential and gave me the confidence and inspiration to follow through on my vision, but also provided perspective and a sense of humor to keep me grounded throughout the entire process. JSEL further confirms my belief that with enough hard work, support, determination, and inspiration, anything is possible.

JSEL will forever be indebted to those who initially sought to bring a sports and entertainment law journal to HLS.

One of Professor Weiler's former students, Professor Peter A. Carfagna, returned to HLS three years ago, and his arrival sparked a renewed interest in these fields. Under Professor Carfagna's guidance, there have been two additional sports law courses added to the HLS curriculum, a significant increase in the amount of independent writing projects in the area, a variety of clinical internship opportunities for students, and a scholarship for a sports law student created in Professor Weiler's name. Students who had benefited from this explosion of opportunities in sports and entertainment law decided to contribute in their own way, by hosting the first annual Sports Law Symposium at HLS in March 2009 and the first annual Entertainment Law Symposium at HLS in November 2009. These events were a huge success, as various prominent HLS alumni and other leaders in these fields were able to provide robust discussion on the key issues facing each industry to an audience of students eager to interact with these prominent figures. The 2009 Sports Law Symposium focused on the effects of the economic downturn on the sports industry, while the 2009 Entertainment Law Symposium focused on the interrelation between entertainment, celebrity, and the law. The second annual HLS Sports Law Symposium has since been held, and focused on the upcoming collective bargaining negotiations across the three major leagues. The Committee on Sports and Entertainment Law ("CSEL") plans to host these events annually, in addition to planning a variety of other events that will allow interested students to connect with distinguished individuals in the fields of sports and entertainment. This journal—the *Harvard Journal of Sports and Entertainment Law* ("JSEL")—is a product of the momentum created by all of these other developments, which have collectively enhanced the profile of sports and entertainment law at HLS.

Publishing this inaugural issue was not an easy task. We encountered numerous challenges along the way. Two of these challenges were finding appropriate venues in which to solicit articles, and creating the infrastructure for an entirely student-run journal. Achieving balance between sports and entertainment law in our inaugural issue, and publicizing the existence of the journal were but two pressing concerns in the solicitation and review of articles. Secondly, we needed to rapidly increase our staffing and build an appropriate infrastructure to support our submissions and editing process. Creating our distinctive brand amongst a crowded journals field at HLS was a challenge we faced immediately and one we will continue to meet as we build our identity on campus.

The support of the Harvard Law School administration and its visionary leader, Dean Martha Minow, enabled us to institutionalize the journal and helped us build upon our own vision. We are also grateful to the various authors, scholars, alumni, and fellow students who have provided invaluable advice and contributed in various ways to this publication. JSEL is extremely indebted to our faculty advisor, Professor Peter A. Carfagna, who provided great oversight of our entire operation, gave us tremendous encouragement throughout the publication process, and most of all, showed incredible faith in our abilities to produce a high-quality issue in our first attempt.

Finally, I want to take this opportunity to thank every member of JSEL for their time, effort, hard work, and patience throughout this long process. As a new journal, we faced many obstacles for which we had to find creative solutions, leading to additional work and requiring untold amounts of additional patience on your part; I am so grateful that you stuck with the journal, believed in our mission, and contributed so much to this publication. Many of you did not have prior journal experience and were in fact attracted to the opportunity and challenge of having significant responsibility, which is certainly available with any new journal. I am incredibly proud of your efforts, which included managing submissions teams and article editing, tasks that are seldom given to first or second-year law students with no previous journal experience. I am also confident that this early exposure to the most critical tasks of a journal will make next year's issue even stronger, and I am thrilled to see that many of you will continue to be deeply engaged with the journal. Last, but certainly not least, I want to thank my Executive Board—Ryan Gauthier, Josh Podoll, and Abigail Hackler—for your incredible dedication and wonderful insights from the moment this journal was conceived to the publication of this issue. This journal would not have been possible without the institutional knowledge that you brought from your previous journal experiences and the creative solutions that you generated to all of the obstacles that we faced. JSEL stands as a testament to the hard work and dedication of all of its members, and I will be eternally grateful for all of your help and support in turning our collective vision into this inaugural issue.



Judicial Erosion of Protection for
Defendants in Obscenity Prosecutions?:
When Courts Say, Literally, Enough is Enough
and When Internet Availability
Does Not Mean Acceptance

Clay Calvert,* Wendy Brunner,† Karla Kennedy‡ & Kara Murrhee§

TABLE OF CONTENTS

I. INTRODUCTION..... 8

II. CONSIDERING A WORK AS A WHOLE: ARE “REPRESENTATIVE PORTIONS” OF A MOVIE ENOUGH? 13

A. Taking a Work as a Whole in Obscenity Law..... 13

B. United States v. Adams 18

C. United States v. Little..... 22

D. Balancing the Interests: The Pros and Cons of a “Representative” Portion Approach Versus Taking the Work as a Whole 25

* Professor & Brechner Eminent Scholar in Mass Communication and director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California.

† Doctoral student in Mass Communication at the University of Florida, Gainesville, Fla. B.A., 1999, Communication, University of Central Florida; M.A., 2008, Communication, University of Central Florida.

‡ Doctoral student in Journalism at the University of Florida, Gainesville, Fla. B.S., 1988, Communication, University of Miami; M.S.C., 2004, Mass Communication, Florida International University.

§ Master’s student in Media Law at the University of Florida, Gainesville, Fla. B.A. 2006, Mass Communication, University of Central Florida.

III. OF COMPARABLES AND COMMUNITIES: THE VIABILITY OF INTERNET RESEARCH TO HELP OBSCENITY DEFENDANTS	28
IV. CONCLUSION	36

I. INTRODUCTION

The ramped-up prosecutorial assault on sexually explicit adult content during the administration of former President George W. Bush, after a dearth of such actions during the administration of President Bill Clinton and then-U.S. Attorney General Janet Reno,¹ is well documented.² For instance, in 2005 the United States Department of Justice created the Obscenity Prosecution Task Force, a unit that is “dedicated exclusively to the protection of America’s children and families through the enforcement of our Nation’s obscenity laws.”³ The move, in the authors’ opinion, was one part public relations strategy and one part prosecutorial overkill, as the Justice Department had already created the Child Exploitation and Obscenity Section (CEOS) fewer than twenty years prior to enforce “federal criminal statutes relating to the exploitation of children and obscenity,”⁴ with the CEOS trumpeting itself as “the nation’s experts”⁵ in obscenity⁶ issues. Nonetheless, the seemingly

¹ See Neil A. Lewis, *A Prosecution Tests the Definition of Obscenity*, N.Y. TIMES, Sept. 28, 2007, at A27 (attributing to Mary Beth Buchanan, then the United States Attorney for Western Pennsylvania, the proposition that “the rarity of obscenity prosecutions during the eight years of the Clinton administration meant that the pornography industry had come to believe that law enforcement had tacitly ‘agreed to an anything-goes approach’”); Joe Mozingo, *Obscenity Task Force’s Aim Disputed*, L.A. TIMES, Oct. 9, 2007, at B1 (describing the Bush administration’s anti-obscenity efforts that have “reversed years of neglect by the Clinton administration,” and quoting Bryan Sierra, a Justice Department spokesperson for the proposition that “[t]here was a lack of enforcement for nearly a decade”).

² The Justice Department, under the Bush administration, “devoted new attention to areas important to conservative activists, such as sex trafficking and obscenity, according to the department’s own performance and budget numbers.” Dan Eggen & John Solomon, *Justice Dept.’s Focus Has Shifted—Terror, Immigration are Current Priorities*, WASH. POST, Oct. 17, 2007, at A1. Under Bush’s lead, the “Justice Department has begun aggressively policing adult pornography as well, a change from the Clinton administration, which pursued almost no such cases.” Shannon McCaffrey, *Justice Department Cracks Down on Adult Porn Industry*, PHILA. INQUIRER, Apr. 4, 2004, at A10.

For instance, the number of obscenity prosecutions brought during President George W. Bush’s first term in office was double the number brought under President Bill Clinton’s term. Paula Reed Ward, *Federal Obscenity Case, Filed 5 Years Ago, Has Stalled*, PITT. POST-GAZETTE, Aug. 26, 2008, at A-1.

³ U.S. Dep’t of Justice, Obscenity Prosecution Task Force, <http://www.justice.gov/criminal/optf> (last visited Feb. 22, 2010).

⁴ U.S. Dep’t of Justice, Child Exploitation & Obscenity Section, <http://www.justice.gov/criminal/ceos> (last visited Feb. 22, 2010).

⁵ *Id.*

duplicative Task Force was created, as the *Los Angeles Times* reported, “after Christian conservative groups appealed to the Bush administration to crack down on smut.”⁷

But this move alone was not the only indicia of the Bush administration’s heightened efforts to attack sexually explicit movies made by and for adults. In particular, there was also substantial evidence that two United States Attorneys were dismissed during the Bush administration, at least in part for refusing to bring obscenity prosecutions when given directives to do so from the then-newly created Obscenity Prosecution Task Force.⁸

Several of the high-profile obscenity cases brought during President Bush’s administration have ended, resulting in either convictions⁹ or guilty pleas.¹⁰ Other

⁶ Obscenity is one of the narrow categories of speech that is not protected by the First Amendment’s guarantee of free speech. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that “obscenity is not within the area of constitutionally protected speech or press”). While the High Court in *Stanley v. Georgia*, 394 U.S. 557 (1969), held that there is a right to possess obscene material in the privacy of one’s own home, there is not a “correlative right to receive it, transport it, or distribute it.” *United States v. Orito*, 413 U.S. 139, 141 (1973).

⁷ Scott Glover, *Trial to Gauge What L.A. Sees as Obscene*, L.A. TIMES, June 8, 2008, at A1.

⁸ See OFFICE OF THE INSPECTOR GENERAL, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, at 201–220 (2008), available at <http://www.justice.gov/oig/special/s0809a/final.pdf>. The Special Report examines the removal of Daniel Bogden from his position as United States Attorney for Nevada, and concludes that “the primary reason for Bogden’s inclusion on the removal list was the complaints by [Brent] Ward, the head of the Department’s Obscenity Prosecution Task Force, about Bogden’s decision not to assign a Nevada prosecutor to a Task Force case.” It also examines the removal of Paul Charlton from his position as United States Attorney for Arizona, and notes that “[w]hile it is not clear to what extent Charlton’s alleged failure to assist the Task Force was a factor in his removal, we believe it played a part in [Chief of Staff of the Justice Department D. Kyle] Sampson’s decision to put him on the list.”

See also Mark Silva & Andrew Zajac, *Bush Takes Tough Line on Firings*, CHI. TRIB., Mar. 21, 2007, at 1 (reporting how, in an email, “Brent Ward, the head of a Justice Department anti-pornography task force, complained to a department colleague he had ‘sat in a meeting with [prosecutor] Paul Charlton in Phoenix and heard him thumb his nose at us’ with a reluctance to take on obscenity cases. Ward also complained about another fired prosecutor, Daniel Bogden of Nevada”); Scott Wilson, *Obama Nominates Fired U.S. Attorney*, WASH. POST, Aug. 1, 2009, at A3 (discussing President Barack Obama’s nomination of Daniel G. Bogden to be the United States Attorney for Nevada three years after he was dismissed from that position and noting how “[a]t least one senior Justice Department political appointee also complained that Bogden was insufficiently aggressive in pursuing obscenity cases in Nevada”).

⁹ Most notably, a federal jury in June 2008 in Tampa, Fla., convicted veteran adult producer Paul Little, who is also known by the stage name of Max Hardcore, of multiple counts related to the transportation and distribution of obscene movies via the Internet and U.S. Mail. See Press Release, U.S. Dep’t of Justice, Federal Jury Convicts California Producer and His Adult Entertainment Company of Obscenity Crimes (June 5, 2008), available at http://www.justice.gov/criminal/ceos/Press%20Releases/MDFL_Little_Conviction_06-05-08.pdf (describing the outcome in the case of *United States v. Little*). The United States Court of Appeals for the Eleventh Circuit upheld Little’s multiple convictions in February 2010, although it vacated his sentence and remanded the case for re-sentencing because the district

Bush-initiated obscenity prosecutions remain pending during the administration of President Barack Obama and under current U.S. Attorney General Eric Holder's leadership, including the case against John Stagliano, a Malibu-based adult movie mogul who was indicted in April 2008 by a federal grand jury all the way across the country in Washington, D.C.¹¹

court "erred when it considered pecuniary gain derived from sales of the DVDs outside the Middle District of Florida." *United States v. Little*, No. 08-15964, 2010 U.S. App. LEXIS 2320, at 25 (11th Cir. Feb. 2, 2010).

Just a few months after Little's conviction and while still on the clock of President Bush, a federal jury in West Virginia convicted Loren Jay Adams, 46, of Martinsville, Ind., of six counts of selling and distributing obscene films in West Virginia. *See* Press Release, U.S. Dep't of Justice, Indiana Man Convicted of Obscenity Violations by Federal Jury in West Virginia (Oct. 1, 2008), *available at* <http://www.justice.gov/usao/wvn/press/press08/october/adams.html> (describing the conviction of Adams and adding that "[i]n an indictment returned by the grand jury on May 20, 2008, and unsealed upon his arrest, Adams was charged with transporting obscene matters through the U.S. mail and transportation of obscene matters for sale or distribution by means of interstate commerce in February 2008.").

¹⁰ The highest profile plea came in March 2009 in the long-running case of *United States v. Extreme Associates, Inc.*, No. 03-0203, 2009 U.S. Dist. LEXIS 2860 (W.D. Pa. Jan. 15, 2009), when Robert Zicari and Janet Romano, owners of a now out-of-business adult movie company Extreme Associates, Inc., "pleaded guilty before United States District Judge Gary L. Lancaster to a felony charge of conspiracy to distribute obscene material through the mails and over the Internet," more than five years after being indicted in the Western District of Pennsylvania in August 2003. Press Release, U.S. Attorney's Office, Western District of Pennsylvania, Extreme Associates and Its Owners, Robert Zicari and Janet Romano, Plead Guilty to Violating Federal Obscenity Laws (Mar. 11, 2009), *available at* http://www.justice.gov/usao/paw/pr/2009_march/2009_03_11_01.html. The movies in question were often graphic, as the government's press release stated:

In connection with the guilty plea, the court was advised that Zicari and Romano, through Extreme Associates, Inc., mailed obscene films entitled "Force [sic] Entry—Director's Cut," "Cocktails 2—Directors Cut," and "Extreme Teen #24" to the Western District of Pennsylvania. Forced Entry portrays the rape and murder of three women, who are slapped, hit, spit upon and generally abused and degraded throughout graphic portrayals of forced sex acts. In Cocktails #2, women engage in sex acts with multiple partners while a bowl, placed in front of the women, is filled with various bodily liquids.

Id.

¹¹ *See* Press Release, U.S. Dep't of Justice, Federal Grand Jury Charges Two Companies and Owner John Stagliano with Obscenity Violations (Apr. 8, 2008), *available at* <http://www.justice.gov/opa/pr/2008/April/08-crm-280.html> (describing the indictment targeting Stagliano and two of his companies, Evil Angel Productions, Inc. and John Stagliano, Inc.).

This article argues that the lasting legacy of the Bush administration's "historical"¹² crackdown on obscenity will not be measured by the sheer number of convictions or guilty pleas it garnered in its efforts to rein in what some perceived as the proliferation of harder, more aggressive content on the World Wide Web¹³ in the prosecutorial vacuum that existed during Bill Clinton's eight years in the Oval Office.¹⁴ Indeed, this article contends that the real damage done to the First Amendment¹⁵ speech rights of those who produce sexually explicit content featuring consenting adults—not child pornography, which is a very different type of content that falls outside the scope of the First Amendment¹⁶—has taken place in the past

¹² See Luiza Chwialkowska, *Crackdown on Pornography Is Being Launched by Bush*, N.Y. SUN, Sept. 15, 2003, at 1 (writing that "[t]he Bush administration is launching a 'historical' crackdown on makers and distributors of material deemed to be obscene, after nearly a decade without prosecutions under federal obscenity laws . . .").

¹³ E.g., Donna M. Hughes, *The Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children*, 13 HASTINGS WOMEN'S L.J. 127, 129 (2002) (contending that "[a]s a result of the huge market on the web for pornography and the competition among sites, the pornographic images have become rougher, more violent, and degrading").

¹⁴ United States Attorney for the Western District of Pennsylvania Mary Beth Buchanan suggested in a 2003 press release regarding the prosecution of Extreme Associates, Inc. and its owners that adult content proliferated during the Clinton administration, stating the "lack of enforcement of federal obscenity laws during the 1990s has led to a proliferation of obscenity throughout the United States, such as the violent and degrading material charged in this case." Press Release, U.S. Dep't of Justice (Aug. 7, 2003) available at http://www.justice.gov/criminal/ceos/Press%20Releases/WDPa%20Zicari%20indict%20PR_080703.pdf. During a 2003 hearing before the Senate Judiciary Committee, U.S. Senator Orrin Hatch (R.-Utah) and "witnesses from the Department of Justice criticized the Clinton administration, saying enforcement was lax and helped foster a Wild West atmosphere in Internet porn." Lisa Friedman, *Internet Cutting L.A. Role in Porn*, L.A. DAILY NEWS, Oct. 16, 2003, at N4.

¹⁵ The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

¹⁶ The U.S. Supreme Court has held that the distribution and possession of child pornography is not protected by the First Amendment. See *United States v. Williams*, 128 S. Ct. 1830, 1836 (2008) (writing that "we have held that a statute which proscribes the distribution of all child pornography, even material that does not qualify as obscenity, does not on its face violate the First Amendment" and "we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (providing that "[a]s a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does *not* embrace certain categories of speech, including defamation, incitement, obscenity, and *pornography produced with real children*") (emphasis added). Under federal statutory law, child pornography is defined as:

two years at the level of the judiciary. As this article illustrates, federal prosecutors recently have coaxed very favorable rulings to their side on critical issues that cut to the heart of the aging—some scholars and attorneys would say outdated,¹⁷ particularly its use of community standards to assess Internet-transmitted material¹⁸—test for obscenity articulated by the United States Supreme Court in 1973 in *Miller v. California*.¹⁹

Part I of this article explores rulings by two different federal courts that dramatically impact the longstanding and explicit requirement under *Miller* that, as the Supreme Court put it, any work must be “taken as a whole”²⁰ by the fact finder in determining whether or not it is obscene. Part II then shifts to another aspect of *Miller* now facing scrutiny before the courts, as it examines recent cases and rulings affecting the ability of defendants in obscenity prosecutions to effectively use Internet-based searches and search engines, such as Google and Yahoo, when trying to demonstrate what the local “contemporary community standards”²¹ are in any given case. Specifically, Part II, which includes exclusive e-mail correspondence conducted by the authors of this article with a defense attorney who attempted to use

any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

18 U.S.C. § 2256 (2008).

¹⁷ See Clay Calvert & Robert D. Richards, *Stopping the Obscenity Madness 50 Years After Roth v. United States*, 9 TEX. REV. ENT. & SPORTS L. 1, 3 (2007) (asserting that the test for obscenity created by the United States Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), “is concurrently confusing and out of touch with recent technological, social and legal developments”); Arnold H. Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS 21, 22 (2005) (arguing that the United States Supreme Court test for obscenity created in *Miller* should be overruled); Lawrence G. Walters & Clyde DeWitt, *Obscenity in the Digital Age: The Re-Evaluation of Community Standards*, 10 NEXUS 59, 60 (2005) (arguing the *Miller* test’s use of contemporary community standards renders it an anachronism when applied to disputes involving content on the Internet).

¹⁸ Professor Mark Alexander, for instance, has observed that “because *Miller* was decided in 1973, it lacks any apparent mechanism for dealing with the Internet, which was only initially conceived in 1969 and really expanded in just the last decade or so.” Mark C. Alexander, *The First Amendment and Problems of Political Viability: The Case of Internet Pornography*, 25 HARV. J.L. & PUB. POL’Y 977, 1006 (2002).

¹⁹ 413 U.S. 15 (1973).

²⁰ *Id.* at 24.

²¹ *Id.*

such an approach, explores how such attorneys might effectively try to use what is known as a comparables argument with Internet resources. Finally, the conclusion suggests it is finally time for the Supreme Court to hear an appeal in an obscenity prosecution involving Internet-disseminated content in order to address the continued viability of *Miller* in the digital era.

II. CONSIDERING A WORK AS A WHOLE: ARE “REPRESENTATIVE PORTIONS” OF A MOVIE ENOUGH?

This part of the article is divided into four sections. The first section provides an overview, based on both case law and a review of the scholarly literature, of the taking-the-work-as-a-whole requirement in modern obscenity law in the United States. The second and third sections of this part then examine and analyze two different cases in which that requirement appears to have been watered down, if not completely obliterated. Importantly, these two sections point out problems with these decisions, particularly as they negatively impact the First Amendment rights of defendants in obscenity prosecutions. Finally, the fourth section sets forth a pro-and-cons balancing analysis for evaluating the relative utility of allowing the prosecution to show only parts of adult movie DVDs rather than showing them in their entirety.

A. Taking a Work as a Whole in Obscenity Law

Although the Supreme Court held more than a half-century ago that “obscenity is not within the area of constitutionally protected speech or press,”²² the Court’s current version of the legal test for determining when content is or is not obscene—a test that replaced an earlier high court formulation in *Memoirs v. Massachusetts*²³—was articulated in 1973 in *Miller v. California*.²⁴ In a fractured decision that has been analyzed by several legal scholars²⁵ and criticized by two in a relatively recent law

²² *Roth v. United States*, 354 U.S. 476, 485 (1957).

²³ 383 U.S. 413 (1966). In *Memoirs*, the high court held that, in light of its earlier decision in *Roth* and subsequent cases, for any work to be deemed obscene

three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

383 U.S. at 418.

²⁴ 413 U.S. at 15 (1973).

²⁵ A complete review of the development of obscenity law in the United States, the *Miller* test, and the criticism of *Miller* are beyond the scope of the article, which focuses on recent decisions affecting the judicial implementation of specific aspects of the *Miller* test. Several important articles have already been written on these topics. See, e.g., Bret Boyce, *Obscenity and*

journal article as “the most vague law that any American citizen has ever been required to interpret,”²⁶ Chief Justice Warren Burger delivered the opinion of the Court that spelled out a conjunctive,²⁷ three-part test for fact-finders to use in deciding whether a speech-product is obscene.²⁸ That test asks the fact-finders to resolve three questions:

1. Does the work in question, when taken as a whole and viewed from the perspective of the average person in light of contemporary community standards, appeal to a prurient interest in sex?
2. Does the work depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law?
3. Does the work, when taken as a whole, lack serious literary, artistic, political, or scientific value?²⁹

Both the first and third prongs of the *Miller* test, as set forth above, explicitly require that a work be considered and evaluated as a whole, while the second part does not.³⁰ This work-as-a-whole requirement, in fact, dates back long before *Miller*, with the Court noting in *Roth v. United States*³¹ in 1957 that the “proper standard”³² for obscenity requires it; the earlier standard “allowed material to be judged merely by

Community Standards, 33 YALE J. INT’L L. 299, 311–325 (2008) (tracing the history of obscenity law in the United States, including a review of the *Miller* test); Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 17–21 (1986) (reviewing the U.S. Supreme Court’s obscenity jurisprudence; contending that “obscenity is another area of the law where the Court has tinkered for years without ever producing a cogent doctrine;” and noting that “the lack of significant change in the Court’s obscenity doctrine, announced in 1973 in *Miller v. California*, is due less to a final resolution of issues by the Court than to the Court’s decision simply to stop tinkering with the test”); and Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL’Y 25 (2004) (reviewing the *Miller* test and, in particular, the difficulty of applying its use of contemporary community standards on the Internet).

²⁶ H. Franklin Robbins, Jr. & Steven G. Mason, *The Law of Obscenity—or Absurdity?*, 15 ST. THOMAS L. REV. 517, 531 (2003).

²⁷ See Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 100 (1996) (describing *Miller* as defining “a new conjunctive test for obscenity,” as it requires the government to prove all three prongs in order to win an obscenity case).

²⁸ *Miller*, 413 U.S. at 24 (setting forth three-part test).

²⁹ *Id.*

³⁰ See James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153, 1174 (1993) (observing that “the part of the test not relying on the work as a whole” is the part evaluating “patently offensive sexual depictions”).

³¹ 354 U.S. 476, 476 (1957).

³² *Id.* at 489.

the effect of an *isolated excerpt*.³³ The Court in *Roth* “rejected the previously accepted proposition that obscenity could be judged on the basis of an isolated, detached, or separate excerpt from a larger work because it was unconstitutionally restrictive of the freedoms of speech and press.”³⁴ Indeed, it observed one year prior to *Miller* that “a reviewing court must, of necessity, look at the *context of the material*, as well as its content.”³⁵ And as one federal court put it, “though *Roth* has been overtaken by *Miller*, the ‘taken as a whole’ requirement survives in the statement of, and thus in applying, the newer *Miller* standard.”³⁶

In a very recent obscenity opinion, U.S. District Judge Gary L. Lancaster interpreted the taken-as-a-whole requirement to mean that “we must view the *context and manner* in which the material has been *created, packaged, and presented by the author to the intended audience* in order to decide what the work ‘as a whole’ is for purposes of the *Miller* test.”³⁷ Showing a jury one scene from an adult movie, without the surrounding “context,”³⁸ clearly fails to present the work as it was “created”³⁹ by the producer and designed to be “presented”⁴⁰ to the intended audience. As illustrated later in this article,⁴¹ many adult movies today do have plots and storylines, silly though they may seem to most observers; taking one scene out of such a plot-driven movie to show in isolation to a jury is not the way such a movie was intended to be watched by its producer. Indeed, allowing jurors to consider only a single scene from a movie represents a return to the isolated-excerpt standard squarely rejected by the Court more than a half-century ago in *Roth*.⁴²

When an issue of a magazine is seized by law enforcement officials because they think it is obscene, courts have held that it is the entire issue of the magazine—articles, photos, letters, and all other content, taken collectively and in the aggregate—that constitutes the work that must be evaluated as a whole.⁴³ When a musical composition is evaluated for whether it is obscene, the entire album, including both

³³ *Id.* at 488–89 (emphasis added).

³⁴ *United States v. Extreme Assoc., Inc.*, No. 03-0203, 2009 U.S. Dist. LEXIS 2860, at 4 (W.D. Pa. Jan. 15, 2009).

³⁵ *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (emphasis added).

³⁶ *United States v. Miscellaneous Pornographic Mags.*, 526 F. Supp. 460, 465 n.8 (N.D. Ill. 1981).

³⁷ *Extreme*, 2009 U.S. Dist. LEXIS 2860, at 5 (emphasis added).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *infra* notes 76–80 and accompanying text.

⁴² See *supra* text accompanying notes 31–34 (addressing the Court’s rejection of the isolated-excerpt approach).

⁴³ See *Penthouse Int’l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1367–70 (5th Cir. 1980) (involving hard-copy issues of adult magazines such as OUI, PENTHOUSE, PLAYBOY, AND HUSTLER; finding that precedent “require[s] us to treat each magazine as a separate work that is to be taken as a whole;” and rejecting the argument “that each article and pictorial presentation is a ‘work’ and a magazine is merely a conglomeration of these works resulting in a ‘volume’”).

lyrics and music—text and sound, as it were—must be considered.⁴⁴ Most importantly for the cases at the center of this article, when the members of the U.S. Supreme Court consider whether a movie is obscene, they watch the entire movie, as they did with the 1971 Jules Feiffer movie starring Jack Nicholson and Ann-Margret, *Carnal Knowledge*, in *Jenkins v. Georgia*,⁴⁵ one year after *Miller*. Likewise, when a court in Virginia deemed the oft-prosecuted⁴⁶ 1970s adult movie THE DEVIL IN MISS JONES to be obscene, Judge James M. Lumpkin wrote that the court has “viewed it from beginning to end.”⁴⁷

More recently, the Supreme Court, in 2002, held that there is “an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene.”⁴⁸ Writing for the majority in *Ashcroft v. Free Speech Coalition*,⁴⁹ Justice Anthony Kennedy added: “Under *Miller*, the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is *part of the narrative*, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive.”⁵⁰

Thus, as recently as 2002, the U.S. Supreme Court reinforced the idea that the government cannot wrench out a scene or two from a movie when it attempts to prove the movie is obscene. For lower court judges, like those described in Sections B and C below, to ignore this “essential First Amendment”⁵¹ rule less than a decade later is for them to boldly contravene precedent.

An important point here is that one small item, standing alone in a much more lengthy work, is not likely to be determinative of whether or not the work as a whole is obscene. As the Supreme Court opined in 1972, “a quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.”⁵²

⁴⁴ Luke Records, Inc. v. Navarro, 960 F.2d 134, 136 (11th Cir. 1992).

⁴⁵ 418 U.S. 153 (1974). The court describes its own viewing of the film in some detail. *Id.* at 161.

⁴⁶ See, e.g., Dyke v. Georgia, 209 S.E.2d 166, 170 (Ga. 1974) (concluding that “the film, ‘Devil in Miss Jones,’ is obscene as a matter of constitutional law and fact”); Commonwealth v. Capri Enter., Inc., 310 N.E.2d 326 (Mass. 1974) (involving a Massachusetts obscenity prosecution of a corporate defendant for showing THE DEVIL IN MISS JONES); Sioux Falls v. Mini-Kota Art Theatres, Inc., 247 N.W.2d 676 (S.D. 1976) (affirming the obscenity conviction of the corporate owner, a Sioux Falls movie theatre, for showing THE DEVIL IN MISS JONES).

⁴⁷ Commonwealth v. “The Devil in Miss Jones”, 3 Va. Cir. 436, 442 (Va. Cir. Ct. 1973). Judge Lumpkin’s apparent utter disgust with having to fulfill this full-length viewing requirement is almost palpable in his opinion, as he writes that “if there are moral values in ‘The Devil in Miss Jones,’ then no movie could ever be obscene, no matter the sexual gymnastics, provided a ‘moral message’ were shown before or after the aforesaid gymnastics.” *Id.* at 444. He concludes his opinion with this memorable last sentence: “The activities depicted in ‘The Devil in Miss Jones’ are, to use the plainest language at hand, low-down, common, trash.” *Id.* at 446.

⁴⁸ Ashcroft v. Free Speech Coal., 535 U.S. 234, 248 (2002).

⁴⁹ *Id.*

⁵⁰ *Id.* (emphasis added).

⁵¹ *Id.*

⁵² Kois v. Wisconsin, 408 U.S. 229, 231 (1972).

This quote taps into what is known by courts as “the ‘sham exception’ to the taken-as-a-whole” requirement,⁵³ referring to the idea that adding into a work a random dose of textual material that may have literary value, or simply may be innocuous, will not necessarily save an otherwise obscene work. As Justice Kennedy might put it, as noted above, the content must fit “the narrative”⁵⁴ and not just be dumped in outside of that storytelling framework or structure.

For instance, one court held that attaching a political letter to a mailing that was otherwise comprised of what the court called “obscene pictures”⁵⁵ did not save the mailing as a whole from being deemed obscene.⁵⁶ As another court put it, “an obscene picture of a Roman orgy would be no less so because accompanied by an account of a Sunday school picnic which omitted the offensive details.”⁵⁷

Serious news articles with political value have helped to save issues of sexually-explicit HUSTLER magazine from being deemed obscene when it comes to the third prong of *Miller* that asks whether the work, taken as a whole, has serious literary, artistic, political, or scientific value. As one court put it when considering an issue of HUSTLER:

The November 1996 *Hustler* magazine contains a serious, non-sexual article entitled “Washington’s Worst Congressman Headline Acts in Capital Hill’s Hall of Shame”. This article is a criticism of more than a dozen members of Congress that *Hustler* magazine judges to be the worst congressmen. This article is clearly one that constitutes political speech and saves this issue from obscenity.⁵⁸

This provides a prime example of why feminist University of Michigan legal scholar Catharine MacKinnon “criticizes the ‘work as a whole’ requirement as legitimating pornographic publications like *Playboy*.”⁵⁹ This perspective should come as little surprise to those familiar with MacKinnon’s views, as a review of the literature reveals that she has written that in pornography women are “humiliated, violated, degraded, mutilated, dismembered, bound, gagged, tortured, and killed.”⁶⁰

⁵³ *United States v. Merrill*, 746 F.2d 458, 464 (9th Cir. 1984), *cert. denied*, 469 U.S. 1165 (1985).

⁵⁴ *Ashcroft*, 535 U.S. at 248.

⁵⁵ *Merrill*, 746 F.2d at 464.

⁵⁶ *Id.*

⁵⁷ *Flying Eagle Publ’n, Inc. v. United States*, 285 F.2d 307, 308 (1st Cir. 1961).

⁵⁸ *Brouette v. Sgt. Starns*, 161 F. Supp. 2d 1021, 1026 (D. Ariz. 2001). The judge in this case seemed to find it particularly important that all issues of HUSTLER included such non-sexual editorial content. *Id.* at 1025–26.

⁵⁹ Lindgren, *supra* note 30, at 1173.

⁶⁰ CATHARINE A. MACKINNON, *ONLY WORDS* 17 (1993).

B. United States v. Adams

In July 2009, in *United States v. Adams*,⁶¹ the United States Court of Appeals for the Fourth Circuit gutted the taken-as-a-whole requirement and held that it was sufficient for prosecutors to merely show “representative portions”⁶² of the adult videos at issue in the case.⁶³ Rather than requiring the videos to be shown to jurors in their entirety, the Fourth Circuit ruled it was sufficient that a federal agent “testified that he had viewed each movie in its entirety, summarized the remainder of the films for the jury, and stated that the unplayed portion of each showed sexual acts similar to those contained in the excerpts.”⁶⁴ The court also found it significant that the federal agent read aloud the defendant’s “website’s descriptions of the films to the jury, and testified that the descriptions accurately detailed the content of each movie.”⁶⁵ Taken together, this was, according to the appellate court, all that was required “despite the jury’s failure to view the films in their entirety.”⁶⁶ The three-judge panel found “that the Government presented evidence sufficient to support the jury’s conclusions that, taken as a whole, the films appealed to prurient sexual interests and lacked serious literary, artistic, political, or scientific value.”⁶⁷

There are several problems with the Fourth Circuit’s opinion, aside from the obvious fact that the court upheld an obscenity conviction in which the prosecution failed to satisfy its duty, as established in *Miller*, to show the works in question in their entirety. The most obvious problem is determining what precisely constitutes a “representative” portion of a work such as a DVD. The term itself likely would be fraught with void for vagueness problems if it were used as part of a statute.⁶⁸ Is there, for instance, a minimum (or maximum) percentage of time or length of the

⁶¹ No. 08-5261, 2009 U.S. App. LEXIS 16363 (4th Cir. July 24, 2009).

⁶² *Id.* at 3.

⁶³ The three videos at issue in the case were DOGGIE3SOME, ANAL DOGGIE AND HORSE and FISTING 1. *Id.* at 3–4. Fisting, as defined by adult entertainment industry veteran Joy King, refers to “[i]nserting the entire hand into a vagina or anus.” JOY KING, GET INTO PORN: AN INDUSTRY INSIDER’S GUIDE TO BECOMING A PORN STAR 98 (2009).

⁶⁴ *Adams*, 2009 U.S. App. LEXIS 16363 at 4.

⁶⁵ *Id.*

⁶⁶ *Id.* at 3.

⁶⁷ *Id.* at 4.

⁶⁸ The United States Supreme Court recently described the void for vagueness doctrine, in the process of considering the constitutionality of a federal statute targeting a particular type of sexual content, as:

an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.

United States v. Williams, 553 U.S. 285, 304 (2008).

“portion” that must be viewed, relative to the entire length of the movie, in order to constitute a “representative” segment? In other words, is ten minutes out of a 90-minute movie a sufficient portion? Or, as the title of this article puts it, when is enough enough?

Likewise, what makes a federal law enforcement agent an expert in determining what constitutes a “representative” part of any movie, particularly if he or she is not well versed in adult movies?⁶⁹ Is any single segment of a full-length movie ever truly representative of the entire movie? While showing an explicit sex scene from an adult movie may indeed signal to jurors that the rest of the movie also has sex scenes, a single scene is not representative of the movie’s content.

Although Little’s movies⁷⁰ and many others do not have plots of any note,⁷¹ some adult videos today actually possess storylines, thin though they may be, and feature very different types of scenes that advance the story being told. For instance, the movie *Pirates II: Stagnetti’s Revenge*, which caused a stir in 2009 when shown on several college campuses,⁷² has been described as a “pornographic epic.”⁷³ Produced by Digital Playground, *Pirates II* “is a \$10 million homage to Disney’s ‘Pirates of the Caribbean’ trilogy, complete with computer-animated skeleton pirates.”⁷⁴ As a review by Jared Rutter of *Adult Video News* puts it:

Director/co-writer/co-producer Joone has gone the extra mile in terms of story, art direction, special effects and, most importantly, performance. And all without stinting on the sex. The 11 sex scenes are rather short, five or six minutes, and completely integrated into the story—the way they used to be in those big productions of porn’s Golden Age.⁷⁵

⁶⁹ This assertion may seem odd at first glance, but many adult publications, such as AVN and HUSTLER, routinely feature reviews of adult movies. It would seem that the people who do such reviews for a living and who watch hundreds of such movies in order to describe them for readers would be better qualified to determine what, if anything, is representative of an adult film.

⁷⁰ See *infra* text accompanying note 114 (describing the content of one of Little’s movies).

⁷¹ See Matt Richtel, *Lights, Camera, Lots of Action. What, You Want a Script, Too?*, N.Y. TIMES, July 8, 2009, at A1 (asserting that the “pornographic movie industry has long had only a casual interest in plot and dialogue” and contending that “moviemakers are focusing even less on narrative arcs these days. Instead, they are filming more short scenes that can be easily uploaded to Web sites and sold in several-minute chunks”).

⁷² See, e.g., Susan Kinzie & John Wagner, *At U-Md., XXX-Rated Show Goes On*, WASH. POST, Apr. 7, 2009, at B1 (describing the controversy when the movie was shown at the University of Maryland).

⁷³ Childs Walker, *Md. Balancing Rights, Politics and Porn*, BALT. SUN, Oct. 7, 2009 at 1A.

⁷⁴ Dave Larsen, *Pirate Porn Movie Sparks Campus Debates*, DAYTON DAILY NEWS (Ohio), Apr. 13, 2009, at A4.

⁷⁵ Jared Rutter, *Movie Review, Pirates II: Stagnetti’s Revenge* (Sept. 29, 2008), <http://www.avn.com/movies/75158.html> (last visited March 9, 2010) (on file with the Harvard Law School Library).

In addition, Hustler Video has produced and distributed a series of spoofs and parodies in the past two years, with tell-all titles such as WHO'S NAILIN' PAYLIN?,⁷⁶ THIS AIN'T THE MUNSTERS XXX,⁷⁷ and NOT THE BRADYS XXX.⁷⁸ The first of these movies is a political parody of an erstwhile Alaskan governor and Republican vice-presidential candidate,⁷⁹ while the last of these movies spoofs *The Brady Bunch* and is described on the back of the DVD box cover as follows:

Facing financial woes, Mike & Carol put the family on a budget. The kids take odd jobs to help save their house from bank foreclosure but when Marcia unwittingly applies for a job as a "figure" model, wild fun & sexual mayhem ensue when she discovers she's about to star in a porn movie!⁸⁰

⁷⁶ WHO'S NAILIN' PAYLIN? (Hustler Video 2008). The humorous, sex-filled parody of Sarah Palin was described this way by GQ magazine:

Take the "work" of another brunet actress, named Lisa Ann. She's the star of *Who's Nailin' Paylin?*, a Hustler movie advertised as "a naughty adventure to the wild side of that sexy Alaska governor." Ann, whose credits include *MILF Magnet 2* and *My First Sex Teacher #4*, plays Serra Paylin, a politician whose activities include "nailing the Russians." The script, proudly described by [Larry] Flynt as "very original and very explicit," opens with a "close up of a Moose head hanging on a wall." Before long, Paylin—wearing glasses, her governor's trademark updo, and not much else—finds herself in various compromising positions, saying things like "You betcha" and "It's okay to let the wolves run wild." (There was no equivalent Obama-inspired video at press time, though the furor over his topless shot in *People* suggests there's an audience.)

Jason Horowitz, *Drill, Baby, Drill*, GQ, Dec. 2008, at 162.

The movie received mainstream news media attention. See, e.g., John Ferguson, *Palin' Porn Star is Vice President*, DAILY RECORD (Glasgow), Oct. 13, 2008, at News 24 (describing the movie as featuring a porn star named Lisa Ann who plays a character "named 'Serra Paylin' in a thinly veiled attempt to distance her from Alaska governor Sarah Palin," and noting that the movie includes "a sex scene with two actors dressed as Russian soldiers"); Richard Johnson et al., *'Sexy' Sarah*, N.Y. POST, Oct. 27, 2008, at 10 (describing the star of the movie, Lisa Ann, as a "38DD-20-34 Palin-lookalike" who speculates that the real Sarah Palin, who she plays in the spoof, likely wears a "really cool sexy panty with a nice matching bra").

⁷⁷ THIS AIN'T THE MUNSTERS XXX (Hustler Video 2008). For more background on this movie, which parodies *The Munsters* television series, see the movie's official website at <http://www.aintthemunsters.com> (last visited March 6, 2010).

⁷⁸ NOT THE BRADYS XXX (X-Play 2007). The website for this movie, replete with a trailer, is available at <http://www.thebradysxxx.com> (last visited March 6, 2010). The movie is so popular that it actually has its own MySpace location, which is available at <http://www.myspace.com/thebradysxxx> (last visited March 6, 2010).

⁷⁹ See *supra* note 76 (describing the movie WHO'S NAILIN' PAYLIN?).

⁸⁰ NOT THE BRADYS XXX (X-Play 2007).

While all of the scenes in the movie feature sex, the sex is not always of the same variety, it takes place between different characters and it does, in fact, advance the plot, making it such that there really is no “representative” portion of the movie. It would be like telling a fan of James Bond movies that any two chase scenes in a specific Bond film are representative of the entire movie or that any two shoot-out scenes in a Western classic are representative of the entire content of the movie.

Secondly, divorcing and separating any single sex scene from the overall plot and context of a movie like NOT THE BRADYS XXX surely takes away whatever literary value—humor is a form of literature, although the late comedian Lenny Bruce found out the hard way that this is not always the case⁸¹—a movie might have. Some people might, for instance, take offense at NOT THE BRADYS XXX, but as the *New York Post* reports, the movie is a “spoof of the ‘70s sitcom”⁸² and its “sales are on fire.”⁸³ In early 2008, in fact, the movie was the hottest adult title in the nation in terms of video-on-demand (VOD) movies.⁸⁴ Such popularity suggests that there is, indeed, some literary value when the movie is considered in its entirety as a spoof, rather than as an isolated scene that is deemed “representative” by a prosecutor and thus parceled out from the larger plot and context.

Third, adult movie DVDs today sometimes feature content, like regular mainstream movie DVDs, that goes far beyond the actual movie itself. For instance, the DVD box cover for THIS AIN’T THE MUNSTERS XXX states that the DVD includes a: blooper reel, photo gallery, director’s commentary, laugh track option, photo slide show and behind the scenes “making of” featurette.⁸⁵ To truly consider the work as a whole—the entire DVD, replete with all of its content—a jury would need to watch such additional content, all of which is unique and different from the movie itself.

This is particularly important because, as First Amendment defense attorney Jeffrey Douglas points out, “extras often include behind-the-scenes shoots or the performers talking about it. When you see that for a very short amount of time, if you hadn’t figured it out before, you realize they’re making a movie, that this is fiction and that they are acting.”⁸⁶

⁸¹ See generally Ronald K.L. Collins, *Lenny Bruce & The First Amendment: Remarks at Ohio Northern University Law School*, 30 OHIO N.U. L. REV. 15, 18 (2004) (describing Bruce’s comedy and noting that “between 1961 and 1964, Lenny Bruce was busted for obscenity for routines he performed in comedy clubs in San Francisco, Chicago, Los Angeles, and New York”).

⁸² Richard Johnson et al., *Brady’ Bonanza*, N.Y. POST, Oct. 1, 2007, at 14.

⁸³ *Id.*

⁸⁴ See Joanne Cachapero, *‘Not the Bradys XXX’ Tops Hot Movies* (Mar. 4, 2008), http://www.xbiz.com/news/news_piece.php?id=90786 (on file with the Harvard Law School Library) (quoting James Cybert, director of business development for HotMovies.com, for the proposition that the movie “first set a new precedent for a VOD opening week. Now the movie has rocketed to No. 1 on the viewer popularity charts in just two weeks”).

⁸⁵ THIS AIN’T THE MUNSTERS XXX (Hustler Video 2008).

⁸⁶ Clay Calvert & Robert D. Richards, *The Prosecution of Max Hardcore: An Insider’s Look* (July 17, 2007), <http://business.avn.com/articles/5788.html> (on file with the Harvard Law School Library).

C. *United States v. Little*⁸⁷

The Fourth Circuit's July 2009 decision in *Adams* is not the only recent case where a federal court eviscerated the taken-as-whole requirement of *Miller*. In particular, during the 2008 obscenity trial of Southern California-based adult movie producer Paul Little in Tampa, Florida, U.S. District Judge Susan Bucklew ruled from the bench that the prosecution did not need to show in their entirety the five movies at issue in the case, simply stating, "I think it would be very difficult for the jury to sit through five of these."⁸⁸ Why did she think that?

According to an article in the *St. Petersburg Times*, "the judge said she doubted the jury could sit through such a volume of graphic and violent depictions."⁸⁹ Her decision stemmed, at least in part, from a note passed to her by one juror that asked, according to the *St. Petersburg Times*, "Your honor, would it be at all possible for clips to be shown to the jury instead of the movie in its entirety?"⁹⁰ There is no doubt that Little's movies are graphic.⁹¹ For instance, a review of the literature reveals that feminist scholar Gail Dines wrote that Little "became famous (and rich) for his particular style of pornography that specializes in extremely violent and degrading sex,"⁹² and journalist Mark Cromer contended that Little's "signature act is brutally unprotected anal sex."⁹³ But that does not mean, of course, that a jury should not be required to watch his movies in order to fairly consider whatever value they might possess, regardless of the descriptions by Dines and Cromer.

Bucklew apparently bought the prosecution's argument. According to Mark Kernes, the senior editor of the *Adult Video News* who covered the case in person:

Prosecutor Lisamarie Freitas argued that playing the entire movies would be repetitive, since similar sex acts appear throughout the material, and renewed her offer to let the defense play whatever

⁸⁷ For procedural context, see *United States v. Little*, 8:07-CR-170-T-24 (MSS), 2008 U.S. Dist. LEXIS 3292 (M.D. Fla. Jan. 16, 2008), *motion for a judgment of acquittal denied*, 2008 U.S. Dist. LEXIS 45639 (M.D. Fla. June 10, 2008), *motion for new trial denied*, 2008 U.S. Dist. LEXIS 61187 (M.D. Fla. July 28, 2008), *aff'd in part, rev'd in part*, No. 08-15964, 2010 U.S. App. LEXIS 2320 (11th Cir. Feb. 2, 2010).

⁸⁸ Mark Kernes, *The U.S. v. Max Hardcore: Inside the Controversial Director's Federal Obscenity Trial* (May 29, 2008), <http://business.avn.com/articles/30477.html> (on file with the Harvard Law School Library) (quoting Judge Bucklew).

⁸⁹ Kevin Graham, *Juror Asks to View Less Porn in Court*, ST. PETERSBURG TIMES (Fla.), May 30, 2008, at 3B.

⁹⁰ *Id.*

⁹¹ As one reporter who covered the trial put it, Little's movies make HUSTLER magazine publisher Larry Flynt "look like Walt Disney." Daniel Ruth, *Jury Delivers Oscar-Level Performance*, TAMPA TRIB., June 10, 2008, at Metro 1.

⁹² Gail Dines, *The White Man's Burden: Gonzo Pornography and the Construction of Black Masculinity*, 18 YALE J.L. & FEMINISM 283, 286 (2006).

⁹³ Mark Cromer, *A Cold Equation*, LA WEEKLY, Apr. 30, 2004, at 23.

footage on the disks that the prosecution didn't play. She also claimed that the rules of evidence allowed "summaries" of documents to be presented during trial, with the full documents sent back to the jury room with the jury during deliberations.⁹⁴

In an interesting, pro-prosecution twist, Judge Bucklew refused a request from the defendant to identify the juror who passed the note asking not to view the movies in their entirety, so that the attorneys could question him or her about the request and determine whether the note reflected the views of only that juror or of other jurors.⁹⁵ She similarly rejected the request of defense attorney H. Louis Sirkin to force the prosecution to show the movies in their entirety, with Sirkin arguing to no avail that "that the law requires jurors to view the materials in their entirety to accurately and fairly judge whether the movies are obscene."⁹⁶

Little's defense attorneys felt it was unfair to let the prosecution show only clips of the movies for several reasons. First, in order to preserve an appeal on the issue of whether the prosecution should have shown the movies in their entirety, the defense felt compelled to try to show those portions of the movies that the prosecution failed to play for jurors. As defense attorney Jeffrey Douglas, who represented Little, put it:

The problem for us, in terms of preserving an appeal, is that we were asked to play chicken. If we hadn't shown the material on cross-examination, would we have waived the issue that the government failed to show it as a whole? In other words, if we didn't show it when we could show it, would we then be barred from arguing about it? The government's gamesmanship was rewarded.⁹⁷

Second, according to Douglas, forcing the defendant's attorneys to show the movies in their entirety makes the defendant look bad in the eyes of the jury because the defense—not the prosecution—appears to be forcing the jurors to watch graphic movies that they would most likely not want to view.⁹⁸ According to Douglas, the government admitted as much when a prosecutor told Judge Bucklew in open court:

⁹⁴ Kernes, *supra* note 88.

⁹⁵ Kevin Graham, *Defense Wants New Judge in Porn Trial*, ST. PETERSBURG TIMES (Fla.), May 31, 2008, at 4B. On appeal, the United States Court of Appeals for the Eleventh Circuit rejected the argument that this incident affected the outcome of the case, reasoning that "Appellants' argument that the note prejudiced their Sixth Amendment rights is based on nothing more than mere speculation, and as such we find no merit to this argument." *United States v. Little*, No. 08-15964, 2010 U.S. App. LEXIS 2320, at 21 (11th Cir. Feb. 2, 2010).

⁹⁶ Graham, *supra* note 95, at 4B.

⁹⁷ Robert D. Richards & Clay Calvert, *The 2008 Federal Obscenity Conviction of Paul Little and What It Reveals About Obscenity Law and Prosecutions*, 11 VAND. J. ENT. & TECH. L. 543, 556 (2009).

⁹⁸ *Id.*

“It all turns on who the jury is going to blame. We don’t want them to blame us for seeing the whole movie. We want them to blame the defense.” That statement is such an astonishing confession. It has nothing to do with evidence—it’s all about gamesmanship. The judge should have stood up, with outrage, and said, “That is unethical. You should be ashamed of yourself. Your job description is not to get a conviction.”⁹⁹

Attorney H. Louis Sirkin, who represented Little’s business entities, concurs with Douglas’ assessment about the government’s gamesmanship in forcing the defense to show the remaining portions of the movies in order to preserve an appeal on that issue.¹⁰⁰ As Sirkin told one of the authors of this article and Professor Robert D. Richards:

Some people said that we shouldn’t have shown the movies. My attitude with that is, “Guys, look, we had the opportunity to show them—we had the right to show them. If we didn’t show them, then the appellate court’s going to say we waived the right to challenge it—when you had your chance to show them, you didn’t do it. You have no one to blame but yourself.”¹⁰¹

In summary, if one accepts the statements of both Douglas and Sirkin, then the prosecution in *United States v. Little* deliberately manipulated *Miller’s* taken-as-a-whole requirement in order to play a blame-game to curry favor with the jury. By not compelling the prosecution to show the movies in their entirety, from start to finish, Judge Bucklew forced defense counsel to show them to the jury in order to preserve an appeal to the United States Court of Appeals for the Eleventh Circuit, which heard oral argument in October 2009.¹⁰²

In February 2009, the Eleventh Circuit affirmed Little’s conviction on all charges, although it reversed Judge Bucklew on the question of damages, because she “considered pecuniary gain derived from sales of the DVDs outside the Middle District of Florida.”¹⁰³ The Eleventh Circuit rejected Little’s taken-as-a-whole argument, reasoning by a high-brow, artistic example that “if an art critic were asked to judge the quality of the Mona Lisa he would not consider the Louvre part of the work.”¹⁰⁴ The appellate court also rejected the argument that the prosecution had the burden of showing the movies in their entirety, observing that:

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ *Id.* at 560.

¹⁰¹ *Id.*

¹⁰² See Mark Kernes, *Max Hardcore Appeal Argued Today* (Oct. 29, 2009), <http://business.avn.com/articles/36648.html> (on file with the Harvard Law School Library).

¹⁰³ *United States v. Little*, No. 08-15964, 2010 U.S. App. LEXIS 2320, at 25 (11th Cir. Feb. 2, 2010).

¹⁰⁴ *Id.* at 14, n.11.

[t]here was sufficient evidence presented during the government's case-in-chief to meet the government's burden of proving obscenity in the DVDs. The government published excerpts of the DVDs to the jury as allowed by the district judge. We need not determine whether the excerpts alone would have been sufficient to meet the government's burden of proof because Appellants published the DVDs in their entirety during their cross examination of the government's witness. The evidence presented to the jury was sufficient to meet the government's burden of proving that the DVDs contained obscene material.¹⁰⁵

The irony here is rich: Little's attorneys, as noted earlier, only showed the movies in their entirety so as not to waive on appeal the argument that the government had the burden to show them. The appellate court then dodges the issue on the very ground that the jury did get to see them because Little's attorneys showed them on cross-examination.

D. Balancing the Interests: The Pros and Cons of a "Representative" Portion Approach Versus Taking the Work as a Whole

While the comments of both Jeffrey Douglas and H. Louis Sirkin strike at key problems with the approach taken by Judge Bucklew in *United States v. Little*, they fail to provide what might be considered a cost-benefit analysis for evaluating a judicial decision that allows prosecutors to show only a portion of the videos or content under prosecution in an obscenity prosecution. In other words, in the opinion of the authors, it is necessary to weigh the pros and cons of an approach in which, theoretically, the prosecution is permitted (as it was in *Adams*) to show jurors only a representative portion of an adult DVD.

Pros of a Representative-Portion Approach: Two apparent advantages may be derived from employing a representative-portion methodology in obscenity cases: *judicial economy*¹⁰⁶ and *protecting jurors from offensive content*. The former benefit relates to the idea of saving scarce judicial resources—both time and money—by speeding up obscenity trials, since showing only portions of movies would make those cases go more quickly, thus freeing up prosecutors and judges to deal with other matters and, concomitantly, allowing jurors to return to their normal lives and jobs. The latter benefit relates to the idea that jurors should not be subjected to speech that might deeply disturb or offend them. Both of these interests are outweighed, however, by the interests of the defendant in an obscenity prosecution.

¹⁰⁵ *Id.* at 16.

¹⁰⁶ The term is used here to the extent that it refers to "interests in economy and efficiency by conserving judicial resources and providing expeditious resolution of the disputes, thereby saving time, labor, and money." Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part 1: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717, 737 (1995).

Cons of a Representative-Proportion Approach: The judicial-economy interest in speeding up an obscenity trial by one, two, or even three days seems trivial, if not completely irrelevant, when it is weighed against the long-term loss of liberty at stake for the defendant. Paul Little, for instance, is now serving a 46-month sentence in federal prison,¹⁰⁷ while Loren Jay Adams is serving a 33-month sentence.¹⁰⁸ To put it bluntly, it boils down to potentially saving a few days and dollars versus possibly losing one's freedom and liberty for several years.

It is impossible to know, of course, whether forcing the prosecution in *United States v. Little* to show each of the DVDs at issue, from start to finish, would have made any difference in the minds of the jurors. However, Little's attorney, Jeffrey Douglas, contended that showing only clips from the movies harmed the defendant's case and aided the prosecution.¹⁰⁹ Douglas asserted "that showing only portions of the films was a ploy by the prosecution to make the movies appear more jarring than they actually are."¹¹⁰ "If jurors watched the movies as they were intended to be seen, it would desensitize them and take some of the force out of the government's case."¹¹¹ Douglas contended in court to Judge Bucklew that "over a period of time, the shock is blunted." "That is part of the presentation. That is part of the DVD."¹¹² One scene, when taken alone, may be shocking to individuals never previously exposed to one of Paul Little's movies, but watching several of them, within the context of an entire movie, may lessen that initial shock and emotional blow jurors might experience. Indeed, the news media reported that jurors who watched what excerpts were shown to them "squirmed, diverted their eyes," and "shifted in their chairs."¹¹³ Whether, in fact, such apparent physical manifestations of shock may have

¹⁰⁷ Ben Montgomery, *Pornographer to Serve Nearly 4 Years, Pay Fines*, ST. PETERSBURG TIMES (Fla.), Oct. 4, 2008, at 1B (reporting that Judge Bucklew sentenced Paul Little "to 3 years and 10 months in federal prison for selling and distributing his messy, sometimes violent videos in Tampa. She also made him forfeit three Web sites, fined him \$7,500, ordered him to face three years of probation after his prison sentence and fined his company, Max World Entertainment, \$75,000"). According to an October 2009 letter that Little wrote to the editors of *AVN* magazine, he was confined at that time at the La Tuna Federal Correctional Institution, a low-security facility housing male inmates in Anthony, Texas. See Federal Bureau of Prisons, BOP: FCI La Tuna, <http://www.bop.gov/locations/institutions/lat/index.jsp> (last visited Feb. 22, 2010) (describing the La Tuna facility); Mark Kernes, *A Letter from Max* (Oct. 27, 2009), <http://business.avn.com/articles/36617.html> (on file with the Harvard Law School Library) (containing Little's description of the facility).

¹⁰⁸ *Ind. Man Gets 33 Months for Obscenity Violations*, ASSOC. PRESS STATE & LOCAL WIRE, Dec. 13, 2008, available at LexisNexis Academic (reporting that Adams was "sentenced to 33 months in prison for shipping obscene materials through the mail" and that he was ordered "to forfeit his Web site domain name and all copies of DVDs involved in the case").

¹⁰⁹ Kevin Graham, *Juror Asks to View Less Porn in Court*, ST. PETERSBURG TIMES (Fla.), May 30, 2008, at 3B.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Thomas W. Krause, *Jurors Watch Adult Video*, TAMPA TRIB., May 30, 2008, at Metro 1.

¹¹³ Ben Montgomery, *To the Jury, Obscene; To Him, a Day's Work*, ST. PETERSBURG TIMES (Fla.), June 8, 2008, at 1A.

dissipated over the course of watching the movies in their entirety may never be known.

As to the second interest, there is little doubt that some jurors might be offended by watching adult movies in their entirety, particularly those made by Paul Little that reportedly “feature[] scenes of vomiting and urination, showing women being forced to ingest various bodily fluids.”¹¹⁴ However, offensiveness is not the same thing as obscenity. The U.S. Supreme Court has made it clear that offensive speech generally is protected by the First Amendment.¹¹⁵

Potential jurors who take such umbrage to the content that they cannot watch an entire movie should simply be removed in defense challenges during *voir dire*.¹¹⁶ Indeed, the *Tampa Tribune* reported that during *voir dire* in *United States v. Little*, “several jury candidates said they would have trouble viewing such scenes, including a youth minister who said he struggled to overcome a pornography addiction and would have trouble if he had to watch those videos again.”¹¹⁷ Those jurors were, in fact, removed, as the newspaper noted that “although prosecutors objected to removing some potential jurors who said they would have difficulty watching the videos, U.S. District Judge Susan Bucklew granted defense challenges to their jury service.”¹¹⁸

The bottom line is that, when viewed collectively, the decisions in *United States v. Adams* and *United States v. Little* erode what, as recently as 2002, the United States Supreme Court called the essential First Amendment rule of requiring a work to be considered as a whole before it can be adjudicated obscene.¹¹⁹ As the *Little* case demonstrates, the judicial erosion of this rule works in favor of the prosecution and, concomitantly, against the First Amendment speech rights of defendants.

¹¹⁴ Elaine Silvestrini, *Filmmaker Receives 46-Month Sentence*, TAMPA TRIB., Oct. 4, 2008, at Metro 1.

¹¹⁵ See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (opining that “if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); see also *Cohen v. California*, 403 U.S. 15, 25 (1971) (observing that it is “often true that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.”).

¹¹⁶ See generally R. Brent Cooper & Diana L. Faust, *Procedural and Judicial Limitations on Voir Dire—Constitutional Implications and Preservation of Error in Civil Cases*, 40 ST. MARY’S L. J. 751 (2009) (providing an excellent overview of the purposes of *voir dire*).

¹¹⁷ Elaine Silvestrini, *Jury Selected For Obscenity Trial Over X-Rated Films*, TAMPA TRIB., May 28, 2008, at Metro 3.

¹¹⁸ *Id.*

¹¹⁹ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248 (2002).

III. OF COMPARABLES AND COMMUNITIES: THE VIABILITY OF INTERNET RESEARCH TO HELP OBSCENITY DEFENDANTS

The first prong of the *Miller* test requires jurors to apply contemporary community standards in making their obscenity determination,¹²⁰ with the High Court adding that jurors are not to consider a nationwide community but rather a more local one.¹²¹ As Professor Dawn C. Nunziato recently observed, “*Miller* makes clear that obscenity is to be judged by a local community standard.”¹²² The ramification of this decision about the scope of the community is, as Professor Stanton D. Krauss observed, that:

individual jurisdictions enjoy considerable discretion as to the selection of the “community” to be represented in this manner, and a number of different approaches are currently being taken. In some jurisdictions, the “community” whose standards are to govern the resolution of the selection questions is not specified by law. In others, juries are supposed to identify and express the views of a particular “community,” which may be the vicinage from which their members are drawn or some larger region, up to and including the state.¹²³

One method¹²⁴ defense attorneys sometimes use to demonstrate the contemporary standards of a given community¹²⁵ is what is known as a “comparables”¹²⁶ argument. A review of the paucity of legal literature on this particular facet of obscenity law reveals that the gist of the comparables argument is that “in determining whether materials are obscene, the trier of fact may rely upon the widespread availability of comparable materials to indicate that the materials are

¹²⁰ *Miller v. California*, 413 U.S. 15, 24 (1973).

¹²¹ *Id.* at 30 (opining that “our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists”).

¹²² Dawn C. Nunziato, *Technology and Pornography*, 2007 BYU L. REV. 1535, 1539 (2007).

¹²³ Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617, 632–33 (1989).

¹²⁴ Another method of proving contemporary community standards—a method that is beyond the scope of this article—is to introduce survey evidence, presented by expert witnesses, about community standards. See *Asaff v. Texas*, 799 S.W.2d 329, 332–34 (Tex. App. 1990) (concluding the trial court judge erred in preventing the defendant in an obscenity case from introducing survey evidence relevant to the contemporary community standards of what type of sexually explicit content is tolerated in the community).

¹²⁵ Note that the prosecution “is *not* constitutionally required to introduce evidence of community standards.” *United States v. Various Articles of Obscene Merch.*, 709 F.2d 132, 135 (2d. Cir. 1983) (emphasis added).

¹²⁶ See Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REFORM 255, 265 (1987) (defining this as an attempt to show that “similar sexually explicit material [is] available nearby” that is not being prosecuted).

accepted by the community and hence not obscene under the *Miller* test.”¹²⁷ Courts sometimes refer to the comparables argument as a “comparative evidence” argument.¹²⁸

A Georgia appellate court explained the relevance and theory of the comparables argument this way:

The rationale behind the admission of “comparative” evidence is to allow the defendant in an obscenity case the opportunity to attempt to persuade the trier of fact that the challenged material does not exceed contemporary community standards, as represented by the comparable material and against which the challenged material is judged. The comparative material is tangible evidence of contemporary community standards.¹²⁹

In other words, if magazines that are *not* the subject of an obscenity prosecution and that are, instead, sold freely in the community are comparable and similar to those magazines that are targeted for prosecution, this would suggest that the community accepts the type of content being prosecuted and, in turn, that it must not be obscene. To lay the foundation to admit comparables evidence as relevant¹³⁰ to the case at hand, the defense must show that the works in question that are offered as comparable are, in fact, similar to those under prosecution and, in addition, that they enjoy “a reasonable degree of community acceptance.”¹³¹ The second part of this two-part test is critical; as a Missouri appellate court has observed, “evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance.”¹³² In a nutshell, availability does not equal acceptance, and acceptance is a prerequisite or necessary element to admissibility.

This is a point that the United States Supreme Court recognized when considering the relevance of comparables evidence in obscenity cases in *Hamling v. United States*.¹³³ It wrote that:

¹²⁷ Joan Schleaf, Note, *United States v. Various Articles of Obscene Merch.*, 52 U. CIN. L. REV. 1131, 1132 (1983).

¹²⁸ See *Flynt v. Georgia*, 264 S.E.2d 669, 673 (Ga. Ct. App. 1980).

¹²⁹ *Id.* at 674.

¹³⁰ Under the Federal Rules of Evidence, relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401 (2009).

¹³¹ *Flynt*, 264 S.E.2d at 675.

¹³² *Missouri v. Cooley*, 766 S.W.2d 133, 139 (Mo. Ct. App. 1989) (quoting *United States v. Manarite*, 448 F.2d 583, 593 (2d Cir. 1971)).

¹³³ 418 U.S. 87 (1974).

[T]he defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce relevant, competent evidence bearing on the issues to be tried. But the availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the nonobscenity of the materials which the defendant is charged with circulating.¹³⁴

Akin to the three-part test in *Miller* itself, a successful comparables argument requires three foundational elements be present with the proffered evidence: *similarity* or “reasonable resemblance”¹³⁵ of content; *availability* of content; and *acceptance*, to reasonable degree, of the similar, available content.

What this triad suggests is that mere *availability* of similar content does not mean *acceptance* of it. As one court put it in a pre-*Miller* obscenity case in Michigan, “the fact of the *presence* of other magazines in Wayne County does not necessarily mean that they are *tolerated* by the average person in the local community or in the nation.”¹³⁶ The bottom line, as the United States Court of Appeals for the Ninth Circuit wrote more than thirty years ago, is that “there are foundational requirements for admissibility of such evidence that have evolved as logical indicia of its materiality and relevance.”¹³⁷ There thus is no obligation for a judge to admit comparables evidence, as “a jury can sufficiently rely on their own experiences and judgment to determine community standards.”¹³⁸

Can a high-tech comparables argument be used successfully today, with adult material readily available on the World Wide Web? The Internet raises new issues about the use and viability of comparables arguments when nearly any and all varieties of sexual content are obtainable via the World Wide Web anywhere in the United States via search engines like Google and Yahoo. The *New York Times* brought the issue, which might be thought of as comparables in cyberspace, to public attention in June 2008 when it pointed out that “the defense in an obscenity trial in Florida plans to use publicly accessible Google search data to try to persuade jurors that their neighbors have broader interests than they might have thought.”¹³⁹

¹³⁴ *Id.* at 125.

¹³⁵ *United States v. Pinkus*, 579 F.2d 1174, 1175 (9th Cir. 1978).

¹³⁶ *Wayne County Prosecutor v. Doerfler*, 165 N.W.2d 648, 659 (Mich. Ct. App. 1968) (emphasis added).

¹³⁷ *Pinkus*, 579 F.2d at 1175.

¹³⁸ *United States v. Ragsdale*, 426 F.3d 765, 776 (5th Cir. 2005).

¹³⁹ Matt Richtel, *What's Obscene? Defendant Says Google Data Offers [sic] a Gauge*, N.Y. TIMES, June 24, 2008, at A1.

The article noted that Florida-based defense attorney Lawrence Walters¹⁴⁰ planned “to show that residents of Pensacola are more likely to use Google to search for terms like ‘orgy’ than for ‘apple pie’ or ‘watermelon’”¹⁴¹ in an attempt “to demonstrate that interest in the sexual subjects exceeds that of more mainstream topics—and that by extension, the sexual material distributed by his client is not outside the norm.”¹⁴² In brief, Walters’ argument was that people in the community actually *seek out* comparables on the Internet, not simply that the comparables are *available* to them on the Internet. However, the case against Clinton Raymond McCowen described in the *New York Times* article was settled out of court,¹⁴³ thus leaving the viability of such a search-for-comparables approach untested. But, as Walters told the *Washington Post*, the key benefit of using Google to help determine community standards in such a seeking-out-comparables approach is that “what we really do in our bedrooms is much different than what we admit to doing.”¹⁴⁴ In other words, the theory appears to be that information culled from Internet-based searches for adult content conducted in the quiet and cloistered confines of one’s own home better illustrates actual community standards than evidence of what is available for rent or sale at a traditional bricks-and-mortar adult bookstore where people must go out in public to make purchases.¹⁴⁵ As Professor Ann Bartow recently observed, the Internet allows adult content to arrive “discreetly into the homes of conventional consumers.”¹⁴⁶ It thus would seem to take much more moxie to go out in public and to walk into an adult store than it would to watch or shop for that same content on the Internet from the privacy of one’s bedroom.¹⁴⁷

¹⁴⁰ As described on his firm’s website, Walters:

[I]s the managing partner of Walters Law Group, a boutique law firm concentrating in First Amendment, Internet and Gaming law. Mr. Walters has developed a[] noteworthy reputation for representing the interests of the online entertainment community, as well as other more traditional industries. He has practiced law for over two decades, and is recognized as a national expert on legal issues pertaining to Free Speech and the Internet.

Walters Law Group—First Amendment Lawyer—Qualifications & Experience, <http://www.firstamendment.com/qualifications/> (last visited Mar. 10, 2010).

¹⁴¹ Richtel, *supra* note 139, at A1.

¹⁴² *Id.*

¹⁴³ Monica Hesse, *The Google Ogle Defense: A Search for America’s Psyche*, WASH. POST, July 3, 2008, at C1.

¹⁴⁴ *Id.*

¹⁴⁵ *Cf.* Clay Calvert & Robert D. Richards, *Stopping the Obscenity Madness 50 Years After Roth v. United States*, 9 TEX. REV. ENT. & SPORTS L. 1, 10–17 (2007) (discussing how privacy on the Internet has affected notions of obscenity among members of the public).

¹⁴⁶ Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 VAND. J. ENT. & TECH. L. 799, 809 (2008).

¹⁴⁷ *E.g.*, FREDERICK S. LANE III, *OBSCENE PROFITS: THE ENTREPRENEURS OF PORNOGRAPHY IN THE CYBER AGE* xvi (2000) (“the potential privacy of talking to a phone sex operator or watching an adult movie in one’s own living or hotel room has made it a much

The Fourth Circuit's July 2009 opinion in *United States v. Adams* is important not only because it claws away at the taken-as-a-whole requirement in *Miller*, as discussed in Part I, but also because it is the first federal appellate court opinion to rule on the admissibility and relevance of Internet-based searches in an attempt to demonstrate community standards. Defendant Loren Jay Adams, who was being prosecuted in federal court in West Virginia where he had shipped his content, "intended to call a computer systems administrator who would testify that, by entering the terms 'fisting' and 'bestiality' into search engines, he found thousands of articles, movies, links, and photos devoted to these terms, which were available to anyone in the Martinsburg, West Virginia area with Internet access."¹⁴⁸

Adams' theory here was that "by introducing testimony of the availability of like materials on the Internet, [he] sought to demonstrate that such materials were 'accepted' in the Martinsburg community, and therefore did not appeal to the prurient sexual interest."¹⁴⁹ For instance, the search term "bestiality" potentially would be relevant because two of the movies in question in *United States v. Adams* "depicted women engaging in sexual acts with dogs and a horse."¹⁵⁰

Affirming the decision of the trial court judge in excluding this evidence, however, the Fourth Circuit focused its attention on the fact that availability/accessibility of content on the Internet in a community does not equal acceptance of that content. The appellate court thus agreed with the lower court finding "that the testimony Adams wished to present regarding the accessibility of comparable materials online was not relevant to the determination of contemporary community standards."¹⁵¹

It is important to note here that the evidence Adams was attempting to introduce was very different, in a critical way, from the evidence that attorney Lawrence Walters wanted to introduce in the now-settled case of Clinton Raymond McCowen in Pensacola, Florida, discussed above. In particular, Adams' Internet-based evidence only dealt with the accessibility of Internet material via search engines in a community, while Walters wanted to do more. In particular, he wanted to demonstrate that the Internet search engines in an identified community were actually used by members of that community to search for specific material. As he told *The New York Times*, Walters wanted to show that residents of Pensacola "are at least as interested in group sex and orgies as they are in apple pie."¹⁵²

Walters' intended comparables approach thus might be simplified into the following formula:

more palatable activity for millions of people, most of whom would never have considered going to an adult movie theater either by themselves or with a spouse or friend").

¹⁴⁸ *United States v. Adams*, No. 08-5261, 2009 U.S. App. LEXIS 16363, at 5 (4th Cir. July 24, 2009).

¹⁴⁹ *Id.* at 6.

¹⁵⁰ *Id.* at 3.

¹⁵¹ *Id.* at 7-8.

¹⁵² Richtel, *supra* note 139, at A1.

access + actively seeking out = acceptance

In this formula, the access to sexually explicit content that is provided by the Internet to a given community is actually used by the members of that community. The active searching for content, in turn, demonstrates the community's acceptance of material that is sought out, particularly when it is sought out far more than other terms (i.e., "apple pie" with benign meanings). At least that seems to be the logic.

In email correspondence with attorney Lawrence Walters that was specifically generated and collected by the authors for exclusive use with this article, Walters explained, in much more detail than did *The New York Times* article, about his *McCowen* strategy:

Google Trends¹⁵³ information showed helpful comparisons by geographic area. It showed that 'orgies' were [sic] searched more often in Pensacola than 'apple pie' for example.

While that was a good start, we wanted the actual statistical numbers underlying these comparisons from Google. The actual numbers were not part of the charts provided by the Google Trends software. We wanted to be able to show that X-Thousand people looked for orgies in September, [sic] 2006, versus X-Thousand people who looked for apple pie. That was the nature of the information sought by the subpoena . . . We never sought any personally identifiable information regarding the Google users. It was enough that they were listed as being from Pensacola—which was within the relevant 'community' as determined by the court. Therefore, there was never any concern over privacy rights. No private information would need to be produced in order to show users looked for one subject versus another.¹⁵⁴

Two potential problems, however, with the Walters approach come to mind: first, the feasibility, upon either force of subpoena or voluntary disclosure, of obtaining community-specific data from search-engine companies; and second, the privacy expectations of the members of the community whose search histories (even though not perhaps personally revealed) are disclosed in the aggregate.

¹⁵³ See generally About Google Trends, <http://www.google.com/intl/en/trends/about.html> (last visited Mar. 10, 2010) ("With Google Trends, you can compare the world's interest in your favorite topics. Enter up to five topics and see how often they've been searched on Google over time. Google Trends also shows how frequently your topics have appeared in Google News stories, and in which geographic regions people have searched for them most.").

¹⁵⁴ E-mail from Lawrence G. Walters, former managing partner of Weston, Garrou, Walters & Mooney and current managing partner of Walters Law Group, Altamonte Springs, Fla., to Clay Calvert, Brechner Eminent Scholar in Mass Communication, University of Florida, Gainesville, Fla. (Aug. 18, 2009, 16:09:22 EST) (on file with the authors).

Walters, in fact, served Google “with a subpoena seeking more specific search data, including the number of searches for certain sexual topics done by local residents.”¹⁵⁵ In particular the subpoena duces tecum for trial filed by Walters and served on the record custodian for Google, Inc. in Sacramento, California, sought:

The actual number of user searches for the terms “orgy,” “bukkake,” “group sex,” “apple pie,” “ethanol,” and “watermelon” conducted by residents of Pensacola, Florida, and its surroundings during the past two (2) years. This data is believed reasonably available through Google, Inc.’s, “Google Trends,” search feature.¹⁵⁶

If the two potential hurdles suggested above are overcome—Walters, as noted above, contends that privacy is not an issue¹⁵⁷—then it seems that Walters’ Internet efforts to demonstrate community standards for actual searches for comparable content might have a chance of passing evidentiary muster.

A review of both federal and state cases reveals that the Fourth Circuit, in *Adams*, is not the only appellate-level court that considered the admissibility of Internet-based evidence on the issue of contemporary community standards. In *Burden v. Texas*,¹⁵⁸ the Texas Court of Criminal Appeals considered whether or not it was improper for the trial court judge to have excluded the testimony of an expert witness named Stanley Wilder in the 1996 obscenity prosecution of the owner of a Dallas adult video center.¹⁵⁹ Outside the presence of the jury:

Wilder testified that there were 225,000 sexually oriented Internet sites and that anybody with a computer and modem could access those sites. He testified that the Internet sites were available at the Dallas Public Library, but that he did not know of any efforts by library personnel to censor access to the Internet.¹⁶⁰

The Texas Court of Criminal Appeals began its review of the comparables doctrine by noting that while “comparable materials to the allegedly obscene material may be relevant to the issue of contemporary community standards,”¹⁶¹ they are not necessarily admissible as “the trial court has the inherent discretion to limit the quantum and quality of this evidence.”¹⁶² The court adopted a two-part evidentiary test for comparables akin to the one described earlier in this section, opining that:

¹⁵⁵ Richtel, *supra* note 139, at A1.

¹⁵⁶ Subpoena Duces Tecum for Trial at 1, *Florida v. McCowen*, No. 2007-CF-000823-A (Fla. Cir. Ct. filed June 18, 2008).

¹⁵⁷ *Supra* note 154.

¹⁵⁸ 55 S.W.3d 608 (Tex. Crim. App. 2001).

¹⁵⁹ *Id.* at 611.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 615.

¹⁶² *Id.*

[W]hen a defendant seeks to admit comparable materials in an effort to demonstrate contemporary community standards, the defendant must show: 1) there is a reasonable resemblance between the proffered comparable materials and the allegedly obscene materials; and 2) there is a reasonable degree of community acceptance of the proffered comparable materials.¹⁶³

Applying this rule, the Texas Court of Criminal Appeals determined that the exclusion of Wilder's Internet evidence was proper. Why? Because, as the court put it—and as the title of this article reflects—“the *availability* of similar materials through library computers does not show *acceptance*.”¹⁶⁴ The defendant's expert had “made no showing that the community accepted the images available through the library's computers, only that such images were available.”¹⁶⁵

Not only did the court in *Burden* find that the second prong of its two-part evidentiary test was not met, but also that the first prong was not satisfied. It wrote that the defendant's expert failed:

[T]o show a reasonable resemblance between many of the proffered images and the videotape. For example, a number of the Internet images that were shown to the court are just the banners of Internet sites. Most of these banners have no pictures and instead have only the name of the particular Internet site; no sexual activity is depicted.¹⁶⁶

Finally, during the 2008 trial of *United States v. Little* discussed earlier in Part I, Judge Susan Bucklew allowed the defense to use an in-court Google search engine demonstration conducted on behalf of the defense by George Scott.¹⁶⁷ As reported by Mark Kernes, a senior editor of *Adult Video News* who covered the trial:

Scott testified that he had conducted a number of Internet searches, which he recreated in the courtroom, using search terms related to the charged material. For instance, one Google search included “pissing,” “porn” and “video” and specifically excluded (as did all the searches) “trial,” “juror” and “Max Hardcore,” in order to eliminate all hits related to the current trial. That search brought up roughly 1.7 million pages, while “fisting,” “porn” and “video” brought up 1.98 million. By contrast, a search for Heismann trophy winner “Tim Tebow” and “video” brought up just 306,000 pages; “David Cook” plus “American Idol” plus “video” brought 1.5 million pages; and the big “winner,” “Rolling Stones,” brought up

¹⁶³ *Id.* at 616.

¹⁶⁴ *Id.* (emphasis added).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Kernes, *supra* note 88.

2.1 million. Scott said he had performed similar searches at a university library and a public library in the area, and had gotten similar results.¹⁶⁸

Without issuing a written ruling, Judge Bucklew allowed this evidence into court, but, importantly, she specifically denied the request of Little's attorneys to instruct the jurors, at the close of arguments, "that the jury had a right to consider, as part of the 'community,' material available over the Internet."¹⁶⁹ This failure to instruct the jury that it could consider as relevant Scott's testimony and Google search essentially rendered nugatory all of his in-court testimony and presentation.

In summary, the use of a comparables argument in obscenity cases, in an effort to help identify contemporary community standards, has been allowed by courts in obscenity prosecutions involving traditional forms of media, like magazines and movies, provided that certain foundational steps of similarity, availability and acceptance are first satisfied when the defense counsel initially proffers the evidence. Courts only now are starting to consider the viability of Internet-based evidence concerning the availability and acceptance of content that can be searched for and downloaded on the Web in order to prove community standards.

When considering the viability of such searching-for-comparable evidence on the Internet, the 2009 appellate court opinion in *Adams* seems to have it correct that mere accessibility on the Internet does not also mean community acceptance. Likewise, the Texas appellate court in *Burden* also was correct in rejecting evidence when all that it proved was mere availability on the Internet. Just because something is "out there" does not mean that it has, as the courts have put it in traditional-media obscenity cases, "a reasonable degree of community acceptance."¹⁷⁰

In contrast, the approach that attorney Lawrence Walters intended to use in *McCoven* seems far more likely to win judicial approval. Why? It actually attempts to demonstrate the use and deployment of search engines in a given community for certain sexual content, with that use—especially when considered in comparison with the use of the same search engine in that same community for non-sexual, benign terms—seems to be probative of acceptance in the community. Unfortunately, that case settled before trial, so there are no judicial rulings on point.

IV. CONCLUSION

The *Miller* test is more than thirty-five years old,¹⁷¹ but developments and changes are now taking place in courtrooms that affect its continuing viability. In particular, this article has demonstrated that the taken-as-a-whole requirement may be in some jeopardy, as at least two courts—one in 2008 and one in 2009—have allowed

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Missouri v. Cooley*, 766 S.W.2d 133, 139 (Mo. Ct. App. 1989) (citing *United States v. Manarite*, 448 F.2d 583, 593 (2d Cir. 1971)).

¹⁷¹ *Miller v. California*, 413 U.S. 15 (1973).

the prosecution to get away with only showing jurors selected portions of the works in question. The other change addressed here is driven by technology, with the Internet forcing judges to consider a new twist on the traditional comparables argument that defense attorneys sometimes use to prove contemporary community standards. Pro-prosecution rulings in this area have been handed down in both *Adams* and *Burden*. And while Judge Bucklew in *Little* allowed Internet-based search evidence to come into court, she refused to instruct the jury that it could—not even that it must—consider it as relevant of community standards.

This article has attempted to demonstrate the multiple problems that exist in allowing prosecutors to play or show only portions of a movie. It has argued that the *Adams*' proportionate-portion approach is unworkable and wrong. Conversely, it has suggested some courts are getting it right on the issue of Internet-based searches for comparables when they exclude evidence that merely shows that certain content can be found online by using a search engine in a given community. The traditional comparables requirements of similarity, availability, and acceptance require something more—something that attorney Lawrence Walters hoped to prove through Google's data on how many people in a given community actually sought out the material in question.

While the U.S. Supreme Court is no longer in the business of regularly hearing obscenity cases as it once was, it may be time for the Court to revisit the *Miller* test and to reassess the work-as-a-whole requirement and to consider whether Internet-based comparables arguments about contemporary community standards are viable in a digital online world the High Court never could have imagined when it adopted *Miller* back in 1973. Until such time, lower courts will be left to wrestle with these issues, with some seeming to clearly sidestep *Miller* on the taken-as-a-whole requirement in contravention of the high court's admonishment in 2002 that this was an essential rule of First Amendment jurisprudence.¹⁷²

¹⁷² See *supra* text accompanying note 47.



The NBA and the Single Entity Defense: A Better Case?

Michael A. McCann*

TABLE OF CONTENTS

I. INTRODUCTION	40
II. AN OVERVIEW OF THE NBA AND ITS OPERATIONS	41
<i>A. The NBA and Its Associated Leagues</i>	41
<i>B. The NBA and Its Relationship with the NBPA</i>	44
<i>C. The Collaboration and Competition of the NBA</i>	47
III. THE NBA AND ITS RELATIONSHIP TO FEDERAL ANTITRUST LAW	52
<i>A. The NBA as a Joint Venture</i>	52
<i>B. The NBA's Aspirations for Single Entity Recognition: The Role of American Needle v. NFL</i>	54
<i>C. Does the NBA Have a Stronger Argument for Single Entity Recognition than the NFL?</i>	57
IV. CONCLUSION	61

* Associate Professor of Law, Vermont Law School; Legal Analyst and *SI.com* Columnist, *Sports Illustrated*; Co-Founder, Project on Law and Mind Sciences at Harvard Law School; Distinguished Visiting Hall of Fame Professor of Law, Mississippi College School of Law. I am grateful to Christopher Lund, David Katz, Jeffrey Mogan, and Ryan Rodenberg for their outstanding comments. I also thank Patrick Malloy and Jonathan Hamlin for their excellent research assistance. This Article raises similar issues that I discuss in a companion piece, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 *Yale L.J.* 726 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1471515.

I. INTRODUCTION

This Article explores the relationship between the National Basketball Association (“NBA”), its independently-owned teams, and associated corporate entities; including the Women’s NBA (“WNBA”), NBA Properties, NBA Developmental League (“D-League”), NBA China, and single entity analysis under section 1 of the Sherman Act.¹ Section 1 chiefly aims to prevent competitors from combining their economic power in ways that unduly impair competition or harm consumers, be it in terms of raised prices, diminished quality, or limited choices. Single entities are exempt from section 1 scrutiny because they are considered “one,” rather than competitors, and thus their collaboration does not implicate anti-competitive concerns. Although single entity status has traditionally been limited to parents and their wholly owned subsidiaries, recent decisions suggest that other business arrangements may enjoy single entity status.

In *American Needle v. NFL*,² for which the Court heard oral arguments on January 13, 2010, the Supreme Court will decide whether the National Football League (“NFL”), its teams, and associated corporate entities, constitute a single entity. Other leagues, including the NBA, may be impacted by the Court’s decision, which is expected by the summer of 2010. If the NBA gained single entity status, it could potentially execute exclusive contracts with video game companies and apparel companies, restrain players’ salaries and employment autonomy, and impose heightened age restrictions on amateur players who seek employment in the NBA, all without concern for section 1 scrutiny.

In a recent feature in the *Yale Law Journal*, I discourage the Court from recognizing the NFL as a single entity but recommend that Congress consider targeted, sports league-related exemptions from section 1.³ In this Article, I survey whether the NBA’s globalized business agenda and the league’s exposure to competition from foreign professional basketball leagues *necessitate* that NBA teams act in unison and with a “shared consciousness.”⁴ The necessity of cooperation, at least for certain international endeavors, may distinguish NBA teams from teams in the NFL and possibly those in the two other “Big Four” professional sports leagues—Major League Baseball (“MLB”) and the National Hockey League (“NHL”)⁵—which remain more anchored to domestic operations. To the extent

¹ 15 U.S.C. § 1 (2006). Section 1 provides, in relevant part, that “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” *Id.*

² 174 L. Ed. 2d 575 (2009).

³ See Michael A. McCann, *American Needle v. NFL: An Opportunity to Reshape Sports Law*, 119 YALE L.J. 726 (2010) [hereinafter McCann, *An Opportunity to Reshape Sports Law*].

⁴ “Shared consciousness,” in the context of professional sports leagues, refers to a symbiotic arrangement between a league and its teams. The arrangement exists because it maximizes business interests and promotes the league’s sustainability. *Id.* at 751.

⁵ *N. Am. Soccer v. Nat’l Football League*, 670 F.2d 1249, 1253 (2d Cir. 1982) (classifying the NFL, NBA, MLB, and NHL as the “major” professional sports leagues). As a point of context, Major League Baseball already enjoys a limited exemption from section 1, but the

Congress considers legislative exemptions for professional sports leagues, the experience of the NBA, a trailblazer in promoting a league product abroad, may lend insight on how antitrust law should regulate leagues in the years ahead.

II. AN OVERVIEW OF THE NBA AND ITS OPERATIONS

A. The NBA and Its Associated Leagues

The NBA began in 1949 as an unincorporated association of twelve privately owned teams.⁶ As is often the case with nascent leagues, the NBA's early years were turbulent, with modest attendance and several teams folding soon after their formation.⁷ The league stayed afloat in part because franchise owners ceded a great deal of authority to the league's first commissioner, Maurice Podoloff, an attorney with a proficiency in marketing and advertising,⁸ and because those owners realized that their collective and individual success depended on unity.⁹

The league's fortunes would improve in the 1960s. Propelled by Bill Russell, Wilt Chamberlain, Bob Cousy, and other marketable stars, as well as a national television contract with ABC, the NBA became a nationally-relevant sports league.¹⁰ In the following decades, other popular players, most notably Larry Bird, Magic Johnson, and Michael Jordan, would help the NBA become one of the "big four" professional leagues. Franchise values have soared in the last three decades: the average price of an NBA franchise increased from \$12 million in 1983 to \$114 million in 1993 to \$200

exemption does not extend to matters impacting players' employment conditions and may not extend to licensing. See McCann, *An Opportunity to Reshape Sports Law*, *supra* note 3, at 771–72.

⁶ See Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 117 (2004).

⁷ See GEORGE W. SCULLY, *THE MARKET STRUCTURE FOR SPORTS* 16–18 (1995); PAUL C. WEILER, *LEVELING THE PLAYING FIELD: HOW LAW CAN MAKE SPORTS BETTER FOR FANS* 236 (2000).

⁸ See WALTER LAFEVER, *MICHAEL JORDAN AND THE NEW GLOBAL CAPITALISM* 40 (2002).

⁹ See Colin J. Daniels & Aaron Brooks, *From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority*, 10 TEX. REV. ENT. & SPORTS L. 23, 28–29 (2009); see also PAUL D. STAUDOHR, *PLAYING FOR DOLLARS: LABOR RELATIONS AND THE SPORTS BUSINESS* 103 (1996) (noting that Podoloff receives credit for "holding the league together in the difficult early years").

¹⁰ See WILLIAM JOSEPH BAKER, *SPORTS IN THE WESTERN WORLD* 317 (1988).

million in 1999 and to \$367 million in 2009.¹¹ The NBA is also considered the most successful U.S. sports league overseas in attracting fans and their money.¹²

David Stern, who has served as NBA commissioner since 1984, deserves considerable credit for the league's success. Widely regarded as a savvy businessperson, Stern has generated significant fan interest in the NBA's product and has earned the trust of NBA owners.¹³ Indeed, in generating \$3.2 billion a year in revenue,¹⁴ the NBA is undoubtedly the world's leading basketball league.¹⁵ To be sure, Stern's leadership style—described by some as “dictatorial” or “autocratic”—has received criticism,¹⁶ but his leadership has resulted in a highly successful league.

In recent years, the NBA has expanded its business operations to include new basketball leagues that, though distinct, remain under the control of Stern and the NBA. The WNBA is perhaps most illustrative. Founded in 1996 as a subsidiary of the NBA, the WNBA currently features twelve teams, half of which are owned by NBA teams, with the other half owned by persons who lack equity in NBA teams.¹⁷ As a result, the WNBA is a partially owned, rather than wholly owned, subsidiary of the NBA. The NBA devised the WNBA with the stated purpose of embodying a

¹¹ See DANIEL R. MARBURGER, STEE-RIKE FOUR! WHAT'S WRONG WITH THE BUSINESS OF BASEBALL? 99 (1997) (noting average value of NBA franchises in 1983 and 1993); Jeffrey E. Garten, *The NBA Needs to do Some Globetrotting*, BUS. WK., July 19, 1999, at 19 (noting average value of NBA franchises in 1999); Kurt Badenhausen, *The Business of Basketball*, FORBES.COM, Dec. 9, 2009, <http://www.forbes.com/2009/12/09/nba-basketball-valuations-business-sports-basketball-values-09-intro.html> (noting average value of NBA franchises in 2009).

¹² See Richard Sandomir, *NFL Pulls Plug on its Own League in Europe*, N.Y. TIMES, June 30, 2007, at D1.

¹³ See Jimmy Smith, *Silver Salute*, TIMES-PICAYUNE, Feb. 1, 2009, at Sports 1; see also, THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 297 (2000) (discussing how Stern has understood and exploited the globalization of commerce); BERNARD JAMES MULLIN ET AL., SPORTS MARKETING 2 (2007) (describing “brilliant” marketing ideas of Stern).

¹⁴ See *Sports Industry Overview*, PLUNKETT RESEARCH, <http://www.plunkettresearch.com/Industries/Sports/SportsStatistics/tabid/273/Default.aspx> (last visited Jan. 26, 2010) (comparing favorably NBA revenue to revenue generated by four major sports leagues).

¹⁵ See *Harlem Wizards Entm't Basketball, Inc. v. NBA Props.*, 952 F. Supp. 1084, 1086 (D.N.J. 1997) (describing the NBA as “the world's preeminent professional basketball league”); *Hall v. Nat'l Basketball Ass'n*, 651 F. Supp. 335, 336 (D. Kan. 1987) (“The NBA and its member teams comprise the premier professional basketball league in the United States.”).

¹⁶ See, e.g., Dan Patrick, *Just My Type*, SPORTS ILLUSTRATED, June 23, 2008, at 28 (quoting Ralph Nader, who calls Stern “autocratic”); King Kaufman, *Sports Daily*, SALON.COM, May 16, 2007, <http://www.salon.com/sports/col/kaufman/2007/05/16/wednesday/index.html> (describing Stern as a “dictator”); see also Sekou Smith, *NBA's Savior or Dictator?*, INDIANAPOLIS STAR, Dec. 5, 2004, at 4C (examining the competing arguments concerning Stern's leadership style).

¹⁷ See Ben Collins, *Trying to Ensure a Bright Future*, BOSTON GLOBE, June 6, 2009, at 1; *WNBA Enterprises, LLC*, BUS. WK., <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=28093080> (last visited Jan. 26, 2010); Mark Bechtel et. al, *For the Record*, SPORTS ILLUSTRATED, Nov. 30, 2009, at 22 (noting that Sacramento Monarchs folded in November 2009, reducing the number of WNBA teams from thirteen to twelve).

completely centralized entity, with league ownership of teams and with WNBA players subject to rules unilaterally imposed by the WNBA.¹⁸ In 2002, however, WNBA players chose to unionize and, as mentioned above, the league now has individualized ownership groups.¹⁹ The WNBA and NBA nonetheless remain closely connected, with league offices housed in the same building in New York City and with frequent collaboration on marketing and sponsorship arrangements.²⁰

The NBA's recent investment in minor league basketball is also indicative of an expanding league. In 2001, the NBA created the D-League in order to provide a minor league for NBA teams and their players.²¹ Though thirteen of the sixteen D-League teams are independently owned,²² the NBA by and large controls D-League operations, and most NBA teams share D-League teams for purposes of player development.²³

NBA China is a similar extension of the NBA's business model, which is based on approximately 10% of league revenues being generated outside the U.S.²⁴ Formed in 2008, NBA China is a partially owned subsidiary of the NBA, with minority interests held by ESPN and several financial institutions.²⁵ The NBA and its teams

¹⁸ See LISA PIKE MASTERALEXIS ET AL., PRINCIPLES AND PRACTICE OF SPORT MANAGEMENT 208 (2008); GLENN M. WONG, THE COMPREHENSIVE GUIDE TO CAREERS IN SPORTS 78 (2008); Edward Mathias, Comment, *Big League Perestroika? The Implications of Fraser v. Major League Soccer*, 148 U. PA. L. REV. 203, 221–22 n.107 (1999).

¹⁹ See Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW. J. L. & SOC. POL'Y 1, 9 (2008) (discussing unionization of WNBA players); Lacie L. Kaiser, *The Flight from Single-Entity Structured Sport Leagues*, 2 DEPAUL J. SPORTS L. CONTEMP. PROBS. 1, 11 (2005) (discussing WNBA movement away from a single entity structure).

²⁰ See WONG, *supra* note 18, at 78.

²¹ In addition to developing players, the D-League is also designed to provide coaches, trainers, and other officials with experience in professional basketball. See Barry Lewis, *Tulsa Adds New Professional Basketball Franchise*, TULSA WORLD, Mar. 22, 2005, at B1.

²² See Ron Chimelis, *Armor's Milligan Out*, REPUBLICAN, Dec. 10, 2009, at B01 (noting that only three D-League teams are owned by NBA teams).

²³ See Mike Baldwin, *Owning 66ers Benefits Thunder*, OKLAHOMAN, Nov. 22, 2009, at 6B; Steve Carp, *Fan Turnout Strong for Summer League*, LAS VEGAS REV.-J., July 20, 2009, at 1C. Although the NBA dictates the D-League's policies and procedures, thirteen of the sixteen D-League teams are owned by local owners, with only three D-League teams owned by NBA teams. See Mike Snider, *Snide Remarks*, NBA.COM, Mar. 10, 2009, at http://www.nba.com/dleague/idaho/Stampede_Blog.html.

²⁴ See Mark Leftly, *Basketball Takes a Shot Across The Pond*, INDEP., Oct. 11, 2009, at 82.

²⁵ *NBA Announces Formation of NBA China*, Jan. 14, 2008, NBA.COM, http://www.nba.com/news/nba_china_080114.html; see also FRANK P. JOZSA, JR., GLOBAL SPORTS: CULTURES, MARKETS AND ORGANIZATIONS 92 (2008) (discussing how NBA China evaluates, initiates, and controls the NBA's image in China); *Sports Leagues Go Global*, METROPOLITAN CORP. COUNS., Feb. 2008, at 6 (providing comments by Jon Oram, a partner at Proskauer Rose and attorney for the NBA, on ownership and management structure of NBA China and NBA's investment in China); Adam Thompson & Alan Paul, *NBA Uses Local Allure to Push Planned League in China*, WALL ST. J., Jan. 11, 2008, at B1 (providing additional detail on NBA China).

have quickly, and considerably, invested in marketing NBA-sponsored basketball to Chinese consumers. From 2004 to 2009, the NBA opened offices in Beijing, Shanghai, Taiwan, and Hong Kong, and the number of full-time NBA employees based in China increased from three to more than 145.²⁶ Also, working alongside the Chinese government and sports complex developers, the NBA expects to build up to twelve NBA-style arenas across China.²⁷

China reflects a sensible locale for league expansion, as it is the NBA's largest market outside of the United States, contributing approximately 30% of the NBA's international income.²⁸ The NBA expects that NBA China will generate significant revenue and that it, along with an increasing presence of international players in the NBA,²⁹ will serve as a trend-setter in the NBA's global ambitions.³⁰

B. *The NBA and Its Relationship with the NBPA*

Since the formation of the league, NBA players have been aware of their contributions to the league's financial success. They have also been aware that when compared to individual teams, the league, and players in general, star NBA players tend to generate disproportionate revenue for the NBA.³¹ Naturally, NBA players have demanded compensation for their contributions. To advance those demands, NBA players formed a union, the National Basketball Players' Association (NBPA), in 1954.³² The NBPA serves as the exclusive bargaining representative of all NBA

²⁶ See John Reid, *China is Becoming a New Hoops Frontier*, TIMES-PICAYUNE, Sept. 20, 2009, at Sports 1.

²⁷ See David Barboza, *China Offers Fertile Ground for Branding*, INT'L HERALD TRIB., Dec. 8, 2009, at 23. While China contributes 30% of the income received by the NBA through international sources, only 10% of the NBA's total revenue derives from international sources. See Leftly, *supra* note 24 (noting that 10% of total NBA revenue derives from international sources).

²⁸ See Samantha Marshall, *NBA's Big Plans Hinge on Beijing*, CRAIN'S N.Y. BUS., July 7, 2008, at 3.

²⁹ See FRIEDMAN, *supra* note 13, at 297 (discussing the NBA's use of global commerce to expand its product); GIORGIO GANDOLFI, *NBA COACHES PLAYBOOK: TECHNIQUES, TACTICS, AND TEACHING POINTS* 135 (2008) (noting that nearly 20% of NBA players were born outside of the U.S.); Benjamin Hochman, *NBA Teams Continue to Look Outside U.S.*, TIMES-PICAYUNE, June 21, 2004, at Sports 2 (discussing increase in percentage of international players in the NBA).

³⁰ Michael Lee, *The NBA in China: Opening a Super Market*, WASH. POST, Oct. 18, 2007, at A1.

³¹ To illustrate, such legendary stars as Michael Jordan, Larry Bird, and LeBron James have been shown to significantly increase ticket sales, including for away games. See ANDREW ZIMBALIST, *THE ECONOMICS OF SPORT* 569 (2001). Also consider that during the 1990s, items associated with the Chicago Bulls and Michael Jordan accounted for nearly half of NBA Properties' revenue. *Id.* at 575. Star NBA players are thus considered irreplaceable or extremely difficult to replace. See SCOTT ROSNER & KENNETH L. SHROPSHIRE, *THE BUSINESS OF SPORTS* 204 (2004).

³² See Paul A. Fortenberry & Brian E. Hoffman, *Illegal Muscle: A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports' CBAs That Led to the Steroid Controversy*, 5 VA. SPORTS & ENT. L.J. 121, 131 (2006).

players and negotiates a bevy of employment related conditions, including the league's salary structure, rules of conduct, and procedures for discipline.³³

Negotiation between the NBA and NBPA is crucial for the league's success and for the league's capacity to avoid antitrust rebuke. Namely, by collectively bargaining rules with the NBPA, the NBA ensures that those rules are exempt from section 1 of the Sherman Act. Section 1 bars collaborations by competitors—in this context, NBA teams—that unduly harm competition and consumers.³⁴ The exemption from section 1 derives from the non-statutory labor exemption, which was borne from several Supreme Court decisions³⁵ and dictates that if a bargained rule concerns a mandatory subject of bargaining (most notably, players' salaries and working conditions)³⁶ and primarily affects the owners and players (as opposed to third parties, like media), it is exempt from section 1 scrutiny.³⁷ Rules unilaterally imposed by the NBA, in contrast, are subject to section 1 scrutiny, which has invalidated a number of unilaterally-imposed NBA rules, perhaps most notably in the context of age eligibility restrictions.³⁸

The relationship between the NBA and NBPA has seen its highs and lows. Its nadir occurred in 1998, when the two bargaining units were unable to agree on revisions to the structure of players' salaries.³⁹ The lack of agreement prompted the

³³ See *Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n*, No. 04 Civ. 9528, 2004 U.S. Dist. LEXIS 26244 (S.D.N.Y. Jan. 3, 2005) (describing the NBPA as the “exclusive bargaining representative of all NBA players”). For background on the types of rules bargained for by the NBPA, see NBPA.com, About the NBPA, http://www.nbpa.com/about_nbpa.php (last visited, Jan. 27, 2010).

³⁴ Sherman Act, 15 U.S.C. § 1 (2006) (providing in pertinent part: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”). For professional sports, section 1 scrutiny normally involves rule of reason, which entails a weighing of pro- and anti-competitive effects. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235–38 (1996) (explaining that it would be difficult and illogical to exclude all “competition-restricting agreements” from collective bargaining); see also *Five Smiths, Inc. v. Nat'l Football League Players Ass'n*, 788 F. Supp. 1042, 1045 (D. Minn. 1992) (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) for discussion on rule of reason).

³⁵ See *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657, 664–65 (1965).

³⁶ See *Clarett v. Nat'l Football League (Clarett I)*, 306 F. Supp. 2d 379, 392–93 (S.D.N.Y. 2004).

³⁷ See *Mackey v. Nat'l Football League*, 543 F.2d 606, 623 (8th Cir. 1976).

³⁸ *Denver Rockets v. All-Pro Mgmt.*, 325 F. Supp. 1049, 1062 (C.D. Cal. 1971). For a discussion of Denver Rockets, see Nicholas E. Wurth, *The Legality of an Age-Requirement in the National Basketball League After the Second Circuit's Decision in Clarett v. NFL*, 3 DEPAUL J. SPORTS L. CONTEMP. PROBS. 103, 109–11 (2005). A collectively-bargained rule, however, is exempt from section 1 analysis. See, e.g., *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987) (holding that while a salary cap would normally violate section 1 because of its anti-competitive effects, it is exempt from section 1 analysis if collectively-bargained).

³⁹ For a helpful overview of the NBA lockout, see Bertrand-Marc Allen, “*Embedded Contract Unionism*” in *Play—Examining the Intersection of Individual and Collective Contracting in the National*

NBA to lock out the players.⁴⁰ The lockout lasted from July 1998 to January 1999, when the NBPA acquiesced to most of the NBA's demands.⁴¹ Popularity in the NBA suffered as a result of the lockout.⁴² Similar fallout could be experienced next year. Although there remains considerable time for negotiations with the NBPA, the NBA has until December 15, 2010 to decide to extend the current collective bargaining agreement into the 2011–12 season.⁴³ For a variety of reasons, the league will probably not extend the CBA, meaning the NBA could lockout the players in 2011.⁴⁴

A more constructive era in the relationship between the NBA and NBPA occurred during the early 1980s. At the time, the NBA was experiencing financial woes caused in part by player payroll disparities among wealthier and less affluent clubs.⁴⁵ In order to mollify these disparities, NBA owners sought, and obtained through collective bargaining, a cap on team payrolls (“salary cap”).⁴⁶ The 1983 collective bargaining agreement included such a cap, which restricted the aggregate salaries paid by each NBA team to its players.⁴⁷ The salary cap has remained a feature of subsequent collective bargaining agreements and is generally considered to have promoted competitiveness and parity.⁴⁸ The NBPA has acceded to a cap in part

Basketball Association, 35 CONN. L. REV. 1, 6–15 (2002); see also Phil Taylor & Jackie MacMullan, *To the Victor Belongs the Spoils*, SPORTS ILLUSTRATED, Jan. 18, 1999, at 48 (describing NBA Commissioner David Stern as “w[inning] a landmark victory” and obtaining most of his demands).

⁴⁰ See Allen, *supra* note 39, at 10.

⁴¹ *Id.* at 11.

⁴² See James B. Perrine, *Media Leagues: Australia Suggests New Professional Sports Leagues for the Twenty-First Century*, 12 MARQ. SPORTS L. REV. 703, 750 (2002) (discussing impact of lockout on viewership of NBA games).

⁴³ See Chris Colston, *Marathon Season Takes Toll*, USA TODAY, Apr. 30, 2009, at 1C.

⁴⁴ *Id.*; see also Frank Hughes, *NBA Expected to Take Hard Line in First Proposal to Union for New CBA*, SI.com, Jan. 29, 2010, http://sportsillustrated.cnn.com/2010/writers/frank_hughes/01/29/labor.strike/index.html?eref=sihp (detailing demands of the NBA, which expects major economic concessions from the NBPA in the next CBA). As a technical matter, the current collective bargaining agreement contains no strike/no lockout provisions, meaning a lockout could not occur until the agreement expires. See Nat'l Basketball Ass'n Collective Bargaining Agreement, art. XXX, § 1–2, available at <http://www.nbpa.org/sites/default/files/ARTICLE%20XXX.pdf>

⁴⁵ See Fran Blinbury, *Channel Surfing Won't be Enough*, HOUS. CHRON., Apr. 16, 1994, Sports, at 1.

⁴⁶ See Alan M. Levine, *Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports Leagues*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 243, 289 (1995) (discussing how the NBA was on the “brink of financial ruin”).

⁴⁷ See Bappa Mukherji, *The New NBA Collective Bargaining Agreement: The Changing Role of Agents in Professional Basketball*, 2 VAND. J. ENT. L. & PRAC. 96, 97 (2000).

⁴⁸ See Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 686 (2d Cir. 1994) (noting continued presence of the salary cap in CBAs between the NBA and NBPA); Tim Brown, *Still a Dynasty, or Dead Ringers?*, L.A. TIMES, Dec. 10, 2002, at Sports 1 (noting that the NBA's salary cap has enjoyed some success in promoting a more competitive product).

because the NBA guarantees that players receive a percentage of the NBA's "gross revenues," which include gate receipts, local and national television and radio revenue and preseason and postseason revenue.⁴⁹

The presence of substitute professional opportunities for male basketball players has impacted the relationship between the two bargaining units. To illustrate, the NBPA enjoyed considerable bargaining power during the late 1960s, when the American Basketball Association, a now defunct rival of the NBA, pursued NBA players. The pursuit led to a more competitive market for player employment and more bargaining power for the NBPA.⁵⁰

As recently discussed by Professor Marc Edelman, a burgeoning international market for men's basketball might yield similar bargaining enhancements for NBA players.⁵¹ Indeed, over the last several years, there has been an increase in international basketball opportunities offering compensation comparable to that of the NBA.⁵² Several U.S. players have even selected contracts to play on European teams instead of NBA teams.⁵³ In recent years the NBA has lost between 9% and 15% of its players to foreign teams, according to Edelman.⁵⁴ Unrestrained by salary caps, international teams may soon pursue the NBA's very best players with offers that, in terms of financial compensation, far exceed what NBA teams can offer under the league's salary cap.⁵⁵

C. The Collaboration and Competition of the NBA

In negotiating with the NBPA, and more generally in its operations, the NBA considers the sometimes collaborative, but sometimes competing, interests of NBA owners and their franchises. To be sure, NBA owners must agree on certain rules and procedures in order to operate a functional sports league. Game rules are an

⁴⁹ See Alan Greenberg, *NBA Closed Until Dec. 1*, HARTFORD COURANT, Oct. 29, 1998, at C1.

⁵⁰ See Daniel M. Faber, *The Evolution of Techniques for Negotiation of Sports Employment Contracts in the Era of the Agent*, 10 U. MIAMI ENT. & SPORTS L. REV. 165, 176 (1993); see also Robert I. Lockwood, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Frontcourt in the NBA*, 15 SPORTS LAW. J. 137, 149 (2008) (discussing how presence of ABA promoted bargaining leverage for NBA players).

⁵¹ See Marc Edelman, *Does the NBA Still Have "Market Power?" Exploring the Implications of an Increasingly Global Market for Men's Basketball Player Labor*, 41 RUTGERS L.J. (forthcoming 2010). Given that European basketball leagues are not restricted by salary caps, some commentators have mused that European teams will eventually present star NBA star players with employment offers that more than double their potential earnings in the NBA. See, e.g., Marc J. Spears, *Europe Can Reach for Stars: Top NBA Talent May Be Lured Over*, BOSTON GLOBE, Aug. 10, 2008, at C6 (discussing possible employment offers for Kobe Bryant and LeBron James).

⁵² See, e.g., Pete Thamel, *A Top Prospect Picks Europe Over High School and College*, N.Y. TIMES, Apr. 23, 2009, at B14.

⁵³ Sekou Smith, *Childress Headed Back to Greece*, ATLANTA J.-CONST., July 15, 2009, at 1C (mentioning Josh Childress and Jannero Pargo choosing to play in Europe).

⁵⁴ See Edelman, *supra* note 51.

⁵⁵ See Spears, *supra* note 51.

obvious example of necessary collaboration; schedules and types of permissible equipment are others.⁵⁶

Owners also agree on operational devices that, while not “necessary” for NBA basketball, nonetheless advance the league’s collective interests. For instance, NBA owners agree on a salary cap and an entry draft as means of promoting parity, even though some teams would benefit from the capacity to spend more on players’ salaries or to sign any amateur player.⁵⁷

They also choose to equally own and employ a separate corporate entity, NBA Properties, for the exclusive licensing of member teams’ intellectual property rights.⁵⁸ NBA Properties, which shares revenue evenly among the teams,⁵⁹ is clearly not essential for NBA basketball: NBA teams previously chose to license their own intellectual property, and could choose to do so again.⁶⁰ Nevertheless, because of

⁵⁶ Cf. Michael S. Jacobs & Ralph K. Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1, 28 (1971) (reasoning that while individual owners may disagree about particular rules, owners collectively deem those rules necessary for generating league product). As a point of distinction, owners may lack collective accord on the necessity of regulating game *styles*. In Major League Baseball, for instance, Commissioner Bud Selig recently encouraged teams to accelerate the pace of games. Teams which encourage batters to take pitches—and thus wear out pitchers but also prolong games—are especially encouraged to reconsider their style of play. At least one of those teams, the New York Yankees, appears resistant to changing an approach which has generally proven successful. See Ben Walker, *Playoff Sked, Pace of Game Draw MLB Attention*, ASSOCIATED PRESS, Mar. 19, 2010, at <http://nbc.com/sports/msnbc.com/id/35955310/ns/sports-baseball/>.

⁵⁷ Marc J. Yoskowitz, Note, *A Confluence of Labor and Antitrust Law: The Possibility of Union Decertification in the National Basketball Association to Avoid the Bounds of Labor Law and Move into the Realm of Antitrust*, 1998 COLUM. BUS. L. REV. 579, 631 (“The salary cap does not allow the wealthier, larger market teams to create league-wide domination by offering exponentially higher salaries, more attractive locales in which to play, and greater endorsement opportunities”).

⁵⁸ MARK CONRAD, *THE BUSINESS OF SPORTS: A PRIMER FOR JOURNALISTS* 268 (2006); see also Abib Tejan Conteh, *The Right of Publicity in Sports: Athletic and Economic Competition*, 3 DEPAUL J. SPORTS L. CONTEMP. PROBS. 136, 150 (2006) (noting that NBA Properties “is responsible for licensing all forms of fan memorabilia, including replica and authentic team jerseys and apparel, and other souvenirs, such as ‘bobbleheads’ and calendars.”); Brief of Amici Curiae Nat’l Basketball Ass’n & Nat’l Basketball Ass’n Props. in Support of the Respondents, *Am. Needle, Inc. v. Nat’l Football League*, 129 S. Ct. 2859 (2009) (No. 08-661), at 2–3 [hereinafter *NBA Amici Curiae Brief*] (noting that NBA Properties is equally owned by the thirty NBA teams).

⁵⁹ See ROSNER & SHROPSHIRE, *supra* note 31, at 185 (supplying additional background on NBA Properties’ sharing of revenue).

⁶⁰ See *NBA Properties, Inc.*, BUS. WEEK, at <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=4762333> (last visited Feb. 21, 2010) (noting that NBA Properties was founded in 1967—some twenty-seven years after the NBA was formed). NBA Properties enjoys its collective licensing power because each NBA team contractually grants NBA Properties the exclusive right to license most of its intellectual property. The intellectual property, therefore, belong to the teams and is only obtained by NBA Properties through the

their collaborative philosophy, NBA owners deem NBA Properties to be a more advantageous arrangement than individualized licensing ventures.

Similarly, unlike competitors, NBA franchises share certain forms of revenue, including revenue generated by national TV contracts and licensing contracts, without regard for individual teams' contributions.⁶¹ They also embrace a democratic form of rule: the NBA utilizes a Board of Governors, which consists of one representative of each NBA franchise and which, pursuant to the NBA's Constitution, determines the league's business and policy decisions.⁶² Furthermore, with various powers assented to by each NBA franchise, the NBA commissioner very much serves as a centralizing force over NBA teams.⁶³

In other ways, however, NBA owners better resemble competitors. Each NBA game seemingly proves that, as NBA games appear to be genuinely competitive contests between teams that seek to defeat one another. Competition is also detectable in the off-season, when teams compete for free agents, to make trades, and to draft the most talented amateur players so as to improve themselves (as opposed to the league).⁶⁴

In fairness, though, some have questioned the true competitiveness of NBA games and of the NBA in general. Consider allegations by disgraced former NBA referee Tim Donaghy, who recently completed a prison term for his mafia-induced role in fixing NBA games.⁶⁵ Though his allegations have not been corroborated with persuasive evidence,⁶⁶ and though his credibility is highly dubious, Donaghy charges that "top executives of the NBA sought to manipulate games using referees."⁶⁷

assent of those teams. *Chicago Prof'l Sports Ltd. Partnership v. Nat'l Basketball Ass'n*, 754 F. Supp. 1336, 1339 (N.D. Ill. 1991).

⁶¹ ROBERT F. REILLY & ROBERT P. SCHWEIHS, *HANDBOOK OF ADVANCED BUSINESS VALUATION* 374 (1999).

⁶² *Fishman v. Estate of Wirtz*, 807 F.2d 520, 526 (7th Cir. 1986).

⁶³ See Jeffrey Standen, *The Beauty of Bets: Wagers as Compensation for Professional Athletes*, 42 WILLAMETTE L. REV. 639, 649 n.43 (discussing powers of the NBA commissioner to regulate gambling activities).

⁶⁴ E.g., DONALD H. BROWN, *A BEST OF BASKETBALL STORY* 105 (2007) (discussing competition among NBA teams for the employment services of Gilbert Arenas in the 2003 offseason).

⁶⁵ Phil Taylor, *Why is the NBA Getting a Pass in Donaghy, Referee Scandal?*, SI.COM, Dec. 9, 2009, http://sportsillustrated.cnn.com/2009/writers/phil_taylor/12/08/donaghy/index.html.

⁶⁶ While Donaghy's accusations have not been proven, some NBA players and commentators believe there is truth behind them. See, e.g., Steve Bulpett, *Celtics Beat: Ref's Foul Language*, BOSTON HERALD, Dec. 9, 2009, at 64 (quoting Celtic Rasheed Wallace who claims that "now the truth is coming out"); Wallace Matthews, *Stern, Take Donaghy Seriously*, NEWSDAY, Dec. 8, 2009, at A71 (opining that Commissioner Stern would be mistaken to presume that Donaghy is necessarily lying).

⁶⁷ Letter from John F. Lauro to Carol Bagley Ammon, Judge, U.S. District Court E.D.N.Y., Re: U.S. v. Timothy Donaghy, June 10, 2008, available at <http://assets.espn.go.com/media/pdf/080610/donaghy03.pdf>; see also TIM DONAGHY, *PERSONAL FOUL: A FIRST-PERSON ACCOUNT OF THE SCANDAL THAT ROCKED THE NBA* (2009) (expounding upon the accusations).

Donaghy's depiction of the NBA would lead one to believe that the competitiveness of NBA games bears some familiarity to the competitiveness of professional wrestling matches, where the outcomes are pre-determined and much of the "contest" is scripted and choreographed.⁶⁸ Unlike in the professional wrestling context, however, where both wrestlers and wrestling fans understand the scripted elements of their sport, neither NBA players nor NBA fans would be aware of their "script." In theory, both could pursue legal actions against the NBA. Players could refer to obligations of good faith in collective bargaining⁶⁹ and to general contract law principles that make contracts, such as the NBA's Uniform Player Contract, voidable on grounds of fraud and misrepresentation.⁷⁰ Patrons of NBA games and merchandise, in turn, enjoy protection from false advertising and deception under consumer fraud statutes.⁷¹

A less damaging, and perhaps more observable, accusation implicating the competitiveness of NBA games concerns the "tanking" phenomenon, where NBA teams with poor records arguably have incentives to lose games in order to secure a better position in the NBA draft.⁷² M.L. Carr, the former head coach, executive vice president, and director of basketball operations for the Boston Celtics, implied that the Celtics tanked games in the 1996–97 season hoping to draft Wake Forest

⁶⁸ Nathaniel Grow, *A Proper Analysis of the National Football League Under Section One of the Sherman Act*, 9 TEX. REV. ENT. & SPORTS L. 281, 287 (2008) (discussing the feigned competitiveness of professional wrestling).

⁶⁹ See Thomas Brophy, Casenote, *Icing the Competition: The Nonstatutory Labor Exemption and the Conspiracy between the NHL and OHL in NHLPA v. Plymouth Whalers Hockey Club*, 14 VILL. SPORTS & ENT. L.J. 1, 31 (2007) (discussing argument by NHL players that NHL failed to bargain CBA in good faith).

⁷⁰ Jason R. Marshall, *Fired in the NBA! Terminating Vin Baker's Contract: A Case-Study in Collective Bargaining, Guaranteed Contracts, Arbitration, and Disability Claims in the NBA*, 12 SPORTS LAW. J. 1, 33 (2005) (discussing role of misrepresentation in an NBA player contract); see also Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Contract*, 75 NOTRE DAME L. REV. 1681, 1715 (2000) (discussing grounds for voidable contract). But see National Basketball Association Uniform Player Contract § 19 (releasing NBA and NBA teams from any and all claims by player during the term of his contract).

⁷¹ Cf. Paul Finkelman, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball?*, 23 CARDOZO L. REV. 1609, 1625 (2002) (discussing how Major League Baseball and its franchises could commit fraud by advertising that fans can keep home run balls but then confiscating those balls under certain circumstances); Christopher T. Pickens, Comment, *Of Bookies and Brokers: Are Sports Futures Gambling or Investing, and Does it Even Matter?*, 14 GEO. MASON L. REV. 227, 267 (2006) (discussing illegality of point shaving, where teams alter the outcome of games in order to advance a party's betting interests).

⁷² See, e.g., Ian Thomsen, *NBA Looking to Prevent Tanking*, SI.COM, Oct. 28, 2009, http://sportsillustrated.cnn.com/2009/writers/ian_thomsen/10/28/tanking/index.html; Michael McCann, *The Pursuit of Crappyness: Are NBA Teams Tanking Games for Greg Oden and Kevin Durant?*, SPORTS LAW BLOG, Apr. 5, 2007, <http://sports-law.blogspot.com/2007/04/pursuit-of-crappyness-nba-teams-tanking.html>.

University star Tim Duncan with the first pick in the 1997 draft.⁷³ Still, the prevailing view is that NBA games are competitive contests between competing NBA teams. Moreover, even if tanking impacts some games, teams—eyeing better draft position—appear to act as selfish actors when engaged in tanking.⁷⁴ “Tanking” can thus be viewed as selfish and competitive behavior, with teams competing, rather than cooperating, to lose for their own self-interest.

There are less obvious ways in which NBA teams compete, or refrain from collaborating, and they illuminate why NBA owners approach league economic issues from different lenses. For instance, while NBA teams share national TV and licensing revenue, they do not share their local TV revenue or gate revenue;⁷⁵ in fact, teams only share approximately 25% of all revenue.⁷⁶ To illustrate the revenue significance of teams retaining gate receipts, consider that while the average ticket price to Los Angeles Lakers games is \$93, the average ticket price for Memphis Grizzlies games is “just” \$24.⁷⁷ Not surprisingly, the Lakers, with a net worth of \$607 million,⁷⁸ are worth considerably more than the Grizzlies, which are valued at \$257 million.⁷⁹

Moreover, though NBA owners have generally remained a cohesive group over the course of the league’s history,⁸⁰ individual owners have, on occasion, sued or

⁷³ Mark Cofman, *Celtics Dismiss Outspoken Carr*, BOSTON HERALD, Feb. 1, 2001, at 84 (describing the Celtics trying to lose games as part of an “orchestration”).

⁷⁴ See McCann, *The Pursuit of Crappyness*, *supra* note 72 (noting that both the Boston Celtics and Milwaukee Bucks may have tried to lose a game they played against one another toward the end of the 2006–07 season).

⁷⁵ See Timothy R. Deckert, Casenotes: *Multiple Characterizations for the Single Entity Argument?: The Seventh Circuit Throws an Airball in Chicago Professional Sports Limited Partnership v. National Basketball Association*, 5 VILL. SPORTS & ENT. L.J. 73, 100 (1998) (noting that NBA teams keep 94% of gate receipts, with the remaining 6% allocated to the NBA, and also generally keep their local television revenue); ZIMBALIST, *supra* note 31, at 575; ROSNER & SHROPSHIRE, *supra* note 31, at 363 (describing how the sharing of revenue promotes financial stability in a league).

⁷⁶ See PROFESSIONAL SPORTS: THE CHALLENGES FACING THE FUTURE OF THE INDUSTRY: HEARING BEFORE THE COMMITTEE ON THE JUDICIARY, U.S. SENATE 64 (1996) (quoting sports economist Andrew Zimbalist); Anthony Schoettle, *NBA Revenue-Sharing Plan Could Save Pacers*, INDIANAPOLIS BUS. J., June 2, 2008, at 5 (a more recent source, also quoting sports economist Andrew Zimbalist).

⁷⁷ Andrew Ungvari, *Another NBA Lockout?: Where That Probably Isn’t the Best Idea Happens*, BLEACHER REPORT, Aug. 6, 2009, <http://www.bleacherreport.com/articles/231404-is-another-nba-lockout-inevitable>.

⁷⁸ Kurt Badenhausen et al., *NBA Team Valuation: Los Angeles Lakers*, FORBES.COM, Dec. 9, 2009, http://www.forbes.com/lists/2009/32/basketball-values-09_Los-Angeles-Lakers_320250.html.

⁷⁹ Kurt Badenhausen et al., *NBA Team Valuation: Memphis Grizzlies*, FORBES.COM, Dec. 9, 2009, http://www.forbes.com/lists/2009/32/basketball-values-09_Memphis-Grizzlies_325603.html.

⁸⁰ *E.g.*, *Owners Make News on Revenue*, PHILADELPHIA INQUIRER, Nov. 26, 2006, at D06 (observing that “NBA owners, unlike their brethren in pro football and baseball, have been remarkably disciplined over the years in maintaining their silence on just about every issue.”).

threatened to sue the league. This was most notably seen in *Chicago Professional Sports Ltd. Partnership, v. NBA*,⁸¹ a litigation brought by the owners of the Chicago Bulls in response to the NBA's Board of Governors adopting resolutions that limited the autonomy of individual teams to enter into television contracts.⁸² Less contentious, some owners of NBA teams which generate relatively limited amounts of unshared revenue (e.g., local broadcasting revenue; gate receipts; luxury box revenue) have complained that they are unfairly positioned when competing with more prosperous teams.⁸³ In addition, several NBA owners have approached their equity stakes in NBA franchises with idiosyncrasies, seeming more like advocates for their teams than devotees to league orders. Dallas Mavericks owner Mark Cuban, who has encountered frequent disagreements with the NBA and Commissioner Stern, is perhaps the paradigmatic example.⁸⁴ Owners also vary in their public persona and management style, with some taking a more hands-on, visibly competitive approach.⁸⁵

In sum, there are areas of cooperation and competition evident throughout the NBA, a combination which has likely contributed to the league's success while also revealing the league as one comprised of sometimes unitary and sometimes divergent actors.

III. THE NBA AND ITS RELATIONSHIP TO FEDERAL ANTITRUST LAW

The business operations of the NBA, and the related interplay between collaboration and competition, bear on how federal antitrust law should regard the NBA.

A. The NBA as a Joint Venture

Courts have traditionally regarded the NBA and similar professional sports leagues as joint ventures,⁸⁶ which are associations of "two or more persons formed to

⁸¹ 95 F.3d 593, 593 (7th Cir. 1996).

⁸² ROSNER & SHROPSHIRE, *supra* note 31, at 154–55; *see also infra* Part II.B.

⁸³ *Owners Make News on Revenue*, *supra* note 80.

⁸⁴ *See* BILL SIMMONS, THE BOOK OF BASKETBALL: THE NBA ACCORDING TO THE SPORTS GUY 164 (2009) (referencing imperfect relationship between Cuban and Stern).

⁸⁵ *See, e.g.*, JACK RAMSEY, DR. JACK'S LEADERSHIP LESSONS LEARNED FROM A LIFETIME IN BASKETBALL 25 (2000) (describing most NBA owners as "removed from the scene").

⁸⁶ *E.g.*, *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 673 (7th Cir. 1992) (reasoning that the court will "treat the NBA as a joint venture"); *Levin v. Nat'l Basketball Ass'n*, 385 F. Supp. 149, 150 (S.D.N.Y. 1974) (concluding that the NBA is a joint venture because the NBA's own constitution makes such a conclusion); *Fishman v. Wirtz*, No. 74-2814, 1981 U.S. Dist. LEXIS 9998 at *12 (N.D. Ill. 1981) (regarding the NBA Board of Governors as evidence of the NBA being a joint venture); *Lemat Corp. v. Barry*, 275 Cal. App. 2d 671, 673 (Ct. App. 1969) (concluding that the NBA is a joint venture because of its business operations); *cf. N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1251 (2d Cir. 1992) (characterizing the NFL as a joint venture); *cf. Major League Baseball Props.*,

carry out a single business enterprise for profit for which purpose they combine their property, money, effects, skill, and knowledge.”⁸⁷ Leagues are viewed as joint ventures because a competitive, team-based sporting event necessarily requires multiple—and distinct—teams and some level of cooperation among those teams.⁸⁸

Joint ventures are not unique to professional sports. They exist in fields as diverse as stock exchanges, credit card networks,⁸⁹ trade associations,⁹⁰ and so-called “independent practice associations” among physicians.⁹¹ Joint ventures arise when competitors align in order to achieve certain business goals, and they normally involve resource pooling and risk sharing.⁹²

Joint ventures are most likely subject to section 1 scrutiny.⁹³ The rationale is straightforward: joint ventures involve integration and risk sharing among distinct and competing entities.⁹⁴ Such cooperation can limit or reduce competition, an outcome which, on its surface, may frustrate the goals of section 1 and impede the prevention of collaborations that impair competition or harm consumers.⁹⁵ The normal type of section 1 scrutiny for joint ventures is rule of reason, which entails a weighing of pro- and anti-competitive effects of a particular collaboration.⁹⁶ Under rule of reason scrutiny, collaboration is deemed unlawful only if its anti-competitive effects are

Inc. v. Salvino, Inc., 542 F.3d 290, 337–38 (2d Cir. 2008) (identifying Major League Baseball Properties as a joint venture).

⁸⁷ 46 AM. JUR. 2D *Joint Ventures* § 1 (2006) (supplying a commonly-accepted, though not exclusive, definition of joint ventures). *But see*, Daniel E. Lazaroff, *The Antitrust Implications of Franchise Relocation Restrictions in Professional Sports*, 53 FORDHAM L. REV., 157, 196–97 (1984) (noting that some antitrust scholars narrowly define joint ventures as temporary relationships). For a thoughtful discussion of professional sports leagues as joint ventures, *see* Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 920–31 (1999).

⁸⁸ For a more complete discussion, *see* McCann, *Opportunity to Reshape Sports Law*, *supra* note 3, at 738.

⁸⁹ *See* Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 IOWA L. REV. 1137, 1173 (2001).

⁹⁰ *See* Alvin F. Lindsay, III, Comment, *Tuning in to HDTV: Can Production Joint Ventures Improve America’s High-Tech Picture?*, 44 U. MIAMI L. REV. 1159, 1168, n.49 (1990).

⁹¹ *See* Micah Berman, Note, *The “Quality Health Care Coalition Act”: Can Antitrust Law Improve Patient Care?*, 53 STAN. L. REV. 695, 706 (2000) (discussing how physicians integrate part of their practices, while otherwise remaining competitors, in independent practice associations); Piraino, *A Proposed Antitrust Approach to Collaborations Among Competitors*, *supra* note 89, at 1173.

⁹² *See* Thomas A. Piraino, Jr. *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 725 (1991).

⁹³ *See* Darren Bush & Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 2004 WIS. L. REV. 1035, 1097 (2004).

⁹⁴ *See* Frederic J. Entin et al., *Hospital Collaboration: The Need for An Appropriate Antitrust Policy*, 29 WAKE FOREST L. REV. 107, 114 (1994); *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982).

⁹⁵ Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2006).

⁹⁶ *See* Gordon H. Copland & Pamela E. Hepp, *Government Antitrust Enforcement in the Health Care Markets: The Regulators Need an Update*, 99 W. VA. L. REV. 101, 106–07 (1996).

dominant.⁹⁷ To better characterize these labels, an anti-competitive effect would describe a deprivation of competition in the marketplace when otherwise competing entities act as a joint venture; a pro-competitive effect, in contrast, would describe the market efficiencies generated by the joint venture.⁹⁸

Even though they evince cooperation among competitors, some types of collaboration among sports teams easily pass rule of reason analysis. Field dimensions and scoring methods, for instance, are viewed as predominantly pro-competitive.⁹⁹ These basic types of understandings are essential for there to be competitive games; if the Boston Celtics and New York Knicks disagreed on whether travelling with the basketball is allowed or disallowed, they would not be able to play each other, no matter how talented their rosters.¹⁰⁰

Off-field restraints on competition, however, have normally been regarded as predominantly anti-competitive. To illustrate, in *Chicago Professional Sports*,¹⁰¹ the Seventh Circuit considered an NBA rule that prevented NBA teams from broadcasting on a “superstation”—a local broadcast station that is nationally distributed by cable and satellite systems—games that were not part of a national TV contract. In the Seventh Circuit’s view, the district court did not commit reversible error when it found that the NBA’s attempt to prevent potential competition between games broadcast *by a team* on the superstation and games nationally broadcast *by the NBA* would pose a greater anti-competitive harm than pro-competitive benefit.¹⁰²

*B. The NBA’s Aspirations for Single Entity Recognition:
The Role of American Needle v. NFL*

While courts have repeatedly classified the NBA as a joint venture,¹⁰³ the NBA hopes the Supreme Court’s forthcoming decision in *American Needle* will provide a new playbook for antitrust litigation.¹⁰⁴ *American Needle* concerns whether the NFL

⁹⁷ *Id.*

⁹⁸ See Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679 (1978) (discussing how courts regard anti-competitive effects); see also Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77 (applying the rule of reason to various joint ventures).

⁹⁹ See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents, 468 U.S. 85, 101 (1984) (“[Some] activities can only be carried out jointly. Perhaps the leading example is league sports.”) (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 278 (1978)).

¹⁰⁰ Literally, they *could* play each other, but their games would not be competitive contests.

¹⁰¹ *Chicago Prof’l Sports, Ltd. P’ship v. Nat’l Basketball Ass’n (Bulls I)*, 961 F.2d 667, 669 (7th Cir. 1992).

¹⁰² *Id.* at 672–74. *But see* Molinas v. Nat’l Basketball Ass’n, 190 F. Supp. 241, 243–44 (S.D.N.Y. 1961) (court found that the NBA suspension of a player who bet on games in which he was playing passed rule of reason, since it was deemed both reasonable and necessary for a sports league that requires genuine competition).

¹⁰³ See cases cited *supra* note 86.

¹⁰⁴ The NBA has filed an amicus brief in support of the NFL. See NBA Amici Curiae Brief, *supra* note 58.

and its teams should be considered “one” entity for purposes of section 1 of the Sherman Act.¹⁰⁵ As one entity—a single entity—the NFL and its often competing teams could be considered distinct corporate entities that nonetheless share a “corporate consciousness.” The expression “corporate consciousness” is a product of the Supreme Court’s decision in *Copperweld Corp. v. Independence Tube Corp.*,¹⁰⁶ where the Court held that parents and wholly owned subsidiaries cannot violate section 1 in their collaborations.¹⁰⁷ The Court reasoned that since a parent can, at any time, take control of a wholly owned subsidiary, the latter is akin to a division of the former—rather than an autonomous entity—and that therefore, any collaboration between the two does not warrant section 1 scrutiny.¹⁰⁸ Although some lower courts have extended single entity recognition to business entities with weaker relationships,¹⁰⁹ many have not.¹¹⁰

American Needle is on appeal from the Seventh Circuit, which held that the NFL and its teams are a single entity for purposes of licensing.¹¹¹ The Seventh Circuit reasoned that individual NFL franchises, by voluntarily choosing to bargain their licensing contracts through a separate and shared entity—NFL Properties—were cooperating in order to compete as a league against other entertainment providers.¹¹² As a consequence, their collaboration on licensing constituted behavior by a single entity, rather than by competitors. The Seventh Circuit declined to opine on the availability of the single entity defense outside of the context of licensing, though it did suggest that single entity issues in professional sports be determined “‘one league at a time . . . [and] . . . one facet of a league at a time.’”¹¹³ The Seventh Circuit also intimated that matters concerning labor, which are the subject of collective bargaining,¹¹⁴ would be ill-suited for single entity recognition.¹¹⁵

¹⁰⁵ See generally, McCann, *An Opportunity to Reshape Sports Law*, supra note 3; see also Michael McCann, *Why American Needle v. NFL is Most Important Case in Sports History*, SI.COM, Jan. 12, 2010, http://sportsillustrated.cnn.com/2010/writers/michael_mccann/01/12/american_needlev.nfl/index.html.

¹⁰⁶ 467 U.S. 752 (1984).

¹⁰⁷ *Id.* at 777.

¹⁰⁸ *Id.* at 770–72.

¹⁰⁹ See, e.g., *Williams v. Nevada*, 794 F. Supp. 1026, 1034 (D. Nev. 1992) (recognizing a single entity between a fast food franchisor and its separately owned franchisees).

¹¹⁰ See Ryan P. Meyers, Comment, *Partial Ownership of Subsidiaries, Unity of Purpose, and Antitrust Liability*, 68 U. CHI. L. REV. 1401, 1407–14 (2001) (noting various courts’ applications of *Copperfield*).

¹¹¹ *American Needle Inc. v. Nat’l Football League*, 538 F.3d 736, 744 (7th Cir. 2008), cert. granted, 174 L. Ed. 2d 575 (2009).

¹¹² *Id.* For additional discussion of the Seventh Circuit’s opinion, see McCann, *An Opportunity to Reshape Sports Law*, supra note 3.

¹¹³ *American Needle*, 538 F.3d at 742 (quoting *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass’n (Bulls II)*, 95 F.3d 593, 600 (7th Cir. 1996)).

¹¹⁴ See supra Part I.B.

¹¹⁵ *American Needle*, 538 F.3d at 741–42 (“[I]ndividuals seeking employment with any of the league’s teams would view the league as a collection of loosely affiliated companies that all have the independent authority to hire and fire employees. That being said, we have

The Seventh Circuit's logic in *American Needle* may be criticized on several grounds. Those grounds include the sometimes factionalized, far from unitary relationship among NFL owners, most notably detected when Dallas Cowboys owner Jerry Jones sued NFL Properties and his fellow owners under section 1.¹¹⁶ Also, the collaboration among NFL teams for licensing is not necessary—NFL teams previously competed over apparel and merchandise sales.¹¹⁷ Along those lines, though it would be audacious to predict the Supreme Court's decision based on their questions posed during the January 13, 2010 oral argument, several Justices seemed unconvinced by the NFL's reasoning and, by implication, the Seventh Circuit's reasoning.¹¹⁸

Until the Seventh Circuit's decision in *American Needle*, the single entity argument had failed repeatedly for professional sports leagues.¹¹⁹ Teams with independent ownership, and which compete in numerous and self-interested ways, were viewed as materially different from a parent and wholly-owned subsidiary.¹²⁰ Such a deduction was even found in the context of Major League Soccer ("MLS"), which owned MLS franchises and furnished them with only limited autonomy.¹²¹ In *Fraser v. Major League Soccer*,¹²² the First Circuit categorized MLS as a "hybrid arrangement" between

nevertheless embraced the possibility that a professional sports league could be considered a single entity under [*Copperweld*]." (internal citation omitted)).

¹¹⁶ See *Dallas Cowboys Football Club, Ltd. v. Nat'l Football League Trust*, No. 95-9426, 1996 WL 601705 (S.D.N.Y. Oct. 18, 1996); see also McCann, *An Opportunity to Reshape Sports Law*, *supra* note 3, at 759–61 (discussing section 1 litigation by Dallas Cowboys and its owner, Jerry Jones, against the NFL and NFL Properties).

¹¹⁷ See McCann, *An Opportunity to Reshape Sports Law*, *supra* note 3, at 759.

¹¹⁸ Both Chief Justice John Roberts and Justice Stephen Breyer, for instance, questioned the plausibility and sensibility of trying to distinguish when the NFL acts as a single entity and a joint venture, when restraints of trade that satisfy rule of reason would do so. See Official Transcript of *American Needle v. NFL*, No. 08-661, Jan. 13, 2010, available at http://www.supremecourt.us/oral_arguments/argument_transcripts/08-661.pdf.

¹¹⁹ See, e.g., *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994); *N. Am. Soccer League v. Nat'l Football League*, 670 F.2d 1249, 1257–58 (2d Cir. 1982); *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469–70 (6th Cir. 2005); and *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1387–90 (9th Cir. 1984);

¹²⁰ See, e.g., *L.A. Mem'l Coliseum Comm'n*, 726 F.2d at 1390 (describing how in the NFL, "profits and losses are not shared, a feature common to partnerships or other 'single entities'").

¹²¹ See Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 891, 900–03 (2008) (describing Major League Soccer's original "league-based common property system"—which called for, *inter alia*, central ownership of the soccer teams by the league and the equal sharing of profits by the leagues' "investor-controllers"—and its subsequent abandonment).

¹²² 284 F.3d 47 (1st Cir. 2002).

a single entity and joint venture, but one that was still subject to rule of reason scrutiny.¹²³

If the Supreme Court chooses to characterize the NFL as a single entity, the NBA would certainly attempt to gain from the recognition.¹²⁴ For instance, if the Court were to endorse the Seventh Circuit's recognition of single entity status for purposes of NFL licensing, the NBA would be poised to argue that it receive comparable protection. After all, the NBA and NFL are similarly structured and their respective licensing entities—NBA Properties and NFL Properties—each negotiate licenses on behalf of all teams and each equally distribute the earnings among those teams.¹²⁵ NBA licensing for apparel and possibly other products, including video games, would thus be exempt from section 1, even if an exclusive licensing contract between the NBA and a licensed company raised prices or disappointed consumers.¹²⁶

Though unlikely, the Court could alternatively find that the NFL constitutes a complete single entity in all facets of its business operation, meaning the NFL could unilaterally impose labor conditions on NFL players.¹²⁷ Given the NBA's difficult collective bargaining with the NBPA, the ability to unilaterally impose salary restraints and other employment restrictions would be of great attraction to the league.¹²⁸ It would also empower the NBA to impose a sought-after elevated age eligibility restriction,¹²⁹ the current version of which requires that an amateur player of U.S. origin be at least nineteen years old on December 31 of the year of the NBA draft and that at least one NBA season must have passed between when the player graduated from high school, or when he would have graduated from high school, and the NBA draft.¹³⁰ The Court could also reverse the Seventh Circuit, subjecting the NFL, and by implication similar leagues, to the traditional mode of analysis for joint venture behavior: rule of reason.

*C. Does the NBA Have a Stronger Argument for Single Entity
Recognition than the NFL?*

As evidenced by their status as national sports leagues with independent team ownership, powerful commissioners, bargaining relationships with a players'

¹²³ *Id.* at 58.

¹²⁴ The NBA's filing of an amicus brief in the case is suggestive of its interest in the outcome. See NBA Amicus Curiae Brief, *supra* note 58.

¹²⁵ See CONRAD, *supra* note 58, at 268; ROSNER & SHROPSHIRE, *supra* note 31, at 184–85.

¹²⁶ The potential danger of such exclusive video game contracts can be seen with the NFL's such contract with Electronic Arts, which has drawn criticism for its impact on prices and quality. See McCann, *Opportunity to Reshape Sports Law*, *supra* note 3, at 764–66.

¹²⁷ See *id.* at 766–68.

¹²⁸ See *supra* Part I.B.

¹²⁹ See Howard Beck, *From Preps to the Pinnacle of the N.B.A.*, N.Y. TIMES, May 28, 2009, at B15 (discussing NBA's desire to raise the age limit to twenty years of age, a desire opposed by the NBPA).

¹³⁰ See Nat'l Basketball Ass'n Collective Bargaining Agreement, art. X, § 1(b)(i), available at <http://www.nbpa.org/sites/default/files/ARTICLE%20X.pdf>.

association, and combinations of collaboration and competition in their business practices, the NFL and NBA are clearly similar. But they are dissimilar in ways which may suggest that the viability of the single entity defense for one may not determine that for the other.

Consider the extent of revenue sharing among the two leagues. NFL teams share approximately 90 percent of their revenues,¹³¹ while NBA teams—which, unlike the NFL, do not divide revenue from local TV broadcasts or gate receipts—share only about 25 percent of their revenues.¹³² The NFL’s emphasis on sharing would likely require owners to “share consciousness” at a higher level than NBA owners who, from a domestically-oriented financial standpoint, appear more self-autonomous.

Other factors, however, posit the NBA more as a single entity. Take the level of cooperation required of team owners for the creation and development of subsidiary leagues. While NBA owners have closely collaborated on the WNBA, D-League, and NBA China, NFL owners have pursued subsidiary leagues with less interest and questionable esprit de corps. The respective success of the NFL and NBA in using subsidiary leagues to export their products is particularly illustrative of this point.

The NFL has encountered significant obstacles in generating sustained international interest in “American football.” Most notably, from 1991 to 2007, the NFL owned and operated NFL Europe (also called World League of American Football, World League, and NFL Europa).¹³³ NFL Europe featured between six and 10 teams each season, with teams stationed in such cities as Barcelona, Amsterdam, and Berlin.¹³⁴ Although NFL Europe attracted viable fan bases in certain locations,¹³⁵ it reportedly lost \$30 million a year.¹³⁶ A leading reason for its failure was the refusal of most NFL teams—and their owners—to follow NFL directives that teams use NFL Europe for player development.¹³⁷ Acting instead in self-interested and entirely rational ways—most NFL teams declined to send their promising and young, but not yet ready for the NFL, players to NFL Europe.¹³⁸ Teams surmised that those players would develop faster if they worked with NFL coaches and practiced against seasoned NFL players.¹³⁹ In lieu of sending those promising players to NFL Europe,

¹³¹ Comment, *Leveling the Playing Field: Relevant Product Market Definition in Sports Franchise Relocation Cases*, 2000 U. CHI. LEGAL F. 245, 254 n.48 (2000).

¹³² See *supra* note 75 and accompanying text; see also Howard Beck, *Amid a Downturn, the N.B.A. Union Is Willing to Talk, Not Surrender*, N.Y. TIMES, Apr. 23 2009, at B16 (noting limitations of sharing among NBA teams).

¹³³ See Sandomir, *supra* note 12.

¹³⁴ See *id.*

¹³⁵ See David Elfin, *NFL Bags European League*, WASH. TIMES, June 30, 2007, at C1 (noting that NFL Europe had “record attendance” in its final year).

¹³⁶ See Bryan Burrwell, *Please, World, Let Americans be Indifferent to Pro Soccer*, ST. LOUIS POST-DISPATCH, July 17, 2009, at D1.

¹³⁷ See Len Pasquarelli, *NFL Europa Failed to Produce Players, Profits*, ESPN.COM, June 29, 2007, http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=2920635.

¹³⁸ *Id.*

¹³⁹ *Id.*

teams usually sent marginal players, thereby providing European fans with inferior American football.¹⁴⁰

The failure of NFL Europe has not dissuaded the NFL from seeking other ways of promoting its product abroad. Indeed, since 2007, the NFL has played both exhibition and regular season games abroad, including in Mexico City and London, and with sold out attendances and great fanfare.¹⁴¹ There are skeptics, however, as to whether “American football” will ever catch on outside the United States, particularly if—as shown in the NFL Europe experiment—NFL owners do not act as “one” in facilitating the promotion of the game abroad.¹⁴² In addition, the absence of top-level American football professional leagues in other countries means that NFL owners are not required to collaborate in responding to external competition for American football.¹⁴³ In short, the NFL does not resemble a single entity in the context of international endeavors; in fact, in some ways it resembles a coalition of the unwilling.

In contrast, and as discussed earlier in this Article, the NBA’s international endeavors have proven far more successful.¹⁴⁴ The league’s considerable investment in NBA China, coupled with its increasingly international business model and player demographics, also suggest the NBA and its teams will experience a mounting obligation to act as one. The NBA’s pursuit of marketing abroad has already required sustained solidarity among NBA owners; to the extent international endeavors continue to encompass rising portions of NBA investments, NBA owners may in fact lose autonomy and be forced to defer to centralized league wishes.

Moreover, NBA teams now compete with international teams for U.S. and international players’ services.¹⁴⁵ The presence of international competition with bona fide rival basketball leagues possesses legal significance. Although the First Circuit rejected MLS as a single entity in *Fraser*, it opined that the capacity of MLS players to secure comparable employment in international leagues advanced the MLS’s single entity argument.¹⁴⁶ In that same vein, as basketball grows in popularity across the world, it stands to reason that superior alternatives to the NBA may emerge. If so, NBA owners may have no choice but to act as one in competing with those leagues. Such shared consciousness may necessitate that NBA teams pay

¹⁴⁰ *Id.*; see also Neil D. Isaacs, *Anniversary Offering*, 25 J. SPORT LITERATURE 33 (2007) (discussing how NFL Europe players were vastly inferior to NFL players and likely had little chance of becoming NFL players); Mark Woods, *Is NFL Europe Set to Fumble?*, SCOT. ON SUNDAY, June 15, 2003, at 11 (providing local Scottish perspective of NFL Europe as a disappointing minor league enterprise).

¹⁴¹ See Les Carpenter, *Bringing Pigskin to Land of Ping-Pong*, WASH. POST, Sept. 13, 2009, at A1.

¹⁴² See *supra* notes 137–40 and accompanying text.

¹⁴³ Even in the domestic sphere, the NFL has no competition. The United Football League (UFL), which began play in the fall of 2009, is unlikely to emerge as a competitor to the NFL, as the UFL’s employment offers and ambitions appear to be more consistent with that of a minor league, rather than a rival. See Doug Haller, *Upstart League Moves Forward*, ARIZ. REPUBLIC, June 17, 2009, at C7.

¹⁴⁴ See *supra* Part I.B.

¹⁴⁵ *Id.*

¹⁴⁶ *Fraser v. Major League Soccer*, 284 F.3d 47, 59, 63 (1st Cir. 2002).

players higher salaries or charge less in merchandise and apparel, among other possible outcomes.

To be sure, the cohesiveness demanded of the NBA in its international endeavors would help insulate the league under rule of reason scrutiny. Collaboration is more likely to be perceived as advancing competition if it is also perceived as necessary.¹⁴⁷ Therefore, in a section 1 challenge to NBA business dealings related to international endeavors, the NBA would likely draw strength from the necessity of collaboration.

The harder question is whether such collaboration should influence the characterization of the NBA and its teams as one entity or many entities aligned in a joint venture. In some respects, the difference may prove immaterial. If an NBA restraint of trade can easily pass rule of reason analysis, then an exemption from section 1 would likely benefit the NBA only by providing relief from litigation costs and costs associated with the possibility of section 1 litigation; the restraint would remain compatible with section 1 either way.¹⁴⁸

Then again, exempting the NBA from section 1 scrutiny, such as through single entity recognition, could pose unintended, but foreseeable problems. Perhaps foremost, consider the constantly evolving relationship between leagues and their teams, be it in revised formulas for revenue sharing, centralization of licensing agreements, or one of many other transformations. If the NBA and its teams were exempt from section 1 for a particular purpose—such as for international endeavors—could entities still challenge the NBA and its teams under section 1 each time the relationship for that purpose changes? Would the exemption remain valid for certain changes but not others?

Along those lines, can leagues and their teams constitute a single entity for certain purposes at a given moment revert to separate entities at a later time? In *American Needle*, the NFL insists that it constitutes a single entity for sales of licensed apparel even though one of its owners, Jerry Jones, previously sued his fellow owners under a section 1 claim for the freedom to separately sell Cowboys' apparel.¹⁴⁹ Presumably, at the time Jones sued his fellow owners, the NFL and its teams were not a single entity for sales of licensed apparel. Single entity recognition therefore may not supply a professional sports league with continual protection from section 1 litigation.

On the other hand, the Seventh Circuit's opinion in *American Needle* asserts that voluntary collaboration for purposes of competing as a league can give rise to single entity recognition.¹⁵⁰ From that vantage point, the NBA's international endeavors would seem to furnish a strong case for such recognition, which the NBA, as shown in its amicus brief in *American Needle*, clearly seeks. After all, unlike with professional

¹⁴⁷ See, e.g., *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646, 652–54 (5th Cir. 1977) (holding that under rule of reason analysis, necessary collaboration for registration rules are essential for survival of sports enterprises).

¹⁴⁸ Section 1 litigation can involve very high discovery costs. See Amber A. Pelot, Casenote, *Bell Atlantic Corp. v. Twombly: Mere Adjustment or Stringent New Requirement in Pleading?*, 59 MERCER L. REV. 1371, 1387–88 (2008).

¹⁴⁹ See *supra* Part II.B.

¹⁵⁰ *American Needle Inc. v. Nat'l Football League*, 538 F.3d 736, 744 (7th Cir. 2008), *cert. granted*, 174 L. Ed. 2d 575 (2009).

football and baseball, there appears to be global competition among professional basketball leagues for players and markets. Such competition may require the NBA to compete *as a league*, with the obligation of individual NBA owners to follow suit.

IV. CONCLUSION

The Supreme Court's decision in *American Needle* remains unknown at the time of this writing. Based on existing conceptions of single entity analysis, however, while the domestic operations of the NBA are clearly not more akin to a single entity than those of the NFL, the league's international operations—an increasingly significant revenue dynamic for the NBA—portray the NBA more like a single actor. As the NBA becomes a more globalized league, the significance of its international operations and relationship to federal antitrust law could prove intriguing. Indeed, the NBA's globalized business agenda and exposure to competition from international basketball leagues may necessitate that NBA teams act in harmony, at least for international business endeavors. The failure of NFL teams to do so in their NFL Europe endeavor seems to corroborate that point.

Furthermore, and as I argue elsewhere, regardless of how the Supreme Court decides *American Needle*, Congress could use the lawmaking process to tailor section 1 to promote the competitiveness of professional sports leagues.¹⁵¹ Namely, Congress could consider targeted, sports-related exemptions from section 1 that recognize the evolving nature of U.S. professional sports and their global stakes. Through periodic legislative hearings, such exemptions could prove more durable and pliable than judicially-crafted exemptions, which may be subject to litigation each time a change in circumstances arises, thereby curtailing one of the exemptions' primary benefits: avoidance of section 1 litigation. For purposes of professional sports leagues, the NBA may present the best case for exempting leagues from section 1 scrutiny in matters related to international business.

¹⁵¹ See McCann, *An Opportunity to Reshape Sports Law*, *supra* note 3, at 779–81.



Hardball Free Agency—The Unintended Demise of Salary Arbitration in Major League Baseball:
How the Law of Unintended Consequences Crippled the Salary Arbitration Remedy—and How to Fix It

Eldon L. Ham* & Jeffrey Malach†

TABLE OF CONTENTS

I. INTRODUCTION	64
II. THE DEVELOPMENT OF BASEBALL SALARY ARBITRATION	66
III. SALARY ARBITRATION IN ITS CURRENT FORM	75
<i>A. The Process</i>	75
<i>B. Admissible Criteria</i>	76
<i>C. Salary Arbitration in the National Hockey League</i>	77
IV. BENEFITS OF THE FINAL OFFER ARBITRATION PROCESS	78
V. CURRENT PROBLEMS WITH SALARY ARBITRATION	80
<i>A. Failure to Assign Weight to Admissible Criteria Creates Inconsistent and Unpredictable Results</i>	80
<i>B. Comparing Players with Different Years of Service Time</i>	82

* Eldon L. Ham has taught Sports, Law & Society at Chicago-Kent College of Law for seventeen years. He has published three sports-related books including LARCENY & OLD LEATHER: THE MISCHIEVOUS LEGACY OF MAJOR LEAGUE BASEBALL; is the designated sports law analyst for WSCR Sports Radio in Chicago; and is the three-term chair of the Chicago Bar Committee on Law & Literature. Mr. Ham has practiced law in Chicago since 1976, and has represented scores of athletes, agents, and sports entrepreneurs.

† Jeffrey Malach received his J.D. from Chicago-Kent College of Law in 2009 and his B.A. in Sports Management and Communications from the University of Michigan in 2006. At Chicago-Kent, Jeffrey was President of the Sports and Entertainment Law Society. Jeffrey is a member of the Illinois State Bar and is currently an Associate at The Law Offices of Wolf and Wolfe, Ltd.

C. Salary Arbitration Creates an Inefficient Free Agent Market.....	83
D. Super Two Eligibility Fosters a No-Win Situation for Teams, Players, and Fans	85
E. Salary Arbitration Unfairly Favors Players During Economic Recessions	87
F. Salary Arbitration Ignores the Business Models of Small-Market Franchises.....	89
VI. PROPOSALS FOR CHANGING THE SALARY ARBITRATION SYSTEM.....	90
A. Refine the Admissible Criteria.....	90
B. Eliminate Super Two Eligibility.....	91
C. Issue Written Opinions	91
VII. CONCLUSION	93

I. INTRODUCTION

When the 2008 Major League Baseball (“MLB”) season ended, New York Yankees star outfielder Bobby Abreu became a free agent.¹ Although Abreu was an established star able to negotiate with all of the baseball clubs in MLB, his salary did not go up; it went down dramatically, symbolizing the full circle that baseball economics had traveled since free agency began in 1976. How could this have happened?

Over the course of the 2008 season, Abreu’s cumulative batting average was .296, and he totaled twenty home runs, one hundred runs scored, and one hundred runs batted in.² That season marked his sixth consecutive year with at least one hundred runs batted in.³ The Yankees paid Abreu \$16 million in 2008, and at the close of the season he was seeking a new three-year contract for \$48 million.⁴ It seemed all but certain that the Yankees would offer him salary arbitration.⁵ Yet, in mid-February 2009, Abreu signed a one-year deal with the Anaheim Angels for \$5 million, a 68.8% reduction from his 2008 salary.⁶ The Yankees’ replacement for Abreu had batted .219 with only twenty-four home runs and sixty-nine runs batted in for the 2008 season.⁷

¹ Jorge L. Ortiz & Gerry Fraley, *Free Agent Players Face Their Own Economic Slump*, USA TODAY, Mar. 2, 2009, at 6C, available at http://www.usatoday.com/sports/baseball/2009-03-02-econ-package_N.htm.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Dan Graziano, *Economy Putting Chill on Baseball’s Free Agent Spending*, STAR LEDGER, Dec. 6, 2008, at 5, available at http://www.nj.com/sports/ledger/graziano/index.ssf/2008/12/economy_putting_chill_on_baseb.html.

⁶ Ortiz & Fraley, *supra* note 1. In 2008 the Yankees paid Abreu \$16 million whereas in 2009 the Angels paid Abreu \$5 million, a 68.8% reduction. *See id.*

⁷ Nick Swisher Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=430897 (last visited Mar. 9, 2010). The Yankees traded for Nick Swisher to replace Bobby Abreu in right field. *See* Jerry Crasnick, *Yankees Acquire Swisher, Send Betemit and Two Pitchers to White Sox*, ESPN, Nov. 13, 2008, <http://sports.espn.go.com/mlb/news/story?id=3700869>.

Salary negotiations in 2008 with another star outfielder, Adam Dunn, ended with similar results.⁸ Dunn, who had just tallied five consecutive seasons with forty home runs for the Arizona Diamondbacks,⁹ signed a new deal at a 38.5% salary reduction with the Washington Nationals.¹⁰ Meanwhile the Diamondbacks' replacement for Dunn only hit twelve home runs with seventy-five runs batted in for the 2008 season.¹¹ Both Dunn and Abreu were forced to explore the free-agent market for one simple reason: they were not offered salary arbitration by their former teams. In each situation, *both* the player *and* his former team were left in a far worse position—the player with less money and the team with an inferior athlete. A closer examination into the salary arbitration process reveals numerous flaws that likely contributed to the Yankees' and the Diamondbacks' decisions not to offer salary arbitration to Abreu and Dunn.

Baseball is America's oldest team sport, and MLB is the oldest and most storied of America's four most prominent professional leagues. As such, it has a long history of player salaries, free agency restrictions, labor strife, and legal actions, including a landmark antitrust case holding that baseball is not a business engaged in interstate commerce.¹²

Throughout the decades, baseball embraced protectionism while displaying overt disdain for the free market, especially where player compensation was concerned, symbolized by this widely quoted observation by baseball legend and subsequent sports equipment entrepreneur Albert Spalding:

Professional baseball is on the wane. Salaries must come down or the interest of the public must be increased in some way. If one or the other does not happen, bankruptcy stares every team in the face.¹³

Never mind that Spalding's comment was originally made in 1881 to the *Cincinnati Enquirer*,¹⁴ for its age and longevity only prove the timeless central point, to wit: professional baseball has been concerned, if not obsessed, with the cost of labor from nearly its very beginnings. Over the years management has argued for antitrust protection, taken unbridled control over the players in the form of a player option clause (best known as the infamous reserve clause), colluded to depress salaries in the 1980s, and sustained a remarkably acrimonious relationship with the players' union

⁸ Ortiz & Fraley, *supra* note 1.

⁹ Adam Dunn Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=276055 (last visited Mar. 9, 2010).

¹⁰ Ortiz & Fraley, *supra* note 1.

¹¹ Conor Jackson Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=433582 (last visited Mar. 10, 2010). The Diamondbacks moved Conor Jackson from first base to outfield to replace Adam Dunn. See Jorge L. Ortiz, *With No Offseason Overhaul, D'backs Keep Core in Place*, USA TODAY, Dec. 19, 2008, available at http://www.usatoday.com/sports/baseball/nl/diamondbacks/2008-12-18-organizational-report_N.htm.

¹² Fed. Baseball Club v. The Nat'l League, 259 U.S. 200, (1922).

¹³ PAUL DICKSON, BASEBALL'S GREATEST QUOTATIONS 405 (1991).

¹⁴ *Id.*

that produced lock-outs, strikes, and the cancelation of the 1994 World Series. The inability to work with the Players Association may even have contributed to the paucity of performance-enhancing drug testing, which in turn almost certainly contributed to an aberrant decade of home runs and baseball offense that began some time in the mid-1990s and is now largely known as baseball's steroid era.¹⁵ Yet with all that, MLB was still forced to accept free agency, salary escalation, and drug testing—all without adopting a salary cap as other sports have done.

Why? As the game reluctantly inched toward free market labor, management demonstrated a remarkable acuity for losing labor wars and legal battles, even where the result was due to voluntary compromises, some of which underlie the Rube Goldberg machination called baseball salary arbitration. Essentially a ruse to stave off free agency and control salaries, the arbitration system, in practice, has managed to find the worst of all worlds for both players and owners. As such, it seems to have embodied the essence of the “law of unintended consequences,” a rule of economics and posterity that suggests the baseball clubs have not been very good at understanding the true consequences of their economic behavior.

Now those consequences will have to be addressed by another round of collective bargaining. The impending labor negotiations for the year 2012 will focus on baseball's approach to free-market-by-committee: salary arbitration. As constituted, salary arbitration has fallen victim to its own flaws, forcing star players sometimes to accept lower salaries, and forcing teams to lose star players even when they would prefer to keep them. This article is an attempt to define the baseball arbitration system, address its numerous flaws, and suggest a number of ways the system can right itself—some being as simple as allowing, or rather forcing, the salary arbitrators to provide reasons and, thus, precedent for their rulings, and others amounting to more substantive reconsideration in view of sports economics, labor negotiations, and law. Former New York Yankees slugger Bobby Abreu, whose salary decreased despite his stellar season, is a case in point.

This article examines salary arbitration, specifically through the lens of the 2008 and 2009 off-seasons, in the context of emerging baseball salaries over the past four decades. Part II of this article addresses the creation and developments of salary arbitration in MLB. Part III discusses the process and admissible criteria of salary arbitration as defined by the collective bargaining agreement signed in 2006. Part IV discusses the historical results of salary arbitration along with its perceived benefits. Part V explores current problems with salary arbitration. Finally, Part VI suggests proposals for improving the salary arbitration process for the next collective bargaining agreement in 2012.

II. THE DEVELOPMENT OF BASEBALL SALARY ARBITRATION

Taken altogether, the evolution of baseball salary arbitration is a series of steps and missteps that has ultimately led to results that are contrary to those originally intended. The cause of such anomalies is often cited in the field of economics and

¹⁵ See Baseball's Steroid Era, <http://www.baseballssteroidera.com> (last visited Apr. 2, 2010).

elsewhere as “the law of unintended consequences,” whereby well-intentioned undertakings are met and sometimes overwhelmed by foreseeable or unforeseeable repercussions, some of which seem entirely counterintuitive.

The cornerstone of free market economics is the often-quoted “invisible hand” of economist Adam Smith, whereby individuals acting in their own self-interest in the aggregate benefit society as a whole.¹⁶ But the effects of such unintended consequences are not always productive and often lead to surprising results. A 1936 analysis by American sociologist Robert K. Merton, one of the first to identify the unintended consequences phenomenon, identified the most pervasive contributing factors as “ignorance” and “error.”¹⁷ In the context of baseball labor negotiations, one might add short-sightedness, if not greed, to the equation. As noted herein, each respective advent of free agency, salary escalation, and salary arbitration were direct consequences of actions expressly intended by the clubs to control salaries and avoid free agency. In this regard, the consequences of salary arbitration have led to remarkably counterproductive results for *both* players and club owners, the Bobby Abreu aberration being just one of them.

The advent of baseball salary arbitration was not a singular event but, rather, the product of a dynamic evolution of sports, economics, and law that may have begun as early as 1966 when teammate pitchers Don Drysdale and Sandy Koufax masterminded a joint holdout to leverage substantially more money from the Los Angeles Dodgers.¹⁸ This was a radical move necessitated by the lack of player bargaining power mostly because of the seemingly insurmountable “reserve clause” in MLB player contracts, which enabled clubs to renew player contracts on the same terms. The owners read this to mean that they could renew player contracts each year in perpetuity, in practice never granting players the opportunity to negotiate with other teams. The reserve clause hurdle, however, appeared more daunting on the surface than it actually proved to be in practice when it was seriously challenged in 1975. Its meaning was virtually overhauled by the landmark Andy Messersmith and Dave McNally grievance arbitration,¹⁹ but that only came about after decades of challenges from other angles.

During the early 1960s the players still largely believed that revoking the MLB antitrust exemption was the best approach to achieve free agency and the

¹⁶ Rob Norton, Unintended Consequences, Library of Economics and Liberty, <http://www.econlib.org/library/Enc/UnintendedConsequences.html> (last visited Mar. 9, 2010).

¹⁷ *Id.*

¹⁸ Drysdale and Koufax were two of the best pitchers in baseball at the time. In 1965, Drysdale notched twenty-two wins with a 2.77 earned run average and Koufax was even better with twenty-six wins behind a league-leading 2.04 ERA and 382 strikeouts. See BURT SOLOMON, *THE BASEBALL TIMELINE* 647, 649 (Avon Books 2001).

¹⁹ *National and American League Professional Baseball Clubs v. Major League Players Association*, 66 Lab. Arb. 101 (1975) (Seitz, Arb.) [hereinafter Messersmith and McNally Grievances].

commensurate salary increases it would likely bring.²⁰ But the Drysdale-Koufax holdout suggested a provocative alternative to antitrust relief: federal labor laws. Although the pitchers demanded a three-year \$1 million aggregate package, a radical increase for the times, they settled for raises of just under fifty percent, bringing their annual compensation to \$125,000 for Koufax and \$115,000 for Drysdale.²¹ The owners dodged an economic bullet, but they nevertheless recognized the impending danger of such joint bargaining possibilities.

Until 1965, just before the Drysdale-Koufax holdout, the players had nearly no power in baseball negotiations.²² When the players elected Marvin Miller in 1966 to head the Players Association, the business of baseball would be forever changed. Miller, a former economist for the United Steelworkers of America, soon built the strongest player union in professional sports.²³ Miller's first major accomplishment was convincing the owners to enter into a collective bargaining agreement in 1968 (just after the Drysdale-Koufax holdout), called the Basic Agreement.²⁴ One of Miller's goals at the time was to eliminate the reserve system that baseball owners had enjoyed in one form or another since the 1870s.²⁵ The reserve system required players to be "bound to one club for his entire career or until that club assigned his contract to another club."²⁶ The owners would not budge on the issue of the reserve system, but they eventually agreed to conduct a comprehensive study on the subject.²⁷ Between the 1968 and 1972 labor agreements, Curt Flood, a star player for the St. Louis Cardinals who was backed by the union, challenged the reserve system by means of an antitrust attack through the judicial system.²⁸

²⁰ Although widely referred to as an "exemption," this term is really a misnomer. *Federal Base Ball Club of Baltimore v. National League*, 259 U.S. 200 (1922), essentially found MLB was not a business in interstate commerce. Thus, in a practical matter baseball was exempted from antitrust, but not in the usual manner, as in, for example, the Sports Broadcasting Act of 1961, 15 U.S.C. 1291 (1961), which statutorily exempted certain sports league broadcasting from the reach of otherwise applicable antitrust laws.

²¹ See, e.g., JOHN HELYAR, *LORDS OF THE REALM* 24 (1994).

²² ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 74 (1998). The owners actually financed the Players Association, a violation under the National Labor Relations Act [hereinafter ABRAMS, *LEGAL BASES*]. *Id.*

²³ *Id.* at 71.

²⁴ *Id.* at 82–83. The Basic Agreement incorporated the Uniform Player's Contract. The owners could no longer unilaterally change the form of an individual player's contract. The Agreement also required that all changes be made through collective bargaining. MARVIN MILLER, *A WHOLE DIFFERENT BALL GAME* 97 (1991).

²⁵ ROGER I. ABRAMS, *THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION* 26 (2000) [hereinafter ABRAMS, *THE MONEY PITCH*].

²⁶ *Id.*

²⁷ ABRAMS, *LEGAL BASES*, *supra* note 22, at 82–83.

²⁸ *Id.* at 45. Flood was traded from the St. Louis Cardinals to the Philadelphia Phillies after he requested a \$30,000 raise. Flood refused to report to the Phillies and wrote to then-commissioner Bowie Kuhn, "After 12 years in the Major Leagues, I do not feel I am piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen." *Id.* at 65.

Flood sought to reverse a 1922 landmark Supreme Court decision that granted baseball an exemption from the Sherman Anti-Trust Act. In *Federal Baseball Club v. The National League*, the Court concluded that the business of giving baseball exhibitions is purely a state affair and thus not interstate commerce for the purposes of the Sherman Act.²⁹ This decision was reaffirmed by the Supreme Court in 1952 with its ruling in *Toole v. New York Yankees, Inc.*³⁰ Flood brought a new challenge to this court-created exemption, though he ultimately lost his battle to overturn the antitrust exemption, and the owners once again retained monopolistic power over the players. Unlike the two preceding cases, however, the Court in *Flood v. Kuhn* held that baseball *is* a form of interstate commerce.³¹ Moreover, Flood's antitrust litigation set the table for some of the greatest tactical mistakes the owners ever made—ultimately agreeing to both grievance and salary arbitration for player disputes.

On the eve of Flood's trial in 1970, the owners and players agreed to a new Basic Agreement.³² The owners granted the players a right that was already enjoyed by virtually every other industry in America by allowing them to have their grievances decided by a neutral third party.³³ This set into motion a process that would evolve into salary arbitration. Then, soon after grievance arbitration was instituted, the players struck again at the bargaining table. During the contentious 1972–1973 collective bargaining process, Marvin Miller pushed for the elimination of the reserve system, reaching an eventual compromise that became salary arbitration.³⁴ Miller sought to achieve through collective bargaining what Drysdale and Koufax could not accomplish via individual leverage and what Flood failed to achieve through the courts.³⁵ At that point, however, the owners still feared a complete abolishment of the reserve system for two reasons. First, a free market for a player's services would result in rash player mobility. Second, a bidding war between teams would drastically increase player salaries.³⁶ As a compromise, the owners proposed a system in which individual salary disputes between the players and owners would be submitted to a neutral third party, an arbitrator.³⁷ The owners thought the arbitration process would eliminate players' holding out for higher salaries and partly quash the desire for free agency.³⁸ Miller saw this proposal as an improvement over the reserve system, for it would finally give the players some bargaining power. It was not the ideal solution,

²⁹ 259 U.S. 200, 208 (1922).

³⁰ 346 U.S. 356 (1953).

³¹ 407 U.S. 258, 282 (1972).

³² ABRAMS, LEGAL BASES, *supra* note 22, at 83.

³³ *Id.* Miller believed that Flood's litigation led directly to this concession by the owners. BRAD SNYDER, A WELL-PAID SLAVE 316 (2006).

³⁴ Miller led the players on strike prior to the 1972 season, the first strike in baseball history. ABRAMS, LEGAL BASES, *supra* note 22, at 85.

³⁵ *See id.* at 87.

³⁶ ABRAMS, THE MONEY PITCH, *supra* note 25, at 29.

³⁷ *Id.*

³⁸ *Id.* In 1966, Don Drysdale and Sandy Koufax of the Los Angeles Dodgers joined forces and held out for higher salaries. Eventually, the parties settled and the two became the highest paid players in the game at that time. *Id.* at 28.

but it was a quantum leap in the right direction.³⁹ A new collective bargaining agreement was reached on February 28, 1973, containing a version of the salary-arbitration provision.⁴⁰

Beginning in 1973, the development of baseball's salary arbitration system took a path that was virtually concurrent to the evolution of free agency. Arbitration and free agency were being forged by the same economic forces that drove the allocation of labor and capital, and so neither evolved in a vacuum wholly independent of the other. Then, while the Players Association and league owners were still addressing the equitable allocation of revenues, the groundbreaking Messersmith-McNally grievance arbitration case was set into motion when both players refused to sign new 1975 contracts. The object was to induce their respective teams to invoke the reserve clause, thus forcing the issue of free agency as a viable means to achieve market value for the players.

Messersmith challenged the reserve clause in the standard player contract by filing a grievance with an arbitrator (as did McNally on the American League side).⁴¹ Although his case was not directly about salary arbitration, it nonetheless was a grievance dispute since Messersmith was still under contract with the Dodgers.⁴² Unlike Flood, who was unable to penetrate baseball's antitrust shield, Messersmith hit the proverbial home run when a neutral arbitrator interpreted the standard player contract as only a one-year option to renew for the team.⁴³ This not only changed the free-agency status quo but also was a baseball epiphany that would influence all baseball labor economics, necessarily including the free-market proxy that became salary arbitration. The Messersmith ruling held that, after a club exercises its one-year right of renewal, a player is no longer under contract.⁴⁴ As players would finally be free on the open market, competitive bidding for them would increase and thus force their salary levels upward. The owners challenged the arbitrator's decision in federal court,⁴⁵ but they lost largely because of their own missteps.

The reserve language had last been amended with the Uniform Player Contract adopted in 1947, which contained two salient provisions. First, the respective owners could renew an unsigned player "on the same terms" as his expiring contract for one year.⁴⁶ The owners interpreted this renewal to mean that each time the newly renewed one-year playing contract expired, it could be renewed again, over and over,

³⁹ Murray Chass, *Baseball Notebook: Salary Arbitration and Free Agency and the Road to Riches and Ruin*, N.Y. TIMES, Jan. 7, 2001, at 85.

⁴⁰ ABRAMS, LEGAL BASES, *supra* note 22, at 87. The first player to go through baseball's salary arbitration process was Dick Woodson, a right-handed pitcher with the Minnesota Twins in 1974. Woodson wanted \$30,000 while the club wanted to pay him \$23,000. Woodson would prevail. ABRAMS, THE MONEY PITCH, *supra* note 25, at 143.

⁴¹ ABRAMS, LEGAL BASES, *supra* note 22, at 118.

⁴² *Id.*

⁴³ *Id.* at 125.

⁴⁴ *Id.*

⁴⁵ *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615 (1976).

⁴⁶ Messersmith and McNally Grievances, *supra* note 19.

because each time the “same terms” would supposedly include the renewal option, virtually expanding what looked like a one-year extension into perpetuity. Although perpetual employment agreements are dubious enough, the owners had taken their argument still further, pushing the envelope of logic and economic reason: the reserve clause also gave the clubs the right to renew not at the same compensation but at a lesser modified salary reduced by up to twenty-five percent of the prior amount.⁴⁷ The clubs may have felt this would force recalcitrant players to accept lesser pay increases for new contracts, but by 1976 these words were backfiring, again invoking the law of unintended consequences for the owners.

When Messersmith and McNally challenged this draconian logic through their 1975 grievance, Arbitrator Peter Seitz found that, although a perpetual renewal could legally be bargained for and enforced, such a possibility was duly qualified, expressly limited by the arbitrator as follows: “provided the contract expresses that intention with explicit clarity and the right of subsequent renewals does not have to be implied”⁴⁸ But not only was the right to renew merely *implied* in the first place, when it was read in conjunction with the twenty-five percent pay-cut provision, the implication was not only illogical, but also unconscionable and, therefore, unenforceable. How could there be the requisite mutuality if clubs could unilaterally force a player to accept twenty-five percent less compensation into perpetuity? Indeed, what could stop the clubs from intentionally obstructing the execution of any new agreements, knowing that by doing so, they could theoretically reduce any player salary to near zero after a few seasons?

The owners lost not because their argument was dubious—to the contrary, there was a clever charm to the perpetuity logic—but because their position was ultimately disingenuous. The perpetuity rationale was betrayed by the second clause allowing the reduction of a player’s salary by twenty-five percent for each renewal, an anomaly that was eventually deemed the deciding last straw in an unconscionable synthesis of illogic and greed. In the end, therefore, the owners had only themselves to blame, harkening Shakespeare’s *Julius Caesar*: the fault was not in their stars—neither the celestial nor the major league variety, as it happens—but in themselves, for it was their own oppressive language that had gone too far.

The ruling by Arbitrator Seitz was significant not only for its outcome but also for its reasoning. Almost inconceivably, however, present day baseball salary arbitration does not require arbitrators to provide reasoning behind the arbitration rulings, allowing no room for interpretation or precedent (see Parts III and VI *infra*). But since Seitz both struck down the reserve clause *and* provided the basis for doing so, the Messersmith ruling set free agency into motion, and player salaries inevitably began to escalate. Messersmith himself had earned \$90,000 with the Dodgers in 1974 but was offered only modest increases even though he had won twenty games in 1971, then twenty more in 1974, followed by nineteen wins in 1975, the year he

⁴⁷ *Id.*

⁴⁸ *Id.*

played under the reserve system terms.⁴⁹ But in 1976 Messersmith was able to switch teams, signing with Ted Turner's Atlanta Braves for \$200,000 in 1976 and \$330,000 in 1977.⁵⁰ When free agency proceeded to escalate player compensation to unprecedented levels in the 1980s, the owners countered with Commissioner Ueberroth's collusion scheme.

Immediately after the Messersmith arbitration, the owners and players again faced off in collective bargaining. For the first time in baseball history the players had significant power at the bargaining table, and so in a mere ten years, Marvin Miller had reversed the roles of labor and management. However, the union feared that complete free agency, after only one year of major league service, would result in a flooding of the market and, consequently, a *reduction* in salaries,⁵¹ at least for the foreseeable near term. Conversely, the owners sought to hold their exclusive rights to players as long as possible.⁵² Thus, the two parties came together, albeit from different perspectives, agreeing that a player would be eligible for free agency after six years of major league service.⁵³

Salary arbitration remained in the 1976 Basic Agreement.⁵⁴ The union, of course, was not about to give up what it had won three years earlier.⁵⁵ Explaining why the union was unwilling to relinquish arbitration, Miller stated:

For one thing, salary arbitration covers a different group of employees. In '76, there were a lot of people who didn't have six years of major league service. It's like saying if you could have gotten higher pensions for 70-year-olds, you'd give it up for 65-year-olds. It wouldn't happen.⁵⁶

Looking back at the 1976 negotiation then-Commissioner Bowie Kuhn publicly stated, "In a better world, we wouldn't have negotiated salary arbitration with free agency. If that simple thing had been changed, I don't think the system would be what it is."⁵⁷ Miller has insisted that the union was never willing to abandon the arbitration process despite a myth to the contrary.⁵⁸ Miller has stated:

The difference between a ballplayer's being required to accept whatever a club offered him, as had been the case almost from the beginning of professional baseball, and the new system of salary

⁴⁹ Andy Messersmith Baseball Stats, <http://www.baseball-almanac.com/players/player.php?p=messean01> (last visited Mar. 9, 2010).

⁵⁰ *Id.*

⁵¹ ABRAMS, THE MONEY PITCH, *supra* note 25, at 30.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Chass, *supra* note 39.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

arbitration was like the difference between dictatorship and democracy. Salary arbitration has been a major factor in eliminating gross inequities in the salary structures from club to club (and sometimes on the same club) and, along with the right of free agency, negotiated three years later, produced the most rapid growth of salaries ever experienced in any industry.⁵⁹

During the 1976 bargaining negotiations, MLB lobbied for and won an express prohibition against joint player negotiations. In so doing, the owners would suppress player uprisings, but they would also deal themselves an unwitting blow. The relevant restrictive language inserted into baseball's collective bargaining agreement in 1976 included the following:

The utilization or non-utilization of rights under this Article XVIII is an individual matter to be determined solely by each player and each club for his or its own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs.⁶⁰

This clause abruptly solved the Drysdale-Koufax problem, but the Players Association had astutely managed to insert the final phrasing into the last line to pose a *quid pro quo* restriction on the clubs themselves. Perhaps the owners had allowed this insertion because they were so relieved to win the primary negotiating point, or maybe they simply dismissed the possibility that two or more clubs would negotiate with one player—a seemingly unlikely eventuality that could easily have been overlooked. Ultimately, though, the clause would later become the crux of the “baseball collusion” case against Commissioner Peter Ueberroth and the clubs during the mid-1980s, whereby the clubs were deemed to have acted in concert with a “common goal” contrary to the individual bargaining efforts mandated by the collective bargaining agreement.⁶¹

If the owners had felt immune because of the antitrust exemption, their comfort was misplaced because a subsequent player grievance led to a pair of rulings by Arbitrators Tom Roberts (after the 1985 season) and George Nicolau (following the 1986 season) that found such overt behavior to violate the express terms of the very joint negotiation clause that the owners had themselves inserted.⁶² The clubs and the Players Association then negotiated a settlement of \$280 million to compensate for lost opportunities and earnings, but some estimates, which consider the increased salary costs over what the compensation might have been had the players become free agents the year before, suggest the real cost to the owners was closer to \$1 billion.⁶³

⁵⁹ MILLER, *supra* note 24, at 109.

⁶⁰ PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 265 (3d ed. 2004). Article VIII is Articles XIX(A)(2) and XX in the 2007–2011 Basic Agreement.

⁶¹ Murray Chass, *7 in Baseball Collusion Case Win Free Agency*, N.Y. TIMES, Jan. 23, 1988, at 11.

⁶² WEILER & ROBERTS, *supra* note 60, at 265.

⁶³ *Id.* at 267–68.

Serving as a clear example of the “law of unintended consequences” in its own right, the legal odyssey of the baseball collusion case was exacerbated by the related, concurrent misstep that led to the Messersmith and McNally arbitration award. In other words, such collusion was originally intended to control, if not depress, player salaries, yet it ultimately became a factor in expanding those salaries when subsequent grievances exposed the collusion and unleashed free market forces. Similarly, the original player option clause intended to control players and quash free agency was found to be egregious and was defeated by the Messersmith grievance arbitration ruling. Ironically, National League player Andy Messersmith and American League player Dave McNally were both pitchers, just as Drysdale and Koufax had been, and Messersmith was even a Dodger. Although it had taken several years, the joint holdout proscription was finally inserted just after the Messersmith-McNally arbitration ruling, but, as described, it also proved to be a fatal move by the owners.

Salary arbitration was again a focal point of the 1985 collective bargaining negotiations.⁶⁴ The owners managed to increase the service time from two years to three years for arbitration eligibility.⁶⁵ However, this victory was short-lived. In response to the 1990 player strike, “the owners proposed a radical restructuring of the collective bargaining agreement.”⁶⁶ Specifically regarding player compensation, the owners “proposed a pay-for-performance arrangement in which players with zero to six years of experience would be compensated on the basis of statistical formulas by position,” thereby eliminating the need for salary arbitration.⁶⁷ The players, on the other hand, sought to restore the two-year period of prior major league service required for arbitration eligibility that they had given away in the 1985 Basic Agreement.⁶⁸ The parties eventually compromised and agreed to eligibility for the top seventeen percent of players with two to three years of major league service for arbitration.⁶⁹

The owners voted to reopen negotiations in 1992, setting the stage for a particularly acrimonious player strike in 1994,⁷⁰ the one that led to the unprecedented cancellation of the 1994 World Series. The owners proposed a seven-year contract that would eliminate salary arbitration, yet would allow players with four to six years of major league service to become free agents with a right of first refusal by the player’s current club.⁷¹ Players with fewer than four years of service time would be subject to escalating minimum salaries negotiated collectively by the union.⁷² The union responded by proposing to lower the eligibility for salary arbitration to two years. The owners countered by declaring an impasse and eliminating salary

⁶⁴ Paul D. Staudohar, *The Baseball Strike of 1994–1995*, 120 MONTHLY LAB. REV. 23 (1997) [hereinafter Staudohar, *The Baseball Strike*].

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 24.

⁷² *Id.*

arbitration unilaterally.⁷³ The players' union then successfully obtained an injunction preventing the owners from unilaterally removing salary arbitration. The court held that salary arbitration was a mandatory subject of collective bargaining and thus could not be unilaterally removed.⁷⁴ The players and owners eventually settled on a new agreement in 1996 with little modification to the salary-arbitration and free-agency provisions.⁷⁵

A new collective bargaining agreement was signed in 2002, but the focus of this agreement veered away from arbitration issues, which were largely supplanted by testing for performance-enhancing drugs and a different approach to player salary limitations by means of a luxury tax.⁷⁶ The agreement was renewed in 2006 when, in the wake of considerable public outrage over what was becoming baseball's steroid era, the parties again considered rules regarding performance-enhancing drugs and extended the drug-testing rules through the 2011 season.⁷⁷ With an effective drug testing system finally in place, it is reasonable to anticipate that salary arbitration will again be at the forefront of negotiations in 2012.

III. SALARY ARBITRATION IN ITS CURRENT FORM

A. The Process

The current collective bargaining agreement that runs through 2011 makes salary arbitration available to all players who have completed three to six years of major league service.⁷⁸ The agreement also permits certain players, known as the "Super Twos," those with more than two years but less than three years of service, to use salary arbitration if they have accumulated at least eighty-six days of service during the immediate prior season provided they rank in the top seventeen percent of players in the two-year service group.⁷⁹ Teams must tender a contract offer to the player on or before the third Friday in December.⁸⁰ The player then has until the middle of January to negotiate with his team or file for arbitration.⁸¹

⁷³ Silverman v. Major League Baseball Player Relations Comm., 67 F.3d 1054, 1060 (2d. Cir. 1995).

⁷⁴ *Id.* at 1062.

⁷⁵ Staudohar, *The Baseball Strike*, *supra* note 64, at 27.

⁷⁶ Paul D. Staudohar, *Baseball Negotiations: A New Agreement*, 125 MONTHLY LAB. REV. 15 (2002) [hereinafter Staudohar, *Baseball Negotiations*].

⁷⁷ *MLB Players, Owners Announce Five-Year Labor Deal*, ESPN, Oct. 25, 2006, <http://sports.espn.go.com/mlb/news/story?id=2637615>.

⁷⁸ 2007–2011 Basic Agreement art. VI(F)(1)(2006), *available at* http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf [hereinafter MLB Basic Agreement].

⁷⁹ *Id.*

⁸⁰ Eugene Freedman, *The Salary Arbitration Primer*, BASEBALL THINK FACTORY, Dec. 15, 2003, http://www.baseballthinkfactory.org/files/primate_studies/discussion/eugene_freedman_2003_12_14_0/.

⁸¹ *Id.*

Players with more than six years of service time are also eligible for salary arbitration,⁸² but they are subject to a different set of rules:⁸³ “These players must be offered arbitration on or before December 7 and must accept arbitration on or before December 19.”⁸⁴ Such a player is considered signed for the next year if he is offered arbitration.⁸⁵ If that player chooses to sign with another team after being offered arbitration, his former team is entitled to compensatory draft picks.⁸⁶ If the player is not offered arbitration his team may not negotiate with or sign the player until May 1.⁸⁷

The union and the Player Relations Committee, which represents the owners, mutually select a three-member panel from a list of approximately twenty-four arbitrators provided by the American Arbitration Panel.⁸⁸ The arbitrators are seasoned in MLB salary arbitration and labor grievances. Arbitrators are paid \$950 per case and are not informed of which cases they will hear ahead of time.⁸⁹ The hearings take place in the first three weeks of February.⁹⁰

B. Admissible Criteria

The arbitration process becomes something of a trial by statistics, augmented by the player’s community standing, physical or mental condition, and the overall success of the employer ballclub. Specifically, the criteria that may be introduced in an arbitration hearing under the collective bargaining agreement include:

The quality of the Player’s contribution to his Club during the past season (including but not limited to his overall performance, special qualities of leadership and public appeal);

The length and consistency of his career contribution;

The record of the Player’s past compensation;

Comparative baseball salaries;

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ ABRAMS, *THE MONEY PITCH*, *supra* note 25, at 147. Until the labor strike of 1994 salary arbitration cases were decided by one arbitrator. Management pressed for a change to a panel of three arbitrators, believing they were less likely to produce faulty decisions. The results from the change, however, show no statistical difference. *Id.* at 155.

⁸⁹ *Id.* at 147.

⁹⁰ *Id.*

The existence of any physical or mental defects on the part of the Player;

The recent performance record of the Club including but not limited to its League standing and attendance as an indication of public acceptance.⁹¹

The following evidence, even though it is arguably relevant, is not admissible in an arbitration hearing:

The financial position of the Player and the Club;

Press comments, testimonials or similar material bearing on the performance of either the Player or the Club, except that recognized annual Player awards for playing excellence shall not be excluded;

Offers made by either Player or Club prior to arbitration;

The cost to the parties of their representatives, attorneys, etc.;

Salaries in other sports or occupations.⁹²

Although the collective bargaining agreement outlines criteria that arbitrators can and cannot consider, the agreement does not specify the weight an arbitrator can apply to each such criterion. Arbitrators are instructed to assign “such weight to the evidence as shall appear appropriate under the circumstances.”⁹³

The method of arbitration used by MLB is based on “final offer arbitration.” The arbitrator must choose either the owners or the player’s position and cannot compromise between the two positions.⁹⁴ Now widely referred to in business as “baseball style arbitration,” the rule barring compromise draws the two offers toward the center rather than forcing a polarized pair of starting points.

C. Salary Arbitration in the National Hockey League

Currently the only other major sports league that has a salary arbitration provision in its collective bargaining agreement is the National Hockey League (“NHL”). The NHL collective bargaining agreement was signed in 2005 after a 310-day lockout by the owners. The agreement runs through the 2010–2011 season.⁹⁵ Article 12 of the

⁹¹ MLB Basic Agreement, *supra* note 78, at art. VI(F)(12)(a).

⁹² *Id.* at art. VI(F)(12)(b).

⁹³ *Id.* at art. VI(F)(12)(a).

⁹⁴ *Id.* at art. VI(F)(5).

⁹⁵ See Collective Bargaining Agreement Between National Hockey League and National Hockey League Players’ Association (2005), available at <http://www.nhl.com/cba/2005-CBA.pdf>.

NHL agreement outlines the league's salary arbitration system.⁹⁶ Salary arbitration in the NHL has a couple key distinctions from the system used by MLB. A player is eligible for salary arbitration after four years of professional experience if between eighteen and twenty years old or after one year of professional experience if twenty-four years or older.⁹⁷ The player or the team may elect to go to salary arbitration.⁹⁸ The two parties must submit their briefs to the selected arbitrator forty-eight hours in advance of the hearing, and the arbitrator has forty-eight hours to render a decision after the hearing.⁹⁹ Furthermore, the parties may not present evidence of any contract entered into by an unrestricted free agent or any player contract not offered by one of the parties as a comparable contract.¹⁰⁰

One major difference in the two arbitration systems is that in the NHL the arbitrator must issue "a brief statement of the reasons for the decision, including identification of any comparables(s) relied on."¹⁰¹ Another important distinction is that the NHL allows teams to have "walk-away rights."¹⁰² An NHL team is afforded the chance to "walk away" from an arbitration decision within forty-eight hours, and the player subsequently becomes an unrestricted free agent.¹⁰³ "Walk-away rights" are limited to cases in which the player elects to go to salary arbitration.¹⁰⁴ The "walk-away right" is far different than the binding arbitration system used by MLB. An important factor to consider when comparing the two arbitration systems is that the NHL has a salary cap.¹⁰⁵ This distinction should be kept in mind when comparing the two arbitration systems.

IV. BENEFITS OF THE FINAL OFFER ARBITRATION PROCESS

Salary arbitration in baseball is actually a sort of hybrid of two forms of final-offer arbitration.¹⁰⁶ The first form is "issue-by issue" arbitration, "in which the arbitrator selects one party's final proposal for each issue separately."¹⁰⁷ The second is "by package" arbitration, where the arbitrator must select the entire package from either party.¹⁰⁸ The risk is much greater for both parties in the latter form. There is only

⁹⁶ *Id.* at art. 12.

⁹⁷ *Id.* at art. 12.1(a).

⁹⁸ *Id.* at art. 12.2, 12.3.

⁹⁹ *Id.* at art. 12.9 (b), (n).

¹⁰⁰ *Id.* at art. 12.9(g)(ii)(G), (g)(iii)(B).

¹⁰¹ *Id.* at art. 12.9(n)(ii)(D).

¹⁰² *Id.* at art. 12.10.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at art. 50.

¹⁰⁶ Jonathan M. Conti, *The Effect of Salary Arbitration on Major League Baseball*, 5 SPORTS LAW. J. 221, 230, (1998).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

one issue in salary arbitration, salary, but the arbitrator must select the entire package.¹⁰⁹

The final-offer arbitration process adopted by baseball has many advantages to alternative forms of arbitration.¹¹⁰ Final-offer arbitration encourages settlement between the two parties.¹¹¹ Rational parties naturally desire to avoid the extreme risk of final-offer arbitration due to the arbitrator's inability to compromise between the two offers.¹¹² Both sides shift their positions in order to capture the difference between the player's actual worth and what he demands or the team offers. Winning in final-offer arbitration means one's position is more reasonable or closer to the player's actual worth.¹¹³ The commensurate risk normally narrows the gap between positions, and this is "the key that unlocks the door to settlement."¹¹⁴

In contrast, conventional arbitration can produce a chilling effect on negotiations.¹¹⁵ Parties do not "bargain in good faith because they may have reason to believe a more attractive outcome may result from arbitration than negotiation."¹¹⁶ Thus, the parties may adopt extreme positions and drive themselves further away from settlement.¹¹⁷

Additionally, in final-offer arbitration, parties are made aware of the midpoint between their two offers and have considerable time to meet that midpoint prior to the arbitration proceeding.¹¹⁸ Arbitration hearings take place in February, giving the teams about a month to negotiate a settlement.¹¹⁹ However, recently teams such as the Tampa Bay Rays have implemented a "file and go strategy."¹²⁰ The Rays do not negotiate once numbers are filed for arbitration.¹²¹ Instead they choose to wait and let the arbitrator decide the appropriate salary.¹²² This strategy essentially eliminates the advantage of being made aware of the mid-point prior to the hearing date.

¹⁰⁹ *Id.*

¹¹⁰ Brien Wassner, *Major League Baseball's Answer to Salary Disputes and the Strike*, 6 VAND. J. ENT. L. & PRAC. 5, 10 (2003).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ ABRAMS, THE MONEY PITCH, *supra* note 25, at 149.

¹¹⁴ *Id.*

¹¹⁵ Spencer B. Gordon, *Final Offer Arbitration in the New Era of Major League Baseball*, 6 J. AM. ARB. 153, 158 (2007).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Wassner, *supra* note 110, at 11.

¹¹⁹ ABRAMS, THE MONEY PITCH, *supra* note 25, at 147.

¹²⁰ Bill Chastain, *Aybar, Navarro Will Go to Arbitration*, MLB, Jan. 1, 20, 2009, http://mlb.mlb.com/news/article.jsp?ymd=20090120&content_id=3751465&vkey=hotstove2008&fext=.jsp.

¹²¹ *Id.*

¹²² *Id.*

The threat of final-offer arbitration can also motivate parties to settle based on interest-based incentives.¹²³ Players can negotiate terms outside of the scope of the arbitration salary like bonuses and multi-year contracts.¹²⁴

Furthermore, owners normally prefer to avoid the adversarial nature of an arbitration hearing. Teams risk injuring their relationship with a player by arguing that his worth is well below what the player thinks he is worth.¹²⁵ A team might be forced to defend its proposal by “insulting a player and presenting arguments that harp on a player’s physical or mental defects, or demeaning his past contributions to the club, playing record or public appeal.”¹²⁶ Despite all these reasons why final-offer arbitration encourages settlement, some cases are still not settled and make it to the arbitration table. To date, 495 cases have been arbitrated between players and owners and the owners have won 285 such hearings.¹²⁷ However, a closer look at salary arbitration reveals that the players have benefited far more than the owners in the long run and that the system as a whole has flaws that affect all parties involved in the game of baseball.

V. CURRENT PROBLEMS WITH SALARY ARBITRATION

A. Failure to Assign Weight to Admissible Criteria Creates Inconsistent and Unpredictable Results

The collective bargaining agreement outlines specific criteria that may be presented at an arbitration hearing; however, the agreement does not assign specific weight to the criteria.¹²⁸ A closer look at three arbitration hearings during the 2008 offseason reveals the inconsistency and unpredictability that can arise from such a lack of guidance.

Oliver Perez, starting pitcher for the New York Mets, filed for arbitration following a season in which he had fifteen wins and ten losses with a 3.56 earned run average.¹²⁹ The Mets offered him \$4.725 million, but Perez sought \$6.5 million.¹³⁰ Perez had accumulated 5.034 years of major league service time.¹³¹ Perez won his arbitration hearing and was awarded a salary of \$6.5 million for the 2008 season.¹³²

¹²³ Wassner, *supra* note 110, at 11.

¹²⁴ *Id.*

¹²⁵ ABRAMS, THE MONEY PITCH, *supra* note 25, at 164.

¹²⁶ Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT’L ARB. 383, 390 (1999).

¹²⁷ Maury Brown, Arbitration Scorecard, http://bizofbaseball.com/index.php?option=com_content&view=article&id=719&Itemid=116 (last visited Mar. 9, 2010) [hereinafter Brown, Arbitration Scorecard].

¹²⁸ MLB Basic Agreement, *supra* note 78, at art. VI(F)(12)(a).

¹²⁹ Oliver Perez Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=424144 (last visited Mar. 9, 2010).

¹³⁰ Brown, Arbitration Scorecard, *supra* note 127.

¹³¹ Maury Brown, Arbitration Figures, http://bizofbaseball.com/index.php?option=com_content&view=article&id=3400&Itemid=173 (last visited Mar. 9, 2010) [hereinafter Brown,

Chien-Ming Wang, starting pitcher for the New York Yankees, also filed for arbitration following a season in which he had nineteen wins and seven losses with a 3.70 earned run average.¹³³ Wang's service time was 2.159 years.¹³⁴ The Yankees offered him \$4 million, but Wang sought \$4.6 million.¹³⁵ Unlike Perez, Wang lost his case and was awarded the club's salary position.¹³⁶ The cases were decided by different arbitration panels.¹³⁷ The results suggest that service time may have been weighted disproportionately given that Perez was awarded a much higher salary despite winning four fewer games and having only a slightly lower earned run average.

Brien Fuentes, relief pitcher for the Colorado Rockies, also filed for arbitration in 2008 with 5.125 years of major league service time, nearly identical to that of Perez.¹³⁸ Fuentes had twenty saves and an earned run average of 3.08 in 2007, nearly a full half-run lower than Perez.¹³⁹ The Rockies offered \$5.05 million and Fuentes sought \$6.5 million.¹⁴⁰ Fuentes lost his case at arbitration and thus was awarded \$1.45 million less than Perez.¹⁴¹ This arbitration panel assigned significantly less weight to service time and the result was a \$1 million deviation from the Perez award.

The uncertainty regarding the weight an arbitration panel will assign to the particular admissible criteria creates a highly unpredictable process evidenced by the results in the Perez, Wang, and Fuentes hearings. In response to such unpredictability, teams and players often present the panel with mountains of information and statistics hoping to catch the arbitrator's eye.¹⁴² However, arbitrators only have twenty-four hours from the hearing to issue their opinions.¹⁴³ Roger Abrams, an established baseball arbitrator and former dean at three law schools including Northeastern University in Boston, has observed, "At times, the litigation seems to have more in common with rotisserie baseball leagues than with normal grievance arbitration."¹⁴⁴

Arbitration Figures]. Note that in customary arbitration nomenclature, although the mathematical service designations give the appearance of a decimal system, they actually represent years followed by days such that the Perez shorthand notation of 5.034 means that Perez had accumulated five years and thirty-four days of service time.

¹³² Brown, Arbitration Scorecard, *supra* note 127.

¹³³ Chien-Ming Wang Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=425426 (last visited Mar. 9, 2010).

¹³⁴ Brown, Arbitration Figures, *supra* note 131.

¹³⁵ Brown, Arbitration Scorecard, *supra* note 127.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Brown, Arbitration Figures, *supra* note 131.

¹³⁹ Brian Fuentes Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=150118 (last visited Feb. 16, 2010).

¹⁴⁰ Brown, Arbitration Scorecard, *supra* note 127.

¹⁴¹ *Id.*

¹⁴² ABRAMS, THE MONEY PITCH, *supra* note 25, at 158.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 157.

The inconsistency and unpredictability is compounded by the fact that baseball arbitrators do not issue written opinions explaining their reasoning. Parties can only infer what evidence was given more weight before attempting to use that ruling as precedent at a later hearing, but they have no real ground on which to stand when making their subsequent presentations regarding precedential value.

By not assigning weight to the admissible criteria presented at an arbitration hearing, both teams and players engage in a much riskier and unpredictable process. The amount of discretion given to arbitrators to “assign such weight to the evidence as shall appear appropriate under the circumstances”¹⁴⁵ is unnecessary and fosters a system of inconsistency. Both players and owners would benefit from assigning weight to the admissible criteria presented at a salary arbitration hearing, or at least requiring further explanation in the arbitration award.

B. Comparing Players with Different Years of Service Time

The collective bargaining agreement states:

The arbitration panel shall, except for a Player with five or more years of Major League service, give particular attention, for comparative salary purposes, to the contracts of Players with Major League service not exceeding one annual service group above the Player’s annual service group. This shall not limit the ability of a Player or his representative, because of special accomplishment, to argue the equal relevance of salaries of Players without regard to service, and the arbitration panel shall give whatever weight to such argument as is deemed appropriate.¹⁴⁶

At the arbitration table, a player prefers to be compared with players who have more major league service than he has completed.¹⁴⁷ A player with more major league service is likely to have a higher salary. The team, therefore, prefers the exact opposite.¹⁴⁸ The above excerpt from the collective bargaining agreement offers little to no guidance to arbitrators on this issue.¹⁴⁹ Arbitrators are directed to give “particular attention” to the player’s service group and one service group above that group. However, the agreement does not define or give any guidance as to what “particular attention” means.

Furthermore, the agreement also allows players to argue equal relevance of salaries without regard to service because of “special accomplishment.” Once again the agreement does not define this term or provide any guidance as to its meaning. Is a special accomplishment a Gold Glove award for noteworthy defense, throwing a

¹⁴⁵ MLB Basic Agreement, *supra* note 78, at art. VI(F)(12)(a).

¹⁴⁶ *Id.*

¹⁴⁷ ABRAMS, THE MONEY PITCH, *supra* note 25, at 161.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

no-hitter, playing injured, hitting a game-winning home run, not missing any team meetings—or, for that matter, passing a steroid test?

The following table illustrates 2008 mean average salary by years of service:¹⁵⁰

Years of Service	Number of Players	Average Salary
At least 3 but less than 4	76	\$1,794,652
At least 4 but less than 5	62	\$3,412,746
At least 5 but less than 6	59	\$3,948,787

The lack of guidance given to arbitrators regarding comparing players in different service groups can lead to inconsistent results.¹⁵¹ If an arbitrator were to reach up and compare a third-year player with a fourth-year player, the result might be a drastically inflated salary given that the average salary difference is over \$1,600,000.¹⁵² Without proper guidance as to the term “particular attention,” a player with exactly the same “special accomplishments” could receive a lower salary, defeating the purpose of paying similar players similar salaries.

While there is no actual proof that arbitrators are engaging in the practice of looking to other service groups, due to the fact that no written opinions are required, it is inevitable that an arbitrator will know and have a sense for other player levels—judicial notice of sorts—since they are experienced with other cases and are not limited to the data presented at the actual hearing.

C. Salary Arbitration Creates an Inefficient Free Agent Market

In economic terms, baseball players are labor, in effect virtual “goods” to which owners purchase exclusive rights for a term of years. Salary arbitration creates three separate classes of this player commodity. One class encompasses players who have yet to reach arbitration eligibility. Another class includes players that are arbitration-eligible. The final class consists of free agents. In an ideal market, supply will ultimately equal demand and equilibrium will be reached.¹⁵³ The amount of goods produced will be equal to the amount of goods demanded. However, this is not the case in the baseball free-agent market, and thus the allocation of players as goods is not efficient. The free-agent market for players is limited to those who have reached six years of major league service. In 2009, twenty-three percent of players were not eligible for free agency.¹⁵⁴ This decrease in supply creates an inefficient market and,

¹⁵⁰ MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, AVERAGE SALARIES IN MAJOR LEAGUE BASEBALL 1967–2009, at 4, available at http://hosted.ap.org/specials/interactives/_sports/baseball08/documents/bbo_average_salary2009.pdf.

¹⁵¹ See ABRAMS, THE MONEY PITCH, *supra* note 25, at 162.

¹⁵² MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, *supra* note 150, at 4.

¹⁵³ Economics Basics: Demand and Supply, <http://www.investopedia.com/university/economics/economics3.asp> (last visited Mar. 9, 2010).

¹⁵⁴ See MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, *supra* note 150.

as a result, salaries are artificially inflated.¹⁵⁵ The Messersmith decision empowered the players' union to negotiate the hybrid free agency that creates this inefficient market, and the escalating results have been astronomical.¹⁵⁶ The owners' desire to retain exclusive control for the first six years of a major league player's service time has led to a significant increase in player salaries.¹⁵⁷ The average player salary has increased from \$44,676 in 1975 to \$2,925,679 in 2008.¹⁵⁸ The owners undoubtedly would prefer lower salaries, even though the increase was largely brought on by themselves—just as their overreaching led to the Messersmith decision's elimination of the reserve clause—once again exposing the clubs to the law of unintended consequences.

The National Football League ("NFL") does not separate its players into classes of goods. In fact, a first-round draft pick may be one of the higher paid players on any given team in the NFL.¹⁵⁹ However, unlike in baseball, the NFL established a hard cap on a team's total salaries.¹⁶⁰ This tempers the free market in a more efficient way than baseball's salary arbitration structure, and the result is increased cost certainty for NFL teams. The combination of separating players into classes of goods in baseball while maintaining no limit on team spending has resulted in massive player salaries.¹⁶¹ For instance, in the last decade, Alex Rodriguez signed two deals worth over \$200 million each.¹⁶²

Certainly, the significant increase in baseball salaries cannot be blamed wholly on the advent of salary arbitration. Prior to the Messersmith decision, each team had the luxury of being the only employer able to negotiate with its own player, thereby achieving the intended result of artificially lower salaries.¹⁶³ There is ample anecdotal evidence of such economic aberrations, much of it comprising some of baseball's greatest lore. When prodigious slugger Jimmy Foxx won the coveted Triple Crown in

¹⁵⁵ See John P. Gillard, Jr., *An Analysis of Salary Arbitration in Baseball: Could a Failure to Change the System Be Strike Three For Small-Market Franchises?*, 3 SPORTS LAW J. 125, 133 (1996).

¹⁵⁶ Marvin Miller's economic background likely contributed to the creation of the inefficient market.

¹⁵⁷ ABRAMS, THE MONEY PITCH, *supra* note 25, at 30.

¹⁵⁸ MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, *supra* note 150, at 3.

¹⁵⁹ See John Clayton, *Lions Secure QB Stafford*, ESPN, Apr. 25, 2009, <http://sports.espn.go.com/nfl/draft09/news/story?id=4097641> (reporting that Matthew Stafford, the first pick in the 2009 draft, received \$41.7 million guaranteed, while veteran Albert Haynesworth received \$41 million guaranteed).

¹⁶⁰ 1993 Collective Bargaining Agreement between the NFL Management Council and the NFL Players Association, as amended Feb. 25, 1998, art. XXIV, 1(c)(i) & 4, in Vittorio Vella, *Swing and a Foul Tip: What Major League Baseball Needs to Do to Keep Its Small Market Franchises Alive at the Arbitration Plate*, 16 SETON HALL J. SPORTS & ENT. L. 317, 333 (2006). A hard cap is how much each team is allowed to spend on player salaries for a given year. A team may not go over a hard cap under any circumstances.

¹⁶¹ See Chass, *supra* note 39.

¹⁶² See Associated Press, *Rodriguez Finalizes \$275M Deal with Yankees*, ESPN, Dec. 13, 2007, available at <http://sports.espn.go.com/mlb/news/story?id=3153171>.

¹⁶³ See Conti, *supra* note 106, at 236.

1933, Athletics owner Connie Mack tried to actually reduce his salary.¹⁶⁴ This, however, was during the Great Depression, so a better example might be Mickey Mantle's 1957 season when he batted a lofty .365, a feat that inspired Yankees owner George Weiss to offer a pay cut.¹⁶⁵ When superstar Ralph Kiner led the National League in home runs for the seventh consecutive year for the last place Pirates, General Manager Branch Rickey cut his salary by twenty-five percent.¹⁶⁶ When a stunned Kiner protested, claiming the lowly Pirates needed him, Rickey countered with one of the more enduring lines in the annals of baseball: "We would have finished last without you."¹⁶⁷

It is clear that baseball revenues have increased significantly over the past twenty years, and player salaries have also increased since the demise of baseball's reserve clause. Nevertheless, the market for free agents is an inefficient one caused by salary arbitration and the absence of a cap on team salaries.

D. Super Two Eligibility Fosters a No-Win Situation for Teams, Players, and Fans

One of the many highlights of the 2008 playoffs was the success of the Tampa Bay Rays.¹⁶⁸ Among other things, the Rays' run to the World Series featured a surprise pitching performance from David Price.¹⁶⁹ Price was the Rays' first pick of the amateur draft in 2007.¹⁷⁰ In the 2008 playoffs, he earned his first major league win and recorded the final four outs of the American League Championship Game.¹⁷¹ Yet, despite his performance—a seemingly "special accomplishment"—when the 2009 season started, the Rays left him off their twenty-five man roster and assigned him to the minor leagues.¹⁷² This decision was not in the best interest of the team in winning games, nor was it in the best interest of the paying fans. The Rays' decision to assign him to the minor leagues was simply an attempt to delay his arbitration eligibility.¹⁷³

¹⁶⁴ HELYAR, *supra* note 21, at 10.

¹⁶⁵ *Id.* at 82.

¹⁶⁶ DICKSON, *supra* note 13, at 358.

¹⁶⁷ *Id.*

¹⁶⁸ "The Rays were the worst team in the majors last year, had never come close to a winning season in their 10-year franchise history and spent less money in 2008 payroll than every other team but the Florida Marlins. Vegas set odds of 200 to 1 for Tampa Bay to win the World Series this year. The Rays, however, won 97 games and the pennant . . ." Tom Verducci, *The New Reality*, SPORTS ILLUSTRATED, Oct. 27, 2008, at 46.

¹⁶⁹ *Id.*

¹⁷⁰ Jayson Stark, *Believe It or Not, Price Headed to Minors*, ESPN, Mar. 24, 2009, http://sports.espn.go.com/mlb/spring2009/columns/story?columnist=stark_jayson&id=4011780.

¹⁷¹ *See id.*

¹⁷² Associated Press, *Rays Send Lefty Price to Minors*, ESPN, Mar. 25, 2009, <http://sports.espn.go.com/mlb/spring2009/news/story?id=4016400>.

¹⁷³ *See* Stark, *supra* note 170.

The collective bargaining agreement provides that a player with at least two, but less than three, years of major league service shall be eligible for salary arbitration if he has accumulated at least eighty-six days of service during the immediately preceding season and he ranks in the top seventeen percent in total service in the class of players who have at least two but less than three years of major league service.¹⁷⁴ A major league season is defined as 172 days on the roster.¹⁷⁵ Players who qualify for eligibility under these criteria are deemed Super Twos. This distinction was implemented by the 1990 collective bargaining agreement. In the 1994 labor strike, the owners pushed for the elimination of the Super Two eligibility scheme, and the players refused.

From a player's perspective, gaining Super Two eligibility can result in a significant increase in pay.¹⁷⁶ In 2008, Ryan Howard of the Philadelphia Phillies became a Super Two by a mere five days and his salary increased \$10 million as a result of salary arbitration.¹⁷⁷ In an effort to avoid Super Two eligibility teams have, in the past, risked costing themselves a chance for a place in the playoffs. In 2007, the Milwaukee Brewers did not bring up their star prospect Ryan Braun until May 25. From that day forward he compiled better statistics than the American League Most Valuable Player.¹⁷⁸ Yet, the Milwaukee Brewers missed the playoffs by a mere two games.¹⁷⁹ Whether Braun could have made up those two games by appearing seven weeks sooner is uncertain, but it is apparent that the Brewers were willing to take that risk. This unwillingness has created a losing situation for the game of baseball itself, not to mention the Brewers and their fans.

The Tampa Bay Rays assigned the 2008 Minor League Player of the Year, David Price, who accumulated a 1.08 earned run average in spring training and significantly contributed to the Rays' first trip to the World Series, to the minor leagues.¹⁸⁰ The Rays are not the only team to make similar decisions with top prospects in 2009.¹⁸¹

¹⁷⁴ MLB Basic Agreement, *supra* note 78, at art. VI(F)(1).

¹⁷⁵ Tim Sullivan, *Padres' Stance on Headley all about the money*, SAN DIEGO UNION TRIB., May 28, 2008, at D1, available at <http://www3.signonsandiego.com/news/2008/may/27/headleys-prolonged-apprenticeship-portland-makes-d/>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Braun hit thirty-four home runs, had ninety-seven runs batted in, and hit .324 in 113 games in 2007. Ryan Braun Stats, Bio, Photos, Highlights, http://milwaukee.brewers.mlb.com/team/player.jsp?player_id=460075 (last visited Mar. 9, 2010). American League MVP, Alex Rodriguez, hit thirty-five home runs, had 111 runs batted in, and hit .325 in the last four months of the 2007 season. Alex Rodriguez Stats, Bio, Photos, Highlights, http://mlb.mlb.com/team/player.jsp?player_id=121347 (last visited Mar. 9, 2010).

¹⁷⁹ Regular Season Standings, <http://mlb.mlb.com/mlb/standings/index.jsp?ymd=20071001> (last visited Mar. 9, 2010).

¹⁸⁰ Stark, *supra* note 170.

¹⁸¹ Matt Wieters, the number two ranked prospect behind David Price was also assigned to the minor leagues by the Baltimore Orioles despite batting .335 with twenty-seven home runs and ninety-one runs batted in for the 2007 minor league season. See Associated Press, *Orioles' Wieters to Minors*, WASH. TIMES, Mar. 23, 2009, available at <http://www.washingtontimes.com/news/2009/mar/30/orioles-wieters-is-off-to-minors-but-not-for-long>.

By doing so, the Rays and other teams are essentially withholding certain better players in an effort to save a significant amount of money in the long term. Fans, therefore, pay full price for tickets to see an inferior, manipulated product on the field, and teams are hurting their own chances of winning by keeping a qualified major league player in the minors.¹⁸²

Moreover, the Super Two eligibility scheme has a negative impact on the Rays' David Price himself, both in his potential earnings and in his development as a player. If Price does not reach Super Two eligibility, then he has to play another season at his original major league salary before reaching arbitration eligibility. He must play for earnings that are arguably well below his market value for a full year when he risks a career ending injury. Furthermore, in the minor leagues Price is forced to pitch to inferior talent. Price himself stated, "If I'm getting innings, I would love to get them in the big leagues. If I'm going to work on stuff, I'd love to work on it up there and get real reactions to hitters."¹⁸³

During the 2008 season the agent for Francisco Liriano, pitcher for the Minnesota Twins, asked the players' union to investigate why his client had not been called up to the major leagues despite his excellent performance in the minor leagues.¹⁸⁴ The investigation was eventually dropped but will likely be revisited if the current structure remains in place.

E. Salary Arbitration Unfairly Favors Players During Economic Recessions

In the aftermath of a severe economic recession in 2008, the 2009 baseball offseason exposed a particular flaw in the salary arbitration process as utilized by MLB: evidence of a team's financial condition is inadmissible at the salary arbitration table.¹⁸⁵ The economic climate entering the 2009 offseason was unusually weak, if not at post-Depression lows. Employers across America cut jobs and salaries, and fourteen teams across baseball lowered their salaries from their 2008 payrolls.¹⁸⁶ The Arizona Diamondbacks and Toronto Blue Jays laid off dozens of front office employees in an attempt to reduce costs.¹⁸⁷ Ticket sales and advertising revenues were significantly lower than in past years. The free agency class of 2009 felt the effects of the depressed market; however, the arbitration class saw an increase of 143% in salary.¹⁸⁸ Thus, teams could not offer players, like Bobby Abreu, salary arbitration simply because of the likely economic result.¹⁸⁹

¹⁸² Stark, *supra* note 170.

¹⁸³ *Id.*

¹⁸⁴ Associated Press, *Agent Wants Player's Union to Investigate Twins' Call-up Snub of Liriano*, ESPN, July 18, 2008, <http://sports.espn.go.com/mlb/news/story?id=3494330>.

¹⁸⁵ MLB Basic Agreement, *supra* note 78, at art. VI(F)(12)(b).

¹⁸⁶ Bob Nightengale, *Incredible Shrinking Payroll: 14 of 30 MLB Teams Cut Back*, USA TODAY, Apr. 6, 2009, at 1C, available at http://www.usatoday.com/sports/baseball/2009-04-05-Salaries_N.htm.

¹⁸⁷ Graziano, *supra* note 5.

¹⁸⁸ Maury Brown, *Detailed Report: 2009 MLB Salary Arbitration by Club, Position, and More*, BIZ OF BASEBALL, Feb. 24, 2009, http://bizofbaseball.com/index.php?option=com_content&

Under the collective bargaining agreement, a team has a small window at the conclusion of the season to offer salary arbitration to its players not under contract but who have six or more years of major league service time.¹⁹⁰ If the club offers a player salary arbitration and he signs with another team, then that team is given compensatory draft picks.¹⁹¹ However, if no other team signs him, the club risks going to arbitration. In 2002, Greg Maddux of the Atlanta Braves surprised his team by accepting its offer for salary arbitration, a bold move that forced Atlanta's hand. The likely result in arbitration would have put Atlanta over its team budget, so the Braves traded their star pitcher Kevin Millwood as a result.¹⁹²

The economic climate entering the 2009 offseason lowered the operating budgets of fourteen major league teams, including the New York Yankees.¹⁹³ If the Yankees had offered salary arbitration to Bobby Abreu, the likely award would have been a salary similar to the one he received in 2008, which was \$16 million.¹⁹⁴ The Yankees, however, correctly concluded that the real market for Abreu was far less due to unavoidable factors like the economic climate and the likely financial condition of other major league teams, and so the team released him.¹⁹⁵ The overall economic conditions of America and baseball would not have been relevant in arbitration, but they were the most compelling factors behind Abreu's decline in market value at that time.

Arbitrators use contracts and salaries made in completely different economic climates as comparables. However, using comparable salaries is only realistic for comparable economic times. A salary negotiated in the winter of 2006 is likely to be drastically different than one negotiated in the winter of 2009, even if the players are virtually identical. It is therefore no coincidence that the arbitration class of 2009 saw an increase in pay while teams across baseball were cutting their payrolls. Artificial forces were interfering with supply and demand. Normally, when a team is negotiating with a free agent, it determines his current market value based on what the club is willing to pay balanced against what other teams are willing to pay. The salary arbitration process completely ignores this market analysis,¹⁹⁶ and therefore the realities of the market itself. Instead, the process not only focuses on what players were paid in the past, it does so in a virtual economic vacuum.

These flaws in the arbitration process create an especially difficult situation for teams in times of economic distress. The Yankees had to let Bobby Abreu walk away

view=article&id=2982:detailed-report-2009-mlb-salary-arbitration-by-club-position-and-more&catid=66:free-agency-and-trades&Itemid=153.

¹⁸⁹ Graziano, *supra* note 5.

¹⁹⁰ Freedman, *supra* note 80.

¹⁹¹ *Id.*

¹⁹² Tom Verducci, *Deadly Deal*, SPORTS ILLUSTRATED, Apr. 29, 2003, http://sportsillustrated.cnn.com/inside_game/tom_verducci/news/2003/04/29/insider.

¹⁹³ Nightengale, *supra* note 186.

¹⁹⁴ See Ortiz & Fraley, *supra* note 1.

¹⁹⁵ Graziano, *supra* note 5.

¹⁹⁶ See Gillard, *supra* note 155, at 134.

without receiving compensation, and they replaced him with far inferior talent. This was a losing proposition for the Yankees, their fans, and Abreu.

Perhaps even more remarkably, the backward looking dynamic of salary arbitration does not help teams in periods of economic growth either. If a team exercises its option of offering salary arbitration, the player still has the advantage of knowing that, at worst, he may receive an arbitration salary greater than or equal to his current salary, and can use that as leverage in the open market.

F. Salary Arbitration Ignores the Business Models of Small-Market Franchises

The highest opening-day payroll for the 2009 season belonged to the New York Yankees at \$201.4 million.¹⁹⁷ On the opposite end of the spectrum, the lowest payroll belonged to the Florida Marlins at \$36.8 million.¹⁹⁸ Clearly the Marlins pay their players much less than the New York Yankees; the Marlins' entire 2009 payroll is only about ten percent more than the 2009 salary of Yankees star Alex Rodriguez.¹⁹⁹ Baseball is the only major professional team sport without a salary cap,²⁰⁰ a fact that has contributed to tremendous disparities in payrolls between teams.²⁰¹ A large-market team is usually willing to pay more for a player's services than a small-market team due to the revenue-producing potential in that market,²⁰² through lucrative television contracts and enhanced gate revenues.

Because of the adverse economic climate, the need for a salary cap, although not on the official agenda, was at the forefront of the owners meetings during the 2009 offseason.²⁰³ Mark Attanasio, owner of the Milwaukee Brewers, believed a salary cap would make it easier for teams to control their payrolls. Attanasio stated, "Obviously, by definition, if you have a salary cap you have some cost certainty because there are very clear parameters . . ." ²⁰⁴ But the flaws in salary arbitration contribute to a team's lack of cost certainty, exacerbating the related economic challenges in operating a major league franchise.

Despite the vast differences in payrolls and revenue among teams, when a player from a small-market club files for arbitration his salary will largely be determined by comparable salaries paid to players by all teams.²⁰⁵ As a result, if a Marlins player were to file for arbitration, the team might be forced to pay Yankee-type money for that player. The Yankees committed \$423.5 million to multi-year deals for just three new free agents in the 2009 offseason.²⁰⁶ Exacerbating the problem still further is

¹⁹⁷ Nightengale, *supra* note 186.

¹⁹⁸ See MLB Salaries, CBSSports.com, <http://www.cbssports.com/mlb/salaries>.

¹⁹⁹ See *id.*

²⁰⁰ See Associated Press, *Some Baseball Owners Call for Salary Cap*, ESPN, Jan. 14, 2009, <http://sports.espn.go.com/espn/wire?section=mlb&id=3833674>.

²⁰¹ See *id.*

²⁰² Gillard, *supra* note 155, at 134.

²⁰³ Associated Press, *supra* note 200.

²⁰⁴ *Id.*

²⁰⁵ See Gillard, *supra* note 155, at 134.

²⁰⁶ Nightengale, *supra* note 186.

that salaries determined through genuine free agency can be used as a valid comparison in an arbitration hearing.²⁰⁷ But all circumstances are not comparable; for example, a given team might be willing to pay a premium for a player if that player fulfills a much-needed position on that particular club's roster.²⁰⁸ Yet the rationale for this free agent salary is ignored and the final number is used in salary arbitration as a comparable without appropriate qualification:²⁰⁹ "[A]n employer's ability to pay, which is a customary consideration in setting workers' salaries in most businesses, lies outside the foul lines of baseball salary arbitration."²¹⁰ Thus, a small market team's business model and overall economic reality are completely ignored in the arbitration process.

VI. PROPOSALS FOR CHANGING THE SALARY ARBITRATION SYSTEM

A. Refine the Admissible Criteria

The current salary arbitration system is an economic and logical aberration. One modification that could curb many of the aforementioned arbitration problems would be to refine the admissible criteria allowed under the collective bargaining agreement. Especially in light of the 2009 offseason, a team's financial position should be admissible in arbitration. If the Yankees were to offer evidence of a planned reduction in payroll as a result of the recession, they might have been able to offer Bobby Abreu salary arbitration and be awarded either a modified lesser salary or at least receive compensatory draft picks if Abreu were to sign with another team. Moreover the overall arbitration class would better represent the true market for player services in a given year. Allowing the team financial position to be considered would additionally benefit the small-market teams. The Marlins would be able to present evidence that its payroll is significantly less than that of the Yankees, and thus Yankee player salaries should not be used as a comparable without appropriate explanation or qualification. Otherwise, all player salaries would sooner or later reach Yankee levels, even though the Yankees would be the only team theoretically able to pay that much for its own finite roster. Under this proposed change, if a team did not present evidence of its financial condition, the arbitrator panel would not be permitted to consider it in its decision.

Another approach would be to mirror the NHL and utilize only other arbitrated salaries as admissible comparables, or at least to qualify the admissible salaries accordingly. After all, salaries negotiated in free agency can be multi-year contracts loaded with bonus and incentive clauses. Furthermore, teams are often willing to pay

²⁰⁷ ABRAMS, *THE MONEY PITCH*, *supra* note 25, at 161.

²⁰⁸ Gillard, *supra* note 155, at 133–34. For example the New York Mets signed star relief pitcher Francisco Rodriguez to a \$37 million contract in the 2009 offseason largely because of their bullpen problems in 2008. See Associated Press, *K-Rod, Mets Finalize Deal*, ESPN, Dec. 10, 2008, <http://sports.espn.go.com/mlb/news/story?id=3760925>.

²⁰⁹ Gillard, *supra* note 155, at 146.

²¹⁰ ABRAMS, *THE MONEY PITCH*, *supra* note 25, at 64.

a player more in free agency if that player fills a specific need that is unique to that team. Arbitrated salaries are set forth by standard player contracts for one year with no such clauses. Therefore, only comparing arbitrated salaries is not inappropriate and may provide a better apples-to-apples comparison.

Finally, the admissible criteria should be assigned weight. This will take away the unnecessary amount of discretion given to arbitrators and result in a more consistent and predictable process. As it is currently constructed, salary arbitration is a high-risk roll of the dice. The procedure is arbitrary at best, and in practice it is often unfair to teams, players, and fans alike.

B. Eliminate Super Two Eligibility

The Super Two eligibility scheme should be eliminated from the collective bargaining agreement. The eligibility for salary arbitration should either be returned to three years of service time or be replaced with a rookie scale similar to that used in the National Basketball Association (“NBA”). The NBA has an escalating wage scale for its rookies that was negotiated collectively by the union.²¹¹ In 1994, MLB owners attempted to institute a similar salary scale; however, their proposal was coupled with the elimination of salary arbitration.²¹² The owners would be better served to offer a hybrid of both rookie scale and salary arbitration to the players. One solution is a rookie scale for four years with arbitration still available for free agents after they complete their fourth year of service time, similar to the current system used by the NHL. This would prevent teams from keeping top draft picks like David Price stashed away in the minor leagues for the purpose of avoiding salary arbitration eligibility. Although no solution is entirely free from flaws or potential abuse, this approach offers a viable compromise without eliminating salary arbitration entirely.

C. Issue Written Opinions

Unlike the NHL, MLB’s current collective bargaining agreement does not require salary arbitrators to issue written opinions that explain their choices.²¹³ The arbitrator simply fills in the chosen position on a blank standard player contract within twenty-four hours of the conclusion of the arbitration hearing.²¹⁴ After all, these decisions, much like judicial decisions, affect not only the player at issue but also future players who will engage in salary arbitration.²¹⁵ Future player representatives and teams will use arbitration decisions as comparables and try to draw analogies to them. However, they may only be analogizing to a stark number and not to the reasoning behind that

²¹¹ See 2009–2010 Rookie Salary Scale, http://www.hoopsworld.com/Story.asp?story_id=9301 (last visited Mar. 9, 2010).

²¹² Staudohar, *The Baseball Strike*, *supra* note 64, at 24.

²¹³ MLB Basic Agreement, *supra* note 78, at art. VI(F)(5).

²¹⁴ *Id.*

²¹⁵ ABRAMS, *THE MONEY PITCH*, *supra* note 25, at 152.

number. Salary arbitration would be vastly improved if arbitrators' decisions were required to be accompanied by written opinions.

Written judicial opinions serve three primary functions, and all are relevant to a written salary arbitration hearing in MLB. The first is to discipline judges in the decision-making process.²¹⁶ The act of writing helps to ensure that judges properly reason through the issues put before them. Translating thought into concrete text leads the writer to reconsider the content of his thought once he has put it on paper.²¹⁷ Baseball arbitrators are presented with an overwhelming amount of statistics in a three-hour hearing.²¹⁸ It is nearly impossible to analyze all the data in the allotted period of time.²¹⁹ Additionally, the collective bargaining agreement does not specify the weight the arbitrator should apply to the evidence presented. A written opinion will ensure that the arbitrator is thorough in his or her decision-making, and he or she will better reason through the evidence presented and the weight he or she chooses to assign to such evidence. The end result will be more fair and reasoned for the benefit of the parties, while also improving the overall process.

Every victory or loss in salary arbitration has precedential value because the system focuses on comparables as the measure of a player's value.²²⁰ However, in a system of law with no written opinions, parties are limited in what they can argue.²²¹ Perhaps most importantly, arbitrators themselves are left in the dark as to the reasoning behind apparently similar cases decided in the past, which is contrary to the second primary function of a written judicial opinion: facilitating the system of precedent.²²² Teams and players can be more refined in their arguments and arbitrators will have the ability to support their decisions with careful elaborations. A written opinion will provide proper guidance for future salary arbitrations by providing parties a window into the criteria considered in past arbitration decisions and the weight assigned to such criteria.

A baseball arbitrator's guidelines or source of law are derived from the collective bargaining agreement. It outlines the admissible and inadmissible criteria on which an arbitrator can base his or her decision. However, the absence of a written opinion brings into question whether they actually stayed within these guidelines. This leads to the third function of a written opinion, which is to legitimize a ruling by providing the public with some assurance that the given decision is not arbitrary.²²³ A written judicial opinion provides a window into the court's decision-making process and allows inspection as to whether a court in a given case has acted in accordance with the law rather than pursuant to some other illegitimate standard.²²⁴ But baseball

²¹⁶ Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L. J. 1283, 1317 (2008).

²¹⁷ *Id.* at 1321.

²¹⁸ ABRAMS, *THE MONEY PITCH*, *supra* note 25, at 157.

²¹⁹ *Id.*

²²⁰ *Id.* at 152.

²²¹ Oldfather, *supra* note 216, at 1328.

²²² *Id.* at 1317.

²²³ *Id.*

²²⁴ *Id.* at 1335.

salary arbitration as presently conducted leaves the parties and future parties in the dark and left to guess whether the arbitrator has stayed within the letter of the law outlined by the collective bargaining agreement. If an arbitrator is a fan of a particular team and chooses that team's position instead of a player's position, it would go unchecked and the parties would never know. Furthermore, there is nothing to stop an arbitrator from simply flipping a coin to reach his or her decision. Although there is little to no specific evidence to suggest that arbitrators have been prejudiced or have otherwise improperly strayed beyond their guidelines, requiring written opinions will better ensure that this is never the case. This, of course, begs the real point: without detailed written opinions there can be no such evidence of impropriety, and with no explanations to rely upon at all, how can there be genuine accountability?

VII. CONCLUSION

Salary arbitration in MLB has remained largely unchanged since its introduction in 1973.²²⁵ First presented as a compromise to avoid eliminating the baseball reserve concept,²²⁶ salary arbitration has become a contentious issue between players and owners that is inherently arbitrary and unfair in practice and has little hope of resolving itself. The owners have negotiated the eligibility rules of salary arbitration and have tried and failed to remove arbitration from baseball altogether through collective bargaining sessions in 1985 and 1994.²²⁷ The issue has taken a back seat in recent labor negotiations due to performance-enhancing drugs and the introduction of the luxury tax.²²⁸ But with the contentious drug issues largely resolved, the owners have an opportune chance at forthcoming bargaining negotiations to properly address the issue of salary arbitration. If they do, the owners should focus on improving the system instead of trying to eliminate it from baseball altogether. Specifically, the teams should focus their efforts on refining the admissible criteria, eliminating the Super Two eligibility scheme, and requiring written arbitration opinions. The result will be a more predictable and consistent process that benefits the teams, the players, the fans—and the game of baseball.

The players are not likely to roll over and concede the owners' demands, of course, so it is vital that the owners approach bargaining sessions with a true strategy of negotiation instead of acting unilaterally if negotiations reach an impasse like they did in 1994 (from which the economic and public relations fallout has still not fully settled). The salary cap is currently the topic of conversation heading into new rounds of labor negotiations.²²⁹ The owners desire to achieve cost certainty through the implementation of a salary cap is likely to be met with strong opposition from the players. Refining the salary arbitration system, if presented correctly, could be seen as

²²⁵ See Chass, *supra* note 39.

²²⁶ *Id.*

²²⁷ Staudohar, *The Baseball Strike*, *supra* note 64, at 23, 24.

²²⁸ Staudohar, *Baseball Negotiations*, *supra* note 76, at 18.

²²⁹ Associated Press, *supra* note 200.

a compromise between the owners and the players, and the result would be a major benefit to the game of baseball.

The salary arbitration system was itself a compromise, but it has devolved into an arbitrary ritual that undermines both fairness and public confidence. Baseball's history of labor disputes has been acrimonious at best, leading both sides to dig into rigid, polarized positions that often invoke the law of unintended consequences. In the wake of a steroid era that tarnished the sanctity of baseball's record books, the owners have themselves to blame.

The fault, in the end, lies not in the proverbial stars, be they celestial bodies or able-bodied players, but in the owners themselves, suggesting that the celebrated political cartoon *Pogo* trumps even Shakespeare: "We have met the enemy, and the enemy is us."



Wiki Authorship, Social Media, and the Curatorial Audience

Jon M. Garon*

TABLE OF CONTENTS

I. INTRODUCTION.....	96
II. NORMATIVE WIKIS AND THE INVISIBLE AUTHOR.....	100
III. ROLE OF THE CURATORIAL AUDIENCE.....	102
IV. THE ESSENTIALITY OF ATTRIBUTION.....	107
V. PSEUDONYMOUS ATTRIBUTION AND INTEGRITY OF THE PRIVACY FILTERS.....	111
VI. THE LEGAL REGIME FOR ENFORCEMENT OF THE WIKI'S NORMATIVE EXPECTATIONS.....	115
VII. WIKIFRAUD AND EDITORIAL MISCONDUCT.....	122
VIII. VARYING THE NORMS FOR EMPLOYER-SPONSORED AUTHORSHIP.....	124
IX. INCENTIVIZING COLLABORATIVE SCHOLARSHIP—CREATION AND DISSEMINATION OF KNOWLEDGE.....	127
X. TOWARD A NORM OF ACCOUNTABILITY IN NEW MEDIA—ATTRIBUTION, INTEGRITY, AND SOCIAL MEDIA.....	133
XI. CONCLUSION.....	143

**Professor of Law, Hamline University School of Law; J.D. Columbia University School of Law 1988. Initially prepared for Association of American Law Schools 2010 Annual Meeting, Computers and Law Section. I wish to thank program organizer Eric Goldman and panelists Tim Armstrong, Jacqueline Lipton and Salil Mehra.*

The instruction we find in books is like fire. We fetch it from our neighbours, kindle it at home, communicate it to others and it becomes the property of all.

–Voltaire

No man but a blockhead ever wrote, except for money.

–Samuel Johnson

I. INTRODUCTION

“In the beginning was the [w]ord,”¹ and each word was linked via hypertext.²

The idea of connecting one document to another using hypertext links motivated Internet founder Tim Berners-Lee and other early innovators to develop the Web so that content could be created, linked and shared.³ Speaking before the collected faculty and students at the MIT Laboratory for Computer Science, Berners-Lee explained, “[t]he idea was that everybody would be putting their ideas in, as well as taking them out.”⁴

The idea behind Berners-Lee’s Internet embraced the creation and expansion of social capital⁵ through technologically mediated communication.⁶ While there are many variations on the definition of social capital, one powerful definition focuses on

¹ John 1:1 (King James).

² See Tim Berners-Lee, Talk at the MIT Laboratory for Computer Science (LCS) 35th Anniversary Celebration (April 14, 1999) (transcript available at www.w3.org/1999/04/13-tbl.html):

I wrote the proposal in 1989 and tried to explain that I thought the global hypertext would be a great idea. . . . Vennevor Bush started in 1945 and it was published in the Atlantic Monthly and still nobody developed a global hypertext system. And then Doug Enbgebart actually showed people how to do it two decades later, and still it didn’t happen because he just didn’t happen to be in the right place at the right time. But I was.

³ *Id.*

⁴ *Id.* Berners-Lee’s emphasis focused on collaboration rather than passive viewership:

The basic [idea] of the Web is . . . an information space through which people can communicate, but communicate in a special way: communicate by sharing their knowledge in a pool. The idea was not just that it should be a big browsing medium. . . . This is not supposed to be a glorified television channel.

⁵ See Anita Blanchard & Tom Horan, *Virtual Communities and Social Capital*, in SOCIAL DIMENSIONS OF INFORMATION TECHNOLOGY: ISSUES FOR THE NEW MILLENNIUM 6–22 (G. David Garson ed., 2000).

⁶ *Id.*

“features of social organization such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit.”⁷

Berners-Lee’s vision for the Web was founded on the notion of an interlinked shared experience—an experience intended to build rather than consume social capital. Out of that vision grew a number of extraordinary tools and organizations. CompuServe and America Online originally generated closed communities comprised of millions of users.⁸ Those gave way to the open Internet dominated by Yahoo and other Web portals, which cataloged and organized the proliferating content available through the hypertext links.⁹ By the end of the 20th century, these hierarchical systems were surpassed by search engines, which created hierarchies on-the-fly in response to users’ search criteria.¹⁰ Software allowed users to connect directly to each other in peer-to-peer networks and to tag information for more contextual retrieval.¹¹

The work of Ward Cunningham in 1995 initiated the wiki software and platform for collaboratively authored web pages.¹² Wikis expanded alongside the other innovations on the Internet. Through this format, the vision of Berners-Lee continued to grow, serving as cultural high-point in an increasingly commercialized environment.¹³ Using wiki software, users could put information into organized websites, bringing coherence to the information available online.¹⁴

The term wiki reflects both a software platform and a website format.¹⁵ The salient features for the typical wiki website are pages that can be easily edited using a

⁷ *Id.* at 7 (citing Robert D. Putnam, *Bowling Alone: America’s Social Capital*, 6 J. OF DEMOCRACY 65, 66 (1995)). See also Geert Lovink, *The Rise and Fall of the Digital City Metaphor and Community in 1990s Amsterdam*, in THE CYBERCITIES READER 371–77 (Stephen Graham ed., 2004); John Leslie King et al., *The Rise and Fall of Netville: The Saga of a Cyberspace Construction Boomtown in the Great Divide*, 7 ELECTRONIC MARKETS 22, 22–23 (1997), http://www.electronicmarkets.org/issues/volume-7/volume-7-issue-1/v7n1_king0.pdf (last visited Mar. 9, 2010).

⁸ JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT 25–29 (R.R. Donnelley 2008); RAVI KALAKOTA & MARCIA ROBINSON, E-BUSINESS 2.0: ROADMAP FOR SUCCESS 9 (2001). See also LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 147 (2001).

⁹ KALAKOTA & ROBINSON, *supra* note 8, at 88.

¹⁰ E. Van Couvering, *The History of the Internet Search Engine: Navigational Media and the Traffic Commodity*, in WEB SEARCH: MULTIDISCIPLINARY PERSPECTIVES 177, 177–79 (Amanda Spink & Michael Zimmer eds., 2008).

¹¹ See Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 319 (1992) (“In many respects, the conditions of the Internet environment today resemble those which prevailed at other moments of polymorphous collaboration, unrestrained plagiarism, and extraordinary cultural productivity—such as the Elizabethan stage or Hollywood before 1915.”).

¹² ANJA EBERSBACH ET AL., WIKI WEB COLLABORATION 10 (2006).

¹³ See A. Hess, *Reconsidering the Rhizome: A Textual Analysis of Web Search Engines as Gatekeepers of the Internet*, in WEB SEARCH: MULTIDISCIPLINARY PERSPECTIVES 35 (Amanda Spink & Michael Zimmer eds., 2008).

¹⁴ *Id.*

¹⁵ JANE KLOBAS, WIKIS: TOOLS FOR INFORMATION WORK AND COLLABORATION 3 (2006).

web browser, updated—often in real time—and collectively edited by its reader/participants.¹⁶ Of course, given the fluid nature of the web and the flexibility of the wiki software, these features may vary on particular sites.¹⁷ Increasingly, for example, some public wikis require that some or all pages be subject to editorial preview to make sure that no third party's legal rights have been infringed.¹⁸ In this way material that is defamatory, obscene or likely to be an invasion of privacy can be kept off the wiki site.¹⁹

Wiki software plays an increasingly important role within corporate, nonprofit and educational institutions.²⁰ The ability to author documents collectively, track changes to the materials and centrally host the content on institutional servers or the Internet makes wiki software a useful alternative to desktop publishing solutions for jointly authored projects.²¹ In many cases, the wiki software is free to use and deploy within organizations, making it a cost effective authoring solution for many projects. "The vast majority of wiki deployments are not intended for public use."²² As a software platform, therefore, wiki software has provided organizations a useful option in their authoring strategies and encouraged collaborative authorship through the wiki's ease of use. This article does not focus on the role of wikis within organizations. Instead, it looks at the impact of wiki authorship as a form of social media within the context of the new wave of social media dominated by Facebook,²³ MySpace,²⁴ YouTube²⁵ and similar Internet portals.

Whether used within closed organizations or deployed in the public Internet space, wikis typically focus on collaborative authorship and incorporate normative expectations that exclude the so-called moral rights of attribution and integrity reflected in international copyright treaties.²⁶ In contrast, as explored below, the

¹⁶ *Id.* at 8–9.

¹⁷ Brian Lamb, *Wide Open Spaces: Wikis, Ready or Not*, 39 EDUCAUSE REV. 36, 48 (2004) ("There is no unified set of software characteristics that are shared by all wikis. . . . Technical quirks of wiki systems, indicative of the often anarchic programming communities that have developed them, need to be considered before choosing a system.").

¹⁸ CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 66 (Hyperion, 2008) (describing wiki editors as "curators"); Tania Tudorache et al., *Supporting Collaborative Ontology Development in Protégé*, in *THE SEMANTIC WEB—ISWC 2008: 7TH INTERNATIONAL SEMANTIC WEB CONFERENCE 21* (Amit P. Sheth et al. eds., 2008).

¹⁹ E.g., John Seigenthaler, *A False Wikipedia 'Biography'*, USA TODAY, Nov. 29, 2005, http://www.usatoday.com/news/opinion/editorials/2005-11-29-wikipedia-edit_x.htm (last visited Mar. 9, 2010).

²⁰ See VINCE CASAREZ ET AL., *RESHAPING YOUR BUSINESS WITH WEB 2.0* 42 (2009).

²¹ *Id.*

²² *Id.*

²³ <http://www.Facebook.com>.

²⁴ <http://www.MySpace.com>.

²⁵ <http://www.YouTube.com>.

²⁶ Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. [hereinafter *Berne*]

growth of social media such as Facebook, MySpace and YouTube emphasize the identification of the individual in the Internet. The curatorial audience which has grown up around social media tends to be focused much more heavily on the individual's role in creating and aggregating content.

Equally important, wikis, blogs and social media have the potential to build social capital. "The central idea of social capital is that social networks are a valuable asset ... [enabling] people to cooperate with one another—and not just with people they know directly—for mutual advantage."²⁷ By expanding opportunity for interaction and fostering behavioral norms of trust among users, these communications tools can expand the reach of social networks for mutual advantage.²⁸

The unanswered question is whether the expectations inherent in wiki participation actually build these social networks or whether other models of authorship are more effective. "[E]lectronic technology is playing a crucial role in promoting writing practices in which the identities of individual contributors to shared dynamic texts are deemphasized, and their useful contributions effectively merged."²⁹ While this accurately describes the wiki authorship experience it does not answer the question whether this form of authorship maximizes participation and engagement. As discussed below, the ability of an author to blog to one's own page seems to attract far more users than formats promoting an author's contribution to a collaborative wiki.

Of course this trend should not discourage the continued participation of those who do value the norms of the wiki. Nonetheless, to the extent that attribution has both a popular role in the present Internet ecology and remains important for the development of high-value publications, an alternative wiki model should be developed that encourages collaboration, but uses the metadata captured by wiki sites to identify the key contributors to those sites. By combining the best of wiki authorship with the normative expectations of traditional authorship, a new form of wiki may develop which contributes in new and important ways to the creation and dissemination of knowledge on the Internet.

-
- (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

²⁷ JOHN FIELD, SOCIAL CAPITAL 14 (2d ed. 2008).

²⁸ *But see id.* at 105 ("There is no real evidence on the type of social capital that is being produced by networks of online networks.").

²⁹ Jaszi, *supra* note 11, at 319 (citing Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425, 426 (1984)).

II. NORMATIVE WIKIS AND THE INVISIBLE AUTHOR

Wiki content should be recognized as a discrete discursive form with its own particular benefits. Two particular advantages of the wiki modality are that “(a) it eliminates the social biases associated with group deliberation, thus contributing to the diversity of opinions and to the collective intelligence of the group, and (b) it directs authors toward group goals, rather than individual benefits.”³⁰ Wikis maximize the power of collective action while minimizing the transaction costs.³¹

The most salient aspect of wikis flows from their collective authorship. That strength, however, may also be one of the wiki’s most significant limiting factors. The wiki culture does not provide that the individual contributions of the participants be identified.³² While this is not a legal or software limitation, it remains a powerful normative value that defines most wiki culture.³³ The typical attribution of a wiki author is found, if at all, in the history of the user profile. For participants who register with a wiki, the changes they make to the site are logged under their user names or handles, while anonymous users are logged using the IP address from which they make their edits.³⁴ As such, an author may be able to follow his or her impact on the site, but architecture of the wiki does not value or promote the significance of the individual author.

At a minimum, the issue of wiki authorship has been described as contentious:

³⁰ Ofer Arazy & Eleni Stroulia, *A Utility for Estimating the Relative Contributions of Wiki Authors*, PROC. THIRD INT’L ICWSM CONF. 171, 171 (2009), available at <http://www.aaai.org/ocs/index/php/ICWSM/09/paper/viewFile/157/483>.

³¹ See Lamb, *supra* note 17, at 40 (“And as open systems, wikis can extend their reach far beyond departmental or organizational limits, expressing the interests of virtually any community.”).

³² See Jeff Atwood, *Mixing Oil and Water: Authorship in a Wiki World*, CODING HORROR, <http://www.codinghorror.com/blog/2009/02/mixing-oil-and-water-authorship-in-a-wiki-world.html> (Feb. 2, 2009) (“When you visit Wikipedia’s entry on asphalt, you get some reasonably reliable information about asphalt. What you don’t get, however, is any indication of *who the author is*. That’s because the author is irrelevant.”).

³³ Although Wikipedia is used as a common example by this author and many of the authors cited, it serves merely as an illustration for the practices described herein. For example, wikiHow, <http://wiki.ehow.com>, provides no attribution for its posts, but has a separate post dedicated to authors. See <http://www.wikihow.com/wikiHow:Herald/Meet-The-Author> (last visited Mar. 9, 2010). Other examples of non-attributed wikis include Wikibooks, <http://en.wikibooks.org>; Wikinews, <http://www.wikinews.org>; Wikitravel, <http://wikitravel.org>. In contrast, WikiFAQ, <http://www.wikifaq.com>, uses a page statistics footer that captures the name of the person who originally created the page, the person last modifying a page and a list of all contributors. See, e.g., http://www.wikifaq.com/American_Toad (last visited Mar. 9, 2010).

³⁴ Fernanda B. Viégas et al., *Studying Cooperation and Conflict between Authors with History Flow Visualizations*, 6 CONF. HUM. FACTORS COMPUTING SYS. 575, 576 (2004), available at http://alumni.media.mit.edu/~fviegas/papers/history_flow.pdf.

Explicit authorship of contributions on wiki pages is an issue of some contention among wiki users; whereas some feel that authorship is an important part of social collaboration in the sense that it adds context to interactions, others feel that authorship data is irrelevant and sometimes even detrimental to the creation of truly communal repositories of knowledge.³⁵

In addition, the nature of these logs does not reflect any value assessments of editorial impact. On sites such as Wikipedia the logs are linked to the editorial contributions of the content, allowing a user to read the log in order to approximate an author's resiliency, but these are not the goals of the logs. As IBM research on cooperation and conflict between Wikipedia authors suggests, the task is daunting: "Making sense of the history for even a single entry . . . is not straightforward. The sheer number of versions can be daunting: as of August 2003, the entry for Microsoft had 198 versions comprising 6.2 MB of text . . ." ³⁶

The normative basis for wikis, known as "[w]ikiquette[.]" refers to the etiquette that Wikipedians follow,³⁷ and by extrapolation influences the broader wiki movement.³⁸ Authorship on Wikipedia, for example, is encouraged to a certain degree. "Sign and date your posts to talk pages (not articles!), unless you have some excellent reasons not to do so."³⁹ By encouraging a community of signed users, the active community develops an appreciation for those participants who are posting useful content. The attributions, however, are left out of the primary areas seen by the general public.

In all likelihood, on most wiki sites the primary reason for encouraging even a modest level of attribution is to provide information about the users posting to the site for purposes of site protection and management. Regular site watchers utilize the signature information as a flag signaling potential vandalism that may occur on a page.⁴⁰ "First-time contributors represent a potential threat of vandalism and

³⁵ *Id.* at 580. See also KLOBAS, *supra* note 15, at 57 ("Because wikis have multiple authors and the authors are often unknown, it is rarely possible to credit authorship of a wiki.").

³⁶ Viégas et al., *supra* note 34, at 576.

³⁷ CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* 155 (2006).

³⁸ See, e.g., Wikipedia:Etiquette, http://en.wikipedia.org/wiki/Wiki_etiquette (last visited Mar. 9, 2010); Help:Wikiquette, <http://en.wikiversity.org/wiki/Help:Wikiquette> (last visited Mar. 9, 2010); WoWWiki:Wikiquette, <http://www.wowwiki.com/WoWWiki:Wikiquette> (last visited Mar. 9, 2010).

³⁹ Wikipedia:Etiquette, *supra* note 38. See also Viégas et al., *supra* note 34, at 576.

The Wikipedia community also sets up secondary pages that are devoted to the discussion of issues surrounding the topics on "real" pages; these are sometimes called "talk pages." They represent an attempt to separate what is "real" information from discussions about what should and should not be on the real page.

⁴⁰ See Viégas et al., *supra* note 34, at 580.

therefore their edits are closely scrutinized. On the other hand, there is also the possibility that a newcomer is someone who may be unfamiliar with Wikipedia standards. In either case the article merits a second look.”⁴¹ As such, the limited attribution afforded the talk pages on wikis plays a significantly different role than authorship in traditional media.

Professor Rebecca Tushnet summarizes the expectation of attribution in traditional media: “Both authors and audiences generally accept that attribution is important to authors, and that false attribution, especially plagiarism, is a moral wrong.”⁴² Professor Jane Ginsburg echoes the statement, recognizing that “few interests seem as fundamentally intuitive as that authorship credit should be given where credit is due.”⁴³ Both examples, however, presume a normative expectation for authors.⁴⁴ For wikis, no such expectation exists and therefore fundamental fairness does not automatically demand wiki attribution. Within the confines of the wiki community, therefore, the normative role of attribution remains relevant only as a part of the methodology for protecting the integrity of the content.

III. ROLE OF THE CURATORIAL AUDIENCE

The wiki represents only one collaborative content regime amidst a wide range of user generated media. “User-generated content can be found on wikis, blogs, Twitter feeds, YouTube, Facebook, and pirate websites, as well as in virtual worlds, reactions to news stories, reactions to others’ reproductions of news stories, and ratings for products. . . .”⁴⁵ Wikis are often compared to professionally created content produced on a one-to-many business model, such as Encyclopedia Britannica, just as open source software is typically compared to software publishers such as

⁴¹ *Id.*

⁴² Rebecca Tushnet, *Naming Rights: Attribution and Law*, UTAH L. REV. 789, 791 (2007).

⁴³ Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 264 (2004).

⁴⁴ *E.g.*, Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 75 (2007).

The patchwork approach to moral rights is similar to the right of personality approach in that it does not view moral rights rules as part of copyright law but dissimilar in the sense that it does not conceptualize these rules as flowing from a single principle or abstract right. Instead, the patchwork theory distributes the various moral rights rules across completely different legal doctrines, such as defamation, passing off, trademark law, the right of privacy, and the law of contracts.

See also Ryan M. Seidemann, *Authorship and Control: Ethical and Legal Issues of Student Research in Archaeology*, 14 ALB. L.J. SCI. & TECH. 451 (2004); Raul Jauregui, *Comment, Rembrandt Portraits: Economic Negligence in Art Attribution*, 44 UCLA L. REV. 1947 (1997) (discussing the role of attribution for works of visual arts).

⁴⁵ Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 924 (2009).

Microsoft.⁴⁶ These successful publishers and software companies compete with collaboratively authored content or open source software, respectively. The benefits to the public from open source, collaborative authorship include content which is robust, highly adaptive and free.⁴⁷

In most media, however, content is generated in a range of forms, not merely the dichotomous choices of commercial publisher or open source community. Journalism today, for example, reflects a range of modalities which—at one extreme—only publish the edited content created by their full-time professional staff and—at the other extreme—utilize citizen journalism with unmediated content generated from unpaid, volunteer investigators and community authors.⁴⁸ Freelance journalists, stringers, wire copy, letters to the editor, reader comments, viewer photos, storm-watchers, twitter reports, live-from-the-scene unverified video, and similar news sources illustrate the many ways in which even so-called traditional journalism blends the content provided by full-time professionals with a wide range of other content creators.⁴⁹ The label “user generated content,” therefore, creates an artificial dichotomy of publisher/nonpublisher content or one-to-many versus many-to-many content consumption which does not exist in practice.⁵⁰ The authorship of distributed content reflects a continuum from the individual to the collective, from a sole scribe to a republic. If wikis represent the paradigmatic example of many-to-many collaborative authorship, the essence of individual, user generated authorship would likely be Internet weblogs⁵¹ or blogs.⁵²

[T]he development of blog software contributed to the rise of noninstitutional media. Blog software allows a person with little knowledge of HTML or other Web programming to post news items in a chronological format. Such software, which is as easy to use as word-processing programs, truly made it possible for anyone with a computer and a good Internet connection to publish his or her own content.⁵³

⁴⁶ E.g., Philip B. Evans & Thomas S. Wurster, *Strategy and the New Economics of Information*, 75 HARV. BUS. REV. 70, 71 (Sept.–Oct. 1997) (Encyclopedia Britannica to Microsoft Encarta).

⁴⁷ See Lamb, *supra* note 17, at 38.

⁴⁸ See Marcy Wheeler, *How Noninstitutionalized Media Change the Relationship Between the Public and Media Coverage of Trials*, 71 LAW & CONTEMP. PROBS. 135 (2008). See also *Citizen Journalism Publishing Standards*, HUFFINGTON POST, Apr. 14, 2009, http://www.huffingtonpost.com/2009/04/07/citizen-journalism-publis_n_184075.html.

⁴⁹ See, e.g., Andrew Lam, *Freelance Journalists Are on Their Own*, NEW AM. MEDIA, Aug. 10, 2009, http://news.newamericamedia.org/news/view_article.html?article_id=cea86b411664162bb31dfc63be470826.

⁵⁰ See Wheeler, *supra* note 48, at 137–38.

⁵¹ Rebecca Blood, *Weblogs: A History and Perspective*, http://www.rebeccablood.net/essays/weblog_history.html (Sept. 7, 2000).

⁵² See Halbert, *supra* note 45, at 924–25.

⁵³ Wheeler, *supra* note 48, at 137–38.

Wikis and blogs share much in common, but are divided by their common language. Both emphasize user generated content and highlight the technology's elimination of barriers to entry for anyone who wishes to share his thoughts, ideas or research with the world. Both wikis and blogs provide free content to the public, but whereas wikis reflect collaborative writing, blogs typically emphasize the writer as well as the community.⁵⁴

Blogs are often identified by the named (and often depicted) individual who provides the content on a regular basis.⁵⁵ Readers are typically encouraged to post responses to blogs, and guest writers are typically identified as such.⁵⁶ Some blogs aggregate authors who share duties, a format that comes closer to the wiki experience, but blogs still differ from wikis by maintaining an emphasis on the source or attribution of content.⁵⁷

Still, wikis and blogs belong on a common continuum. Both are forms of user generated content that allow for some degree of public participation. Together, these two forms of user generated content coexist on the Internet, providing participants a range of communicative tools.

Wikis and blogs differ most dramatically in their ability to gain adherents. Wikipedia, unquestionably the most successful wiki, boasts a regular contributor base of 91,000 individuals.⁵⁸ This is a notable achievement and would be worthy of great accolades if not compared to other Internet activities. Blogging is vastly more common, with 20 million amateur bloggers and 452,000 professional (or at least compensated) bloggers.⁵⁹ These bloggers average 900,000 posts daily.⁶⁰ Even YouTube, the site for video hosting, has 200,000 contributing video publishers.⁶¹

The numerical supremacy of blogs, videos, and social media updates certainly suggests that there is something in the normative expectations for those regularly creating content on the Internet that wikis lack.⁶² Given the modest technological know-how needed for wikis, the barrier to participation is unlikely to be training, and

⁵⁴ See Wheeler, *supra* note 48, at 135–6 (“Since the advent of the Internet, however, additional media outlets—like blogs and wikis—have begun to change the relationship between media coverage of legal proceedings and the public.”).

⁵⁵ Nerino J. Petro, Jr., *Creating a Blog*, 26 GPSOLO, June 2009, at 34 (“Blogs (short for ‘web logs’) are considered by many to be the new personal diaries of the Internet age, except, unlike diaries of old, blogs are very public.”).

⁵⁶ *Id.*

⁵⁷ Wheeler, *supra* note 48, at 138 (providing “schema that defines institutional and noninstitutional press” that apply to “media outlets increasingly associated with the Internet—particularly blogs, though this holds true for wikis as well . . .”).

⁵⁸ Wikipedia: About, <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited Feb. 17, 2010).

⁵⁹ Mark Penn & E. Kinney Zalesne, *On the Web, Amateurs Rivaling Professionals*, WALL ST. J., Oct. 28, 2009 available at <http://online.wsj.com/article/SB125668986047512001.html>.

⁶⁰ The Future Buzz, <http://thefuturebuzz.com> (Jan. 12, 2009).

⁶¹ *Id.*

⁶² *E.g., id.* Facebook has 200,000,000 active users and 100,000,000 daily visitors.

given the similarity of wikis and blogs, the barrier cannot be access to the Internet or other technological concerns.

Moreover, there has been a fundamental shift in the nature of the audience for professionally created content. “Although not producing art themselves, citizens have developed the skills and expertise to be connoisseurs and mavens—seeking out new experiences, learning about them, and sharing that knowledge with friends.”⁶³ The modern content consumer, then, is as much a participant in the dissemination and characterization of the content as the original publisher. These individuals are active and engaged in the content they consume.

For this modern *audience*—an increasingly archaic characterization—sharing knowledge among friends is an important form of user-generated information. Like wikis and blogs, social media networks rely on the participation of the users to create timely, relevant content.⁶⁴ By 2007, the top three social media sites attracted over 153 million unique visitors.⁶⁵ This audience is a highly participatory community.

Social media sites differ from both wikis and blogs to the extent the authors are enabled to limit the public access to content on those sites.⁶⁶

According to [MIT Professor Henry] Jenkins, participatory cultures take the form of “affiliations” (i.e., informal and formal memberships built around various forms of media, which include social networking sites, message boards and gaming communities), “expressions” (producing transformative forms of creative expression such as mash-ups and fan fiction), “collaborative problem-solving” (working in teams to complete tasks and contribute to a knowledge base using a wiki or other collaborative

⁶³ Bill Ivey & Steven Tepper, *Cultural Renaissance or Cultural Divide?*, CHRON. OF HIGHER EDUC., May 19, 2006, at 85. See also Laura Grindstaff, *Cultural Sociology and Its Diversity*, 619 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 206 (2008).

⁶⁴ See Cindy Royal, User-Generated Content: How Social Networking Translates to Social Capital, Ass’n Educ. Journalism and Mass Comm. 2008 Annual Convention, http://www.allacademic.com/meta/p_mla_apa_research_citation/2/7/1/1/9/pages271193/p271193-1.php.

⁶⁵ *Id.* at 4.

⁶⁶ Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 1 (2007), available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>. Boyd & Ellison define social media as:

[W]eb-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system. The nature and nomenclature of these connections may vary from site to site.

environment), and “circulations” (changing the distribution and flow of media through tools like blogging and podcasting).⁶⁷

The affiliations described by Professor Jenkins are the building blocks on which social capital can manifest in the online community. But not all online activities are considered co-equal by the participants. Broadly speaking, Internet users value the participation in the community as more important than the content of the contribution they are making to that community.⁶⁸ As a result, the participatory culture has a decidedly curatorial nature. A great deal of the content is not original material but postings, re-postings, commentary and conversation, making the participant a curator of the content with which he or she interacts.⁶⁹

The curatorial audience has become an engaged participant in the creation and dissemination of content. In many ways, however, the traditional functions usurped by the curatorial audience have been the functions of the publisher and distributor more than the author. The relatively modest participation in the wikis and other forms of content creation is dwarfed by the massive participation in the social networks, video-sharing sites and other media that modulate how content is distributed.

Nevertheless, social media’s new content modalities reflect a paradigmatic shift:

The shift from a one-to-many entertainment and information infrastructure to a many-to-many infrastructure has deep consequences on many levels. It has made possible on a massive scale content such as fan fiction, mashups, music remixes, cloud computing, and collages; blogs have transformed access to, and arguably the nature of, information.⁷⁰

But the nature of the traffic strongly suggests that while all new media transformation is possible, it is content distribution where the greatest transformation is taking place. The curatorial audience has wrested control out of the distributors’ hands. Wikis, blogs and video posts now share the same characteristics of television, music, journalism, and academic publishing. All content distribution models incorporate some level of the many-to-many modality. The curatorial audience is a participant in every aspect of content: creation, distribution and consumption.

⁶⁷ Amanda Lenhart, et. al., *Teens and Social Media*, PEW INTERNET & AMERICAN LIFE PROJECT, 3 (2007) (citing Confessions of an Aca-Fan: The Official Weblog of Henry Jenkins, <http://www.henryjenkins.org/> (Oct. 26, 2006)).

⁶⁸ See Royal, *supra* note 64.

⁶⁹ See Ivey & Tepper, *supra* note 63, at B6.

⁷⁰ Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 842–43 (2009).

IV. THE ESSENTIALITY OF ATTRIBUTION

Given the wide disparity in modalities of online activity for the curatorial audience, there must be a social reason for the dramatically larger participation in blogs and social media sites than in wikis. There are, of course, significant differences between public platforms such as wikis and blogs when compared to the closed social networks such as Facebook and MySpace.⁷¹ The role of private communications and shared experiences among those friended on a social network may be influenced by significantly different factors than those forces pulling users away from wikis and towards blogs. Generally speaking, wiki authors are collectively writing together for the general public—disseminating the authors' knowledge to a less knowledgeable public. Social network participants, in contrast, are exchanging their personal content with others in their shared community. A person on a trip may post photographs she has taken of interesting locations to a travel wiki while posting family photos to a social networking site. The travel photographs would be of interest to any visitor of that location, while the family photos are intended for only friends and family. For purposes of understanding the need to foster a new norm for wikis, the comparisons to the closed social networks are inapposite.⁷² Blogs encompass attributes of both wikis and social networks, with authors using them for a very wide range of purposes.

Attribution is inherent in the personal nature of social networks but is the result of intentional design choice for wikis and blogs. Between wikis and blogs, the central difference remains the direct ability of the author to control the level of attribution and integrity of the work. Wikis, by their structure and wikiqette, sublimate the identity of the contributors to the history pages.⁷³ While members of the active wiki author community are likely to know the names or handles of the frequent contributors, the general public will not. The wiki authors are essentially anonymous. The much more popular blog format, in stark contrast, tends to emphasize the author and provide that author with much greater control over the content.

Because the Creative Commons provides a very popular standardized copyright licensing scheme for Internet publishers, its practices may be informative regarding

⁷¹ Facebook and MySpace have as their core purpose to allow individuals to share information in a very personal manner. Facebook Is on Facebook, <http://www.facebook.com/facebook?ref=pf#!/facebook?v=info&ref=pf> (last visited Mar. 9, 2010) (“Facebook's mission is to give people the power to share and make the world more open and connected. Millions of people use Facebook everyday to keep up with friends, upload an unlimited number of photos, share links and videos, and learn more about the people they meet.”); Connect with MySpace, <http://www.myspace.com/getconnected> (last visited Mar. 9, 2010) (“Discover MySpace around the Web. Bring your photos, friends, activities and more with you”).

⁷² Cf. Halbert, *supra* note 45; Jane C. Ginsburg, *Separating the Sony Sheep From the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs*, 50 ARIZ. L. REV. 577 (2008). While a further comparison between open and closed content communities is warranted, the normative implications of online social network behavior should be analyzed in a different article.

⁷³ See KLOBAS, *supra* note 15, at 57.

author and publisher expectations.⁷⁴ The Creative Commons itself recognized the dominant trends toward attribution when it revised the licensing scheme in 2004 to make attribution standard:

Attribution comes standard

Our web stats indicate that 97–98% of you choose Attribution, so we decided to drop Attribution as a choice from our license menu—it’s now standard. . . . Important to remember: Attribution can always be disavowed upon licensor request, and pseudonymous and anonymous authorship are always options for a licensor, as before.⁷⁵

Popular choice—the normative expectation of the authorial public—is necessarily the first reason to provide attribution. Given the Creative Commons’ adoption of an attribution component to its standard licenses and the usage trends favoring user-generated content formats, it is reasonable to say that the Internet norm emphasizes attribution (or pseudonymous attribution, as will be discussed below) rather than the obscurity engendered in the wiki format.

The second reason to provide attribution stems from non-economic interests in inherent copyright. The combination of attribution and integrity are often referenced as moral rights.⁷⁶ “Moral rights are a bundle of rights given to the author of a work, even if another owns the copyright that confers control over the economic exploitation of the work.”⁷⁷ Although they are acknowledged to a limited degree under U.S. law for works of visual arts,⁷⁸ moral rights are not presently protected by copyright or trademark law for authors.⁷⁹

Under U.S. copyright law, authors do not have legal protections for their rights of attribution and integrity separate from their economic rights, but they nonetheless receive such protections through contract,⁸⁰ code,⁸¹ and normative behavior.⁸² As

⁷⁴ The Creative Commons was founded in 2002 to provide a set of standardized copyright licenses for free to the public. Fashioned after open source software licenses, Creative Commons licenses provide standardized contract language for authors seeking to license their works for public use. See Creative Commons About History, <http://creativecommons.org/about/history/> (last visited March 18, 2010).

⁷⁵ Posting of Glenn Otis Brown to Commons News, <http://creativecommons.org/weblog/entry/4216> (May 25, 2004).

⁷⁶ See Berne, *supra* note 26, at art. 6bis.

⁷⁷ Orit Fischman Afori, *Reconceptualizing Property in Designs*, 25 CARDOZO ARTS & ENT. L.J. 1105, 1151 (2008).

⁷⁸ *E.g.*, Visual Artists Rights Act, 17 U.S.C. §106A (1990).

⁷⁹ *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 36-37 (2003) (rejecting Lanham Act Section 43(a) as the basis for protecting the attribution or integrity of copyrightable works). *Cf.* Michael Landau, *Dastar v. Twentieth Century Fox: The Need for Stronger Protection of Attribution Rights in the United States*, 61 N.Y.U. ANN. SURV. AM. L. 273 (2005).

⁸⁰ *E.g.*, *Gilliam v. Am. Broad. Cos., Inc.*, 538 F.2d 14, 23-25 (2d Cir. 1976) (protecting the contractual rights to integrity). See Robert C. Bird & Lucille M. Ponte, *Protecting Moral Rights in*

such, publishing and artists contracts universally include clauses granting the author the rights of attribution in his or her work.⁸³ “Attribution is foundational to the modern economy. . . . Credit is instrumentally beneficial in establishing a reputation and intrinsically valuable simply for the pleasure of being acknowledged. Indeed, credit is itself a form of human capital.”⁸⁴

Contract law generally supplies the missing term of attribution.⁸⁵ The rights of attribution are central to the legal protections standard in publishing agreements⁸⁶ and talent agreements in media industries.⁸⁷ Moreover, until 2003, the unfair competition provision of the U.S. Federal Trademark Act⁸⁸ was presumed to provide protection for the falsification or omission of attribution for copyrighted works.⁸⁹ In *Dastar Corp. v. Twentieth Century Fox Film Corp.*,⁹⁰ the Supreme Court repudiated this use of trademark law as it related to copyrighted works.⁹¹ Nonetheless, despite the broad

the United States and the United Kingdom: Challenges and Opportunities under the U.K.’s New Performances Regulations, 24 B.U. INT’L L.J. 213, 252 n.306 (2006).

⁸¹ See, LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 138–41 (1999).

⁸² Jon M. Garon, *Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics*, 88 CORNELL L. REV. 1278, 1336 (2003).

⁸³ Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 50–51 (2006).

⁸⁴ *Id.* at 50.

⁸⁵ *Jacobsen v. Katzer*, 535 F.3d 1373, 1382 n. 5 (Fed. Cir. 2008) (“Copyright law does not automatically protect the rights of authors to credit for copyrighted materials.”); *Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 24 (2d Cir. 1976) (“American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.”). Even in the arena of open source licensing and Creative Commons Licenses, for example, attribution is included in the standard language, which along with limitations on downstream uses, distinguishes these agreements from dedications to the public domain.

⁸⁶ See, RONALD V. BETTIG, *COPYRIGHTING CULTURE: THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY* 12–13 (1996) (noting that attribution of authors began in sixth century Athens before other norms of copyright were established and that “oral reporters of the Hebrew Talmud were required to identify the contributors of new principles . . . [a] citation in scholarship [that] involves a claim to the authority in spoken word or text”).

⁸⁷ See, e.g., Dramatist Guild, *Dramatists Bill of Rights* at §5, *available at* http://www.dramatistsguild.com/about_rights.aspx; Writers Guild of America, *Credits Survival Guide*, *available at* http://www.wga.org/content/subpage_writersresources.aspx?id=153.

⁸⁸ 15 U.S.C. § 1125(a) (2009).

⁸⁹ *Shaw v. Lindheim*, 919 F.2d 1353, 1364 (9th Cir. 1990) (“Although this court has twice specifically reserved the question whether ‘reverse passing off’ claims may be recognized in situations where works are substantially similar, [the earlier cases] have implicitly limited the ‘reverse passing off’ doctrine to situations of bodily appropriation.”). *Cf.* *Lamothe v. Atlantic Recording Corp.*, 847 F.2d 1403 (9th Cir. 1988) (misattribution of musical compositions); *Smith v. Montoro*, 648 F.2d 602, 607 (9th Cir. 1981) (misattribution of acting credits).

⁹⁰ 539 U.S. 23 (2003).

⁹¹ *Id.* at 34. (“That express right of attribution is carefully limited and focused: It attaches only to specified ‘works of visual art,’ Recognizing in § 43(a) a cause of action for

dismissal of Section 43(a) as the gap-filler for copyright law, “[t]he Court in *Dastar* left open the possibility that some false authorship claims could be vindicated under the auspices of § 43(a)(1)(B)’s prohibition on false advertising.”⁹² As such, trademark law continues to provide some ongoing protection of attribution rights for advertising and promotional uses as well as through contractual obligations.⁹³

There is a third reason for authorial attribution: the brand expectations of the reader. The name of the author serves as a brand,⁹⁴ indicating the source of the content and providing the reader some measure of knowledge regarding the quality or expectation of the content for readers who have experience or knowledge of that brand.⁹⁵

[R]eaders bring at least two distinct but related types of prior inferential knowledge to their construction of an implied author: the assumptions about reliability, credibility, and wisdom that a given culture confers on authorship, and some rudimentary sense of a particular authorial biography, even if “biography” is as limited as a suggestion of the author’s sex or nationality.⁹⁶

This quasi-brand role for attribution combines with the other indicia for the context of written materials. “While authors’ names are not trademarks per se and not all consumers value authorial indicia in all instances, author names can act very much like trademarks by providing useful information to consumers selecting among competing products.”⁹⁷ For creative works, it may convey style, tone or subject matter.⁹⁸ For authoritative or research tomes (whether physical or virtual), the author’s academic standing and institutional affiliations further identify the work, serving as paratext to validate or undermine the work.

Wikis substitute the publisher and its community as the implied author. The paratext, or grounding contextual materials, that contextualize a wiki are provided by the wiki community rules and the statements of goals and purposes provided by the

misrepresentation of authorship of noncopyrighted works (visual or otherwise) would render these limitations superfluous.” (*Internal citations omitted*).

⁹² *Zyla v. Wadsworth Div. of Thomson Corp.*, 360 F.3d 243, 252 n.8 (1st Cir. 2004) (citing *Dastar Corp.*, 539 U.S. at 38).

⁹³ 15 U.S.C. § 1125(a)(1)(B) (2006).

⁹⁴ See Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U.L. REV. 1171, 1173–75 (2005) [hereinafter Lastowka, *Trademark*].

⁹⁵ *Id.* at 1179 (“Authorial attribution furthers the interests of consumers by reducing the costs of searching for creative content . . . it signals a certain predictable quality and type of associated work.”).

⁹⁶ Susan S. Lanser, *The Authors’ Queer Clothes: Anonymity, Sex(uality), and The Travels and Adventures of Mademoiselle de Richelieu*, in *THE FACES OF ANONYMITY: ANONYMOUS AND PSEUDONYMOUS PUBLICATION FROM THE SIXTEENTH TO THE TWENTIETH CENTURY* (Robert J. Griffin Ed.) 81, 84 (2003) (describing how readers make assumptions about the nature of authors, credibility and authority through paratext).

⁹⁷ See Lastowka, *Trademark*, *supra* note 94, at 1180.

⁹⁸ *Id.*

publisher.⁹⁹ As a result, the normative expectations of the author may provide the most compelling reason for having no wiki attribution requirement. Since the participants are not seeking to promote themselves through attribution, there is no contractual or quasi-contractual breach when the authorship goes unnoted or acknowledged only on talk pages.¹⁰⁰

Just as the publishing contracts reflect the expectation of the parties, so too should the terms of use provisions and wikiquote determine the expectations of the wiki community. To the extent, therefore, this article suggests that some wikis should have attribution integrated into their norms and codes, it does not suggest that these changes should be imposed on other authorial communities. The Internet can support multiple community norms and each norm should be respected.

V. PSEUDONYMOUS ATTRIBUTION AND INTEGRITY OF THE PRIVACY FILTERS

Regardless of the nature of the published work, control over attribution plays a number of roles. Pseudonymity, in particular, is appropriate for collaboratively authored works because it allows joint authors¹⁰¹ and collective authors to represent their work under a single name.¹⁰² Collective authors may choose to use a single name as a form of anonymity, to integrate otherwise divergent prose and thoughts, or simply out of convenience.¹⁰³

⁹⁹ Cf. Lanser, *supra* note 96, at 84–88.

¹⁰⁰ Wikipedia:Etiquette, *supra* note 38.

¹⁰¹ See, e.g., John Bainbridge, *Ellery Queen Crime Made Him Famous and His Authors Rich*, LIFE, Nov. 22, 1943 at 70 (discussing the careers of “Frederick Dannay and Manfred B. Lee, the prolific detective-story writers who operate under the pseudonym of Ellery Queen”); Motley Fool, About the Motley Fool, <http://www.fool.com/press/about.htm?source=ifltnvsnv0000001> (last visited Mar. 9, 2010) (discussing the website created and originally written in the name Motley Fool by brothers David and Tom Gardner).

¹⁰² Perhaps the most important such body of works is The Federalist Papers. See, e.g., Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U.L. REV. 801, 811 (2007) (“Hamilton, Madison, and Jay did not sign their names to the Federalist Papers. Instead, they wrote all of them under the pseudonym ‘PUBLIUS.’ They chose the name Publius because it was the first name of Publius Valerius Publicola, an important supporter of the Roman Republic.”).

¹⁰³ *Id.*

Why the authors thought that signing their own names would have less political advantage than using a pseudonym remains unclear. Perhaps Hamilton and Madison felt that praising a Constitution that they had helped to write would appear immodest. Maybe they wanted to make arguments that they later could distance themselves from. They might have wanted to avoid accusations that they were violating the confidentiality of the Constitutional Convention. Or they could have decided that their group should use just one name to cover the work of all three authors. But whatever their reason, their use of a pseudonym probably did not stand out

In the dynamic and often confrontational environment of online discourse, control of attribution allows the author to create an online *nom de plume* or pseudonymous identity.¹⁰⁴ Pseudonymity differs fundamentally from anonymity because the pseudonym continues to have the fundamental branding function for the author and reader.¹⁰⁵ The reader generally accepts that all the works from the pseudonymously named author come from a single voice or a tight-knit collaboration.¹⁰⁶ In contrast, an anonymous writing cannot be referenced or identified, except by its publisher, if any.

The choice to create a pseudonym serves as another communicative act of authorship.¹⁰⁷ In some cases, it is used to highlight brand expectations for the public by the author.¹⁰⁸ An author of suspense novels chooses to write mysteries or science fiction under a different name so as to protect the followers of the suspense novels from frustration in inadvertent purchases of books in other genres.¹⁰⁹ Similarly, an author may wish to separate out her academic works from her fictional works, so that the non-academic materials do not detract from the scholarly reputation.

Pseudonymous authorship also allows authors to develop non-mainstream themes and ideas with a lower risk of economic reprisals or social attacks.¹¹⁰ It serves

as unusual; political writers of the time commonly used pseudonyms in essays published in newspapers.

¹⁰⁴ Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1380 (2005) (“choice of an author’s name for each created work is a branding choice.”).

¹⁰⁵ *Id.* at 1396–98.

¹⁰⁶ *Id.* at 1406–10. Professor Heymann contrasts “one-to-many authornym” in which the author may choose multiple personas with “many-to-one authornyms” in which a group of individuals may write under one name and with one-to-one authornyms which operate as traditional pseudonyms.

¹⁰⁷ MICHEL FOUCAULT, *What is an Author?*, in THE FOUCAULT READER 101, 107 (Paul Rainbow ed., 1984) (“[A]n author’s name is not simply an element in a discourse (capable of being either subject or object . . .) it performs a certain role with regard to narrative discourse, assuring a classificatory function.”).

¹⁰⁸ See, e.g., Lastowka, *Trademark*, *supra* note 94, at 1193–94 (“Just as trademarks familiarize us with words and logos, the packaging and advertising of movies, music, and even learned legal treatises familiarize us with certain words that are the personal names of the authors and artists who created these works.”); Jane C. Ginsburg, *The Author’s Name as a Trademark: A Perverse Perspective on the Moral Right of “Paternalism”?*, 23 CARDOZO ARTS & ENT. L.J. 379, 380 (2005) (exploring how trademark and copyright law might be used to protect rights of attribution); Heymann, *supra* note 104, at 1398–99.

¹⁰⁹ Heymann, *supra* note 104, at 1380.

¹¹⁰ Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U.J. GENDER SOC. POL’Y & L. 273, 300–303 (2007).

Copyright law operates under the assumption that commercial, profit-seeking uses are the core of creative production, the standard by which the value and effectiveness of copyright law is judged. In fact, noncommercial

to help the author separate the public persona from the private person and protect some sphere of personal space.¹¹¹ While this has long been the case,¹¹² the dark side of social media is the rapidity and cruelty with which commentary can turn to personal attack, particularly against women.¹¹³ As Professor Bartow notes, “[e]fforts to decrease the sexist aspects of online fora have been largely ineffective, and in some instances seemingly counterproductive, in the sense that they have provoked even greater amounts of abuse and harassment with a gendered aspect.”¹¹⁴ Participants in blogs and social media have limited choices. Maintaining separation between one’s Internet persona and one’s personal life is at least a partial solution.

Concepts of attribution and integrity inform another tool authors may use to control their environments—the potential to limit accessibility in social media sites with privacy filters and distribution controls.¹¹⁵ Through privacy filters and other controls, the author generating content has the ability to manage the extent to which the content is kept private or made public. A Pew Internet study reflects the significant gender-based trends for such activities.

production is *also* everywhere, though legal academics are just beginning to theorize its pervasiveness and its relations to commercial production.

....

Along with regulating market relations, sex and gender factor into controlling protest, resistance, and disobedience in intellectual property. Fan fiction writers, who are mostly women, are less likely to go public and more likely to accept the idea that they should stay under the radar. When female fans write sexually explicit stories, publicly acknowledging their authorship (and thus, implicitly, their own sexual desires and fantasies) would be embarrassing and, for those with conservative families or communities, potentially devastating. Therefore, they cannot generally afford to risk exposure. They use pseudonyms and restrict access to their web sites so as not to attract too much attention, self-limiting the liberatory possibilities of their work.

(citations omitted).

¹¹¹ See Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications*, 1995 J. ONLINE L. ART. 2, par. 2 (1995) available at http://web.wm.edu/law/publications/jol/95_96/lemley.html (discussing the fictional use of pseudonymity to affect public perception by characters in Orson Scott Card’s science fiction novel *Ender’s Game*).

¹¹² Cf. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (“numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”).

¹¹³ See Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 383, 389 (2009) (“Neither civil nor criminal laws offer effective tools to prevent, address, or punish online speech, which is viewed by many as being vested with very broad First Amendment protections.”).

¹¹⁴ *Id.* at 391.

¹¹⁵ See Avner Levin & Patricia Sánchez Abril, *Two Notions of Privacy Online*, 11 VAND. J. ENT. & TECH. L. 1001, 1005–06 (2009).

Content creators are more likely to be girls and more likely to be older teens. Fifty-five percent of creators are girls and 45% of creators are boys. Furthermore, 45% of creators are aged 12 to 14 and 55% of creators are aged 15 to 17.

....

Older online girls ages 15–17 are more likely to have used social networking sites and have an online profile; 70% of older girls have used an online social network compared with 54% of older boys, and 70% of older girls have created an online profile, while only 57% [of] boys have done so. For nearly half of social networking teens, visiting these sites is at least a daily occurrence.¹¹⁶

Another online study reached the conclusion that “online socializers have a penchant for disclosure. However, they are aware of the risks involved in online socialization and cherish the ability to shield their multiple social personae and communicate with only intended audiences.”¹¹⁷

Using pseudonymous works, contributors to an online community are more likely to be sure that the other members of a community know each other through their online names, but do not necessarily know each other outside that community. Some members of a community may choose actual names while others utilize *noms de plume*—the choice is personal to the author and often immaterial to the community;¹¹⁸ the critical aspect of the social community is the ability of its members to identify one another. The use of multiple online communities and the ability to keep ones’ participation in various communities separate through pseudonymous authorship will likely continue to be an important tool to protect privacy online, reflecting an inherent need for attributive online authorship.

As the Internet community grows, the spheres of public and private communities continue to merge and sway. As such, content creators will move between entirely closed communities and wholly public communities as such venues support their activities. The more successful modalities for community building must therefore be those environments that provide authorship attribution. While wiki etiquette may abhor direct attribution, the growth and robustness of the Internet will be in those modalities which embrace it.

¹¹⁶ Lenhart et al., *supra* note 67, at 4–5.

¹¹⁷ Levin & Sánchez Abril, *supra* note 115, at 1045.

¹¹⁸ The assertion of immateriality does change, however, if a pseudonym is selected in order to deceive the community in a tortious or criminal manner. *Cf. Lori Drew’s Guilty Verdict is Officially Overturned by Judge*, ST. LOUIS POST-DISPATCH, Aug. 31, 2009, at A2 (Drew used false profile to encourage suicide and jury found her guilty of misdemeanor, but court overturned jury decision); Shane Anthony, *Woman Accused of Cyber Bullying St. Peters Suspect is Charged with Felony Under New State Law.*, ST. LOUIS POST-DISPATCH, Aug. 18, 2009, at A1 (discussing the attempt to criminally prosecute a women who created a false craigslist post to harass and bully ex-husband’s girlfriend’s daughter).

For collaborative authorship projects to continue serving a central role in Internet discourse, the organizers of these projects must recognize the participatory nature of the curatorial audience and its expectation of attribution, integrity and control over the scope of its contributions. In other cases, the multiple authors may find value in joining together behind a common pseudonym. The patterns of Internet usage, importance of author as brand and the need for many authors to create multiple online personas all drive a demand for a new form of wiki that embraces, rather than eschews, attribution for its participants, both accurate and pseudonymous.

VI. THE LEGAL REGIME FOR ENFORCEMENT OF THE WIKI'S NORMATIVE EXPECTATIONS

To enforce the presumptions of the wiki's behavioral and software codes, copyright and contractual rights must protect the rights of the attributive joint author to enforce the author's terms and conditions. Broadly speaking, this is accomplished through the use of the GNU General Public License ("GNU GPL")¹¹⁹ or a Creative Commons license.¹²⁰ The GNU GPL was designed to provide a standardized copyright license for creators of free and open source software, or "FOSS," by which the author of the software granted permission for the reproduction, display and adaptation of the software on condition that the licensee grant identical, reciprocal rights for all of the licensee's works that incorporated any of the software of the licensor.¹²¹ Under the GNU GPL, attribution is a permissive additional provision.¹²² Other open source licenses make attribution mandatory.¹²³

For works like software or visual art, the GNU GPL provides a concrete conditional license regime. The first party creates an original work of authorship, such as a new computer program or motion picture. The material is posted to a

¹¹⁹ Free Software Found., Inc., GNU General Public License, version 2 (1991), <http://www.gnu.org/licenses/old-licenses/gpl-2.0.html> [hereinafter GPL]. See Greg Vetter, *Claiming Copyleft in Open Source Software: What if the Free Software Foundation's General Public License (GPL) had been Patented?*, 2008 MICH. ST. L. REV. 279, 280–81 (2008).

¹²⁰ Creative Commons Corp., <http://creativecommons.org/> (last visited Mar. 9 2010). See Jeremy Phillips, *Authorship, Ownership, Wikiship: Copyright in the 21st Century*, in RESEARCH HANDBOOK ON THE FUTURE OF EU COPYRIGHT 193, 211 (Estelle Derclaye ed., 2009).

¹²¹ Vetter, *supra* note 119, at 281–82. See also Jonathan Zittrain, *Normative Principles for Evaluating Free and Proprietary Software*, 71 U. CHI. L. REV. 265, 268–69 (2004).

¹²² GPL, *supra* note 119, at 7.

¹²³ Zittrain, *supra* note 121, at 269.

GPL has been joined by a flotilla of other similar licenses by other authors, all with their own variations. Beyond the universal trait of allowing others to build upon the base code and release the result, some, such as the license for a variant of Unix called BSD, allow others to build upon the underlying software without passing on the accompanying "copyleft" restrictions. The BSD license materially differs from a wholly public domain release only in that it requires a particular kind of credit or attribution for the original author on whose work the new program is based.

website subject to the terms and conditions of the GNU GPL license (which is at least prominently noted on the site, though not necessarily acknowledged through a clickwrap agreement). The second party copies the work and modifies it to create a second, derivative work. The derivative work is posted to the second party's website with the GNU GPL license. The terms of the first license have been met and a third author is bound by the terms of the GNU GPL license with both preceding licensors. If the third author were to sell the software commercially (in violation of the GNU GPL license) she would be potentially liable to both the first and second licensors.

The GNU GPL license has been consistently upheld as enforceable.¹²⁴ In *Jacobsen v. Katzer*, the plaintiff managed a software collective called Java Model Railroad Interface ("JMRI") that created model railroad software and computer chips, which were uploaded to the open source software site, SourceForge.¹²⁵ The software was subject to the GNU GPL.¹²⁶ Initially, the Federal Circuit reviewed the license to determine if there was sufficient consideration to validate its terms. Specifically, the Court focused on the economic relevance of the open source transaction:

Traditionally, copyright owners sold their copyrighted material in exchange for money. The lack of money changing hands in open source licensing should not be presumed to mean that there is no economic consideration, however. There are substantial benefits, including economic benefits, to the creation and distribution of copyrighted works under public licenses that range far beyond traditional license royalties.¹²⁷

As part of this analysis, the Court relied on the Eleventh Circuit in holding that recognition of a programmer's reputation could provide the necessary economic

¹²⁴ See *Wallace v. IBM, Corp.*, 467 F.3d 1104 (7th Cir. 2006); *Computer Associates. Int'l v. Quest Software, Inc.*, 333 F. Supp. 2d 688 (N.D. Ill. 2004). Other courts have upheld alternate open source Artistic Licenses. See *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008). Other courts have assumed the validity of open source licenses without directly litigating the issue. See *Wallace v. Free Software Found., Inc.*, 2006 U.S. Dist. LEXIS 53003, at *7 (S.D. Ind. Mar. 20, 2006) (discussing antitrust implications of enforcing the GPL license).

¹²⁵ *Jacobsen v. Katzer*, 535 F.3d at 1376.

¹²⁶ *Id.* The Court also identified the central purpose of the license requirements:

By requiring that users copy and restate the license and attribution information, a copyright holder can ensure that recipients of the redistributed computer code know the identity of the owner as well as the scope of the license granted by the original owner. The Artistic License in this case also requires that changes to the computer code be tracked so that downstream users know what part of the computer code is the original code created by the copyright holder and what part has been newly added or altered by another collaborator.

Id. at 1379.

¹²⁷ *Id.*

benefit to support the transaction.¹²⁸ The Federal Circuit thus enforced the terms of the open source license, finding that “a user who downloads the JMRI copyrighted materials is authorized to make modifications and to distribute the materials ‘provided that’ the user follows the restrictive terms of the Artistic License” and failure to follow those restrictive terms results in a termination of the contract and a violation of copyright for continued distribution following such termination.¹²⁹

Though less focused on the copyright aspects of the GNU GPL, Judge Easterbook, writing for the Seventh Circuit in *Wallace v. IBM*, provided a fairly robust explanation and acknowledgement of the open source license:

Authors who distribute their works under this license, devised by the Free Software Foundation, Inc., authorize not only copying but also the creation of derivative works—and the license prohibits charging for the derivative work. People may make and distribute derivative works if and only if they come under the same license terms as the original work. Thus the GPL propagates from user to user and revision to revision: neither the original author, nor any creator of a revised or improved version, may charge for the software or allow any successor to charge. Copyright law, usually the basis of limiting reproduction in order to collect a fee, ensures that open-source software remains free: any attempt to sell a derivative work will violate the copyright laws, even if the improver has not accepted the GPL. The Free Software Foundation calls the result “copyleft.”¹³⁰

The review of the GNU GPL license reinforces the expectation that the open source and Creative Commons licenses contain all the attributes of enforceable contracts. The rights to use the content licensed under the terms is expressly conditioned on the licensee complying with the license, and as such, any breach of the licensing terms results in a copyright violation, not merely a breach of contract action.

¹²⁸ *Id.* (“Program creator ‘derived value from the distribution [under a public license] because he was able to improve his Software based on suggestions sent by end-users. . . . It is logical that as the Software improved, more end-users used his Software, thereby increasing [the programmer’s] recognition in his profession and the likelihood that the Software would be improved even further.” (quoting *Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1200 (11th Cir. 2001))).

¹²⁹ *Id.* at 1382. Given the logic of the decision, the Eleventh Circuit’s apparent dismissal of conditioning a reproduction license on attribution appears misplaced. Attribution rights can have direct economic consequences, certainly more than the affixation of the copyright notice which the Court notes with approval. *Cf. Veith v. MCA Inc.*, 1997 Cal. App. Unpub. LEXIS 1, at *65–77 (Cal. App. 2d 1997).

¹³⁰ *Wallace v. IBM*, 467 F.3d at 1105. Although the focus of the controversy centered on the potential antitrust implications of licensing software for the fixed price of zero, Judge Easterbook’s statement provided broad recognition of open source license validity. Had the open source license not been enforceable, no agreement could have been found upon which an antitrust analysis could be formulated.

In this way the open source and Creative Commons licenses provide the necessary legal protections for meaningful enforcement of the rights provided by the participants in each authoring community.

The license used by Wikipedia illustrates both the benefits and limitations of the open source licensing approach. Wikipedia has adopted the Creative Commons Attribution-Share-Alike 3.0 Unported License, which includes obligations of attribution along with copyright notices.¹³¹ The Creative Commons licenses require attribution for both the author and for any designated parties, such as “a sponsor institute, publishing entity, [or] journal.”¹³² So while the GNU GPL has a permissive

¹³¹ Wikipedia:Text of Creative Commons Attribution-ShareAlike 3.0 Unported License, http://en.wikipedia.org/wiki/Wikipedia:Text_of_Creative_Commons_Attribution-ShareAlike_3.0_Unported_License § 4(c) (last visited Mar. 9, 2010).

If You Distribute, or Publicly Perform the Work or any Adaptations or Collections, You must, unless a request has been made pursuant to Section 4(a), keep intact all copyright notices for the Work and provide, reasonable to the medium or means You are utilizing: (i) the name of the Original Author (or pseudonym, if applicable) if supplied, and/or if the Original Author and/or Licensor designate another party or parties (e.g., a sponsor institute, publishing entity, journal) for attribution (“Attribution Parties”) in Licensor’s copyright notice, terms of service or by other reasonable means, the name of such party or parties; (ii) the title of the Work if supplied; (iii) to the extent reasonably practicable, the URI, if any, that Licensor specifies to be associated with the Work, unless such URI does not refer to the copyright notice or licensing information for the Work; and (iv) , consistent with section 3(b), in the case of an Adaptation, a credit identifying the use of the Work in the Adaptation (e.g., “French translation of the Work by Original Author,” or “Screenplay based on original Work by Original Author”). The credit required by this Section 4(c) may be implemented in any reasonable manner; provided, however, that in the case of a Adaptation or Collection, at a minimum such credit will appear, if a credit for all contributing authors of the Adaptation or Collection appears, then as part of these credits and in a manner at least as prominent as the credits for the other contributing authors. For the avoidance of doubt, You may only use the credit required by this Section for the purpose of attribution in the manner set out above and, by exercising Your rights under this License, You may not implicitly or explicitly assert or imply any connection with, sponsorship or endorsement by the Original Author, Licensor and/or Attribution Parties, as appropriate, of You or Your use of the Work, without the separate, express prior written permission of the Original Author, Licensor and/or Attribution Parties.

¹³² *Id.* The licensing scheme also requires compliance with the GNU license. “For compatibility reasons, you are also required to license it under the GNU Free Documentation License (unversioned, with no invariant sections, front-cover texts, or back-cover texts). Re-users can choose the license(s) they wish to comply with.” Wikimedia Found., Terms of Use,

authorship requirement for software, the Creative Commons license adopted by Wikipedia has a mandatory provision.

For wikis, however, this creates a problem of identifying what is meant by authorship and a fixed work.¹³³ A single wiki entry may have dozens of authors and multiple versions, making the identity of the authors—if not the infringed work—difficult to ascertain. As has been criticized elsewhere, “[t]he licensing of works under the Creative Commons scheme is not yet wiki-friendly, in so far as it presupposes the existence of single, static works which can be identified as having their authorship and content which is to all intents and purposes immutable.”¹³⁴ Presumptively, the structure of Wikipedia is such that the individuals posting to the site are the authors of the pages. The terms of use reflect this presumption:

To grow the commons of free knowledge and free culture, all users contributing to Wikimedia projects are required to grant broad permissions to the general public to re-distribute and re-use their contributions freely, as long as the use is attributed and the same freedom to re-use and re-distribute applies to any derivative works. Therefore, for any text you hold the copyright to, by submitting it, you agree to license it under the Creative Commons Attribution/Share-Alike License 3.0 (Unported). . . . Please note that these licenses *do* allow commercial uses of your contributions, as long as such uses are compliant with the terms.¹³⁵

As with the GNU GPL, the rights of attribution and re-use/re-distribution are the primary limitations of the Wikipedia license. Copyright law, however, requires that a plaintiff be the holder of an exclusive right to sue under the statute.¹³⁶ A collaboratively authored work becomes a *joint work*¹³⁷ requiring that all joint authors be joined as plaintiffs or that they have assigned their rights to a single, exclusive rights holder. If a work—even one as small as a single encyclopedia entry—is authored by multiple individuals who retain copyright, then they would all need to be made parties to any enforcement action, effectively undermining the practicality of most litigation.

http://wikimediafoundation.org/wiki/Terms_of_Use (last visited Mar. 9, 2010) [hereinafter Terms of Use].

¹³³ See 17 U.S.C. § 102 (a) (2010) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . .”).

¹³⁴ Phillips, *supra* note 120, at 211. See also Lynn M. Forsythe & Deborah J. Kemp, *Creative Commons: For the Common Good?*, 30 U. LA VERNE L. REV. 346, 364–67 (2009).

¹³⁵ Terms of Use, *supra* note 132.

¹³⁶ 17 U.S.C. § 501(b) (2010) (“The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.”).

¹³⁷ 17 U.S.C. § 101 (2010) (“A ‘joint work’ is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”).

To comply with the express terms of the Wikipedia Creative Commons license, a party copying a Wikipedia page must also reproduce the attribution information in order to identify the authors of that page. But this information is not on the Wikipedia page. Instead, on the citation link, many pages simply list “Wikipedia contributors” as author.¹³⁸ A table of individual names, online handles and IP addresses is available only as one of the tables in the revision “history statistics.”¹³⁹ The specific terms of the license do not actually identify Wikipedia, nor do they make clear the role of the original author in her capacity as licensor of the content to other editors in the Wikipedia community.¹⁴⁰ Enforcement of the Wikipedia copyright can only be enforced by the copyright holders of the work infringed.¹⁴¹ Even assuming the work in question is an entry rather than the entire wiki, the precedent remains unclear which contributors would be required to bring an infringement action.¹⁴²

Perhaps a better solution would be the modification of the license to allow the elimination of authorship attribution in favor of publisher attribution or collective attribution. In other words, the preferred wiki license should require that contributors agree that their contributions be published with the publisher identified as the “author” for purposes of republication, with the proviso that “Wiki Contributors” be identified as the author if the latter solution is more consonant with the ethos of the site’s collaborative editorial practice. Either term is better than incorporation of a contract provision that serves only to frustrate those re-publishers who might try to comply with its terms.

The use of the publisher-as-author license would also improve the ability to police the work. The plethora of potential exclusive rights holders under the Wikipedia Creative Commons license makes it impractical to register a work, a precondition of filing an enforcement action in federal court.¹⁴³ If instead, all

¹³⁸ See, e.g., Wikipedia, Legal education, http://en.wikipedia.org/w/index.php?title=Special:Cite&page=Legal_education&id=339434493 (last visited Mar. 10, 2010).

¹³⁹ E.g., <http://vs.aka-online.de/cgi-bin/wppagehiststat.pl?lang=en.wikipedia&page=Legal+education> (revision history statistics page for “Legal Education” from prior example) (last visited Mar. 10, 2010).

¹⁴⁰ Terms of Use, *supra* note 132.

¹⁴¹ 17 U.S.C. § 501(b) (2010).

¹⁴² See NIMMER, 3–12 NIMMER ON COPYRIGHT § 12.03 (2010).

A number of cases have held that co-owners of a joint work were indispensable parties in an infringement action brought by one such co-owner. Probably, the better view is expressed in *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, [140 F.2d 268 (2d Cir. 1944)] in which it was held that, pursuant to Rule 17(a) of the Federal Rules of Civil Procedure, one co-owner may be regarded as “the real party in interest,” with respect to his particular share of damages or profits accruing from an infringement of a jointly owned work, and accordingly, may sue without joining the other co-owners.

(Internal footnotes omitted).

¹⁴³ 17 U.S.C. § 411(a) (2010).

contributors granted the wiki publisher the exclusive rights to the work, and the publisher, in turn, granted non-exclusive re-use rights to the world, then the license could be enforced if necessary. As with other copyright licenses, compliance with the material terms is a precondition for exploitation of any of the exclusive rights protected by copyright. In the event one of these terms is violated, the license terminates and the infringer may be liable for copyright infringement. The ability to enforce the license terms may be highly significant to academic and research wikis designed to collect and disseminate a sophisticated body of knowledge, and as such, an enforceable licensing regime should be adopted.

The same result would be true for others who value aspects of control regarding the downstream use of their work. In the case of open source or crowd source news gathering, for example, the journalists participating in the process may welcome the republication of their efforts on websites across the Internet. Nonetheless, if certain re-publishers were editing the posts in a manner which made the content inaccurate (or worse, libelous to third parties), then the journalists would have a strong interest in enforcing their license to bar derivative works that distorted the content. Provisions in the open source license would need to make explicit that the right to alter the content was conditioned on the creator of the derivative work not making alterations that would materially change the meaning.¹⁴⁴

If the participants in the wiki have no interest in enforcement of the copyright license, then a much simpler solution would be to have all authors dedicate their contributions to the public domain. While this would allow anyone to use the material—and even to incorporate some of the content into proprietary, copyright-protected works—it would nonetheless serve to maximize the ability of others to fully exploit the materials posted to the wiki. Dedicating a work to the public domain provides the greatest possible opportunity for that content to be disseminated.¹⁴⁵ An open source license that is impractical to enforce may dilute its benefits. Put simply, an unencumbered gift is better than an unenforceable license. The choice of the correct licensing regime, as always, depends on the normative expectations of the participants.

¹⁴⁴ Such a standard is inherently vague. To overcome this obstacle, such a license could (i) make explicit that the party determining whether an edit “materially changed the meaning of the content” would be determined solely by the licensing party; (ii) force the licensee to agree to take down any content deemed objectionable by the licensor; and (iii) ensure that any licensee who was required to take down content deemed in breach of the license more than three times would thereafter no longer be eligible to republish content under the license. It would also be advisable to include an indemnification provision in the event the licensee’s edits resulted in an action for libel against the licensor. Even generous open source licenses can have teeth.

¹⁴⁵ The open source license has the benefit of leveraging the participation onto others who want the benefits of the unencumbered material. In essence, open source content has a network effect not present in public domain works, while public domain works have even fewer use restrictions. Both models, therefore, provide methods of maximizing public benefit.

VII. WIKIFRAUD AND EDITORIAL MISCONDUCT

In addition to the difficulty enforcing the Creative Commons license in the context of a large authorship community, wikis tend to suffer from a number of forms of vandalism and other damage. “Most wikis will generate content that needs to be deleted. On public wikis, junk, spam, test edits, and vandalism[] are obvious candidates for deletion”¹⁴⁶ Such vandalism can take a number of forms, the most obvious being malicious edits.¹⁴⁷ Such malicious edits also vary in form:

1. Mass deletion[:] deletion of all contents on a page.

2. Offensive copy: insertion of vulgarities or slurs.

3. Phony copy: insertion of text unrelated to the page topic. E.g. on the Chemistry page, a user inserted the full text from the “Windows 98 readme” file.

4. Phony redirection: Often pages contain only a redirect link to a more precise term (e.g. “IBM” redirects to “International Business Machines[]”), but redirects can also be malicious[], linking to an unrelated or offensive term. “Israel” was at one point redirected to “feces.” Note that a phony redirect implies familiarity with Wikipedia’s editing mechanisms.

5. Idiosyncratic copy¹⁴⁸: adding text that is related to the topic of the page but which is clearly one-sided, not of general interest, or inflammatory; these may be long pieces of text. Examples range from “Islam” where a visitor pasted long prayer passages from the Koran, to “Cat” where a reader posted a lengthy diatribe on the Unix *cat* command.¹⁴⁹

Vandalism, as the term implies, harms the wiki or attacks the subject matter described in the wiki. In addition to various forms of vandalism, wiki publishers must remain vigilant against “illegal content including copyright violations and libel”¹⁵⁰ In a wiki system where any user is allowed to make editorial changes, wiki communities and publishers must actively monitor the material to assure a quick response to such vandalism and other inappropriate content.

¹⁴⁶ KLOBAS, *supra* note 15, at 200–01.

¹⁴⁷ Viégas et al., *supra* note 34, at 578 (“Wikis are vulnerable to malicious edits or ‘vandalism,’ which can take a surprising array of forms”).

¹⁴⁸ This is also sometimes known as “trolling.” KLOBAS, *supra* note 15, at 201–02.

¹⁴⁹ Viégas et al., *supra* note 34, at 578–79 (this study used Wikipedia as its source and the examples derive from that wiki).

¹⁵⁰ KLOBAS, *supra* note 15, at 202.

Another structural concern for wiki publishers stems from temptation to use wikis for self promotion. “Wikipedia jettisons more than 100 entries every day, many of them from people who posted autobiographies after registering on the site. (Writing your own entry . . . is ‘strongly discouraged.’)”¹⁵¹ Corporate entities also participate. “Search for a company on **Google** and chances are its Wiki entry will be among the first hits. So perhaps it’s no surprise that corporate spinmeisters are closely guarding their Wiki images.”¹⁵² Wikipedia editors have removed changes by employees from many companies, including McDonald’s and Walmart.¹⁵³

Companies such as these may move links from less flattering sites to more flattering resources, or they may sanitize the copy related to their business practices.¹⁵⁴ For example, a person with a McDonald’s corporate IP address replaced the hyperlink for Eric Schlosser’s *Fast Food Nation*, in favor of *McDonald’s: Behind the Arches*, which had a significantly less negative perspective on the fast food business and its impact on public health.¹⁵⁵

Sue Gardner, executive director of the Wikimedia Foundation, acknowledged the problem of wiki manipulation. “We are vulnerable to exploitation—people want to monetize the traffic that comes to Wikipedia, or pursue a political agenda.”¹⁵⁶ As such, the manipulation of the content may be far more problematic than overt vandalism. In addition to being less obvious, this type of unlabeled marketing can undermine the credibility of the site if such editorial practices are allowed to pass unchecked.

To avoid vandalism, manipulation and self-aggrandizement, some systems require editors or “curators” to control the flow of information into the wiki.¹⁵⁷ In these wikis, the publisher provides only select users the right to approve page changes, assuring that each editorial change has been reviewed by the community of editors.¹⁵⁸ Critics of the curator model, however, suggest that such approaches change the fundamentally egalitarian culture of the wiki.¹⁵⁹ Nonetheless, wiki communities must take steps to discourage vandalism and maintain the integrity of their content.

¹⁵¹ David Segal, *Look Me Up Under N For Nobody; On Wikipedia, Deletion Looms for the Patently Non-Notable*, THE WASH. POST, Dec. 3, 2006, at D01.

¹⁵² Evan Hessel, *Shillpedia*, FORBES, June 19, 2006, at 56.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Noam Cohen, *Wikipedia Looks Hard at Its Culture*, N.Y. TIMES, Aug. 31, 2009, at B3.

¹⁵⁷ See, e.g., Physcome Project and cosmass.org Wiki, Annotation Guidelines https://www.cosmass.org/physcome_project/wiki/Annotation_guidelines (last visited Mar. 31, 2010) (wiki focused on the *Physcomitrella patens* genome) (“Curators can force changes, oversee use annotations, and work on future annotation releases.”); Stack Overflow, <http://stackoverflow.com> (last visited Mar. 31, 2010).

¹⁵⁸ See, e.g., Physcome Project and cosmass.org Wiki, Annotation Guidelines, *supra* note 161; Stack Overflow, *supra* note 161.

¹⁵⁹ See Juan Mateos-Garcia & W. Edward Steinmueller, *Open, But How Much? Growth, Conflict, and Institutional Evolution in Open-Source Communities*, in COMMUNITY, ECONOMIC CREATIVITY, AND ORGANIZATION 269–72 (Ash Amin & Joanne Roberts eds., 2008).

In addition to using editors or curators to approve postings, the active members of wiki communities regularly police the content. They use attribution pages to scan for new users, the people most likely to vandalize sites,¹⁶⁰ as well as to patrol for well known vandals. In this way, the attribution pages provide insiders with the same general type of credibility information that attribution generally provides the public in other publications. Just as “authorship conventionally underwrites readers’ engagements with literary texts,”¹⁶¹ the attribution information provides similar rules of engagement for the page editors and curators—a form of engagement that is not provided to the casual users of the wikis. The only significant difference between wiki attribution and other forms of authorial attribution, therefore, focuses on who can see the credits. Wiki attribution is buried so that only those in the community’s inner circle are in a position to benefit from it.

More prominent attribution in wikis would offer two potential benefits for improving textual integrity. First, it might enable a broader array of readers to notice and correct wiki vandalism.¹⁶² As regular readers use sites, they are likely to recognize frequent vandals, just as the editors do, and this would enlarge the pool of editors attuned to the need to make simple corrections.¹⁶³ An even greater benefit might be felt regarding wikifraud. Authors of self-serving puffery would be far less able to upload self-aggrandizing content if forced to sign their names to it. The public relations staff in most enterprises is sufficiently well known, so that authored articles about the enterprise would become quite visible to others in the organization. The internal response to such puffery would likely dissuade many organizations from participating in such self-serving conduct.

VIII. VARYING THE NORMS FOR EMPLOYER-SPONSORED AUTHORSHIP

Just as the Internet can support multiple norms for authorship, it is important to recognize that authors receive support from multiple sources. In for-profit publication, copyright policy assumes that the economic incentives for the author come from the sale of his or her work. In traditional employment situations, by contrast, Congress presumes that one’s employment provides the reward for one’s authorship,¹⁶⁴ but recognizes that the parties may appropriately have alternative

¹⁶⁰ Viégas, et. al, *supra* note 34, at 576.

¹⁶¹ Lanser, *supra* note 96, at 82.

¹⁶² Admittedly, the downside to attribution is the lure of vandals who wish to see their names on the website. Whether the lure of such fame would outweigh the benefits of greater policing is a matter of speculation.

¹⁶³ See, e.g., Stack Overflow, <http://stackoverflow.com> (last visited Mar. 9, 2010); Atwood, *supra* note 32 (“Insiders account for the vast majority of the edits. But it’s the outsiders who provide nearly all of the content. . . . There’s a strong sense of authorship, with a reputation system and a signature block attached to every post, like traditional blogs and forums. [But] once the system learns to trust you, you can edit anything.”).

¹⁶⁴ 17 U.S.C. § 101 (definitions) (“A ‘work made for hire’ is (1) a work prepared by an employee within the scope of his or her employment . . .”).

expectations.¹⁶⁵ In fields of research and academia, a third expectation may exist because the author's work can be funded by research grants and outside support rather than merely the scholar's ordinary income.¹⁶⁶ Work for hire tracked the presumptions related to the financing of the authorship. Whether the work for hire doctrine should have also varied the norms for attribution and integrity has recently come into question.¹⁶⁷

Duke Professor Catherine Fisk makes a compelling argument that attribution and integrity had historically been integral to U.S. copyright law such that employment law did not divest an employee of the non-economic right of attribution even as it extracted the economic value of the copyright for the benefit of the employer.¹⁶⁸ "Nineteenth century courts believed that actual attributions of authorship were an important reward above and beyond the economic value of the intellectual property rights themselves."¹⁶⁹ The continuing norms in patent law, which vest the attribution of invention solely in the inventor,¹⁷⁰ further suggest that the drafters of the copyright work-for-hire clause swept too broadly when they attempted to clarify the standards.

The line of nineteenth century attribution cases may provide the historical root for the so-called teacher's exception to the work-for-hire doctrine that would exclude academic research from the reach of the 1976 Act's literal text.¹⁷¹ The 1909 Copyright Act had codified an earlier work-for-hire rule by providing that "the word 'author' shall include an employer in the case of works made for hire."¹⁷² Nonetheless, that doctrine had been interpreted in a flexible, case-specific manner.¹⁷³

¹⁶⁵ The statutory presumption that vests copyright in the employer can be altered by the parties, provided "the parties have expressly agreed otherwise in a written instrument signed by them . . ." 17 U.S.C. §201 (b) (2010).

¹⁶⁶ Jon M. Garon, *What If DRM Fails?: Seeking Patronage in the iWasteland and the Virtual O*, MICH. ST. L. REV. 103, 131–34 (2008) ("The fourth source of funding is from private patronage. Charitable tax-exempt organizations collect private donations for visual art, theatre, opera, libraries, motion pictures, public broadcasting, and publishing endeavors of various kinds.").

¹⁶⁷ Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49 (2006).

¹⁶⁸ *Id.* at 57.

¹⁶⁹ *Id.* (citing *Boucicault v. Fox*, 3 F. Cas. 977, 980 (C.C.N.Y. 1862)); *Peters v. Borst*, 9 N.Y.S. 789, 790 (N.Y. Sup. Ct. 1889).

¹⁷⁰ See 35 U.S.C. § 116 (2009).

¹⁷¹ See generally Sunil R. Kulkarni, *All Professors Create Equally: Why Faculty Should Have Complete Control Over the Intellectual Property Rights in Their Creations*, 47 HASTINGS L.J. 221, 223–25 (1995).

¹⁷² 17 U.S.C. § 26 (1909) (internal quotations in original) (current version at 17 U.S.C. 101 (1976)). See *Scherr v. Universal Match Corp.*, 417 F.2d 497, 499 (2d Cir. 1969).

¹⁷³ Sean B. Seymore, *How Does My Work Become Our Work? Dilution of Authorship in Scientific Papers, and the Need for the Academy to Obey Copyright Law*, 12 RICH. J.L. & TECH. 11, 10 (2006) ("This 'faculty exception' was rooted in policy, custom, common law copyright, and possibly section 7 of the 1909 Copyright Act."); Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 595–97 (1987).

Judge Posner has forcefully defended the need for retaining the teacher's exception, based, perhaps in part, on this history.¹⁷⁴ As Posner suggests, the relevance of the teacher's exception and the devolution of attribution may reflect the benign neglect of a doctrine so widely accepted as to go unnoted in the economic debates of the 1976 Copyright Act.¹⁷⁵ The more likely target of the copyright policy drafters was the highly flexible and somewhat unpredictable nature of work-for-hire under the 1909 Act which left employers, commissioning parties, authors and artists with much less clarity regarding their expectations of copyright ownership.¹⁷⁶ The 1976 Act replaced flexibility and ambiguity with a clear default rule which can easily be varied by written agreement.¹⁷⁷ In this way the 1976 Act, even though it may have the wrong presumption with regard to academic scholarship, still provides a clear methodology for articulating the rights of the parties.

The reader of the Copyright Act makes a mistake, however, to assume that the default provision is the presumptive or correct normative choice regarding every application of the doctrine.¹⁷⁸ While the default norm for work-for-hire places copyright ownership in the employer's hands when the work is "prepared by an employee within the scope of his or her employment,"¹⁷⁹ the vesting of the copyright will change if the parties so agree in writing.¹⁸⁰ The parties, not the law, determine the norm. Compared to the universe of all employment contracts, those employment agreements which need provisions for academic, scholarly and creative works compose a very modest—even miniscule—subset. The congressional choice to require academics to establish their rights using contract is likely not an unreasonable

¹⁷⁴ *Hays v. Sony Corp. of America*, 847 F.2d 412, 416–17 (7th Cir. 1988).

But considering the havoc that such a conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the teacher exception, we might, if forced to decide the issue, conclude that the exception had survived the enactment of the 1976 Act.

¹⁷⁵ *Id.* ("it is widely believed that the 1976 Act abolished the teacher exception . . . though, if so, probably inadvertently, for there is no discussion of the issue in the legislative history, and no political or other reasons come to mind as to why Congress might have wanted to abolish the exception.").

¹⁷⁶ See Thomas G. Field, Jr., *From Custom to Law in Copyright*, 49 *IDEA* 125, 138–40 (2008); Dreyfuss, *supra* note 173, at 595 ("Starting with the presumption that works prepared in the course of employment were works for hire, 17 courts allowed employees to introduce evidence on a variety of factors to rebut the presumption that their work belonged to the employer.").

¹⁷⁷ 17 U.S.C. § 201(b) (2009).

¹⁷⁸ See Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 *VA. L. REV.* 1899, 1909 (2007) (" . . . there has been little acknowledgement of the breadth of the customary practices and norms involved in IP and the vast influence that they wield.").

¹⁷⁹ 17 U.S.C. § 101 (2009).

¹⁸⁰ *Id.* at § 201(b).

one and should not be transformed into a public policy endorsement suggesting that academics lose these rights. It merely means that through collective bargaining and shared governance structures, the written agreements between faculty and universities should be clearly articulated.¹⁸¹

The difference between presumptions and norms is also important in the expectation for user generated content on the Internet. Copyright ownership vests in the author in every case. In those communities where the normative expectation is for the author to relinquish the rights provided by copyright, all rights—including those of attribution—can be foresworn. But in the blogs and social media, the authors are not relinquishing all of their ownership interests. For many, the rights to attribution remain the most important; for others it is the right of integrity—at least regarding the original post—that is dearest to the creator. Authors may not be concerned about the re-uses or derivative works that incorporate their posts, but they do not want to see their original posts removed or distorted.¹⁸²

Put in this context, the rights of attribution and integrity play important roles in the new media discourse of the Internet. The concerns underlying the debate over the teacher's exception may serve to highlight the importance of the attribution debate. As Professor Fisk puts it, “[t]he reputation we develop for the work we do proves to the world the nature of our human capital.”¹⁸³ For academic research, this is a critical component of authorship. The topic is keenly felt at universities and research facilities. The normative expectation for faculty and researchers remains one of attribution and integrity, with this norm expressed through collective bargaining agreements and faculty handbooks. Unless it is protected on the Internet, such authors will not place their valuable efforts in that medium.

IX. INCENTIVIZING COLLABORATIVE SCHOLARSHIP— CREATION AND DISSEMINATION OF KNOWLEDGE

In addition to the curatorial need for participants to collect and imprint their identity through online and other media, an equally significant societal objective may be the usefulness of collaborative, attributed authorship for professional and academic research. As noted earlier, “[r]eputation is critical to a person who follows a vocation dependent on commissions from a variety of clients.”¹⁸⁴ In the fields of

¹⁸¹ Jon M. Garon, *The Electronic Jungle: The Application of Intellectual Property Law to Distance Education*, 4 VAND. J. ENT. L. & PRAC. 146, 152–53 (2002). See also Thomas G. Field, Jr., *supra* note 181, at 138–40.

¹⁸² Seen in this light, the myriad of complaints regarding overzealous take-down regimes are really forms of video authors claiming the right of integrity in their posts (whether the clip be decidedly original or have only minimal creative elements).

¹⁸³ Fisk, *supra* note 83, at 50.

¹⁸⁴ Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, *supra* note 43, at 265 (quoting *Prior v. Sheldon* (2000) 48 I.P.R. 301 at para. 87 (Austl.)). See also Ginsburg, *The Author's Name as a Trademark: A Perverse Perspective on the Moral Right of Paternity?*, *supra* note 108, at 380.

academic and scientific research, the key resources for empirical research are based on the competence and credibility of the parties generating the information.

In an information economy, especially one characterized by high degrees of labor turnover, human capital is fantastically important to employees and to firms. Particularly in the case of highly-educated or highly-skilled employees or people who possess a great deal of tacit knowledge, assessing the nature and value of human capital is difficult. . . . Thus, credit becomes a form of human capital itself because it translates and signals the existence of a deeper layer of human capital.¹⁸⁵

Nowhere is this more apparent than in academic institutions. Given the paltry sums generally available to academics for their writings, the emphasis on the teacher's exception to copyright ownership must focus on the moral rights of attribution and integrity. Rather than receive consumer financing for scholarship, university faculty members generally receive institutional support to fund, encourage or reward their efforts. "Hiring, tenure, promotions, grants, and other aspects of the academic reward structure are based on producing peer-reviewed publications."¹⁸⁶ The Dartmouth University Guidelines provide a simple example: "Authorship is important to the reputation, professional advancement, and financial support of individuals, and to the reputation of Dartmouth College."¹⁸⁷

¹⁸⁵ Fisk, *supra* note 83, at 53–54.

¹⁸⁶ CHRISTINE L. BORGMAN, SCHOLARSHIP IN THE DIGITAL AGE: INFORMATION, INFRASTRUCTURE, AND THE INTERNET 196 (2007).

The disincentives to share scholarly information can be divided into four categories: (1) rewards for publication rather than for data management; (2) the amount of effort required in documenting data for use by others; (3) concerns for priority, including the rights to control the results or sources until the publication of research; and (4) intellectual property issues, both the control and ownership of one's own data as well as access to data controlled or owned by others.

¹⁸⁷ DARTMOUTH UNIVERSITY, AUTHORSHIP GUIDELINES, www.dartmouth.edu/~osp/docs/Authorship.pdf.

1. An author should have made substantial contributions to the scholarly work and intellectual process. Examples of activities considered to be a substantial contribution may include one or more of the following: creating the original idea, project planning, experimental work, data collection, analysis, interpretation.

2. An author should be able to articulate and defend their contribution to the scholarly work. They should know and be able to explain how their contribution relates to the overall project.

The lack of any meaningful institutional feedback regarding the efficacy of wiki and other online scholarship has constrained the expansion of such academic research in online fora.¹⁸⁸ While better tools for providing online attribution and integrity will not answer all academic concerns regarding open access of research data, a system built on robust moral rights will reduce barriers for faculty participation in such communities.¹⁸⁹ Adding metadata analysis that informs the participants—and their home institutions, when appropriate—of the value of the participant’s contributions can be used as a viable alternative to peer-review as a measure of scholarly efficacy.¹⁹⁰ Taken together, the positive, normative expectation of wiki contribution and the tools available for schools to use the wiki contributions as part of promotion and grant reviews could potentially create a new class of sophisticated, thoughtful and academically rigorous wiki environments supported by academic institutions rather than volunteer efforts.

Such investment in collaborative, knowledge-increasing efforts could answer some of the criticism leveled at the academy that “demands of tenure and professional advancement emphasize publication over practicality, credit over collaboration, footnotes over feasibility, and social science over saving the world.”¹⁹¹ To the extent that academic scholarship discourages collaboration and progress, an academic wiki may serve as an antidote.

Particularly if the tools can be used to differentiate among the highly inconsistent levels of participation among various wiki participants, they should provide much needed information.¹⁹² From an institutional perspective, the university or academic center expects that the contributions of faculty members are evaluated. Automated reports which provide assessment tools will be warmly welcomed over the time-

3. As single contributions, the acquisition of funding, the provision of technical services and/or materials, the collection of data, or the general supervision of a research group are generally not adequate to justify authorship.

¹⁸⁸ See generally Susan G. Haag et al., *Faculty Incentives and Development for Online Learning*, in ONLINE PROFESSIONAL DEVELOPMENT FOR TEACHERS 69, 75 (Charalambos Vrasidas & Gene V. Glass eds., 2004).

¹⁸⁹ See Richard N. Katz, *The Gathering Cloud: Is This the End of the Middle?*, in THE TOWER AND THE CLOUD—HIGHER EDUCATION IN THE AGE OF CLOUD COMPUTING 2, 17 (Richard N. Katz ed., 2008).

¹⁹⁰ Arazy & Stroulia, *supra* note 30, at 171 (citing additional studies).

¹⁹¹ BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL 188 (2009).

¹⁹² See Jeff Stuckman & James Purtilo, *Analyzing the Wikisphere*, WIKISYM 2009 (Oct. 2009), available at <http://www.wikisym.org/ws2009/wiki-index.php?page=Analyzing+the+Wikisphere> (“We . . . studied 151 popular wikis . . . (none of them Wikipedias). We found that our studied wikis displayed signs of collaborative authorship, [and] . . . the relative contribution levels of users in the studied wikis were highly unequal, with a small number of users contributing a disproportionate amount of work.”).

intensive methods used for traditional scholarship, which relies on peer-review for most disciplines¹⁹³ (with the notable exception of legal scholarship).¹⁹⁴

Building on the values of attribution and integrity, an academic collaborative wiki project should incorporate those attributes that are valued by the academic participants, their sponsors and the research community. It would be naïve to think that the pressures of tenure, promotion and incentive do not drive faculty choices regarding the focus of their scholarship.¹⁹⁵ Therefore, the successful academic wiki projects must “count” for institutional purposes of promotion, tenure and research funding.

For the institutions that support the academic endeavors, they want assurances that the work matters. Whatever the merits of peer review and publication acceptances, these external validations continue to play a significant part in legitimizing faculty work product. If wikis are to compete with peer-reviewed journals or their law school counterparts, the institutions need assurance that the faculty participation has merit.

One alternative for establishing the merit of faculty contributions would be to include only those contributions that have already been through a peer-review process. Faculty members could submit their published work to content aggregators. Websites such as the Social Science Research Network,¹⁹⁶ Bepress Legal Repository,¹⁹⁷ NELLCO Legal Scholarship Repository,¹⁹⁸ ERIC, the Educational Resources Information Center,¹⁹⁹ or others. These sites serve to provide greater public access to faculty scholarship, but they do not build knowledge in any coherent, organized fashion. These articles may represent the grist for new knowledge, but they are not the Libraries of Babel²⁰⁰ or Encyclopedia Galactica²⁰¹ that massive collaborative scholarship could develop.

A second alternative for enhancing world knowledge through massive academic collaboration would be direct funding of such a project. This simple solution merely requires an institution or association of institutions who share the vision for such a project—or any lesser project which values open academic collaboration. But even with funding, such a project will face obstacles. As discussed throughout this article, attribution is an essential component of participation. Academic attribution is the

¹⁹³ Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U.L. REV. 67, 72 (2006) (“Peer review thus became the mechanism for a university to monitor employees and make informed hiring and promotion decisions.”). See also GILLIAN ROSEMARY EVANS, CALLING ACADEMIA TO ACCOUNT: RIGHTS AND RESPONSIBILITIES 34 (1999).

¹⁹⁴ See Richard A. Posner, *Against the Law Reviews*, LEGAL AFFAIRS, December 2004, at 57; Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

¹⁹⁵ HAAG ET AL., *supra* note 188, at 75.

¹⁹⁶ <http://ssrn.com>.

¹⁹⁷ <http://law.bepress.com/repository>.

¹⁹⁸ <http://lsl.nellco.org/>.

¹⁹⁹ <http://www.eric.ed.gov/>.

²⁰⁰ JORGE LUIS BORGES, THE LIBRARY OF BABEL (1941), http://jubal.westnet.com/hyperdiscordia/library_of_babel.html (last visited Mar. 9, 2010); Lamb, *supra* note 17, at 36.

²⁰¹ http://en.wikipedia.org/wiki/Encyclopedia_Galactica.

coin of the realm. As such, to entice the faculty desired by the project leaders, the project must have the ability to provide academic attribution. Such attribution is certainly possible. Participants on the project can be given credit in a screen-credit page much like actors and crew on a motion picture. The listing in the project credits would serve as validity for faculty members including the project on their résumés.

The limitation on this model is that the awarding of credit comes as part of the agreement to participate, and without more, does not have any evaluative tools to emphasize significant participation or incentivize participants to invest time and effort into the project following the initial award of credit. To the extent that editors are hired to evaluate the submissions of the participating faculty, the project relies less on the communal, non-hierarchical wiki tools and more on a model of traditional editing. While traditional publishing certainly continues to work, it comes with significant costs that are otherwise borne by members of the editorial community and dissipated through its large network.

A better alternative maximizes the efficiency of the communal editing nature of wiki software but explicitly values the components of attribution and integrity. By using the same metadata captured for the wiki history pages, the relative impact of participants' editorial contributions can be measured over time. Under this model, the quantity and quality of each contributor's work would be assessed, and that information could be made available.

For example, hypothesize that the National Endowment for the Humanities ("NEH") wishes to produce a public website dedicated to the history of jazz music. The NEH could launch the project by hosting a website, choosing the authoring tools, and hiring a professional curator to define the parameters of the project and encourage academic participation. Participants in the project—whether initially screened or not—would begin to contribute to the site. Scholars in the field could write (or repurpose prior writings) to increase information on the site, and like any other wiki, the site would grow based on the size and interest of the community.

For faculty, however, the project would look somewhat different than Wikipedia because it could report to that faculty member (or the relevant tenure and promotion committee) the quantitative and qualitative measure of the participation. Each participant would be able to download charts and tables showing a detailed explanation of his or her participation.

First, the report could provide a quantitative analysis of participation: the total volume of content the participant contributed, the percentage of the site based upon that person's contribution, and the relative ranking of that person's quantitative input as compared to the other participants in the project (or even a group of identified comparator wiki projects). Next, the report could provide analysis of the resilience of the content provided by that participant. The presumption is that the information which remains on a site the longest is recognized as inherently more valuable than that content which has been edited heavily or quickly removed.²⁰² Finally, the report

²⁰² A measure of resilience can take into account the difference between minor changes in punctuation and word choice and more significant edits, based on algorithms establishing the

could identify the extent to which the contributions were relevant by measuring both the unique visitors to the pages (or the time spent by each unique visitor on each page, if deemed more significant) as well as the number of links to the particular content by sites outside the project. The link-based relevance could include either a universe of all readers or include only links from users within a subscriber community, if the important readership was deemed to be other academics in the field rather than the lay public.²⁰³

The NEH could provide incentives to those institutions which encourage the most effective faculty participation and marshal its public resources on those individuals and institutions that provide the greatest impact on the growth of the project. When the project was sufficiently established, the NEH could add to the knowledge of music history with a project on the Delta Blues and other topics, seamlessly linking one hyper-linked knowledge base with the next as it seeded the growth for an American Library of the Arts.

The combination of these three measures—the quantity of material submitted, the resiliency of the material on the site and the relevancy of the material to the users of the site—should provide an effective snapshot of the faculty member's efficacy on the site. The measures may even forestall the need for any vetting process of the volunteers. If participation itself carried some cache, then participating authors could be required to achieve a threshold level of participation to retain their submission rights. If one wishes to continue to be associated with the project and receive attribution for participation, one needs to provide a threshold level of effort; those authors who are more harmful than helpful and have all their posts removed would be flagged by the metadata and lose their credentials.

Undoubtedly, there will be concerns that such measurements will grow to replace traditional forms of peer review and other reward systems. Faculty members may be concerned that such metadata measurements could take away from the academic freedom of individual faculty, encourage more immediately relevant projects over longer-range scholarship and reduce the academic enterprise into too few measurements. While this dystopian outgrowth is theoretically possible, there is nothing in the methodology to suggest that it will replace all other forms of scholarship. Moreover, the collaborative wiki authorship projects are inherently limited to some forms of research. Many other forms of empirical scholarship, criticism and field research will be left unaffected by this model.

In reality, the model may bare little difference from the current standards of peer review and publication for the faculty member seeking tenure, promotion or funding. The quantity of one's writing certainly matters to tenure committees and university

minimum change in each sentence or paragraph that would constitute a meaningful change for statistical purposes. Arazy & Stroulia, *supra* note 30, at 172–174.

²⁰³ By simply requiring that users register with the site, the publisher could establish a qualitatively superior group of readers that serve as the basis for determining author relevance. A narrower community such as this would increasingly approximate peer review. While merely reading another author may not indicate approval, linking to that scholarship should correlate positively with the quality and usefulness of the content.

administrations (whether focused on the text or the footnotes). The prestige of a particular placement is merely a surrogate for its authoritative impact, and this measure is better assessed by breadth of readership within the field than by the vagaries of publication acceptance. Missing from traditional scholarship methodology is resilience, yet the true value of academic scholarship often comes from those few works which remain current for years rather than weeks. Resilience on the wiki and continued relevance to readers provide a much better tool than anecdote to determine the long-term value of a work of scholarship.

When compared critically to the existing model for academic evaluation, the metadata analysis should provide a more equitable playing field, allowing academics to be judged by the impact of their works, not the status of their institutions. The benefits of incorporating attribution and integrity into academic wikis far exceed any impingement on the academy. It recognizes the valuable role wikis could play in the expansion and access of knowledge.

A variation on this model is applicable to student authorship as well. Rather than limiting student research and writing to term papers and other projects that have little public utility, the metadata analysis provides a faculty member with tools to evaluate the quality of the work contributed by students in a student-edited wiki project. The project would not even need to be limited to a particular course or university. Instead, students in a particular field of study could be expected to grow the base research tools in that field, and their contributions would be judged on the quantity, resilience and relevance of their contributions as compared to their fellow classmates. Moreover, the attribution provided by this form of wiki would enable the students to demonstrate the value of their work for future employers or academic opportunities.

Similar incentives exist in the corporate workplace to utilize these tools for business wikis and other collaborative tools. Employees who contribute quantitatively and qualitatively meaningful content can be identified and rewarded if the wiki tools track quantity, resilience and relevance of the information provided, which may serve to empower the employees to ever higher quality contributions.²⁰⁴ Taken together, the tools that enhance authorial attribution and integrity will lead to a higher quality and quantity of authorship, enabling collaborative scholarship to fulfill its promise.

X. TOWARD A NORM OF ACCOUNTABILITY IN NEW MEDIA— ATTRIBUTION, INTEGRITY, AND SOCIAL MEDIA

The implications for a normative expectation of authorial attribution and, in many circumstances, the associated expectation of authorial integrity may play an important role in the development of social media well beyond that of wikis. The public has become increasingly disaffected with traditional media, so to regain public

²⁰⁴ See PAMELA S. LEWIS, ET. AL., *MANAGEMENT: CHALLENGES FOR TOMORROW'S LEADERS*, 389 (SOUTH-WESTERN COLLEGE PUB; 5TH ED. 2006) (“When organizations increase the amount of control and discretion workers have over their jobs, they are empowering employees and may improve the motivation of both employees and management.”).

trust there will be an increasing need for more trustworthy content sources in the future—the core benefit of robust attribution and integrity.²⁰⁵ Studies have shown, for example, that the public’s confidence in sources of media has reached an all-time low.²⁰⁶ “Just 29% of Americans say that news organizations generally get the facts straight [and] . . . only about a quarter (26%) now say that news organizations are careful that their reporting is not politically biased. . . .”²⁰⁷ Since television news remains the most common news source, “with 71% saying they get most of their national and international news from television,” the lack of confidence is perhaps most problematic for television news.²⁰⁸ But according to the Pew study, 42% of the public uses the Internet as its primary news source, making it the second most significant source for news, while newspapers serve 33% of the public and radio only 21%.²⁰⁹ The Internet has surpassed both radio and newspapers even as public trust has declined, meaning that the lack of confidence in the content may not bode well for the media future.

If the level of confidence has fallen so significantly for branded media outlets on television, how much less confidence does the public have in anonymous blogs, posts and consumer ratings? The answer may not correlate directly. According to Forrester Research, “61% of online retailers use customer ratings and reviews and 71% consider them to be ‘very effective’ tools.”²¹⁰ The consumer reviews provide a double benefit for retailers. They provide sales information perceived as neutral and accurate for new consumers, and they create an opportunity for curatorial engagement that improves customer loyalty.²¹¹ “Consumers’ opinions of a brand are improved when they’re given the opportunity to ask questions and when brands are seen to listen to their comments and respond.”²¹² Even more effective are word-of-mouth interactions,²¹³ but online social media can create a virtual word-of-mouth experience that closely mirrors these benefits.²¹⁴

²⁰⁵ See, e.g., Marianne M. Jennings, *Where are Our Minds and What Are We Thinking? Virtue Ethics for a “Perfidious” Media*, 19 NOTRE DAME J. L. ETHICS & PUB POL’Y, 637, 651 (2005).

²⁰⁶ PEW RESEARCH CTR., PUBLIC EVALUATIONS OF THE NEWS MEDIA: 1985–2009, PRESS ACCURACY RATING HITS TWO DECADE LOW (2009), <http://people-press.org/reports/pdf/543.pdf> (last visited Mar. 9, 2010).

²⁰⁷ *Id.* at 2.

²⁰⁸ *Id.* at 4.

²⁰⁹ *Id.* (representing national news; the figures add to more than 100% due to allowance for multiple responses).

²¹⁰ Elisabeth Sullivan, *Add Consumer-Generated Reviews To Your Holiday Wish List*, MARKETING NEWS, Dec. 30, 2009 at 24 (citing FORRESTER RESEARCH INC.’S STATE OF RETAILING ONLINE (2009)).

²¹¹ Jon M. Garon, *Reintermediation*, 2 INT. J. PRIVATE LAW 227, 234 (2009). (“Reintermediation relies upon customer affinity and behaviour of repeated reliance on a particular company to the exclusion of all other providers of that good or service.”).

²¹² *Social Network Contacts Take on New Role as Recommenders*, NEW MEDIA AGE, July 2, 2009, at 9.

²¹³ William McGovern, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1110 (2009). (“Most fundamentally, however, word of mouth influences consumers’ decisions because they believe it: a recommendation from a disinterested person

Confidence in consumer reviews and virtual word-of-mouth interactions mirror response to wikis in their reliability. Like wiki authorship, they are the most reliable when the level of public participation is sufficient to outweigh the self-interest of any particular participant.²¹⁵ When the group is sufficiently large, the average result should be representative, whereas when there are only a few comments or reviews, the danger exists that the information is idiosyncratic or intentionally misleading. The assumption that large communities are self-correcting, however, should be critically analyzed. Accuracy concerns exist in larger collaborative review sites, if the participants in those sites are atypical of the general public.²¹⁶ Some online communities have mechanisms in place to reduce the ability for a small group of voters to over-participate, but all communities are potentially at risk of non-representative distortion.²¹⁷

There is an even greater risk than participation bias. Retailers and manufacturers have manipulated the source of the public content, overwhelming genuine feedback with planted content.²¹⁸ If the information is inaccurate because it is procured for the benefit of a commercial transaction, then the false information may result in an unfair trade practice.²¹⁹ This concern has led to the revisions of the U.S. Federal Trade Commission's guidelines regarding endorsements.²²⁰ "New media," including blogs

similar to the consumer is likely to be 'immediate, personal, credible, and relevant.'") (quoting MARIA FLORES LETELIER et al., STRATEGIES FOR VIRAL MARKETING, IN KELLOGG ON INTEGRATED MARKETING 90, 90 (Dawn Iacobucci & Bobby Calder eds., 2003)).

²¹⁴ See ERIC GOLDMAN, *Online Word of Mouth and Its Implications for Trademark Law*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 404, 404 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008).

²¹⁵ Beth Simone Noveck, "Peer to Patent": *Collective Intelligence, Open Review and Patent Reform*, 20 HARV. J. L. & TECH. 123, 157 (2006) ("The 'wisdom of crowds' is generally more accurate and more objective than the judgment of one uninformed 'expert.'"). See generally JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS, xv (2004).

²¹⁶ See Kristina Grifantini, *Can You Trust Crowd Wisdom? Researchers Say Online Recommendation Systems Can Be Distorted by a Minority of Users*, MIT TECHNOLOGY REV., Sept. 16, 2009, <http://www.technologyreview.com/web/23477/?a=f> (last visited Feb. 20, 2010). ("[R]ating systems can tap into the 'wisdom of the crowd' to offer useful insights, but they can also paint a distorted picture of a product if a small number of users do most of the voting. . . . [A] small number of users accounted for a large number of ratings.").

²¹⁷ *Id.*

²¹⁸ E.g., Jennifer Peltz, *Some Web Sites Feel the Love from Their (Paid) Admirers*, VIRGINIAN-PILOT, Aug. 1, 2009, at Q2 (describing Belkin International paying for positive reviews on Amazon, a false Walmart blog and staff-written testimonials by plastic-surgery firm Lifestyle Lift Inc.).

²¹⁹ 15 U.S.C. § 45 (1) (a) (2009) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

²²⁰ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 74 Fed. Reg. 53124, 53124 (Oct. 15, 2009) (to be codified at 16 C.F.R. pt. 255).

and social networks, are specifically included in the revised regulations.²²¹ The revised endorsement guidelines include a new example involving blogs which differentiates between a blogger providing her own disinterested opinion and that person receiving free goods to promote her blog activities.²²²

Like the endorsement rules, the rights of attribution and integrity involved focus on the trademark-like role of these interests.²²³ They provide the public confidence in the source of the content.²²⁴ This expectation is also implied in another of the endorsement examples:

A film critic's review of a movie is excerpted in an advertisement. When so used, the review meets the definition of an endorsement because it is viewed by readers as a statement of the critic's own opinions and not those of the film producer, distributor, or exhibitor. Any alteration in or quotation from the text of the review that does not fairly reflect its substance would be a violation of the

²²¹ *Id.*

²²² *Id.* at 53138–39.

Example 8: A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. She writes in her personal blog that the change in diet has made her dog's fur noticeably softer and shinier, and that in her opinion, the new food definitely is worth the extra money. This posting would not be deemed an endorsement under the Guides.

Assume that rather than purchase the dog food with her own money, the consumer gets it for free because the store routinely tracks her purchases and its computer has generated a coupon for a free trial bag of this new brand. Again, her posting would not be deemed an endorsement under the Guides.

Assume now that the consumer joins a network marketing program under which she periodically receives various products about which she can write reviews if she wants to do so. If she receives a free bag of the new dog food through this program, her positive review would be considered an endorsement under the Guides.

²²³ See Heymann, *supra* note 104, at 1445–46. (“If the authorship and its corresponding attributional right are to inhere somewhere in the spectrum of U.S. intellectual property rights, the place to which to anchor them lies toward the trademark end of the spectrum, not the copyright end.”).

²²⁴ See, e.g., *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163–64 (1995). (“In principle, trademark law, by preventing others from copying a source-identifying mark, ‘reduce[s] the customer’s costs of ... making purchasing decisions.’”) (quoting 1 J. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 2.01[2], 2-3 (3d ed. 1994)).

standards set by this part because it would distort the endorser's opinion.²²⁵

The FTC example highlights the public's reliance on the accuracy of the quotation and the unfair trade implications of alteration of such a quote. Thus, both the attribution and the integrity of the film critic's statement must be protected if the quote can be used by the film distributors to promote the movie. This same expectation of attribution and integrity will flow to other sources of content on the Internet.²²⁶ Only those that support mechanisms of reader confidence will ultimately succeed over the long term. And those sites that best reinforce credibility and reliability will outperform other resources.

For "brand-name" content providers such as the traditional media outlets, the accuracy of source information is critical, and it puts the instantaneous newsgathering potential for social feeds directly at odds with the importance of reflective analysis and fact-checking essential to quality journalism.²²⁷ The use of Twitter, Facebook and other social media tools and information sources creates a system of information dissemination that requires no prior fact-checking and encourages traditional media to lower its own standards.²²⁸ The race to the bottom of fact-checking is likely to have a

²²⁵ FTC, 16 C.F.R. § 255, Guides Concerning the Use of Endorsements and Testimonials in Advertising, (citing 16 C.F.R. 255.1 (b)), <http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf> (last visited April 1, 2010).

²²⁶ See Lastowka, *Trademark*, *supra* note 94, at 1179–80.

²²⁷ See, e.g., Rex Smith, *Imperfect Sources, Yet Real News*, THE TIMES-UNION (ALBANY), Sept. 19, 2009, at A15 (discussing the hesitancy of legacy news media to run video footage of an investigation into ACORN, which eventually led to the organization being banned from federal contracts—but the most shocking of the content included a discussion of an employee's murder of her husband was easily proven to be a hoax pulled by the employee on the amateur undercover filmmakers); Eric Deggans, *Eager Media Give Lift to High-Flying Hoaxes*, ST. PETERSBURG TIMES, Oct. 21, 2009, at 1A (discussing failure to fact check the boy trapped in Mylar balloon scandal and false press release involving the U.S. Chamber of Commerce).

²²⁸ See Jennifer Armstrong, *Celebrity Death Rumors*, ENT. WEEKLY, Jan. 22, 2010, at 44. Discussing the false murder reports involving fifteen-year-old celebrity Justin Bieber, the magazine explained:

Bieber's nightclub showdown first appeared on CNN's iPreort site, which allows citizen journalists to post content at will. So the site—which prides itself on having brought the world the first cell phone videos of the 2007 Virginia Tech shootings—also occasionally plays host to a wildly inaccurate false death report. The problem? It permits anonymous online gossips to link to what appears to be a credible news source for a few hours before CNN editors can vet the facts. ("We've had very little of that," spokeswoman Jennifer Martin says. "The benefit far outweighs what a few of these mischief makers are doing.")

great deal to do with the loss of confidence by the public in these media outlets.²²⁹ To offset this trend, accuracy, impartiality and integrity will need to be reestablished and improved.²³⁰ This need will be true for collaborative authorship as well as individual authorship, but it will be even more important for branded news sources and collaborative content that does not have the self-correcting scale and level of participation of Wikipedia and other successful wikis.

The influence of non-representative distortion may be more than merely a vague conceptual risk; it may be an essential aspect of these environments. Although wikis may be socially edited, they may well require entrepreneurial zeal to incubate the project to the point where it becomes self-sustaining. The best known of the wiki sites, Wikipedia, has been fiercely championed by its co-founder, Jimmy Wales.²³¹ His early engagement may explain some of the reason for its singular success. Social chronicler Malcolm Gladwell has identified three members essential to the cast needed for ideas or projects to achieve cultural propagation.²³²

In a social epidemic, Mavens are data banks. They provide the message. Connectors are social glue: they spread it. But there is also a select group of people—Salesmen—with the skills to persuade us when we are unconvinced of what we are hearing, and they are as critical to the tipping of word-of-mouth epidemics as the other two groups.²³³

Jimmy Wales may be the salesman responsible for Wikipedia's growth far outpacing most other wiki projects.²³⁴ Salesmen such as Wales tend to be self-identifying, so that the public knows who is encouraging them to respond, if not by name then by association.²³⁵ The social media and wiki Connectors are the

²²⁹ See, e.g., Howard Kurtz, *Rather Admits 'Mistake in Judgment'*, WASH. POST, Sept. 21, 2004, at A01 (“Dan Rather apologized yesterday for a ‘mistake in judgment’ in relying on apparently bogus documents for a ‘60 Minutes’ report charging that President Bush received favorable treatment in the National Guard, ending a nearly two-week-long defense of the network’s journalistic conduct that media analysts say has badly hurt its credibility.”).

²³⁰ Among readers who are familiar with its content, *The Wall Street Journal* fared better than *The New York Times* or other media outlets at providing unbiased reporting for both Republicans and Democrats. Pew Research Center, *Public Evaluations of the News Media: 1985-2009, Press Accuracy Rating Hits Two Decade Low*, *supra* note 211, at 4.

²³¹ See Fiona McCann, *I Wasn't Sure If Anyone Would Use It*, IRISH TIMES, Nov. 27, 2009, at 23.

²³² See MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 34 (LITTLE BROWN & CO. 2000) (discussing “Connectors, Mavens and Salesmen”).

²³³ *Id.* at 70.

²³⁴ See BILL TANCER, *CLICK, WHAT MILLIONS OF PEOPLE ARE DOING ONLINE AND WHY IT MATTERS* 121 (Hyperion 2008).

²³⁵ See David A. Hoffman and Salil Mehra, *Wikitruth Through Wikiorde*, 59 EMORY L.J. 151, 165 (2010) (describing Jimmy Wales role in problem solving) (available at: <http://ssrn.com/abstract=1354424>).

individuals who push the invitations and build networks within these sites. But it is the Mavens—the authoritative experts—who distinguish mere promotion from substantive value.²³⁶ Mavens are the early adopters who champion one particular wiki, blog or social network over the others because they perceive greater value in one project or idea than the other projects or ideas competing for attention.²³⁷

In the context of the online environment, there may be a fourth category—the Activists.²³⁸ These Activists are the individuals most responsible for generating the user generated content, because “90 percent of online users are ‘lurkers,’ or users who visit online communities but don’t contribute; 9 percent contribute from time to time; and only 1 percent of online users are active contributors.”²³⁹ For social media, the Activists create the content vetted by the Mavens, shared by the Connectors and promoted by the Salesmen.

In addition, the online world is shaped by one other feature, the technology itself. Disparate levels of participation and the gate keeping technologies employed by each site operator may both skew crowd wisdom.²⁴⁰ The nature of the technology used to validate the unique comments or consumer ratings will set the thresholds that determine whether they will participate and affect the extent to which some individuals cheat.²⁴¹ As such, the interface and code serve as the stage upon which the cast of Activist, Maven, Connector and Salesman ply their craft. The choices in the technology will play another key role.

For ongoing success of social media, as with wikis, the site must take barriers to entry and user manipulation into account. The project needs to have a sufficient mix of Activists, Mavens, Connectors and Salesmen to make the site successful. Participation by Mavens will improve the overall quality of the information, and their role is critical to ensure the content is “relevant, accurate, and impartial.”²⁴² Attribution for the Activists or endorsement by the Mavens will help guarantee confidence in the quality of the content, serving as a surrogate accreditation for the

²³⁶ See GLADWELL, *supra* note 232, at 69–70.

²³⁷ *Id.*

²³⁸ TANCER, *supra* note 234, at 124–125.

²³⁹ *Id.* at 124 (citing Jakob Nielson at *Alertbox*).

²⁴⁰ Vassilis Kostakos, *Is the Crowd’s Wisdom Biased? A Quantitative Assessment of Three Online Communities*, Adjunct proceedings of IEEE SocialComm, International Symposium on Social Intelligence and Networking (SIN09), August 29–31, 2009, Vancouver, Canada, available at <http://dme.uma.pt/vk/files/voting.pdf> (reviewing IMDb, Amazon and BookCrossings as sample sites, the study found considerable bias. “This paper set out to answer whether the crowd’s wisdom is biased. The answer is yes. . . . It showed considerable bias in users’ voting behavior, and in addition has framed this bias in terms of the voting mechanisms on each website.”).

²⁴¹ *Id.*

²⁴² Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-generated Information Flows*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 741, 754 (2008) (describing the “accreditation” of a social network).

information.²⁴³ Connectors will build the network, and Salesmen will expand the base.

The importance of this information highlights the steps necessary to assure quality discourse in social networking sites and the media more generally. At the same time, a second implication can be drawn regarding the ability of authors to manipulate public discourse. When Activists and Mavens act in concert, they validate information, and if they so choose, they can readily create misinformation.²⁴⁴ Encouraging attribution will not eliminate this concern, but it provides a minimally intrusive method of identifying sources of information and discouraging false or misleading information from being shared without consequence.

Taken together, the influence of Activists and Mavens may hearken back to the collaborative public advocacy of *The Federalist Papers* as a new form of attributed or pseudonymous citizen journalism.²⁴⁵ Journalism today faces a multitude of threats.²⁴⁶ In addition to the loss of consumer confidence, there has been a significant loss of revenue as its advertising-based revenue has dropped or moved to the Internet.²⁴⁷ “U.S. newspaper circulation dropped 10 percent from April through September [2009], compared to the same period last year.”²⁴⁸ “Newspapers are also in the throes of long-term, structural changes as readers and advertisers move to the Internet.”²⁴⁹ In addition, the same technologies that free anyone to participate in online media also provide new tools for censorship or governmental intrusion into newsgathering.²⁵⁰

²⁴³ *Id.*

²⁴⁴ Exemplary of this are the so-called “death panels” that were falsely supposed to be in the federal health care overhaul legislation. See Angie Drobnic Holan, *Lie of the Year, Death Panels: What Started Out as a Facebook Post Became Part of the National Debate on Health Care Reform*, ST. PETERSBURG TIMES, Dec. 20, 2009 at A1.

²⁴⁵ See Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, supra note 104 and accompanying text.

²⁴⁶ See Suzanne M. Kirchhoff, *The U.S. Newspaper Industry in Transition*, CONGRESSIONAL RESEARCH SERVICE, July 8, 2009 at 4–9.

²⁴⁷ See, e.g., Mathew Flamm, *Daily News Sees Quite a Photo Op; Zuckerman’s Colorful Vision Faces Long Odds in a Newspaper Slump*, CRAIN’S NEW YORK BUS., Dec. 14, 2009 at 1; Holly Sanders Ware, *NY Times Sees Ad Revenue Bouncing Off Bottom*, NY Post, Dec. 9, 2009 at 40.

²⁴⁸ Kathleen Parker, *Trying to Save the News*, THE VIRGINIAN-PILOT, Nov. 3, 2009 at B11 (“the decline was attributed to the usual—advertising and readership lost to the Web.”).

²⁴⁹ Kirchhoff, supra note 246, at 5.

²⁵⁰ See Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 381 (2009) (“Technological censorship by countries worldwide means that how the Net appears depends upon where you access it.”); Gillian Wong, *China Denies Role in Internet Attacks; Spokesman Goes on Offensive*, THE BOSTON GLOBE, Jan. 26, 2010 at B9 (“U.S. Secretary of State Hillary Rodham Clinton has criticized the censorship of cyberspace, drawing a strong counterattack from Beijing. The Foreign Ministry on Friday said her remarks damaged bilateral relations, while a Chinese state newspaper said Washington was imposing ‘information imperialism’ on China.”). See generally, Open Net Initiative, <http://opennet.net/about-filtering> (last visited Feb. 24, 2010).

The number of states that limit access to Internet content has risen rapidly in recent years. Drawing on arguments that are often powerful and

Columbia University President Lee Bollinger recently described the challenge for journalism in the Internet Age as “threefold: overcoming censorship, protecting access for the media and the newsgathering process, and building the capacity of the media to provide us with the professional journalism we need to build a healthy global society.”²⁵¹ Focusing on the capacity building aspect of President Bollinger’s statement, collaboratively gathered and edited news reporting is one among many potential new modalities for journalism.²⁵² More specifically, the problem is not just the variety of news sources, which is growing, but the scale of investigative journalism, which is in decline.²⁵³

Arguably some examples of new media journalism are already significant. New media sources such as The Huffington Post²⁵⁴ and Motley Fool²⁵⁵ tap the social power of the Internet to aggregate and originate content in a format similar to community-based newspapers.²⁵⁶ The British newspaper, The Guardian, has integrated crowdsourcing for the purpose of data analysis. The paper invited its readers to read and analyze 458,832 pages of documents related to a financial misuse scandal in the British Parliament, leveraging collaborative efforts for the investigation,

compelling such as “securing intellectual property rights,” “protecting national security,” “preserving cultural norms and religious values,” and “shielding children from pornography and exploitation,” many states are implementing extensive filtering practices to curb the perceived lawlessness of the medium.

²⁵¹ Lee Bollinger, *A Free Press for a Global Society*, CHRON. OF HIGHER EDUC., Feb. 26, 2010, at B6.

²⁵² This is not to suggest that community reporting will or should replace other forms of journalism. Many other changes may improve the outlook for journalism including subscriber news websites, expanded nonprofit journalistic enterprises, partnerships with digital book readers and computer tablet manufacturers, better integration and revenue sharing with online media and a more general economic rebound.

²⁵³ See generally, Mary-Rose Papandrea, *Citizen Journalism and the Reporter’s Privilege*, 91 MINN. L. REV. 515 (2007). In addition, as reported by propublica.org, for-profit investigative journalism is seriously in decline. <http://www.propublica.org/about/> (last visited Feb. 24, 2010).

According to many news organizations have increasingly come to see investigative journalism as a luxury that can be put aside in tough economic times. Thus, a 2005 survey by Arizona State University of the 100 largest U.S. daily newspapers showed that 37% had no full-time investigative reporters, a majority had two or fewer such reporters, and only 10% had four or more.

²⁵⁴ <http://www.huffingtonpost.com/>.

²⁵⁵ <http://www.fool.com>.

²⁵⁶ See Wheeler, *supra* note 48, at 136 (“The distinction between ‘institutional’ and ‘noninstitutional’ media is a more meaningful one than that between ‘old’ and ‘new’ media. . . .” because repurposing content provides “the same story in fairly static form.”).

if not the written output.²⁵⁷ AOL has launched Seed.com to create content of interest to the public, or more accurately of interest to advertisers hoping to reach targeted audiences.²⁵⁸ News sources such as NewWest.net promote “participatory journalism”²⁵⁹ as does Patch,²⁶⁰ Brewed Fresh Daily,²⁶¹ and the Miami Independent Media Center,²⁶² among others.²⁶³

Despite these examples, however, the trend is at its earliest stages.²⁶⁴ “Citizen news sites remain relatively rare. Among those that do exist, the range of topics is narrower and the sourcing somewhat thinner than on legacy news sites, and the content is generally not updated, even on a daily basis.”²⁶⁵ As these endeavors continue to mature, issues of attribution may be central to their development. Volunteer journalists will benefit from attribution just as professional researchers do—through recognition for the quality of their efforts and through the growth of a fan base which relies on that quality. Pseudonymity may be even more important to the hyperlocal journalists who need anonymity to conduct unfettered investigations while wishing to have name consistency as part of their public credibility.

The value of a byline has long been recognized. As a New York court explained in 1910, “[t]he position of an author is somewhat akin to that of an actor. The fact that he is permitted to have his work published under his name, or to perform before the public, necessarily affects his reputation and standing and thus impairs or increases his future earning capacity.”²⁶⁶ The trend in traditional media has been to increase the presence of bylines “as part of a deliberate effort to deter fraud and to focus blame when problems happen anyway.”²⁶⁷

²⁵⁷ *Investigate Your MP's Expenses*, Guardian.co.uk, <http://mps-expenses.guardian.co.uk/> (last visited Feb. 24, 2010). See also, Cinque Hicks, *EASY: The Guardian's Crowdsourced Game*, Oct. 21, 2009 at <http://jag.lcc.gatech.edu/blog/2009/10/easy-the-guardians-crowdsourced-game.html> (last visited Feb. 24, 2010).

²⁵⁸ Emily Steel, *AOL to Produce New, Videos by the Numbers*, W. ST. J., Nov. 30, 2009 at B8 (available at <http://online.wsj.com/article/SB10001424052748703300504574565673001918320.html>).

²⁵⁹ <http://www.newwest.net/plain/entry/13/>.

²⁶⁰ <http://www.patch.com/>.

²⁶¹ <http://www.brewedfreshdaily.com>.

²⁶² <http://miami.indymedia.org>.

²⁶³ See Wheeler, *supra* note 48, at 137–38 (citing Timothy E. Cook, *Governing with the News* 64 (1998)) (focuses on attributes such as editorial hierarchy, narrative structure, and gatekeeping function of publisher as distinguishing factors between traditional media and the community-based journalism).

²⁶⁴ *The State of the News Media 2009*, PEW PROJECT FOR EXCELLENCE IN JOURNALISM http://www.stateofthemediamedia.org/2009/narrative_special_citizenbasedmedia.php?cat=0&media=12 (last visited Feb. 24, 2010).

²⁶⁵ *Id.*

²⁶⁶ *Clemens v. Press Publ'g Co.*, 122 N.Y.S. 206, 207 (N.Y. App. Term 1910) (“While an author may write to earn his living and may sell his literary productions, yet the purchaser, in the absence of a contract which permits him so to do, cannot make as free a use of them as he could of the pork which he purchased.”).

²⁶⁷ Fisk, *supra* note 85, at 63.

The ability to deflect blame for misinformation emphasizes another role of attribution that is particularly important for community newspapers—the individual responsibility of the writer. Generally speaking, other common attributes of community news are the modest resources and lack of professional hierarchy. A common consequence of these conditions is meager independent source checking, fact checking and editorial review of each writer’s contribution. A writer may be pleased to have fewer editors looking over her shoulder, but she is also more personally responsible for the work she publishes. Attribution reinforces this responsibility. In the absence of a byline, only the site would bear responsibility for the content. Where the content is published under a byline, the author shares—if not owns—the responsibility for the content.

Whether to promote authors or to shield themselves from responsibility,²⁶⁸ the norms in the printed press have moved toward providing attribution. The same is true online. Sites such as Huffington Post demonstrate the efficacy of bylined articles, adding significant original content to the material it aggregates from other news sources. New media has followed traditional media’s lead in valuing the individual author as the source of content. To the extent citizen journalism grows in the sphere of investigative reporting, the same values of journalistic integrity that drive professional journalists to seek bylines will likely shape the attributive properties of these new sources of journalism.

XI. CONCLUSION

Attribution and integrity are essential elements of discourse. The author has not died. Far from it—through social media, blogs and other forms of user generated content, a new authorial, curatorial audience has manifested itself as the voice of this generation.

The public has embraced the quality of Wikipedia and the potential for high quality, relevant and regularly updated user generated content, but it has gravitated to those media that embrace rather than avoid author identification. Even if pseudonymous, author identification serves an important branding function for both the author and the reader.

To embrace the best attributes of collaborative authorship, the metadata gathered by wiki software should be utilized to highlight the identity of site collaborators and to serve as an evaluative mechanism that allows the participants to use their valuable time and effort in pursuit of tenure, promotion, funding and other institutionally significant rewards. Through measures of an author’s quantitative and qualitative contribution to a wiki, each participant can move beyond volunteer status, bringing a critically important part of public knowledge into a more mature, professional environment.

Wikis serve an important role in the growth and development of public knowledge. For some wiki communities, the present norms best achieve their purpose. For many more, however, the wikiquette of anonymity may have stifled the

²⁶⁸ *Id.* at 92.

investment of time and effort by those who could contribute the most. Creating tools to align institutional incentives and existing rewards may serve to renew the participation of scholars, researchers and academics in these more public fields of inquiry and discourse.

The recognition of the importance of attribution for the new wave of public discourse need not detract from the alternatives. The choices are infinitely expandable. But an authorship-centric model of collaborative content should take its place alongside existing wikis and traditional publication models to fill the need for better creation and dissemination of public knowledge—the central enterprise of the academic community—and the font of social capital.

And of course, readers are encouraged to add to this post.



The Integrity of the Game: Professional Athletes and Domestic Violence

Bethany P. Withers*

TABLE OF CONTENTS

I.	INTRODUCTION	146
II.	THE COMMISSIONERS' AUTHORITY	151
	<i>A. MLB</i>	151
	<i>B. NBA</i>	154
	<i>C. NFL</i>	157
III.	HISTORICAL USE OF THE COMMISSIONERS' DISCIPLINARY AUTHORITY TO PUNISH OFF-FIELD CONDUCT	158
	<i>A. MLB</i>	158
	<i>B. NBA</i>	163
	<i>C. NFL</i>	168
IV.	POTENTIAL PROBLEMS WITH THE NFL'S PERSONAL CONDUCT POLICY	174
V.	PROPOSALS FOR LEAGUE-WIDE PERSONAL CONDUCT POLICIES	176
VI.	CONCLUSION	179

* Candidate for J.D., Harvard Law School, 2010; M.A., New York University, 2004; B.A., Boston College, 2002.

I. INTRODUCTION

There is an argument to be made that our sports heroes should be valued solely for their conduct on the field, that the Halls of Fame should bestow the honor of admission based only on career achievement; professional athletes need not be role models to earn our esteem for their talent. However, Major League Baseball (“MLB”), the National Basketball Association (“NBA”), and the National Football League (“NFL”) have not chosen to proceed according to these principles. While past league rhetoric has sometimes pointed to the opposite conclusion,¹ it is clear from league action that certain off-field conduct is indeed a consideration of team and league evaluation and discipline of players. One must consider: What off-field conduct has been deemed detrimental enough to the league to result in disciplinary action? What message does this send regarding the off-field player conduct that is routinely ignored and thus implicitly condoned? Finally, what value judgments are being made and passed down to the fans through these decisions?

From the time the role of the commissioner was established in MLB, player gambling has been forbidden. Similarly, substance abuse is punished with either suspensions or fines. Conversely, other off-field crime has traditionally remained a permissible activity for professional athletes—one that is met without team or league punishment. One might attempt to justify this pattern of punishment by arguing that gambling and substance abuse directly affect the outcome of games, whereas other criminal activity does not;² however, this argument is flawed. Players are punished for gambling, whether or not they bet on games involving their own team, whether or not they bet on games involving their own sport. Players are also punished for use of drugs that do not enhance performance. The leagues have chosen to condemn drug use and gambling, despite the fact that it occurs off field and may not impact the game.

On the other hand, domestic violence has been largely ignored by professional sports leagues. This inaction persists despite the fact that a survey revealed seventy-six percent of U.S. adults and eighty-two percent of teens think it is “bad for society” to allow athletes to continue their sports careers when convicted of a violent crime.³

¹ For instance, in a 1998 article, Greg Aiello, NFL communications director, was quoted as saying, “We’re not the criminal justice system. We can’t cure every ill in society. You know, we’re putting on football games. And unless it impacts on the business, we have to be very careful [from a legal standpoint] about disciplinary action we take.” Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence against Women*, 31 COLUM. J.L. & SOC. PROBS. 167, 183 (1998).

² See, e.g., Dabbs, *supra* note 1, at 183 (“Gambling and drug use reduce the public’s belief in the honesty and fairness of the athletic contest. The NFL’s Lee Burnham distinguishes this from domestic violence: “[T]his domestic violence thing is different. It’s a society thing and there are laws that govern it.”).

³ Anna L. Jefferson, *The NFL and Domestic Violence: The Commissioner’s Power to Punish Domestic Abusers*, 7 SETON HALL J. SPORT L. 353, 354 (1997) (citing David Diamond, *Victory, Violence and Values Out of Bounds*, USA WEEKEND, Aug. 25, 1996, at 4).

Only fourteen percent of adults and teens think allowing athletes to go unpunished is “good because it shows people deserve a second chance.”⁴

Although MLB, the NBA, and the NFL do not release information regarding player arrests or player punishment by teams or leagues, some external studies were conducted in the late 1990s as a result of public attention to domestic violence during the O.J. Simpson murder trial, which concluded with his acquittal for the murders of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman in 1995.⁵ One comprehensive study conducted by Jeff Benedict, former director of research at the Center for Sport in Society, found that 172 athletes were arrested for sex felonies between 1986 and 1995, yet only thirty-one percent were successfully prosecuted.⁶ The study also concluded that 150 athletes had domestic violence criminal complaints filed against them between 1990 and 1996, yet only twenty-eight resulted in convictions and the majority of cases were not prosecuted.⁷

The O.J. Simpson trial and the attention that studies such as Benedict’s brought to the issue of domestic violence had a direct effect on NFL policy. Within weeks of the murders, the NFL sent counselors to twenty-eight team training camps to discuss domestic violence with the players.⁸ In addition, then-Commissioner Paul Tagliabue adopted the Violent Crime Policy in 1997, which was further revised in 2000, becoming a version of the current Personal Conduct Policy.⁹ It was, and is, the *only* policy of its kind among major U.S. sports.¹⁰

⁴ *Id.*

⁵ See Elliott Almond & Gene Wojciechowski, *Domestic Violence Comes Out of the Closet; Discipline: Once an Issue that Was Hushed Up When Athletes Were Involved, Now It’s Front-Page News*, L.A. TIMES, Sept. 12, 1995, at C1. The murder trial brought new light to Simpson’s 1989 New Year’s Day arrest for allegedly beating his wife, Nicole Brown Simpson. See Bill Brubaker, *Violence in Football Extends Off Field*, WASH. POST, Nov. 13, 1994, at A1. He allegedly kicked and punched her while screaming “I’ll kill you.” *Id.* Nicole complained to the police that her eight previous 911 calls had resulted in no action. See *id.* While Nicole asked that no charges be filed the next day, prosecutors filed charges anyway. See *id.* The Times did not report the incident; later, when he pleaded no contest, only a small brief appeared. See Almond & Wojciechowski, *supra*. The plea resulted in two years’ probation, counseling, 120 hours of community service, a \$500 donation to a battered women’s organization, and a \$200 fine. Brubaker, *supra*. Simpson was not punished by the league or his team and he retained his endorsement deals with Hertz and NBC Sports. See *id.*

⁶ JEFF BENEDICT, PUBLIC HEROES, PRIVATE FELONS: ATHLETES AND CRIMES AGAINST WOMEN 80 (1997).

⁷ *Id.*

⁸ See Brubaker, *supra* note 5. Though Lem Burnham, in charge of the NFL’s employee assistance program, insisted that domestic violence was already on his “laundry list of things to cover” with players, the timing insinuates that, at the very least, domestic violence became a more pressing concern after the murders. *Id.*

⁹ See 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, 1086–87 (2008).

¹⁰ See *id.*

Regardless of the attention given domestic violence in the 1990s and the studies and policies that resulted therefrom, it remains difficult to go even one week without hearing of an athlete involved in some sort of domestic altercation. For instance, at the start of the broadcast of the 2008 NFL season playoff game between the Arizona Cardinals and Atlanta Falcons, television commentator Cris Collinsworth stated that, in the week leading up to the game, Larry Fitzgerald's girlfriend obtained a restraining order against him and Michael Turner was involved in a domestic dispute with the mother of his child. Fitzgerald and Turner were two of the most celebrated players on the field that day.

Some argue that athletes are predisposed to commit acts of domestic abuse and sexual assault because they are trained to use violence and intimidation for a psychological edge during their games and because sports create a "macho sub-culture" that equates masculinity with violence.¹¹ One statistical analysis by researchers at Northeastern University and the University of Massachusetts appears to give credence to these beliefs.¹² The study reviewed 107 cases of sexual assault reported at thirty National Collegiate Athletic Association Division I schools between 1991 and 1993 and concluded that "male college student-athletes, compared to the rest of the male student population, are responsible for a significantly higher percentage of the sexual assaults reported to judicial affairs on the campuses of Division I institutions."¹³ Limiting the scope to ten schools, the study found that student-athletes comprised 3.3% of the male student body, but were involved in nineteen percent of the reported sexual assaults.¹⁴

Despite this study and the perceived prevalence of such activity in professional sports, evidence is inconclusive regarding whether athletes are more likely to commit violent acts against women.¹⁵ The San Diego Union-Tribune reviewed news reports and public records from January 2000 to April 2007 and concluded that the biggest problems for NFL players were the same as those of the general population: drunken driving, traffic stops, and repeat offenses.¹⁶ Further, it concluded that the arrest rate among NFL players was less than that of the public population.¹⁷ In an April 2008 update to the study, the Union-Tribune found that the NFL's arrest rate since 2000 was better than that of the rest of society—there was approximately one arrest per forty-seven players per year compared with one arrest per twenty-one for the general

¹¹ Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1050 (1996) (citing MICHAEL A. MESSNER & DONALD F. SABO, *SEX, VIOLENCE & POWER IN SPORTS: RETHINKING MASCULINITY* 34 (1994)).

¹² See Dabbs, *supra* note 1, at 169–70 (citing William Nack & Lester Munson, *Special Report: Sports' Dirty Secret*, SPORTS ILLUSTRATED, Jul. 31, 1995, at 68).

¹³ *Id.* at 170.

¹⁴ *Id.*

¹⁵ See Note, *supra* note 11, at 1050–51; Brubaker, *supra* note 5.

¹⁶ See Brent Schrottenboer, *Arresting Image; As Concerns over Player Conduct Rise, A Review of Crime Reports Shows Arrest Rates Are Consistent with General Population, and DUIs Dominate*, SAN DIEGO UNION-TRIB., Apr. 22, 2007, at C1.

¹⁷ See *id.*

population.¹⁸ It is indeed quite possible that the rate of domestic violence involving professional athletes mirrors the violence against women that occurs in society at large, but when committed by professional athletes and splashed across the sports page, the prevalence of such abuse in our society simply becomes more noticeable.

Nonetheless, there is evidence that professional athletes are not punished by the leagues, teams, or criminal justice system as harshly or consistently as their general public counterparts. “One study indicates that, out of 141 athletes reported to police for violence against women between 1989 and 1994, only one was disciplined by league officials.”¹⁹ While this number has increased since 1994—an increase that will subsequently be addressed—the number remains remarkably low. Similarly, conviction rates for athletes are astonishingly low compared to the arrest statistics.²⁰ Though there is evidence that the responsiveness of police and prosecution to sexual assault complaints involving athletes is favorable,²¹ there is an off-setting pro-athlete bias on the part of juries.²² For example, in 1995, domestic violence cases involving athletes resulted in a thirty-six percent conviction rate, as compared to seventy-seven percent for the general public.²³ There are many individual cases that reflect occasional bias at some point in the criminal justice system, including those of Clarence Kay,²⁴ Barry Bonds,²⁵ and John Stephens.²⁶

¹⁸ Brent Schrottenboer, *Holding that Line; In the Year Since NFL’s Player-Conduct Policy Took Effect, the League Has Taken a Tougher Stance with Players with Criminal Issues . . . Or, at Least, Most of Them*, SAN DIEGO UNION-TRIB., Apr. 19, 2008, at D1.

¹⁹ Michael O’Hear, *Blue-Collar Crimes/White-Collar Criminals: Sentencing Elite Athletes who Commit Violent Crimes*, 12 MARQ. SPORTS L. REV. 427, 431 (2001) (referring to Linda Nicole Robinson, Note, *Professional Athletes—Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 IND. L.J. 1313, 1330 (1998)).

²⁰ See Carrie A. Moser, *Penalties, Fouls, and Errors: Professional Athletes and Violence against Women*, 11 SPORTS LAW. J. 69, 77 (2004) (citing BENEDICT, *supra* note 6, at 80).

²¹ See O’Hear, *supra* note 19, at 432. Out of 217 sexual assault complaints involving athletes from 1986 to 1995, at least fifty-four percent resulted in formal charges, which compares favorably with sexual assault cases generally. *Id.*

²² See *id.* In this same study, only fifteen percent of the cases that went to trial resulted in conviction. Further, while fifty-four percent of rape arrests nationally result in conviction, only thirty-one percent of athletes were convicted. *Id.*

²³ *Id.* (noting that this may have as much to do with juries’ bias in favor of the athletes as it has to do with athletes’ ability to hire superior defense counsel).

²⁴ In 1990, Kay, a Denver Broncos tight end, was arrested on a domestic violence charge after allegedly breaking into the home of his ex-girlfriend, Patricia Spillman. See Brubaker, *supra* note 5. While domestic violence charges usually result in overnight jail time, he was released only five hours later, allowing him to fly to Tokyo with his teammates for a preseason game. See *id.* This only perpetuated the cycle of violence, which eventually ended with Spillman obtaining a restraining order after one of many instances of domestic violence and breaking and entering, and Kay being placed on probation after pleading no contest to violating the order. See *id.*

²⁵ Sun Bonds and Barry Bonds, then San Francisco Giant outfielder, divorced after alleged instances of domestic violence, including one instance in which Barry Bonds allegedly grabbed

While there is extensive off-field conduct that arguably should be punished by professional sports leagues, this article will focus on domestic violence because of its prevalence in sports and society at large and because of the interesting issues that charges of domestic violence raise, given that they are frequently dropped and often do not result in conviction.²⁷ In order to assess what can and should be done regarding the treatment of domestic violence in sports, this article will first trace the authority of the league commissioners and clubs in disciplining players in MLB, the NBA, and the NFL. After examining the legal documents and case precedent of the three leagues, this article will trace the disciplinary action that has been taken against players. Given the increased attention to domestic violence in the late 1990s, the article will focus on the comparative actions of Commissioners Bud Selig (MLB), David Stern (NBA), and Paul Tagliabue and Roger Goodell (NFL), who have been responsible for league action since that time. The NFL's Personal Conduct Policy is emphasized, as it provides a template for possible league action against off-field behavior that compromises the integrity of the game; however, the NFL's Personal Conduct Policy will also be analyzed for its potential faults. Lastly, this article proposes the adoption of similar league-wide personal conduct policies in MLB and the NBA with a few modifications, including the addition of sentencing guidelines, the inclusion of provisions ensuring due process and prohibiting double jeopardy, and the incorporation of such policies into the collective bargaining agreements of the respective leagues.

his wife around the neck, threw her into a car, and then kicked her when she was on the ground. See Aditi Kinkhabwala, *Way off Base: MLB Needs to Take a Stand against Domestic Violence*, SI.COM, May 31, 2007, http://sportsillustrated.cnn.com/2007/writers/aditi_kinkhabwala/05/31/dukes.domestic/index.html. When Barry went to court to request a reduction in his family-support payments to Sun and their two children, pleading financial hardship during the baseball strike, County Superior Court Judge George Taylor granted the request and then asked Bonds for his autograph. See Nack & Munson, *supra* note 12, at 70.

²⁶ Kim Williams, former wife of then-New England Patriots running back John Stephens, claims she made several domestic violence-related complaints to the police, who never arrested him or counseled her on her rights, and repeatedly told her to "calm down." Brubaker, *supra* note 5. Stephens was later charged with the rape of another woman, which resulted in conviction of a lesser charge of sexual assault and only five years' probation. See Matt Taibbi, *Hands of Stone, Sports Blotter: "Ex-Patriot" Edition*, BOSTON PHOENIX, Jan. 16, 2008, <http://thephoenix.com/Boston/RecRoom/54696-Hands-of-stone/?rel=inf>.

²⁷ Domestic violence victims frequently back away from allegations because they fear their abusers or want to avoid disruption of their family lives. See Brubaker, *supra* note 5. It has been suggested that wives of professional athletes may be even more likely to drop charges because of the increased publicity and disruption to their lives. See *id.*

II. THE COMMISSIONERS' AUTHORITY

A. MLB

The first commissioner in American professional sports was Judge Kenesaw Mountain Landis, who was selected to serve as commissioner in 1920.²⁸ The position was created in response to the Chicago Black Sox Scandal, in which eight White Sox players were charged with intending to defraud the gambling public, and the general notion was that baseball had been compromised by widespread gambling.²⁹ Landis was given the authority to “be the final arbiter of disputes between leagues and clubs and disputes involving players and to impose punishment and pursue legal remedies for any conduct that he determined to be detrimental to the best interests of the game.”³⁰ Under the Major League Agreement that governed baseball at the time, he could “investigate, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be detrimental to the best interests of the national game of base ball [sic] . . . [and] determine, after investigation, what preventative, remedial or punitive action [was] appropriate.”³¹

Landis’s powers were broad and, today, the MLB commissioner continues to have expansive authority to take disciplinary action punishing conduct that is detrimental to the best interests of the game. The uniform player contract (“UPC”), incorporated by reference into the Basic Agreement (MLB’s collective bargaining agreement (“CBA”)) in Article III, pledges players to “abide by and comply with all provisions of the Major League Constitution.”³² Over time, however, these broad powers have been defined and constrained by new provisions in the CBA. For example, MLB’s current CBA, which is in effect until 2011, outlines a grievance procedure that allows players to appeal disciplinary action taken against them to an impartial arbitrator who will use “just cause” as the standard of review.³³ Under Article XI(A)(1)(b), the commissioner has the power to remove a grievance from this system and hear the complaint himself if he deems the action taken with respect to the player involves “the preservation of the integrity of, or the maintenance of public

²⁸ See Robert I. Lockwood, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Frontcourt in the NBA*, 15 SPORTS LAW. J. 137, 141 (2008).

²⁹ See *id.*

³⁰ *Id.* (citing Matthew B. Parchman, *Limits on Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1415 (1990)).

³¹ James M. Pollack, *Take My Arbitrator, Please: Commissioner ‘Best Interests’ Disciplinary Authority in Professional Sports*, 67 FORDHAM L. REV. 1645, 1646 (1999) (citing Major League Agreement § 2(a)–(b), at 1 (1921)).

³² 2007–2011 Basic Agreement between Major League Clubs and the Major League Baseball Players Association, Schedule A § 9(a), at 219 (2006), available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf [hereinafter MLB Basic Agreement].

³³ *Id.* at 32, 43.

confidence in, the game of baseball.”³⁴ However, in a letter to Donald Fehr, Executive Director of the Major League Baseball Players’ Association (“MLBPA”), current Commissioner Bud Selig vowed not to remove any actions from the grievance system.³⁵

The MLB commissioner’s authority has also been shaped over the years by judicial decisions and arbitral awards. Traditionally, the courts have granted the commissioner “almost unlimited discretion in the determination of whether or not a certain state of facts creates a situation detrimental to the national game of baseball.”³⁶ In *Milwaukee Am. Ass’n v. Landis*, Landis’s refusal to approve the trade of a St. Louis Browns’ player to a minor league club was challenged.³⁷ The court concluded that the intent evidenced by the various MLB agreements and rules was “to endow the commissioner with all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial *pater familias*.”³⁸ Using this deferential standard of review, the court held that the commissioner had acted within the confines of his authority.³⁹

In 1978, when Bowie Kuhn was serving as commissioner, the commissioner’s authority was challenged again. In *Charles O. Finley & Co. v. Kuhn*, the court concluded: “While it is true that professional baseball selected as its first Commissioner a federal judge, it intended only him and not the judiciary as a whole to be its umpire and governor.”⁴⁰ Using the arbitrary and capricious, or not made in good faith, standard of review, the court deferred to the commissioner’s judgment.⁴¹ This judicial deference to commissioner authority was yet again confirmed in *Rose v. Giamatti* (stating that the commissioner “is given virtually unlimited authority to

³⁴ *Id.* at 32–33.

³⁵ *Id.* Attachment 2, at 128. Further, the Basic Agreement provides that, if the commissioner were to utilize his powers granted under Article XI(A)(1)(b), the MLBPA can reopen negotiations. *See id.* at 32–33.

³⁶ *Milwaukee Am. Ass’n v. Landis*, 49 F.2d 298, 303 (N.D. Ill. 1931).

³⁷ *See* PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES, PROBLEMS 14–15 (3d ed. 2004). Landis had learned that the player involved in the trade, Fred Bennett, had been transferred numerous times between the Browns and minor league teams—all of which were secretly controlled by the Browns’ owner, Phil Ball. *See id.*

³⁸ *Milwaukee*, 49 F.2d at 299.

³⁹ *See id.* at 304.

⁴⁰ *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 537 (7th Cir. 1978). In this action, Charles Finley, owner of the Oakland Athletics, challenged Kuhn’s disapproval of the assignments of Joe Rudi, Rollie Fingers, and Vida Blue to the Boston Red Sox and New York Yankees. *See* WEILER & ROBERTS, *supra* note 37, at 18. Kuhn disapproved the transaction as “inconsistent with the best interests of baseball” because of the potential loss of competitive balance that would occur as a result of the assignments. *Id.* Finley planned to sell off these players—his veteran stars—to invest in the farm system and younger stars who would not demand high salaries. *See id.*

⁴¹ *Charles O. Finley*, 569 F.2d at 539.

formulate his own rules of procedure for conducting . . . investigations”⁴² and *Atlanta Nat'l League Baseball Club v. Kuhn* (upholding Kuhn's power to suspend Atlanta Braves owner Ted Turner for breaching free agency rules).⁴³

While these judicial decisions granted MLB commissioners the utmost authority in acting to protect the best interests of the game, arbitration awards have undermined this authority. Originally the CBA did not provide for the use of an outside arbitrator; however, in 1970, Bowie Kuhn approved the use of independent arbitrators for grievances so long as the grievance did not implicate baseball's integrity or public confidence in the game.⁴⁴ Though the independent arbitrator is required to use a just cause standard of review according to the CBA,⁴⁵ past arbitral awards have reflected the use of a much less deferential standard. For example, George Nicolau's ruling in the arbitration of a Los Angeles Dodgers relief pitcher, Steve Howe, significantly undermined the authority of the MLB commissioner.⁴⁶ After Howe's seventh reported incident of illegal drug use in his twelve-year career, then-Commissioner Fay Vincent banned him from baseball.⁴⁷ Nicolau heard Howe's appeal and, while claiming to use the CBA-imposed just cause standard, he reduced the punishment to a one-year suspension,⁴⁸ essentially substituting his own judgment for that of the commissioner. Significantly, in another arbitration that has not been released publicly, Nicolau lifted a club suspension of a player who had been arrested on drug and sexual assault charges.⁴⁹ Nicolau has stated his own belief that “baseball fundamentally errs in justifying punishment by holding out players as role models,”⁵⁰ and his arbitration decisions clearly seem to abide by this personal philosophy. Though MLB governing documents and judicial opinions indicate that the MLB

⁴² *Rose v. Giamatti*, 721 F. Supp. 906 (S.D. Ohio 1989). This suit was brought by Pete Rose against then-Commissioner Bart Giamatti for pre-judging the facts of his case and not giving “due regard for all the principles of natural justice and fair play.” WEILER & ROBERTS, *supra* note 37, at 8. It resulted in Rose agreeing to settle the case by withdrawing his suit and accepting the commissioner's permanent ban from baseball in return for not having to admit or deny betting on baseball. *Id.* at 9.

⁴³ *Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977). It is, however, important to note that the court ruled that Kuhn “went beyond the scope of his authority” by taking a draft pick away from the Braves. WEILER & ROBERTS, *supra* note 37, at 26. Nonetheless, it came to this conclusion because a draft penalty was not one of the specific commissioner sanctions mentioned in the Major League Agreement. *See id.* at 26–27.

⁴⁴ Pollack, *supra* note 31, at 1662. However, as discussed earlier, current Commissioner Bud Selig has assured the MLBPA that he will not deem any grievance to implicate the integrity or public confidence in the game, thereby making this exception moot.

⁴⁵ *See* MLB Basic Agreement, *supra* note 32, at 43.

⁴⁶ *See* WEILER & ROBERTS, *supra* note 37, at 51–56.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ John Gibeaut, *When Pros Turn Cons: Athletes Who Commit Crimes Are Giving Sports a Black Eye. But While the NFL Claims It's Tackling the Problem, Other Leagues Appear Content to Sit on the Sidelines*, 86 A.B.A.J. 38, 103 (2000).

⁵⁰ *Id.* at 106.

commissioner has broad discretion and authority in administering discipline, these arbitration rulings have served to diminish this authority.

B. NBA

The NBA did not have a commissioner until 1967, when President Walter Kennedy changed his title to commissioner.⁵¹ In 1971, the commissioner was granted far-reaching authority to oversee the league and take disciplinary action.⁵² In contrast to the numerous commissioners of baseball, the NBA has had only four commissioners, including current Commissioner David Stern, who was elected in 1984.⁵³ At the time Stern was elected, Rule 35 of the NBA Constitution gave him the authority to “fine a player for any statement he ma[de] or endorse[d] which [was] prejudicial or detrimental to the best interests of basketball and to suspend or fine the player for conduct that [was] detrimental to the NBA.”⁵⁴ Under the *current* Rule 35, Stern has the power:

[T]o suspend for a definite or indefinite period, or to impose a fine not exceeding \$50,000, or inflict both such suspension and fine upon any player who, in his opinion, (i) shall have made or caused to be made any statement having, or that was designed to have, an effect prejudicial or detrimental to the best interests of basketball or of the Association or of a Member, or (ii) shall have been guilty of conduct that does not conform to standards of morality or fair play, that does not comply at all times with all federal, state, and local laws, or that is prejudicial or detrimental to the Association.⁵⁵

The NBA UPC, incorporated in Article II of the CBA, binds players to Rule 35.⁵⁶

When Stern took power, the CBA allowed him to make final determinations regarding discipline.⁵⁷ However, the 1995 CBA restricted the commissioner’s power, allowing players to have their grievances reviewed by an independent arbitrator.⁵⁸

⁵¹ Lockwood, *supra* note 28, at 149. However, President Maurice Podoloff disciplined Jack Molinas for gambling in 1953 by handing down an indefinite suspension. *Id.* at 147–48.

⁵² *Id.* at 149.

⁵³ *Id.* at 150.

⁵⁴ *Id.* at 151.

⁵⁵ NBA Constitution and By-Laws R. 35(d).

⁵⁶ NBA Uniform Player Contract § 5(d), *available at* <http://www.nbpa.org/sites/default/files/EXHIBIT%20A.pdf> [hereinafter NBA UPC].

⁵⁷ Lockwood, *supra* note 28, at 151.

⁵⁸ *Id.* at 154. Players continue to have the ability to have their grievances reviewed by an independent arbitrator under the current (2005) NBA CBA. However, players may not file a grievance over “[a] dispute involving (i) a fine of \$50,000 or less or a suspension of twelve (12) games or less . . . imposed . . . for conduct on the playing court . . . or (ii) action taken by the Commissioner . . . (A) concerning the preservation of the integrity of, or the maintenance of public confidence in the game of basketball and (B) resulting in a financial impact on the

Though the grievance procedure is outlined in detail in Article XXXI of the CBA, there are seemingly conflicting provisions regarding the standard of review to be used. In § 8, which is titled “Special Procedures with Respect to Player Discipline,” the standard of review for disputes involving the preservation of the integrity of, or public confidence in, the game is “arbitrary and capricious.”⁵⁹ However, in § 14, which is titled “Miscellaneous,” the standard of review for disputes involving discipline is listed as “just cause.”⁶⁰ As can be seen in the subsequent discussion of the Sprewell arbitration, this has led to confusion regarding the appropriate standard of review and, implicitly, the appropriate amount of deference to be given to the commissioner’s determinations.

Significantly, the current CBA also includes sentencing guidelines regarding off-court conduct—“when a player is convicted of (including a plea of guilty, no contest, or nolo contendere to) a violent felony, he shall immediately be suspended by the NBA for a minimum of ten (10) games.”⁶¹ In addition:

[W]hen the NBA and the Players Association agree that there is reasonable cause to believe that a player has engaged in any type of off-court violent conduct, the player will . . . be required to undergo a clinical evaluation . . . and, if deemed necessary by such expert, appropriate counseling.⁶²

Sexual assault and domestic violence are specifically enumerated as examples of “violent conduct.”⁶³ In addition, the current CBA provides that the commissioner’s disciplinary action “will preclude or supersede disciplinary action by any Team for the same act or conduct.”⁶⁴

As in baseball, the courts have granted the NBA commissioner much deference while arbitrators have been less likely to do so. In *Riko Enters., Inc. v. Seattle Supersonics Corp.*, the court defined the outer limits of NBA commissioner authority,⁶⁵ concluding that the commissioner did not have the authority to deny a team’s draft choice, but only because the NBA Constitution explicitly reserved this disciplinary action for the NBA Board of Governors.⁶⁶ In other words, as long as the commissioner does not contradict the express terms of the Constitution, the best interest clause will be interpreted broadly.

player of \$50,000 or less.” NBPA Collective Bargaining Agreement, art. XXXI, § 8(a) (2005), available at http://www.nbpa.com/cba_articles.php [hereinafter NBA CBA].

⁵⁹ NBA CBA, *supra* note 58, at art. XXXI, § 8(b).

⁶⁰ *Id.* at art. XXXI, § 14(c).

⁶¹ *Id.* at art. VI, § 7.

⁶² *Id.* at art. VI, § 8(a).

⁶³ *Id.*

⁶⁴ *Id.* at art. VI, § 10(a). The NBA borrowed this language from the NFL’s CBA after seeing the role double jeopardy played in the arbitrator’s determination of fairness in the Sprewell arbitration, discussed subsequently.

⁶⁵ *Riko Enters., Inc. v. Seattle Supersonics Corp.*, 357 F. Supp. 521 (S.D.N.Y. 1973).

⁶⁶ *Id.* at 525.

While the courts continue to grant the commissioner much authority aside from this one caveat, the arbitration decisions in the Latrell Sprewell and Jermaine O'Neal cases exemplify the extent to which independent arbitrators have impinged on the commissioner's authority. On December 1, 1997, Latrell Sprewell of the Golden State Warriors threatened to kill Coach Carlesimo and proceeded to strangle him for ten to fifteen seconds before his teammates were able to pull him away.⁶⁷ After retreating to the locker room, Sprewell returned to practice twenty minutes later to attack Coach Carlesimo by punching him.⁶⁸ The Warriors terminated Sprewell's contract two days later,⁶⁹ and Commissioner Stern handed down a one-year unpaid suspension.⁷⁰ Sprewell filed a grievance, which was heard by Arbitrator John Feerick.⁷¹ Though Feerick noted that the commissioner was entitled to "great deference" and that "it would be wrong for [him] to substitute [his] judgment for [the commissioner's],"⁷² Feerick concluded that fairness dictated that Sprewell's sentence was too severe—in part because Sprewell was punished by both his team and the league.⁷³ In the end, Sprewell's suspension was reduced to sixty-eight games instead of the original suspension of eighty-two games imposed by Commissioner Stern.⁷⁴

In a similar case of violent conduct considered to be off the playing court, Ron Artest, Stephen Jackson, Anthony Johnson, and Jermaine O'Neal engaged in a fight with fans during a Detroit Pistons and Indiana Pacers game in 2004.⁷⁵ Two days later, Commissioner Stern announced suspensions for each player under the authority granted to him in Article 35 of the NBA Constitution—O'Neal was suspended for twenty-five games without pay.⁷⁶ As in the Sprewell case, the arbitrator supposedly applied a just cause standard of review yet still reduced O'Neal's suspension to fifteen games.⁷⁷ The Sprewell and O'Neal arbitrations demonstrate the way in which

⁶⁷ Roger A. Javier, "You Cannot Choke Your Boss and Hold Your Job Unless You Play in the NBA": *The Latrell Sprewell Incident Undermines Disciplinary Authority in the NBA*, 7 VILL. SPORTS & ENT. L.J. 209, 210–11 (2000).

⁶⁸ *Id.* at 211.

⁶⁹ *Id.* The Warriors terminated Sprewell's contract under the authority of paragraph 20(b)(i) of the UPC, which states, "The Club may terminate this contract . . . if the Player shall do any of the following: (a) at any time, fail, refuse, or neglect to conform his personal conduct to standards of good citizenship, good moral character and good sportsmanship . . ." *Id.* at 219. This language remains the same in the current UPC but is now found in § 16(a)(i). NBA UPC, *supra* note 56, at § 16(a)(i).

⁷⁰ Javier, *supra* note 67, at 211–12.

⁷¹ *Id.* at 212.

⁷² Lockwood, *supra* note 28, at 154. It should be noted that Feerick claimed to use a just cause standard of review instead of an arbitrary and capricious standard, which many attributed to his leniency for Sprewell in the arbitral award. *See* Lockwood, *supra* note 28, at 155.

⁷³ *See* Lockwood, *supra* note 28, at 155; *supra* note 64 and accompanying text.

⁷⁴ Javier, *supra* note 67, at 217.

⁷⁵ *See* Lockwood, *supra* note 28, at 156.

⁷⁶ *Id.*

⁷⁷ *See id.* at 157–58.

arbitrators have undermined NBA commissioner disciplinary authority, although the arbitrators claim to review such punishments solely for just cause.

C. NFL

Unlike the NBA, which waited many years to create the role of the commissioner, the NFL followed in MLB's footsteps and created the role of the commissioner in 1921—just one year after Judge Landis assumed the role in baseball.⁷⁸ Joe Carr was the first commissioner; however it was not until Pete Rozelle became commissioner in 1960 that the potential for professional football in America was realized.⁷⁹ Rozelle was also the first commissioner to make investigating off-field personal conduct a priority, focusing on gambling.⁸⁰ The two most recent commissioners—Paul Tagliabue, serving from 1989 to 2006, and Roger Goodell, still serving—have continued this leadership. Significantly, it was Paul Tagliabue, a former antitrust lawyer, who “consolidated the Management Council under his office, making him the sole authority over NFL business, including discipline of players and all other league employees for misconduct outside work.”⁸¹

Under the NFL Constitution, the commissioner may discipline players who have “violated the Constitution or by-laws of the [NFL], or [have] been or is guilty of conduct detrimental to the welfare of the [NFL] or professional football.”⁸² Under the NFL CBA, Article XI outlines the commissioner's disciplinary authority.⁸³ Contrary to the rules of MLB and the NBA, the NFL CBA stipulates that any “action taken against a player by the Commissioner for conduct detrimental to the integrity of, or public confidence in, the game of professional football” may only be appealed to the commissioner.⁸⁴ In other words, there is no independent arbitrator available to review, and possibly undermine, the commissioner's disciplinary action for off-field conduct. While clubs may also punish players for off-field conduct deemed “detrimental to the club,”⁸⁵ “[t]he Commissioner's disciplinary action will preclude or supersede disciplinary action by any Club for the same act or conduct.”⁸⁶ The NFL player contract, incorporated into the CBA in Article XIV(1), assures that the players

⁷⁸ Michael A. Mahone, Jr., *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 189 (2008).

⁷⁹ *Id.* at 189–90.

⁸⁰ See Ambrose, *supra* note 9, at 1085.

⁸¹ Gibeaut, *supra* note 49, at 107.

⁸² Mahone, *supra* note 78, at 191 (citing Constitution and By-Laws of the National Football League, art. VIII, § 8.13(A)).

⁸³ See Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association 2006–2012, art. XI (2006), available at [http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL COLLECTIVE BARGAINING AGREEMENT 2006 - 2012.pdf](http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL_COLLECTIVE_BARGAINING_AGREEMENT_2006_-_2012.pdf) [hereinafter NFL CBA].

⁸⁴ *Id.* at art. XI, § 1(a).

⁸⁵ *Id.* at art. VIII, § 1(a).

⁸⁶ *Id.* at art. XI, § 5.

agree “the Commissioner will have the right . . . to fine . . . to suspend . . . and/or to terminate this contract” if the player is “guilty of any . . . form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football.”⁸⁷

Because the NFL’s grievance procedure excludes review of punishment for conduct deemed detrimental to the integrity of the game, of the three league commissioners, the NFL commissioner has the most authority in disciplining players for their off-field conduct. This is enhanced by the fact that there is no arbitral or judicial precedent restricting the authority. Further, Commissioners Tagliabue and Goodell have instituted personal conduct policies to reinforce the importance of good player behavior both on and off the field. These policies, which have not been incorporated into the NFL CBA, are discussed subsequently.

III. HISTORICAL USE OF THE COMMISSIONERS’ DISCIPLINARY AUTHORITY TO PUNISH OFF-FIELD CONDUCT

A. MLB

It is very difficult to garner data on player arrests and corresponding league discipline because the leagues do not publish this data. Most of the studies that have been conducted on league punishment, and specifically on punishment for athlete violence against women, are dated and, therefore, do not include the most relevant data from the years following the O.J. Simpson trial, which shined a spotlight on domestic violence. It is safe to say, however, that MLB has done the least in terms of punishing players for off-field conduct; after reading countless newspaper and journal articles from the past ten years describing domestic violence allegations, arrests, and convictions, I did not discover one corresponding case of league punishment.

Although many domestic violence arrests result in dropped charges because the victim refuses to testify in order to escape public ridicule or out of fear of retribution, the lack of a conviction has not stopped baseball from punishing players for other transgressions in the past. Indeed, Judge Landis’s first disciplinary action as commissioner was to impose lifetime suspensions on the eight players allegedly involved in the Black Sox Scandal, despite their acquittal.⁸⁸ “Commissioner Landis linked the integrity of baseball to his view of American morality. He believed that baseball held a special place in the hearts of the nation’s youth, and that required him to take decisive action.”⁸⁹ Landis utilized his “best interest” power against Benny Kauff, a New York Giants outfielder, in much the same manner—after Kauff was acquitted for stealing a car and receiving stolen automobiles, Landis banished him from the game for life.⁹⁰ He did so because, after considering the evidence against Kauff, he found that Kauff’s presence in baseball would “burden patrons of the game

⁸⁷ *Id.* at app. C, § 15.

⁸⁸ See Lockwood, *supra* note 28, at 142.

⁸⁹ *Id.*

⁹⁰ See *id.* at 143.

with grave apprehension as to its integrity.”⁹¹ This is a clear-cut and early example of use of the commissioner’s authority to punish off-field conduct that did not relate to or affect the game of baseball and that did not result in a criminal conviction.

Baseball has even disciplined players and coaches for legal, but reprehensible, personal conduct. Both Marge Schott, then-managing partner and largest shareholder of the Cincinnati Reds, and John Rocker, a former relief pitcher for the Atlanta Braves, were punished by Commissioner Bud Selig for derogatory, racist remarks that were made to reporters off the field.⁹² After Schott made offensive remarks regarding African-Americans, Asians, and Jews to a reporter, she was suspended from baseball for a year.⁹³ A few years later, she resigned from the daily operation of the Reds because she was, again, under threat of suspension.⁹⁴ Likewise, Rocker was suspended for two months and fined \$20,000 for racial and ethnic slurs he directed at New Yorkers, Mets fans, and one of his teammates.⁹⁵ His team took action too, later fining him \$5,000 for allegedly threatening the *Sports Illustrated* author of the article containing his remarks, and ultimately sending him to the minor leagues.⁹⁶

Although these examples suggest commissioner willingness—from the beginning of the commissioner’s office to present day—to punish off-field conduct that offends the public, a line has been drawn between these instances and instances of athletes committing domestic violence. “While [MLB] doesn’t condone domestic violence and provides counseling for players in such situations, [Robert D. Manfred Jr., Executive Vice President of MLB] says the sport can’t justify punishing those players, unlike the epithet-slinging Rocker. ‘It’s a little different than someone insulting your fan base,’ Manfred says.”⁹⁷ But is it?

A 2007 *Chicago Tribune* article notes, “While Major League Baseball continues to focus on steroids and other performance-enhancing substances, it appears to be experiencing a quiet epidemic of domestic battery.”⁹⁸ While this “epidemic” may be reflective of the “epidemic” in society at large rather than particular to baseball, the prevalence of domestic violence in baseball, and sports in general, is undeniable. Prior to the general awakening to this phenomenon in the late 1990s, baseball greats

⁹¹ *Id.* (citing HAROLD SEYMOUR, *BASEBALL: THE GOLDEN AGE* 375 (1971)).

⁹² See Ira Berkow, *After Schott Spoke Out, the Air Needed Clearing*, N.Y. TIMES, Mar. 6, 2004, at D3; Gibeaut, *supra* note 49, at 41.

⁹³ See Berkow, *supra* note 92, at D3.

⁹⁴ See *id.*

⁹⁵ See Gibeaut, *supra* note 49, at 41. Consistent with previously discussed patterns of arbitrator oversight, an arbitrator reduced this suspension to two weeks and the fine to \$500, which Rocker claims he never paid. See Peter Schmuck, *With Rocker Warming Up, Guillen Is in Need of Relief*, BALT. SUN, June 26, 2006, at 2D.

⁹⁶ See Gibeaut, *supra* note 49, at 41.

⁹⁷ *Id.* at 102.

⁹⁸ Phil Rogers, *MLB Must Not Tolerate Reprobates; Domestic Violence Cases Deserve the Same Attention as Steroid Abuse*, CHI. TRIB., May 27, 2007, at C3.

such as Barry Bonds,⁹⁹ Jose Canseco,¹⁰⁰ Darryl Strawberry,¹⁰¹ Dante Bichette,¹⁰² and Albert Belle¹⁰³ were accused of domestic violence—most of them accused in more than one instance. They, and others similarly accused, were not punished by their teams or the league.

The first instance of a MLB team's punishment for domestic violence appears to be the suspension of Wilfredo Cordero by the Boston Red Sox in 1997.¹⁰⁴ Cordero was arrested during a domestic dispute with his second wife, Ana; after the police arrived, and in their presence, Cordero told his wife in Spanish that he would kill her.¹⁰⁵ Though Cordero returned to action immediately after the incident, the following week the *Boston Globe* reported that his 1993 divorce proceedings involving his first wife also included allegations of abuse.¹⁰⁶ In response to this new

⁹⁹ See generally Nack & Munson, *supra* note 12, at 62 (examining incidents of domestic violence involving athletes). Bonds's ex-wife accused him of domestic violence in their marriage. See *id.*; Kinkhabwala, *supra* note 25.

¹⁰⁰ See Donna Pazdera, *Canseco Charged with Battery, Accused of Striking His Wife*, SUN-SENTINEL (Fort Lauderdale, Fla.) Nov. 7, 1997, at 7C; Greg Welter, *Chico Police Respond to Canseco Spat*, CHICO ENTERPRISE-REC. (Cal.), July 20, 2006. Canseco was arrested and charged with aggravated assault after driving his Porsche into his then wife's BMW while she was in the car. See Pazdera, *supra*. The charges were dropped after he agreed to community service and counseling. See John Martin, *The (Exciting) Life and Times of Jose Canseco*, ST. PETERSBURG TIMES (Fla.), Dec. 10, 1998, at 3C. Canseco was also charged with misdemeanor battery on his second wife. See *id.* He pleaded no-contest and was sentenced to one year of probation and twenty-six weeks of counseling. See *id.*

¹⁰¹ See generally Gordon Edes, *Strawberry's Future in Doubt, Assault Charge Is Latest Trouble*, SUN-SENTINEL (Fort Lauderdale, Fla.), Sept. 6, 1993, at 5C. Strawberry was arrested after allegedly striking his girlfriend, Charisse Simons, in the eye. See *id.* The charges were dropped when she refused to press charges. See *Strawberry Won't Face Charges*, CHI. TRIB., Sept. 21, 1993, at 5N. Previously, Strawberry had been arrested on charges of assault with a deadly weapon after he allegedly hit his wife, Lisa Strawberry, and threatened her with a handgun. See Edes, *supra*. These charges were also dropped after he agreed to enter an alcohol rehabilitation program. See *id.* Lisa Strawberry reported that Strawberry broke her nose on another occasion as well. See *id.*

¹⁰² See generally Nack & Munson, *supra* note 12, at 62. Bichette admitted to hitting his pregnant, nineteen-year-old girlfriend, Marianna Peng, who is now his wife. See *id.* at 74.

¹⁰³ See generally Michael Kiefer, *Ex-Slugger Belle Given 90 Days in Jail for Stalking*, ARIZ. REPUBLIC (Phoenix), Aug. 25, 2006, at 4. In 2006, Albert Belle, who was retired at the time, was convicted of stalking his ex-girlfriend after going so far as to attach a GPS tracking device to her car. See *id.* He was sentenced to ninety days in jail and five years of probation. See *id.*

¹⁰⁴ See Mark Alesia, *The Story of Wil Cordero's Pattern of Abuse: Three Women, Three Accounts of Repeated Violence*, CHI. DAILY HERALD, Apr. 6, 1998, at 1.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* His first wife, Wanda Mora, accused him of repeated beatings that left permanent scarring—including one beating while she was pregnant. See *id.* In addition, shortly after the arrest and the publication of the content of the divorce proceedings, a former girlfriend, Yamire Bayron, told reporters that Cordero had been abusive to her as well. See *id.*

information, the Red Sox suspended Cordero on June 27.¹⁰⁷ Though he returned to the line-up on July 11, the Red Sox released him on the last day of the season.¹⁰⁸ Ultimately, Cordero “plead[ed] guilty to four charges: assault and battery, assault and battery with a dangerous weapon (a telephone receiver), making a threat, and violating an emergency restraining order.”¹⁰⁹ He was given a ninety-day suspended sentence and ordered to attend forty weeks of counseling.¹¹⁰ Cordero went on to play for other teams without any reported incidents for a few years, but he was charged with battery in a domestic violence case again in November 2002.¹¹¹

Since the Cordero punishment, more teams have shown willingness to impose disciplinary action for off-field conduct such as domestic violence. Such was the case with Julio Lugo in 2003,¹¹² Julio Mateo in 2007,¹¹³ and Alberto Callaspo in 2007.¹¹⁴ However, team punishment, like league punishment, can be undermined by arbitral review. For instance, although Callaspo was originally suspended and placed on the inactive list by the Arizona Diamondbacks after being arrested for felony criminal damage and misdemeanor assault,¹¹⁵ the Diamondbacks were forced to take him off the inactive list after nine days as a result of a grievance filed by the Players’ Union.¹¹⁶ After the grievance was heard, Callaspo was awarded his salary back for six of the nine days.¹¹⁷

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ Mike Berardino, *Cordero Saga Still Evolving; Marlins First Baseman Ready for Fresh Start, but New Concerns Revive Checkered Past*, SUN-SENTINEL (Fort Lauderdale, Fla.), Mar. 12, 2004, at 1C.

¹¹⁰ *See id.*

¹¹¹ *See id.* These charges were later dropped, and the Florida Marlins, Cordero’s team at the time, did not impose any disciplinary action against him. *See id.*

¹¹² *See generally* Lugo Charged with Assault, Wife Treated for Injuries, ESPN.COM, May 1, 2003, <http://sports.espn.go.com/espn/print?id=1547624&type=news>. The Houston Astros released Lugo after a public fight in which he slammed his wife’s head into his car. *See id.*

¹¹³ *See generally* Rich Rys, *Smack My Bitch Up: Major League Baseball’s Continuing Domestic Abuse Problem*, DEADSPIN.COM, June 24, 2008, <http://deadspin.com/5019197/smack-my-bitch-up-major-league-baseballs-continuing-domestic-abuse-problem>; Kinkhabwala, *supra* note 25; Rogers, *supra* note 98. The Seattle Mariners suspended Mateo for ten games after he was arrested for assaulting his wife, allegedly hitting her in the eye, choking her, and biting her lip after she told him she wanted to end the marriage. *See* Rogers, *supra* note 98. He was demoted to the inactive list for three weeks while undergoing counseling. *See id.*

¹¹⁴ *See* Rys, *supra* note 113; Kinkhabwala, *supra* note 25; Rogers, *supra* note 98.

¹¹⁵ *See* Rogers, *supra* note 98. His wife alleged that he had kicked and hit her during a fight. *See id.* This incident occurred one week after he allegedly cut the side of his wife’s face with a knife and knocked their infant son against a headboard. *See* Kinkhabwala, *supra* note 25. His wife returned to Venezuela to be with her family after the incident and the charges were not pursued against Callaspo. *See* Rogers, *supra* note 98. *See also* David Martin, *Spin Zones; Maybe if KC Teams Gave up Their Little Choirboy Acts, They’d Win Some Damn Games*, PITCH (Kansas City), Jan. 10, 2008.

¹¹⁶ *See* Rogers, *supra* note 98.

¹¹⁷ *See id.*

Still, some teams have taken a stance against domestic violence. The Seattle Mariners were the first to do so, developing the “Refuse to Abuse” program and implementing a strict one-strike policy against violent players.¹¹⁸ However, since the league has not taken a stance against domestic violence, team policies remain inconsistent from one club to another. For instance, in the same time period that the Cordero, Lugo, Mateo, and Callaspo punishments were handed down, other teams chose not to punish players accused, charged, or convicted of domestic violence. High-profile examples include Bobby Chouinard,¹¹⁹ Pedro Astacio,¹²⁰ Milton Bradley,¹²¹ Brian Giles,¹²² Dmitri Young,¹²³ Elijah Dukes,¹²⁴ and Brett Myers.¹²⁵

The case of Elijah Dukes created a public outcry but still did not result in any team discipline. In May 2007, Dukes’s estranged wife, NiShea Gilbert, played a cell

¹¹⁸ See Rys, *supra* note 113. Julio Mateo’s immediate disciplining was an example of the one-strike policy in effect. See *id.*

¹¹⁹ See generally Gibeaut, *supra* note 49, at 41; Rich Elliott, *Chouinards Rediscover Love, Happiness after ‘Nightmare’*, CONN. POST, June 17, 2003. Chouinard was convicted for aggravated assault after holding a gun to his wife’s head. See Elliott, *supra*. Prior to the conviction, Chouinard asked to be released by the Arizona Diamondbacks; however, he was signed by the Colorado Rockies and was allowed to serve his one-year sentence in a work-release program—released at 7 a.m. to work out with the Rockies and required to return by 5 p.m. each day. See *id.* The court later waived the last six months of his sentence. See *id.*

¹²⁰ See generally Gibeaut, *supra* note 49, at 41. Astacio “pleaded guilty to a misdemeanor domestic violence charge for punching his estranged pregnant wife, Ana.” *Id.* However, the Colorado Rockies did not punish him, and he started for them Opening Day. See *id.*

¹²¹ See generally Rys, *supra* note 113. Police were called to Bradley’s home three times after reports of domestic violence. See *id.* He was never arrested and the Dodgers never punished him. See *id.*

¹²² See generally Tom Krasovic, *Giles Denies Allegations, Says Suit ‘All about Money’; Padre Says He Didn’t Cause Miscarriage*, SAN DIEGO UNION-TRIB., Dec. 24, 2008, at D1. In a video played on all major sports networks and shows, Giles seemingly dragged his girlfriend, Cheri Olvera, out of a Phoenix bar and began hitting her. He entered into a plea agreement for a misdemeanor domestic violence charge stemming from this recorded incident and agreed to counseling in exchange for the charge being dropped. See *id.* The San Diego Padres did not impose any disciplinary action. See *id.* Olvera has since filed a civil lawsuit claiming that Giles abused her on multiple occasions, including when she was pregnant. See *id.* Giles has countersued and the suit was still pending as of October 8, 2009. See Debbi Baker, *Marcus Giles Facing Charge of Battery*, SAN DIEGO UNION-TRIB., Oct. 8, 2009, at D5 (also detailing a domestic battery charge against Brian Giles’s brother, Marcus, a former Padres player).

¹²³ See generally Rys, *supra* note 113. Young was charged with domestic violence after his girlfriend accused him of choking her. See *id.* After a couple of months, he was placed on the Detroit Tigers disabled list and later voluntarily left the team for “personal reasons.” *Id.*

¹²⁴ See Kinkhabwala, *supra* note 25; Rogers, *supra* note 98.

¹²⁵ See Rys, *supra* note 113; Rogers, *supra* note 98. Myers was arrested in Boston after witnesses reported that he dragged and hit his wife, Kim. Rys, *supra* note 113. Despite the arrest and reports of abuse, the Phillies started Myers in the game the next day at Fenway. *Id.* The Phillies granted Myers a paid leave of absence, and charges were ultimately dropped when Kim refused to testify against her husband. Rogers, *supra* note 98.

phone message for the *St. Petersburg Times* in which he threatened her life and that of her children; she also showed the newspaper a photo of a gun that he had sent to her cell phone.¹²⁶ Even before this incident, the police had been called on four different occasions to break up domestic disputes at Dukes's residence, and Gilbert had filed for two orders of protection against him.¹²⁷ In one public incident, Dukes had to be restrained by a middle school principal and a deputy when he attempted to approach Gilbert at the middle school where she worked.¹²⁸ In addition, two other women have accused Dukes of domestic abuse and he has been arrested six times—two of those arrests on charges of battery.¹²⁹ Despite this overwhelming evidence of extreme, violent off-field conduct, the Tampa Bay Devil Rays never punished him.¹³⁰ Instead, Devil Rays President Matt Silverman called it “a complicated situation” and explained, “I don't want to see him go to jail. He needs help. I really think this is going to help him. One day he will thank me.”¹³¹ However, given the overwhelming evidence against Dukes, including his public outburst at a middle school, the traceable messages on Gilbert's phone, and his prior record, this would appear to be a convincing case for punishment.

Yet, it should not be surprising that teams have failed to take action against players involved in domestic violence when the league itself has not adopted a policy to address such conduct. MLB Commissioner Bud Selig has not taken a stance on domestic violence and the integrity of his league has been undermined. Individual teams do not have a profit-motive to discipline violent players when they know that those players will simply find homes elsewhere, with teams that do not have strict off-field conduct policies. Furthermore, as was evidenced by the Callaspo and Howe arbitrations, the grievance procedure routinely undermines the authority that the commissioner and teams have in disciplining their players, when and if they choose to use it. As we will see in the NBA and the NFL, utilizing the centralized disciplinary powers granted to the commissioner and restricting arbitral review result in a more consistent and fair system.

B. NBA

The NBA CBA, like the MLB CBA, allows players to appeal their disciplinary action to a neutral arbitrator, who may occasionally undermine the commissioner's authority. Nonetheless, unlike Selig, NBA Commissioner David Stern has not been afraid to use his best interest powers to discipline players for conduct detrimental to

¹²⁶ Kinkhabwala, *supra* note 25.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See Rogers, *supra* note 98. The Rays eventually traded Dukes to the Washington Nationals in December 2007 after Dukes was ejected from a game for going after an umpire who called him out on strikes. Peter Kerasotis, *Are Dukes' Troubles Behind Him?*, FLA. TODAY, Feb. 24, 2008, at 1D.

¹³¹ Rogers, *supra* note 98.

the sport—even if the conduct occurs off the court. Stern’s interest in addressing off-court conduct may be a function of the startlingly high arrest rate among NBA players—a records check on forty-two percent of the league’s players in the 2001–2002 season revealed that forty percent of them had either been arrested or recommended by police for indictment for a serious crime.¹³² A similar study conducted six years earlier revealed an arrest rate of only twenty-one percent for NFL players.¹³³ Early in his tenure, Stern used his best interest authority mainly to punish players for drug abuse—for example, Stern suspended Michael Ray Richardson, Mitchell Wiggins, and Lewis Lloyd each for approximately two years after drug infractions.¹³⁴ He took a similarly hard stance on alcohol, banning Roy Tarpley for alcohol abuse for approximately three years only to ban him once again after he had returned to the league for a short time.¹³⁵ In the 1990s, Stern took action against Dennis Rodman despite the fact that Rodman’s conduct did not involve gambling, drug abuse, or alcohol problems.¹³⁶ Stern fined Rodman \$50,000 after he called Mormons “assholes.”¹³⁷ Making his stance clear, Stern said “insensitivity or derogatory comments involving race or other classifications are unacceptable in the NBA [O]ffensive remarks . . . cannot be tolerated or excused.”¹³⁸

Recently, Commissioner Stern has adopted policies targeting off-court behavior, including a dress code policy and a nightclub ban.¹³⁹ In September 2005, Stern

¹³² JEFF BENEDICT, *OUT OF BOUNDS: INSIDE THE NBA’S CULTURE OF RAPE, VIOLENCE, AND CRIME* 20 (2004).

¹³³ *Id.* The NBA and the NFL have disputed these figures. See Jason Lewis, *Blacked Out*, L.A. SENTINEL, July, 17, 2008, available at <http://www.lasentinel.net/Blacked-Out.html> (discussing the perception of black athletes and the inaccurate reports of athlete criminal behavior that may result from bias). The NBA claimed that a study of only forty percent of players is incomplete and inaccurate. *Id.* Similarly, the NFL claimed that the study of its players unfairly included arrests that occurred during players’ college careers. *Id.* The NFL also highlighted that the its arrest rate is no different than any other group—a point mentioned earlier in this article. *Id.* Regardless of these valid criticisms, these studies—with their inadequacies—remain the only reports that shed any light on the arrest rate of professional athletes. This is, undoubtedly, also due to the fact that the leagues do not make information available regarding player arrests and league punishments, making it difficult to accurately report arrest and punishment statistics. Still, the studies suggest that the NBA has a higher arrest rate than the NFL and the general public.

¹³⁴ Lockwood, *supra* note 28, at 151.

¹³⁵ *Id.*

¹³⁶ *Id.* at 151–52.

¹³⁷ *Id.*

¹³⁸ *Id.* at 152. Commissioner Stern later backed up this statement by fining New Jersey Nets Coach John Calipari and Miami Heat Broadcaster David Halbertstam for insensitive remarks they made. *Id.*

¹³⁹ Lockwood, *supra* note 28, at 158–59; Brent D. Showalter, *Technical Foul: David Stern’s Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. REV. 205, 205 (2007). It should be noted that Stern has been criticized for adopting policies and punishments that are too selective and do not provide adequate due process notice to the players. Lockwood, *supra* note 28, at 166. Further, it has been argued that the unilateral imposition of these policies may not

announced a dress code policy, which requires players to wear business casual attire when engaged in team or league business and explicitly enumerates both satisfactory and unsatisfactory clothing items.¹⁴⁰ Stern implemented this policy using his best interest authority in an attempt to “soften the NBA’s hip-hop image and increase the league’s appeal to its fans.”¹⁴¹ Likewise, in January 2007, Stern ordered the NBA’s security personnel to generate a list of nightclubs to be off-limits to players in response to a slew of shootings involving professional athletes.¹⁴²

In addition to these unilaterally imposed policies, Stern has been pivotal in reshaping the CBA in recent bargaining negotiations. As mentioned previously, the CBA now includes provisions regarding team and league discipline for unlawful violence and violent misconduct that occurs off-court.¹⁴³ Article VI, Section 8(a) specifically identifies sexual assault and domestic violence as instances of punishable violent misconduct. Under Stern’s governance, a provision regarding firearms has also been added to the CBA—the policy requires that, “Whenever a player is physically present at a facility or venue owned, operated, or being used by a Team, the NBA, or any League-related entity, and whenever a player is traveling on any NBA-related business . . . such player shall not possess a firearm of any kind.”¹⁴⁴ Commissioner Stern has said that players should have a gun only for protecting their homes and should not be walking the streets with a weapon, even if legal and properly registered.¹⁴⁵ In anticipation of both league and team punishment, given the expanded categories of punishable behavior, the NBA CBA now includes a provision that mandates league action supersede any team discipline, thereby avoiding a case of double penalty.¹⁴⁶

As in baseball and football, NBA athletes who were charged with or convicted of domestic violence offenses were not punished in earlier years. Prime examples

be valid—the dress code and nightclub restrictions could be considered conditions of employment and as such would be mandatory subjects of collective bargaining. *See Showalter, supra*, at 220. If these policies cover mandatory subjects of bargaining, the policies would be subject to antitrust review since they were implemented without the benefit of collective bargaining. *See Michael McCann, NBA Activates Its “Security Forces” to Prohibit Players from Frequenting Nightclubs*, SPORTS LAW BLOG, Jan. 21, 2007, <http://sports-law.blogspot.com/2007/01/nba-activates-its-security-forces-to.html>. There has been no such challenge to date—likely because the policies have not yet resulted in any significant fine to a player.

¹⁴⁰ Lockwood, *supra* note 28, at 158–59.

¹⁴¹ Showalter, *supra* note 139, at 210.

¹⁴² McCann, *supra* note 139.

¹⁴³ NBA CBA, *supra* note 58, at art. VI, §§ 7–8.

¹⁴⁴ *Id.* at art. VI, § 9.

¹⁴⁵ Lockwood, *supra* note 28, at 162.

¹⁴⁶ NBA CBA, *supra* note 58, at art. VI, § 10(a). This provision helps avoid situations like that found in the Sprewell arbitration where the arbitrator reduced Sprewell’s suspension after finding that punishment from both the team and league was unfair. However, the NBA CBA does allow for double penalty where the player’s act or conduct is so egregious as to warrant it. *Id.* at art. VI, § 10(b).

include Robert Parish,¹⁴⁷ Marcus Webb,¹⁴⁸ Duane Causwell,¹⁴⁹ Scottie Pippen,¹⁵⁰ and Olden Polynice.¹⁵¹ Parish, Webb, and Pippen were documented repeat offenders.¹⁵² The frightening story of Parish's ex-wife, Nancy Saad, was detailed in a 1995 *Sports Illustrated* article.¹⁵³ During one particular incident in 1987, Saad went to Parish's hotel room to discuss their son—at the time, Saad had been estranged from Parish for a year, having left him after an incident in which he reportedly threw her down the stairs of their home and kicked her out the front door.¹⁵⁴ When she arrived at the hotel room, Parish allegedly threatened to kill her, grabbed her by the throat, threw her into the hallway, and then punched and kicked her.¹⁵⁵ Saad cannot remember many of the details after falling in the hallway, as she suffered a “closed head injury” and impaired vision, which led to chronic headaches and convulsions.¹⁵⁶ William Nack and Lester Munson, authors of the *Sports Illustrated* article, observed that Saad's

¹⁴⁷ See Nack & Munson, *supra* note 25.

¹⁴⁸ See Moser, *supra* note 20, at 78–80. In 1993, Webb was arrested for physically assaulting the mother of his child just one week after his former girlfriend, a student at Boston College, filed rape charges against him. Webb ended up pleading guilty to a lesser charge of sexual misconduct (instead of rape) and received a thirty-day jail sentence. During his jail sentence, Webb was allowed to leave prison to stand trial for the charges of assault and battery against the mother of his child, and he eventually received a one-year suspended sentence as well as fifty-nine days of jail time, which were later dropped. Webb ultimately served only twenty-eight days for the two incidents. *Id.* Although Webb's contract with the Boston Celtics was not extended at the end of the season, it is unclear whether this was punishment or a routine business decision. See *Webb Waived by Celtics, then Arrested*, N.Y. TIMES, Mar. 19, 1993, at B12.

¹⁴⁹ See *Causwell to Enter Diversion Program*, LEDGER (Lakeland, Fla.), Feb. 26, 1995, at 5D. In 1994, Causwell was arrested after grabbing his wife in the presence of officers who had responded to an earlier call and charged with corporal injury to a spouse, battery, false imprisonment, assault, and unlawfully removing a telephone. The charges against Causwell were suspended to allow him to enter a domestic violence diversion program. *Id.*

¹⁵⁰ See Nack & Munson, *supra* note 25; Jerry Urban, *DWI Charges Against Pippen Dismissed for Lack of Evidence*, HOUSTON CHRON., May 15, 1999, at A1. In 1995, Pippen was arrested for allegedly grabbing his fiancée, Yvette DeLeone, by the arm and shoving her against a car the day after his team, the Chicago Bulls, was eliminated from the playoffs. Nack & Munson, *supra* note 25. Pippen was charged with domestic battery but the charges were dropped when DeLeone abandoned the case. Prior to this incident, DeLeone had previously reported fractures in her hand from an incident in which Pippen allegedly threw her out the front door. Pippen's former wife, Karen McCollum, had also reported to the police that Pippen hit and choked her. *Id.*

¹⁵¹ See *Kings' Polynice Charged with Hitting Girlfriend*, VIRGINIAN-PILOT, Oct. 18, 1996, at C8. In 1996, Polynice was arrested on charges of domestic assault after his girlfriend reported he threw her against a wall. *Id.*

¹⁵² See Nack & Munson, *supra* note 25 (regarding Parish and Pippen); Moser, *supra* note 20 (regarding Webb).

¹⁵³ Nack & Munson, *supra* note 25.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

story “demonstrates why domestic violence is viewed not only as one of America’s most critical social issues, as disabling psychologically as it is physically, but also is among the most baffling of social phenomena in its often endless repeated spin cycles of pain, retribution, contrition and more pain.”¹⁵⁷

Although the league and individual teams began taking a stronger stance against domestic violence during the 1990s, some investigations into off-court conduct still resulted in no punishment against the player or only in indirect disciplinary consequences. For instance, Allen Iverson was not punished after he was arrested on charges for criminal trespass, simple assault, terroristic threats, and gun offenses when he entered his cousin’s apartment without permission looking for his wife who had reportedly gone into hiding after a domestic dispute that ended with Iverson throwing her out of their home.¹⁵⁸ Similarly, Jason Kidd’s and Lee Nailon’s off-court behavior did not result in direct punishment by their respective teams or by the league; however, both found themselves traded to a different team, and Nailon was benched for a period of time before the trade was completed.¹⁵⁹

Nevertheless, the teams and the league have undertaken direct punishment in several cases. Most recently, Stern suspended Ron Artest for seven games after he pleaded no contest to infliction of injury on his wife, Kimsha Artest.¹⁶⁰ Artest was also sentenced to one hundred hours of community service and ordered to participate in a ten-day work project.¹⁶¹ The NBA Players’ Association backed Artest and filed a grievance to have the suspension reduced to the “standard three to four games for domestic disputes.”¹⁶² Stern, however, cited Artest’s history and repeat-offender status as justification for the length of the suspension and Artest ultimately served the entire seven-game suspension.¹⁶³ Players who have received the “standard” league

¹⁵⁷ *Id.*

¹⁵⁸ *Sixers Star Iverson Awaits Charges of Terror, Trespass*, SAN DIEGO UNION-TRIB., July 12, 2002, at D1; *Last of Charges Against Iverson Dropped*, UNITED PRESS INT’L, Sept. 12, 2002.

¹⁵⁹ Moser, *supra* note 20, at 73–75; *Former 76er Pleads Guilty*, PHILA. INQUIRER, Sept. 21, 2006, at E6. In 2001, Kidd was arrested for punching his wife, who declined medical attention after telling the police that her injuries were “minor compared to what I normally go through.” Moser, *supra* note 20, at 73. Kidd returned to the court for the Phoenix Suns after missing four games and was traded at the end of the season. *Id.* In 2006, Nailon was arrested for domestic assault and pleaded guilty to harassment. *Former 76er Pleads Guilty*, *supra* note 159. This was not Nailon’s first arrest; in fact, he had been arrested during college after a fight with his girlfriend and had pleaded no contest to a misdemeanor assault charge. Keith Herbert, *Nailon out of Jail but Not with 76ers: The Forward, Charged with Assaulting His Wife, Is Inactive and Will Not Practice, the Team Says*, PHILA. INQUIRER, Jan. 26, 2006, at D7. Nailon was eventually traded from the Sixers to the Cleveland Cavaliers. *Former 76er Pleads Guilty*, *supra* note 159.

¹⁶⁰ Mitch Lawrence, *Artest Fights Suspension*, DAILY NEWS (N.Y.), Oct. 24, 2007, at 72.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* The NBA and the Players’ Association did, however, reach a settlement that Artest would only lose four games’ worth of salary, totaling \$255,000, instead of losing all seven games’ worth, which would have totaled \$450,000. Mitch Lawrence, *Son Not Settling*, DAILY NEWS (N.Y.), Nov. 18, 2007, at 91.

three-game suspension include Glenn Robinson,¹⁶⁴ in 2002, and Jason Richardson,¹⁶⁵ in 2003. Teams have also taken a stand, as in 2002, when the Portland Trailblazers fined Ruben Patterson \$100,000 for “conduct detrimental to the team” after he was arrested for domestic abuse.¹⁶⁶

These developments in the NBA are encouraging because they represent a movement toward equal disciplinary treatment for conduct detrimental to the league that takes place off the court. The league is no longer sending mixed messages by banning certain off-court conduct and turning a blind eye to other off-court conduct. Further, the discretion afforded Stern to assess individual cases after investigating surrounding circumstances was endorsed by the result of the Ron Artest arbitration. Commissioner investigatory power and ultimate discretion are exceedingly important in domestic violence cases because the frequency of dropped charges make it pivotal that the commissioner be able to conduct his own investigation into the circumstances of the incident and consider repeat-offender status. However, the inconsistent arbitral awards made in the past indicate that there is a potential for the commissioner’s authority to be undermined in the NBA grievance process.

C. NFL

Of the three leagues, the NFL has granted its commissioner the broadest disciplinary power, and the past two commissioners, Paul Tagliabue and Roger Goodell, have not been afraid to exercise this power. The first significant action regarding off-field player conduct occurred in 1997 when the NFL adopted the violent crime policy under Tagliabue’s leadership.¹⁶⁷ The adoption of this policy, renamed the Personal Conduct Policy in 2000, was largely prompted by the increasingly visible crimes of domestic violence committed by football players.¹⁶⁸ As Tagliabue declared, “I don’t think the issue is one of image. The issue is a substantive one of player conduct.”¹⁶⁹ The policy allowed the commissioner to take disciplinary action on a player charged with any violent crime (felony or misdemeanor) and it required the player to go to counseling and participate in clinical evaluations.¹⁷⁰ The policy did, however, require that the commissioner wait until the criminal justice system had concluded its process before imposing a punishment, thereby precluding

¹⁶⁴ See *League Suspends 76ers’ Robinson*, L.A. TIMES, Oct. 28, 2003, at D6. Robinson was convicted of domestic battery and assault against his former fiancée. *Id.*

¹⁶⁵ See *Warrior Richardson Suspended Three Games*, DETROIT FREE PRESS, Oct. 23, 2003 at 3F. Richardson was convicted of a misdemeanor domestic violence charge after he assaulted his ex-girlfriend. *Id.*

¹⁶⁶ Phil Tatman, *Blazers Sock It to Patterson, Fans Growing Weary*, ORLANDO SENTINEL, Dec. 7, 2002, at D4 (noting that charges were ultimately dropped).

¹⁶⁷ See Ambrose, *supra* note 9, at 1086–87.

¹⁶⁸ *Id.*

¹⁶⁹ Gibeaut, *supra* note 49, at 39.

¹⁷⁰ See Ambrose, *supra* note 9, at 1087.

immediate action.¹⁷¹ In the first two years, league officials reported that the number of player arrests for violent crimes dropped from thirty-eight players in 1997 to twenty-six players in 1999.¹⁷²

Tagliabue also used his best interest authority to crack down on other off-field behavior. For instance, he imposed a policy to discipline players for alcohol-related convictions because of the number of drunk-driving incidents involving football players.¹⁷³ In many ways, Tagliabue was expanding the footprint left by Commissioner Pete Rozelle who unilaterally implemented a strict drug policy for the NFL in 1986.¹⁷⁴ Though some aspects of the drug policy were struck down when the players challenged it in arbitration, the arbitrator ultimately ruled that Rozelle had the power under the integrity of the game clause to implement the policy, so long as it did not contradict pre-existing CBA terms.¹⁷⁵

In April 2007, Tagliabue's successor, Roger Goodell, strengthened the Personal Conduct Policy.¹⁷⁶ Though he did not drastically alter the existing conduct policy, Goodell made it clear that violators would receive longer suspensions and larger fines and indicated that he would subject teams to discipline for the violations of their employees.¹⁷⁷ Significantly, before indicating the change in policy, Goodell reached out to Gene Upshaw, then-executive director of the NFL Players' Association, to get his advice.¹⁷⁸ In addition, he sought advice from players and established a panel to facilitate this process.¹⁷⁹ Because of these efforts, the policy has enjoyed support from both league officials and players. On behalf of the Players' Association, Upshaw stated, "We believe that these are steps that the commissioner needs to take and we support the policy."¹⁸⁰ Cincinnati Bengals quarterback Carson Palmer opined, "I think [the policy] will [help]. With all of the things that have been happening recently, I think it will be good and hopefully give the league a little better image. I hope that it works and that guys abide by the rules and do what's right."¹⁸¹

Differing from the previous policy, the new Personal Conduct Policy states:

It is not enough simply to avoid being found guilty of a crime. Instead, as an employee of the NFL or a member club, you are held to a higher standard and expected to conduct yourself in a way that is

¹⁷¹ See Mahone, *supra* note 78, at 185–86.

¹⁷² Gibeau, *supra* note 49, at 108.

¹⁷³ See Jefferson, *supra* note 3, at 361.

¹⁷⁴ See *id.* at 369.

¹⁷⁵ *Id.* at 369–70.

¹⁷⁶ Ambrose, *supra* note 9, at 1076.

¹⁷⁷ *Id.* at 1076–77.

¹⁷⁸ See *Goodell Strengthens NFL Personal Conduct Policy*, USATODAY.COM, Apr. 11, 2007, http://www.usatoday.com/sports/football/nfl/2007-04-10-new-conduct-policy_N.htm?csp=34.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

responsible, promotes the values upon which the League is based, and is lawful. Persons who fail to live up to this standard of conduct are guilty of conduct detrimental and subject to discipline, even where the conduct itself does not result in conviction of a crime.¹⁸²

Goodell has made this clear: “To some extent, what we’re looking at is if there are a number of players that have repeat offenses, that will be something that our players and clubs will feel at some point we need to act before the judicial system acts.”¹⁸³ Domestic violence is specifically listed as a crime for which discipline may be imposed, as is “conduct that imposes inherent danger to the safety and well being of another person; and [c]onduct that undermines or puts at risk the integrity and reputation of the NFL, NFL clubs, or NFL players.”¹⁸⁴

The policy couples disciplinary action with rehabilitative measures by requiring a formal clinical evaluation for anyone “arrested, charged or otherwise appearing to have engaged in [prohibited] conduct,” and providing for treatment such as counseling where deemed necessary depending on the results.¹⁸⁵ In determining whether certain conduct warrants discipline, the commissioner has the authority to conduct an investigation and, upon its conclusion, he has the “full authority to impose discipline as warranted.”¹⁸⁶ In one of the first punishments handed down under the new policy—a one-year suspension to Adam “Pacman” Jones, despite the fact he had not been convicted of a crime¹⁸⁷—Goodell stated, “The highest standards of conduct must be met by everyone in the NFL because it is a privilege to represent the NFL, not a right. These players, and all members of our league, have to make the right choices and decisions in their conduct on a consistent basis.”¹⁸⁸ As some have pointed out, this rhetoric and these disciplinary actions are reminiscent of Judge Landis’s early governance of MLB player conduct.¹⁸⁹

The NFL reported that, in the first year that the new Personal Conduct Policy was in effect, the number of incidents decreased by twenty percent.¹⁹⁰ Six players were suspended and three people were fined.¹⁹¹ The *San Diego Union-Tribune* confirmed this twenty percent figure, finding that there were sixty-two arrests or

¹⁸² NATIONAL FOOTBALL LEAGUE, 2008 PERSONAL CONDUCT POLICY 1, available at <http://images.nflplayers.com/mediaResources/images/oldImages/fck/NFL%20Personal%20Conduct%20Policy%202008.pdf> [hereinafter NFL Conduct Policy].

¹⁸³ Judy Battista, *Goodell Says He’ll Punish NFL’s Problem Players*, N.Y. TIMES, Mar. 27, 2007, at D4.

¹⁸⁴ NFL Conduct Policy, *supra* note 182, at 2.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *See* Battista, *supra* note 183. Though Jones had not been convicted of a crime, he had been involved in ten incidents with the police since being drafted in 2005. *Id.*

¹⁸⁸ Lockwood, *supra* note 28, at 164.

¹⁸⁹ Ambrose, *supra* note 9, at 1104.

¹⁹⁰ Paul Kuharsky, *NFL Says Player-Conduct Policy Working*, TENNESSEAN, Mar. 13, 2008.

¹⁹¹ *Id.* (noting that the six players suspended in the first year were Adam Jones, Chris Henry, Terry “Tank” Johnson, Michael Vick, Fred Evans, and Robert Reynolds).

citations in the first year under the policy compared to seventy-six arrests or citations in the previous year.¹⁹² The *Union-Tribune* also found that certain teams, the San Diego Chargers and the Cincinnati Bengals, had been successful in reining in player misconduct.¹⁹³ Much of this impact has been achieved by the new focus that has been brought to the draft and to screening potential recruits. Bengals Coach Marvin Lewis indicated that the team changed its strategy by focusing on character issues, stating, “There’s [sic] too many other guys. We’re spending too much time trying to change habits instead of coaching good guys.”¹⁹⁴

The impact of the Personal Conduct Policy implemented by Tagliabue is also apparent when comparing league discipline of alleged domestic abusers before the conduct policy was in place to league discipline after the policy was in place. Prior to 1997, no NFL commissioner had disciplined a convicted domestic abuser¹⁹⁵ even though fifty-six current and former NFL players, and eighty-five college players, were reported for violent behavior toward women between January 1989 and November 1994.¹⁹⁶ In 1994, Greg Aiello admitted that Tagliabue had only disciplined one player for a “gender violence-related offense,” and this was when he denied reentry into the league to ex-Eagles offensive tackle Kevin Allen in 1990, after he had finished serving a thirty-three month jail term for rape.¹⁹⁷ Former football greats who have escaped league punishment despite being accused or found guilty of domestic violence charges include Harvey Armstrong,¹⁹⁸ Scott Davis,¹⁹⁹ Mark Gastineau,²⁰⁰ Vance Johnson,²⁰¹ Clarence Kay,²⁰² Lorenzo Lynch,²⁰³ Warren Moon,²⁰⁴ Freddie Joe Nunn,²⁰⁵ Gerald

¹⁹² Schrottenboer, *supra* note 18.

¹⁹³ *Id.*

¹⁹⁴ Sam Farmer, *Character Will Count in the NFL Draft; With a Stricter Conduct Policy, Teams Will Be Cautious About Making the Right Decisions. Drug Use, Violence Are Issues Among Top Prospects*, L.A. TIMES, Apr. 26, 2007, at D3.

¹⁹⁵ Jefferson, *supra* note 3, at 362.

¹⁹⁶ Note, *supra* note 11, at 1050.

¹⁹⁷ Brubaker, *supra* note 5.

¹⁹⁸ *See id.* Armstrong was charged with battery, criminal confinement, and sexual battery against his ex-girlfriend. He pleaded guilty to criminal confinement and received a suspended sentence. *Id.*

¹⁹⁹ *See id.* Davis has been arrested three times on battery charges against women, but has never been convicted and denies the allegations. *Id.*

²⁰⁰ *See id.* Steve Jacobson, *The Last Word: Gastineau Remains Saddest Sack of All*, NEWSDAY (N.Y.), Aug. 19, 2001, at C25 (discussing Gastineau’s criminal record, including the abuse of multiple women over the span of two decades).

²⁰¹ *See* Brubaker, *supra* note 5. Johnson was arrested and jailed after ramming his car into his estranged wife’s car while she was inside. He has since admitted to repeatedly beating his first two wives. *Id.*

²⁰² *See id.* Kay was arrested in 1990 on domestic violence charges, but the case was later dismissed. In 1993, his ex-girlfriend, who had reported the incident in 1990, contacted police to report numerous incidents in which he had broken into her apartment and assaulted her. She obtained a temporary restraining order and, when Kay violated it, he was placed on probation. *Id.*

Perry,²⁰⁶ O.J. Simpson,²⁰⁷ John Stephens,²⁰⁸ Aaron Wallace,²⁰⁹ Dan Wilkinson,²¹⁰ and Otis Wilson.²¹¹

Though the league was not punishing players such as these prior to the implementation of the Personal Conduct Policy, some teams led the way by imposing punishments of their own. In 1994, the Kansas City Chiefs released Tim Barnett shortly after he was arrested on a third sexual assault charge that involved a fourteen-year-old girl.²¹² In 1995, the Miami Dolphins took an unprecedented stance by placing Irving Spikes on probation after his *first* arrest on domestic battery charges.²¹³ Coach Don Shula said, “[T]he Dolphins will not tolerate that type of behavior” and

²⁰³ See Dabbs, *supra* note 1, at 185; Brubaker, *supra* note 5. Lynch was sentenced to a work-release program after violating his probation by injuring his girlfriend. Brubaker, *supra* note 5. The Arizona Cardinals assistant coach Rob Ryan visited and reviewed game strategies with Lynch while he was in jail. *Id.*

²⁰⁴ See Kate Murphy, *Jury Rapidly Acquits Moon of Spousal Abuse Charges*, N.Y. TIMES, Feb. 23, 1996, at B12; Nack & Munson, *supra* note 25; Note, *supra* note 11, at 1048–49. Moon was acquitted of domestic violence charges after his wife, Felicia Moon, urged the prosecutor to drop the charges and later altered her testimony on the stand. Murphy, *supra* note 204. Moon was acquitted despite the fact that he had publicly stated “this was a case of domestic violence.” Note, *supra* note 11, at 1049. One of the jurors later stated, “There’s some sort of slapping in most marriages.” Murphy, *supra* note 204.

²⁰⁵ See Brubaker, *supra* note 5. Nunn was arrested and charged with misdemeanor assault against his estranged wife, but the charge was dismissed when Nunn agreed to enter an anger-control program. *Id.*

²⁰⁶ See *id.* Perry served jail time and was involved in two civil lawsuit settlements—each involving the abuse of women. *Id.*

²⁰⁷ See *id.*

²⁰⁸ See *id.* His ex-wife, Kim Williams, has accused him of repeated domestic violence. *Id.* He was later charged with raping a woman in Kansas City, which resulted in a conviction of sexual assault, five years’ probation, and a requirement that he register as a sex offender. Taibbi, *supra* note 26.

²⁰⁹ See Brubaker, *supra* note 5. Wallace made a \$60,000 settlement with a woman who alleged he had sexually assaulted her. *Id.*

²¹⁰ See Alex Marvez, *Dan ‘Big Daddy’ Wilkinson’s Career is at the Crossroads*, DAYTON DAILY NEWS, July 5, 1996, at 1D. Wilkinson pleaded no contest to a domestic violence charge and received a six-month suspended sentence and two years probation. *Id.*

²¹¹ See *Ex-Bear Otis Wilson Pleads Guilty to Spouse Abuse*, JET, Oct. 17, 1994, at 51. Wilson pleaded guilty to domestic battery after striking his wife in the face. *Id.* He was fined \$500 and was required to attend counseling. *Id.*

²¹² Brubaker, *supra* note 5. Prior to this incident, he had received a 10-day sentence for receiving a second domestic violence-related conviction in thirteen months. *Id.*

²¹³ See Note, *supra* note 11, at 1055 n.54; Donna Pazdera, *Spikes Must Avoid Wife, Get Counseling: Back Jailed For Night On Battery Charge; Shula Orders Probation*, SUN-SENTINEL (Fort Lauderdale, Fla.), Aug. 28, 1995, at 1C. The Dolphins also required Spikes to enter counseling and reserved the right to further discipline him depending on the outcome of the criminal charges. Note, *supra* note 11, at 1055 n.54. However, in the end, Spikes did not miss a game. *Id.*

deemed Spikes's actions to be "conduct detrimental to the team."²¹⁴ In 1997, Patrick Bates was released by the Atlanta Falcons after charges were filed against him for abuse against a woman.²¹⁵

Since 2000, many more players have been punished by their teams or by the league. In 2000 alone, Corey Dillon, Rod Smith, and Dana Stubblefield were fined and Mario Bates, Mustafah Muhammad, and Denard Walker were suspended for one or two games—all for domestic violence incidents.²¹⁶ In a much-publicized incident, Michael Pittman was suspended for three games in 2004 after ramming his Hummer into a car driven by his wife and also carrying his infant child and babysitter.²¹⁷ Since Pittman's arrest and punishment, eight more players have received suspensions by the league for domestic violence.²¹⁸

At the beginning of the 2008 season, Denver Broncos' receiver Brandon Marshall was suspended for incidents related to domestic violence.²¹⁹ The NFL suspended him for three games when he was charged with misdemeanor battery against his former girlfriend, but this suspension was reduced to one game upon appeal.²²⁰ Though the incident occurred in March, charges were not officially filed until September.²²¹ The NFL indicated that further punishment could be warranted depending on the outcome of the case;²²² however, Marshall was ultimately acquitted of the two misdemeanor battery charges in August 2009.²²³ While this was the first

²¹⁴ Pazdera, *supra* note 213. Shula indicated he made the decision "based on what [he knew] about the case" and said he "[hoped] it [would] send a message." *Id.*

²¹⁵ *Falcons Dump Safety*, N.Y. TIMES, Apr. 24, 1997, at B20. *But cf.* Ron Cook, *Bennett Shines in Light of His Second Chance*, PITTSBURGH POST-GAZETTE, Jan. 26, 1999, at C1 (also detailing Atlanta Falcon Cornelius Bennett's non-punishment in 1997 after being charged with rape, sodomy, unlawful imprisonment, and sexual abuse and pleading to a reduced charge of sexual misconduct).

²¹⁶ *See NFL Players Arrested in 2000*, SAN DIEGO UNION-TRIB., Jan. 22, 2001, at D4.

²¹⁷ Gerry Dulac, *Domestic Violence Difficult to Gauge; Dropped Charges, Few NFL Penalties*, PITTSBURGH POST-GAZETTE, Mar. 12, 2008, at D1.

²¹⁸ *See id.* (reporting that seven players received one-game suspensions between Pittman's suspension and when the article was written, in March 2008). Since March 2008, Brandon Marshall has also received a suspension. Lindsay H. Jones, *Marshall Charged in March Case*, DENVER POST, Sept. 19, 2008, at CC1.

²¹⁹ Even more recently, in 2009, Larry Johnson was given a two-week suspension by the Kansas City Chiefs for conduct detrimental to the team after he criticized the coaching staff and used a homophobic slur. Rich Campbell, *Grossman Signing Allows 'Skins QB Options*, FREE LANCE-STAR (Fredericksburg, VA), Mar. 18, 2010. However, perhaps playing into this decision, Johnson had previously been arrested four times for incidents related to domestic violence and pled guilty to two counts of disturbing the peace for separate incidents involving women at nightclubs. *Id.*

²²⁰ Jones, *supra* note 218.

²²¹ *Id.*

²²² *Id.*

²²³ Lindsay H. Jones, *Marshall Cleared of Battery*, DENVER POST, Aug. 15, 2009, at C1. It should, however, be noted that the jury came to this conclusion despite the fact that seven photographs of the mouth, face, neck, eye, and thigh of Rasheedah Watley, the alleged victim,

time Marshall faced trial on domestic abuse charges, it was by no means the first reported incident.²²⁴ The police had been called to Marshall's house on seven prior occasions involving domestic disputes—he was charged with domestic violence and false imprisonment on one of those occasions, but the charges were later dropped.²²⁵ This is a familiar pattern and one that Commissioner Goodell undoubtedly took into consideration in handing down his initial three-game suspension prior to a conviction. As addressed below in Part V of this paper, a pattern of abusive behavior (or a pattern of any criminal conduct that does not result in a conviction for any number of reasons) can guide a commissioner's decision to punish in much the same way as a conviction can—both decrease the likelihood that a player will be punished for conduct he did not commit.

Though the NFL's conduct policy inevitably grants considerable discretion to the commissioner, this discretion is what enables the commissioner to assess each situation on its own merits and take into consideration patterns of abusive behavior and criminal conduct—even when there have not been convictions. While not undermining a team's individual ability to discipline its players, the policy enables the league to take action and thereby reduces erratic and inconsistent punishments, like those found in baseball. The fact that commissioner decisions may not be appealed to an impartial arbitrator also enables the system to run efficiently and prevents the commissioner's authority from being undermined. Nonetheless, the ability of a player to appeal directly to the commissioner allows some leeway for players as evidenced by the fact that Commissioner Goodell heard Marshall's appeal and was convinced by what he heard that the three-game suspension should be reduced to one. Since the disciplinary measures are coupled with rehabilitative tactics, such as counseling, the NFL's policy is both strict and compassionate—unruly, violent players are not allowed to play in the NFL; however, second chances exist.

IV. POTENTIAL PROBLEMS WITH THE NFL'S PERSONAL CONDUCT POLICY

Though it is tempting to simply advise MLB and the NBA to adopt a policy similar to the NFL's Personal Conduct Policy, there are some potential problems with the policy and, therefore, some improvements that can be made. Criticisms of the policy include the fact that the policy was never incorporated into the NFL's CBA, convictions are not necessary for punishment, and due process rights are not expressly ensured.

Although Goodell reached out to the Players' Association and received feedback from the players and then-executive director Gene Upshaw, the current conduct policy was never incorporated into the CBA. Since this is a bargaining relationship

taken on two different occasions were entered as evidence of Marshall's guilt. *Id.* In addition, Watley had sought a temporary protective order against Marshall. *Id.* According to reports, the defense argued that Watley was volatile and trying to extort money. *Id.*

²²⁴ See Lindsay H. Jones et al., *Marshall's Transgressions*, DENVER POST, June 29, 2008, at C4.

²²⁵ See *id.*

governed by labor law, the commissioner may unilaterally implement rules regarding permissive subjects, but cannot unilaterally implement rules regarding mandatory subjects—wages, hours, and other terms and conditions of employment.²²⁶ Failure to negotiate with the Players' Association regarding mandatory subjects is “a violation of the duty to collectively bargain and is an unfair labor practice.”²²⁷ Though it is often unclear whether rules affect “other terms and conditions of employment,”²²⁸ case law indicates that an employer's ability to enact a policy that would result in suspensions or fines is a term or condition of employment.²²⁹ Despite this likely interpretation, the commissioner has a good argument that the Players' Association “waived its right to bargain collectively over such a policy” because it granted the commissioner authority to discipline players and enact such policies under Article XI of the CBA and under the NFL player contract.²³⁰ Thus, a challenge to the player conduct policy would likely be denied; however, the policy would be decidedly less likely to be challenged if it were incorporated into the CBA.

Another common concern is that the new conduct policy allows the commissioner to discipline players who have not been convicted of a crime.²³¹ There have been examples when league commissioners have preemptively punished players only later to find the players were innocent. For example, in 1986, Green Bay Packers' wide receiver James Lofton faced rape charges.²³² The NFL suspended him for the last game of the regular season, though he was acquitted in the off-season.²³³ Similarly, in 1997, Dallas Cowboys Michael Irvin and Erik Williams were accused of sexual assault and later found innocent.²³⁴ Though the league did not punish them prior to the determination of their innocence, which occurred when the woman recanted her story,²³⁵ the league would likely have suspended them under the current

²²⁶ See Showalter, *supra* note 139, at 218.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Jefferson, *supra* note 3, at 364.

²³⁰ *Id.* at 366.

²³¹ See Jarrett Bell, *NFL Comes Down Hard on Jones, Henry: Titan Suspended for Season, Bengal for Eight Games*, U.S.A. TODAY, Apr. 11, 2007, at 1C (noting that Warren Sapp openly wondered aloud what rule Pacman Jones had broken when Commissioner Goodell suspended him for a year after ten run-ins with the police but without any convictions).

²³² Ambrose, *supra* note 9, at 1105.

²³³ *Id.* The league acknowledged its mistake and paid Lofton's salary for the missed game. *Id.*

²³⁴ See Sam Howe Verhovek, *A Woman's False Accusation Prompts Reflection*, N.Y. TIMES, Jan. 13, 1997, at C1.

²³⁵ *Id.* The police announced that they “determined conclusively that the allegations [were] not true” after finding inconsistencies in the woman's story and after she recanted. It was shown that Irvin was not at Williams's house on the night of the alleged incident. *Id.* However, some friends of the woman, Nina Shahravan, believe that she was indeed assaulted—medical reports showed bruising and abrasions “possibly consistent” with rape. *Id.* Williams had been charged with rape on a prior occasion but reached an out-of-court settlement with the victim who declined to press criminal charges. *Id.*

conduct policy. Given that domestic violence charges frequently result in dropped charges or in no charges at all, many domestic violence advocates would support a policy under which the commissioner could punish alleged abusers when there is evidence suggesting abuse occurred, such as medical injury reports or multiple 911 calls. Nonetheless, the fear of an innocent player losing valuable playing time and receiving public scorn is valid.

Lastly, leagues must grant players certain due process rights in disciplinary proceedings. Though leagues are not bound by constitutional due process, commissioners must still act with “inherent fairness and consistency with past practice.”²³⁶ This is particularly important for the commissioner’s investigation into alleged off-field conduct. The commissioner may not suspend or fine a player without “investigation, consultation, and deliberation.”²³⁷ The commissioner must also complete his duties impartially, which requires that rules are applied uniformly.²³⁸

V. PROPOSALS FOR LEAGUE-WIDE PERSONAL CONDUCT POLICIES

While the NFL’s Personal Conduct Policy has largely been viewed as a success, the constraints and potential problems discussed above suggest that a few alterations may enhance the policy’s perceived fairness and overall effectiveness. Like the NFL, MLB and the NBA should implement league-wide policies that address violent off-field conduct; however, these policies should limit the commissioner’s discretion by providing sentencing guidelines and incorporate provisions that ensure due process and prohibit double jeopardy. These policies should be incorporated into the CBAs of the respective leagues.

As exemplified by the inconsistent punishments doled out by MLB clubs for various off-field conduct, domestic violence and other off-field violent behavior is most efficiently dealt with by league-wide policies and punishment. Leagues are more likely to have the capacity to “establish a system with adequate due process protections,”²³⁹ and they are more likely to retain internal consistency from case to case. While clubs may certainly have their own initiatives to combat domestic violence,²⁴⁰ it is against their economic interest to discipline players who have been contributing to team success—league punishment, on the other hand, reduces the temptation to grant leniency to some players while not to others.²⁴¹ One thing that

²³⁶ Gibeaut, *supra* note 49, at 102.

²³⁷ Ambrose, *supra* note 9, at 1089.

²³⁸ See Mahone, *supra* note 78, at 201–02.

²³⁹ Note, *supra* note 11, at 1056.

²⁴⁰ For instance, the Cincinnati Bengals enlisted a psychologist to address the team after a player was arrested for abusing his pregnant girlfriend. Moser, *supra* note 20, at 84. The Seattle Mariners have implemented a “Refuse to Abuse” program, bringing awareness to the issue of domestic violence. Rys, *supra* note 113.

²⁴¹ It is important to note that the NFL is a revenue-sharing league, so one could certainly argue that the league as a whole may still show leniency toward its better players in order to keep overall revenue up. However, the overall impact of the suspension of one player on the

individual clubs might choose to do is to add special conduct clauses to individual contracts for players that have previously been charged with certain offenses, including violence against women.²⁴² Regardless of such possible team action, the league is in the best position to uniformly implement a policy against violent off-field conduct.

While granting the commissioner discretion to investigate and address player misconduct is necessary in combating off-field player violence and in instituting punishment, it is possible to narrow this discretion. Neither the NFL Personal Conduct Policy nor the NBA CBA provision addressing violent conduct provides sentencing guidelines.²⁴³ One author has suggested that “the [NFL] could detail that a player committing a minor offense under the conduct policy is subject to a one to four game suspension with a fine of no more than \$100,000. For more serious offenses, a player would receive a suspension of four to eight games and a fine no larger than \$250,000, and so forth. The league could then detail non-exclusive lists of what constitutes minor and serious offenses.”²⁴⁴ The lists distinguishing minor offenses from serious offenses should use as guidance the generally accepted distinction between misdemeanors and felonies. Unfortunately, under this system alone, the only off-field conduct punished is that which results in a conviction.

In order to remedy this problem, the personal conduct policy should include additional sentencing guidelines for reprehensible conduct that does not result in conviction. For such conduct, the league should implement a “three strikes, you’re out” policy under which a player would be suspended for a minimum of one game following a third transgression.²⁴⁵ A “transgression” should include incident reports and arrests, even when charges are later dropped, and convictions. Upon a fourth transgression, the player would be suspended for a minimum of two games, for a minimum of three games upon a fifth transgression, and so forth—though it should be noted that the number of games missed may vary by league to make the penalty proportionate.²⁴⁶ Given the shorter season, missing two NFL games is undoubtedly a more severe punishment than missing two MLB games.

league is significantly less than the impact that player’s absence would have on his particular team.

²⁴² Dabbs, *supra* note 1, at 185.

²⁴³ Note that the NBA CBA does provide a guideline for violent felony convictions, mandating a minimum ten-game suspension. NBA CBA, *supra* note 58, at art. VI, § 7.

²⁴⁴ Ambrose, *supra* note 9, at 1111. See also Joel Michael Ugolini, *Even a Violent Game Has Its Limits: A Look at the NFL’s Responsibility for the Behavior of Its Players*, 39 U. TOL. L. REV. 41, 54 (2007) (comparing the specific provisions of the NFL’s drug policy to the vague language of the personal conduct policy).

²⁴⁵ This, of course, would not prevent the league or a team from punishing a player before three transgressions when there is ample evidence of criminal behavior. Rather, it provides a mandatory punishment upon three transgressions, regardless of prior punishment.

²⁴⁶ The three-strikes policy for conduct deemed detrimental to the league but that does not result in conviction would operate in conjunction with the standard guidelines for criminal convictions. A player would not be punished under both systems; however, a conviction that results in punishment would count as a transgression for the purposes of tallying the minimum

NFL players have already voiced support for a three-strikes policy.²⁴⁷ Since domestic violence charges rarely result in conviction, a three-strikes policy would be particularly effective for this offense. While there is always the fear that, without conviction, an innocent player may be punished, a three-strikes policy would help eliminate the chances of this occurring.²⁴⁸ By narrowing the commissioner's discretion through the use of sentencing guidelines, the availability of appeal to a neutral arbitrator would not be necessary and should not be allowed, which means the grievance procedure in the MLB and NBA CBAs would need to be restructured. This structure would enhance the commissioners' authority while limiting the ultimate discretion at his disposal.

In addition to limiting the commissioner's discretion by implementing sentencing guidelines and a three-strikes rule, the policy should expressly address due process and double jeopardy concerns. As mentioned earlier, double jeopardy is already explicitly addressed in the NFL and NBA CBAs and should be included in the MLB policy as well. A simple provision dictating that league action supersedes team action will attend to any concern that a player will be punished by both team and league. Inclusion of due process rights is slightly more complicated, given that the standards by which leagues are held are much vaguer than traditional, constitutional due process rights. Still, any league disciplinary policy should ensure that it will be applied uniformly and that punishment may not be imposed without investigation, consultation, and deliberation. Establishing sentencing guidelines is the best way to ensure that the policies are applied uniformly, though the policy should also expressly state that the commissioner must consider past punishments for similar offenses in determining the ultimate punishment in any given case. The policy should also indicate that thorough investigation and consultation will include a discussion with the player, in order for the player to present his account of the incident, as well as consideration of any evidence the player presents that runs contrary to the allegations.

The policy will be safe from judicial challenge if it is incorporated in the MLB, NBA, and NFL CBAs, like the current violent conduct provision in the NBA CBA. Since the Players' Associations would be able to bargain for other objectives in return

number of games by which the player would be suspended. For instance, if the police file three incident reports after having been called to a player's house in response to reports of abuse, that player will be punished for a minimum of one game under the three-strikes policy. If, then, the player is convicted of a separate crime, he will be punished under the conviction policy. If, yet again, the player has a police report filed upon reports of abuse, he will have five strikes against him and will be subject to a minimum suspension of three games under the three-strikes policy.

²⁴⁷ Ugolini, *supra* note 244, at 56.

²⁴⁸ Again, the commissioner could always punish a player after just one incident if, upon investigation, the commissioner finds the evidence to require such punishment. However, the three-strikes policy would ensure that a player could not continue abuse, even if prior incidents have been deemed minor and therefore have not been punished. For instance, Brandon Marshall, who had police come to his house on seven occasions after reports of domestic disputes, would have been punished more than once prior to his most recent transgression, which resulted in his first one-game suspension.

for agreeing to the conduct policy's inclusion in the CBA, the policy would be safely protected from antitrust law by the non-statutory labor exemption and it would be less likely to be challenged by the players because they would have consented to it through the Association. In addition, allowing the policy to be negotiated gives the players an opportunity to help shape the domestic violence policy and the rules that will govern their behavior.²⁴⁹ The disciplinary reform would then be a collaborative effort and would hopefully lead to a policy by which the players will be more likely to abide.

VI. CONCLUSION

Though the O.J. Simpson trial brought attention to the problem of domestic violence and athletes over a decade ago, there remains much to be done in deterring such behavior. While the leagues continue to punish gambling, drug abuse, and derogatory remarks, other off-field conduct, such as domestic violence, has been largely ignored. It is clear that MLB has done the least in confronting this problem, having yet to punish a player for domestic violence. One wonders whether Commissioner Selig has learned his lesson from baseball's "Steroid Era," which emerged after he refused to take any significant action against substance abuse despite the evidence of its prevalence in his league. Commissioner Stern has followed the NFL's lead in cracking down on player conduct; however, the NBA would be better served by adopting a more specific league-wide policy and by eradicating the inconsistency that results from the current grievance procedure. The NFL and, specifically, Commissioner Goodell have paved the way for the existence of a better sports league—one that celebrates its players' greatness but does not ignore criminal behavior. While domestic violence remains a difficult issue for professional sports leagues to tackle, given the frequency of dropped charges and its image as a private affair, it may nonetheless be addressed through specific policies and through the use of commissioners' authority to preserve the integrity of the game.

²⁴⁹ Admittedly, NFL players did have an opportunity to help shape the Personal Conduct Policy since Commissioner Goodell sought their advice.



In re Dewey Ranch Hockey

Ryan Gauthier*

TABLE OF CONTENTS

I. SUMMARY	182
II. LEAD-UP TO BANKRUPTCY FILING	182
<i>A. History of the Phoenix Coyotes</i>	182
<i>B. Descent into Bankruptcy</i>	185
<i>C. History of Jim Balsillie with the NHL</i>	186
III. POSITIONS OF THE PARTIES	187
IV. FIRST DECISION	189
<i>A. Relocation of the Coyotes over the Objections of Glendale and the NHL</i>	190
<i>B. The Antitrust Claims</i>	191
<i>C. Other Issues</i>	192
V. MEANWHILE...	192
VI. SECOND DECISION	194
<i>A. Balsillie's Bid</i>	194
<i>B. The NHL's Bid</i>	195
VII. ANALYSIS	196
<i>A. League Rules Deserve Deference</i>	197
<i>B. Do NHL Rules on Franchise Relocation, and Specifically on Exclusive Territorial Rights, Violate Antitrust Law?</i>	198
<i>C. Owners Cannot Use Bankruptcy Law to Circumvent League Rules</i>	202
VIII. WHAT NOW?	202

* J.D. Candidate, Harvard Law School, Class of 2010. I would like to thank Ashwin Krishnan and Nnamdi Okike for their insightful questions and suggestions, Jeremy Campbell and Annie Smith for their help in editing, Peter Gall, Q.C. for his support and guidance, and Professors Peter Carfagna and Paul Weiler for their inspiration.

<i>A. NHL Searches for a New Owner</i>	202
<i>B. Is Phoenix a Viable Market?</i>	204
IX. CONCLUSION	206

I. SUMMARY

On November 3, 2009, the Phoenix Coyotes were transferred to the ownership of the National Hockey League (“NHL”). This marked the end of six months of bankruptcy proceedings, and the beginning of the process of finding an owner for the troubled franchise. However, the case was not a simple sale of a troubled asset where the highest bid wins. In fact, the highest bid did not win. This is because of the many concerns that the court had to contend with in effectuating the sale of the Coyotes.

This Comment will examine some of those concerns. First, the summary will set out a bit of the history of the Coyotes franchise and the events leading up to the bankruptcy proceedings. This will be followed by a summary of the two written court decisions. Finally, the summary will posit what this case may mean for other sports franchises.

II. LEAD-UP TO BANKRUPTCY FILING

A. History of the Phoenix Coyotes

The story of the Phoenix Coyotes closely tracks the evolution of the NHL from a six-team league centered in Southeastern Canada and the Northeastern United States in 1967 to its current 30-team national alignment.

The Coyotes began their life as the Winnipeg Jets in 1972.¹ They were a founding member of the World Hockey Association (“WHA”), a league that would compete with the NHL for seven seasons. The Jets gained immediate notoriety by signing NHL superstar Bobby Hull for \$1,000,000 (all monetary values in US\$) over five seasons, an unheard of sum at the time.² After winning several Avco Cups (the WHA Championship), the Jets were one of four teams to merge into the NHL after the WHA folded in 1979.³

¹ Omnibus Statement of Facts in Support of Chapter 11 Petitions and First Day Motions at 2, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkcty.D.Ariz. 2009) (2:09-bk-09488-RTBP) [hereinafter Omnibus Statement of Facts]. Access to the veritable mountain of court filings may be made via BMC Group, Dewey Ranch Hockey, LLC, <http://www.bmcgroup.com/restructuring/docket.aspx?ClientID=204> (last visited Apr. 14, 2010).

² BRUCE DOWBIGGIN, *MONEY PLAYERS: THE AMAZING RISE AND FALL OF BOB GOODENOW AND THE NHL PLAYERS ASSOCIATION* 53 (2006).

³ Omnibus Statement of Facts at 2, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkcty.D.Ariz. 2009) (2:09-bk-09488-RTBP). The four teams that joined the NHL from the WHA were the Winnipeg Jets, the Hartford Whalers, the Québec Nordiques and the Edmonton Oilers. Interestingly, of these four WHA teams that joined the NHL, only the Edmonton Oilers have not relocated. However, the Oilers avoided relocation only by following a strong and

In the mid-1990s, the NHL was in the midst of a makeover that would see thirteen teams brought to life through expansion or relocation between 1991 and 2000. Eleven of these teams would be below the 40th parallel, and nine below the Mason-Dixon Line, in an effort to bring NHL hockey to large or expanding, but generally “non-traditional” markets.⁴ The Jets, hobbled by a small arena and small fanbase,⁵ were moved to Phoenix and re-named the Coyotes after being bought by a group headed by Steven Gluckstern and Richard Burke.⁶ In 2001, the team was sold to Steve Ellman and Wayne Gretzky who brought Jerry Moyes, the founder of Swift Transportation, a national trucking company, on board as an investor.⁷

The Coyotes initially began play in America West Arena (now U.S. Airways Center), also home to the Phoenix Suns, in downtown Phoenix in 1996. However, the arena was built specifically for basketball and was not conducive to viewing hockey games.⁸ A new arena was eventually built in nearby Glendale, to become the lynchpin of a new neighborhood, Westgate City, headed up by Ellman and Moyes.⁹ The city of Glendale contributed \$183 million of the \$220 million required to build the new arena, predominantly funding the project through \$155 million in municipal

ultimately successful effort by a consortium of businessmen to buy the franchise. *See* DOUGLAS HUNTER, *THE GLORY BARONS: THE SAGA OF THE EDMONTON OILERS* 297–333 (1999).

⁴ The expansion teams were: the San Jose Sharks (1991); the Ottawa Senators and Tampa Bay Lightning (1992); the Florida Panthers and Anaheim Ducks (1993); the Nashville Predators (1998); the Atlanta Thrashers (1999); and the Columbus Blue Jackets and Minnesota Wild (2000). The teams that relocated were the Dallas Stars (moved from Bloomington, Minnesota in 1993), Colorado Avalanche (moved from Québec City, Québec in 1995) the Phoenix Coyotes (moved from Winnipeg, Manitoba in 1996), and the Carolina Hurricanes (moved from Hartford, Connecticut in 1997). To put this in geographical perspective, only the Ottawa Senators and Minnesota Wild are located north of the 40th parallel. In 1990, only four teams were south of the 40th parallel: Los Angeles, Washington, St. Louis and Philadelphia. Thus the amount of teams below this line rose from 19% of the league (4/21 teams) to a full 50% of the league (15/30 teams). *See* Hunter, *supra* note 3 at 53–63.

⁵ As of 2001, the population of Winnipeg was 619,544, fully half of the entire population of 1.12 million in Manitoba. In contrast, the population of Phoenix in 2001 was 1.32 million. Winnipeg and Manitoba population figures were found at, STATISTICS CANADA, 2001 COMMUNITY PROFILES, Feb. 1, 2007, *available at*: <http://www12.statcan.ca/english/profil01/CP01/Details/Page.cfm?Lang=E&Geo1=CSD&Code1=4611040&Geo2=PR&Code2=46&Data=Count&SearchText=Winnipeg&SearchType=Begins&SearchPR=01&B1=All&Custom=>. Phoenix population figures were found at, U.S. CENSUS BUREAU, AMERICAN FACTFINDER: ARIZONA, *available at* http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US04&-_box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1_U&-format=ST-7.

⁶ Omnibus Statement of Facts at 3, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkcty.D.Ariz. 2009) (2:09-bk-09488-RTBP).

⁷ *Id.*

⁸ *Id.* *See also* *America West Addresses Hockey Sight Lines*, AMUSEMENT BUSINESS, Nov. 17, 1997, at 12.

⁹ City of Glendale’s Supplemental Objection to the Debtor’s Sale Motion at 1, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkcty.D.Ariz. 2009) (2:09-bk-09488-RTBP) [hereinafter Glendale Supplemental Objection].

bond offerings.¹⁰ However, the results of the project have been “a catastrophe”, as described by Forbes:

The plans to expand the NHL to the southwest and ignite economic growth in Glendale, Arizona by meshing a new multi-purpose arena with 6.5 million square feet of new real estate development has been a catastrophe. Under the leadership of Steven Ellman, Jerry Moyes and Wayne Gretzky, the Coyotes have been a dysfunctional and under-capitalized hockey franchise that Gretzky, the team boss, has been unable to get a grip on. Westgate City, in part tied to the success of people showing up for hockey games, has been a bust. As a result of their consistent losses on and off the ice the Coyotes have struggled to draw fans to Jobing.com Arena since the building opened in December 2003. If it were not for the huge fee the team would have to pay as stipulated by their lease if they were to move, it would make sense for the Coyotes to bolt Phoenix.¹¹

As a condition of the financing, the Coyotes were locked into a thirty-year lease that carries an early-termination penalty of over \$700 million.¹²

The lease contains a non-relocation covenant that states as follows:

Except as expressly provided otherwise in this Agreement and subject to Section 9.6, the Team covenants and agrees with the City that the Team shall play all Home Games at the Arena Facility and shall not play any Home Games at any other location, from and after the Home Game Obligation Effective Date [September 2003] and continuing until (i) the last day of the 30th Full Hockey Season after the Home Game Obligation Effective Date...¹³

There is also a provision for a “Team Use Covenant Default”, which states that there will be a default if:

¹⁰ *See id.* at 7.

¹¹ *NHL Team Valuations 2008: Phoenix Coyotes*, FORBES.COM, Oct. 29, 2008, http://www.forbes.com/lists/2008/31/nhl08_Phoenix-Coyotes_315126.html.

¹² Craig Harris and Carrie Watters, *Coyotes File for Bankruptcy; Move to Canada Next?*, USATODAY.COM, May 6, 2009, http://www.usatoday.com/sports/hockey/nhl/coyotes/2009-05-05-Balsillie-offer-to-buy-phoenix-coyotes_N.htm.

¹³ Arena Management, Use and Lease Agreement, art. 9.5, *reprinted in* Objection of the City of Glendale, Arizona to Motion of the Debtors for Entry of an order (A) Authorizing Conduct of an Auction of Coyotes Hockey, LLC’s Assets; (B) Establishing Procedures to be Employed in Connection With the Sale Including Approval of Termination Fee; and (C) Approving Form and Conditional Cure Notice and Solicitation Notice, exhibit A at 71, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkcty.D.Ariz. 2009) (2:09-bk-09488-RTBP) [hereinafter *Arena Lease*].

[T]he Team enters into any contract of agreement which purports to obligate the Team to play any Home Game at any location other than the Arena Facility during the Agreement Term...

Except as permitted by the provisions of this Agreement, the Team notifies the NHL of the Team's intent, or requests the NHL's permission, to play any Home Game at any location other than the Arena Facility during the Agreement Term...

Except as permitted by the provisions of this Agreement, the Team takes any action that constitutes an anticipatory breach of this Section 9.5.¹⁴

Finally, the agreement allows the City/Arena to obtain specific performance in case of a breach, and only upon the failure of obtaining specific performance are damages to be awarded.¹⁵

B. *Descent into Bankruptcy*

In 2006, three years after beginning play in Glendale, Ellman, Moyes and the NHL entered into a consent agreement. Moyes obtained control of the Coyotes, with Gretzky as an investor, while Ellman gained control of the local real estate development.¹⁶ At the time, the Coyotes had about \$65 million in debt.¹⁷ By 2008, the Moyes group had advanced \$380 million to operate the Coyotes, while the Coyotes had lost approximately \$73 million in three seasons.¹⁸ In the summer of 2008, the NHL began advancing funds to maintain the operation of the Coyotes.¹⁹ At this time, Forbes valued the Phoenix Coyotes at \$142 million; lowest in the NHL, and \$12 million lower than the 29th-ranked New York Islanders.²⁰ The Coyotes also had the second-lowest revenue in the NHL, ahead of only the Islanders.²¹

¹⁴ *Id.* at 72.

¹⁵ *Id.* art. 14.7.1 at 97.

¹⁶ Glendale Supplemental Objection at 1, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkcty.D.Ariz. 2009) (2:09-bk-09488-RTBP).

¹⁷ *Ellman, Moyes to Split Coyotes Holdings*, ESPN.COM, Apr. 13, 2006, <http://sports.espn.go.com/espn/wire?section=nhl&id=2407170>.

¹⁸ Declaration of Michael Nealy at 13, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP).

¹⁹ Declaration of William L. Daly at 11, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkcty.D.Ariz. 2009) (2:09-bk-09488-RTBP) [hereinafter Daly Declaration].

²⁰ *NHL Team Valuations 2008*, FORBES.COM, Oct. 29, 2008, http://www.forbes.com/lists/2008/31/nhl08_NHL-Team-Valuations_Rank.html.

²¹ *Id.* As of 2009, the Coyotes are still the lowest-valued team in the NHL, at \$138-million. However, their revenue remains ahead of the New York Islanders' revenue. *NHL Team Valuations 2009*, FORBES.COM, Nov. 11, 2009, http://www.forbes.com/lists/2009/31/hockey-values-09_NHL-Team-Valuations_Rank.html. The Islanders, in their defense, play in the

On May 5, 2009, the Coyotes filed for bankruptcy.²² The plan was to have Jim Balsillie, co-CEO of Research in Motion (the developers of the BlackBerry), purchase the team out of bankruptcy.²³ The team would be purchased for \$212.5 million, on two conditions:

- 1) that the sale was completed by June 29, 2009; and;
- 2) that the team be moved to Hamilton, Ontario over any NHL objections, and regardless of the current lease with the arena in Glendale, Arizona, which is for a term of over thirty years (or twenty remaining years) and was signed as a condition of the city funding much of the current area for the team.²⁴

C. History of Jim Balsillie with the NHL

Jim Balsillie and the NHL have dealt with each other in the past. Balsillie was initially seen as a preferred suitor for the Pittsburgh Penguins, and almost purchased the Nashville Predators.²⁵ In 2006, Balsillie attempted to purchase the Pittsburgh Penguins for \$175 million.²⁶ However, Balsillie dropped the bid shortly after the NHL imposed twenty-four last-minute conditions on the purchase.²⁷ The next year, he attempted to purchase the Nashville Predators. However, before the \$238 million purchase was completed, Ticketmaster began taking deposits for “Hamilton

second-oldest arena in the NHL, a condition that current owner Charles Wang is desperately trying to ameliorate. Wang is currently in the midst of gaining local approval for “The Lighthouse Project”, a venture that would renovate Nassau Coliseum and the community surrounding it creating a largely residential community. The Lighthouse Development Group, The Lighthouse at Long Island, FAQ, <http://www.lighthouseli.com/about/faq> (last visited Jan. 23, 2010).

²² Omnibus Statement of Facts at 2, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkcty.D.Ariz. 2009) (2:09-bk-09488-RTBP).

²³ Motion of the Debtors for An Order Under Sections 105(a), 363, and 365 of the Bankruptcy Code (i) Authorizing Coyotes Hockey, LLC’s Sale of Substantially All of Its Assets, Free and Clear of Liens, Claims, and Encumbrances, Subject to Higher and Better Offers, and (ii) Approving An Asset Purchase Agreement at 4, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP) [hereinafter Motion for Sale of Coyotes].

²⁴*Id.* at 11–12.

²⁵ Daly Declaration, at 16, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP).

²⁶ *Balsillie Has Agreement to Buy Predators*, CBC SPORTS, May 24, 2007, <http://www.cbc.ca/sports/hockey/story/2007/05/23/balsillie-predators.html>.

²⁷ Some of these conditions included the ability of the NHL to take over the franchise at any time, and a restriction on relocation of the franchise for any reason until 2013. *Balsillie Balked at Last-Minute Conditions*, NATIONAL POST, Dec. 20, 2006, <http://www.canada.com/nationalpost/news/story.html?pid=c66338bf-4285-49b5-b383-d9831115dcb6>.

Predators” season tickets.²⁸ The owner of the Predators, Craig Leipold, ended up selling the team to California businessman William “Boots” Del Biaggio for only \$190 million.²⁹

The denial of the purchase of the Predators was examined by the Canadian Competition Bureau. In 2008, the Bureau released its findings that the NHL did not violate antitrust policies for either transfers of ownership or for relocation of franchises. Additionally, the Bureau found that “the NHL had a legitimate interest in ensuring that the Predators Franchise is successful in Nashville and that any prospective purchaser continued, at least for the near term, to attempt to succeed in Nashville.”³⁰ While the Bureau examined the antitrust concerns under section 79 of the *Canadian Competition Act*,³¹ the Bureau also applied antitrust law regarding franchise relocation used by American courts.³²

III. POSITIONS OF THE PARTIES

Throughout the case, there were literally hundreds of filings made to the court, setting out a myriad of concerns, some of which were not dealt with in the final disposition by the court.³³ However, based on the decision of the court, the positions can be narrowed down to the Moyes/Balsillie faction taking the position that any restrictions on his potential for ownership would violate §§365 and 363 of the federal Bankruptcy Code (“Code”), while the NHL asserted the primacy of league rules.³⁴

²⁸ *Predators to Hamilton Talk Premature: Bettman*, CBC SPORTS, June 20, 2007, <http://www.cbc.ca/sports/hockey/story/2007/06/20/bettman-predators-hamilton-nhl.html>.

²⁹ *Balsillie’s Bid to Buy the Predators Nixed: Report*, CBC SPORTS, June 28, 2007, www.cbc.ca/sports/hockey/story/2007/06/28/balsille-predators.html. On September 8, 2009, Del Biaggio was sentenced to eight years in federal prison for fraud in connection with his purchase of the Nashville Predators. *Predators Part-Owner Del Biaggio Sentenced to Eight Years in Prison*, CBS SPORTS, Sept. 8, 2009, <http://www.cbssports.com/nhl/story/12175616>.

³⁰ COMPETITION BUREAU CANADA, COMPETITION BUREAU CONCLUDES EXAMINATION INTO NATIONAL HOCKEY LEAGUE FRANCHISE OWNERSHIP TRANSFER AND RELOCATION POLICIES: TECHNICAL BACKGROUNDER, Mar. 31, 2008, available at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02640.html>.

³¹ R.S.C., ch. C-34 (1985).

³² *Id.*

³³ An example of a contested issue was the NHL’s claim that they owned the Coyotes based upon financial advances made to the team. See May 19 Declaration of Gary B. Bettman at 1, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP). Another contested issue was over the payment of \$4 million in “break-up” fees if PSE was not the successful bidder. See Limited Objection of the National Hockey League to Motion of the Debtors for Entry of an Order (A) Authorizing Conduct of an Auction of Coyotes Hockey, LLC’s Assets; (B) Establishing Procedures to be Employed in Connection with the Sale Including Approval of Termination Fee; and (C) Approving Form of Order and Manner of Notice of Conditional Cure Notice and Solicitation Notice at 16–17, 406 B.R. 30 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP) [hereinafter NHL Limited Objection].

³⁴ *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrtcy.D.Ariz. 2009).

Section 365 of the Code authorizes the assumption and assignment of an executory contract “notwithstanding a provision in an executory contract...or in applicable law, that prohibits, restricts, or conditions the assignment of such contract.”³⁵ In other words, if an existing agreement somehow prevents the assignment of the assets, it could be struck down. An obvious example of this would be a non-assignment clause.³⁶ Moyes/Balsillie claimed that the Glendale lease³⁷ and the NHL’s likely rejection of transfer of the Coyotes to Hamilton³⁸ were restrictions, or conditions that prohibited the assignment of the ownership of the Coyotes. The NHL countered with the assertion that even if Balsillie was awarded the Coyotes, he would still be bound by all of the conditions in the NHL Constitution and By-Laws as a result of his membership in the League, not just those that were convenient to him.³⁹

Section 363 of the Code allows for a sale free and clear of interests where “applicable nonbankruptcy law permits sale of such property free and clear of such interests” and when such an interest is in “bona fide dispute.”⁴⁰ It is under this section that Moyes/Balsillie argued that antitrust law was applicable nonbankruptcy law, and that the interest affected was his ability to relocate the team upon purchase.⁴¹ Moyes/Balsillie claimed that any restrictions against relocation should be lifted. To meet the second prong of the §363 requirement, it was claimed that since the NHL asserted that the regulations were valid, and that Moyes/Balsillie claimed that there was an antitrust violation, there was a “bona fide dispute”. The NHL countered that these “consent rights”, such as relocation or use of NHL intellectual property rights, were not the type of rights contemplated by §363, and in any event, were not in “bona fide dispute”.⁴²

In response, the City of Glendale argued that even with a liquidated damages provision, the court could order specific performance and force the Coyotes to play in Glendale, even if Balsillie was to own the team as set out in Art. 14.7.1 of the lease.⁴³ In support of this contention, Glendale relied on the bankruptcy proceedings of the

³⁵ 11 U.S.C. § 365(f) (2006).

³⁶ *In re Dewey Ranch Hockey*, 406 B.R. 30, 36 (Bkrcty.D.Ariz. 2009).

³⁷ Debtors’ Reply to Objection of the City of Glendale to Motion of Debtors for Authorization to Conduct an Auction of the Coyotes Hockey, LLC’s Assets at 4–5, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrcty.D.Ariz. 2009) (2:09-bk-09488-RTBP).

³⁸ Motion for Sale of Coyotes at 18–19, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrcty.D.Ariz. 2009) (2:09-bk-09488-RTBP).

³⁹ *See* NHL Limited Objection at 6–7, 406 B.R. 30 (Bkrcty.D.Ariz. 2009) (2:09-bk-09488-RTBP) (noting that rights and obligations of sports teams are “inextricably interrelated,” making league consent invaluable to transfer of a team franchise).

⁴⁰ 11 U.S.C. §363(e) (2006).

⁴¹ Motion for Sale of Coyotes at 16–22, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrcty.D.Ariz. 2009) (2:09-bk-09488-RTBP).

⁴² NHL Limited Objection at 9–13, 406 B.R. 30 (Bkrcty.D.Ariz. 2009) (2:09-bk-09488-RTBP).

⁴³ City of Glendale’s Supplemental Objection to the Debtor’s Sale Motion 7, 406 B.R. 30 (Bkrcty.D.Ariz. 2009) (2:09-bk-09488-RTBP).

Pittsburgh Penguins, where the bankruptcy court held that the Public Auditorium Authority of Pittsburgh was entitled to enjoin the Penguins to not relocate, after holding that the lease gave Pittsburgh the right to liquidated damages for breach only in the event that injunctive relief was not available.⁴⁴ However, Glendale's involvement was not entirely to its benefit as it had been sued by third parties over taxpayer subsidies in any new lease.⁴⁵

IV. FIRST DECISION

On June 15, 2009, the Federal Bankruptcy Court of Arizona published its first decision of *In re Dewey Ranch Hockey*.⁴⁶ This decision denied the initial attempt by Balsillie to buy the team out of bankruptcy and dismissed many of the claims that the NHL rules could be overridden to effectuate the sale and relocation of the Coyotes to Hamilton, Ontario.

The court acknowledged that this was a novel case, combining elements of bankruptcy, antitrust, and commercial law. In denying the motion to purchase the team out of bankruptcy in accordance with the conditions set forth by Balsillie, the court broke the competing claims down into four components. First, and most importantly for this case, the court held that the Coyotes could not relocate under §365 of the Bankruptcy Code because they could not break their arena lease with the city of Glendale. Second, and of most interest to observers, the court denied the claim that the NHL rules regarding relocation were a violation of antitrust laws. Third, in determining whether or not specific performance of the lease should be granted, the court examined the amount of harm that the Coyotes leaving Glendale would cause in comparison to the benefit that such a move would produce for creditors. Finally, the court examined the claims put forth by the other major league sports, Major League Baseball, the National Basketball Association, and the National Football Association, that the relocation of a franchise through bankruptcy proceedings would “undermine or disrupt” the leagues.⁴⁷

⁴⁴ *Id.* at 27, citing *Public Auditorium Auth. v. HBRM, L.L.C. (In re Pittsburgh Sports Associates Holding Co.)*, No. 98-28174-BM, 1999 Bankr. LEXIS 1870 (Bank. W.D. Pa., March 25, 1999).

⁴⁵ As a result of the ongoing re-negotiation of the lease, Glendale has been sued by the Goldwater Institute to force the city to disclose various records. *See, e.g.*, *Application for Order to Show Cause, Goldwater Institute v. City of Glendale*, No. CV2009-020757 (Ariz. June 26, 2009). The Institute has initiated this suit so that it can potentially bring a suit against Glendale, where it would allege a violation of Arizona's Constitution Gift Clause as a result of granting taxpayer subsidies in the new lease. *Goldwater Institute v. City of Glendale*, GOLDWATER INSTITUTE <http://www.goldwaterinstitute.org/case/3200> (last visited Jan. 23, 2010).

⁴⁶ 406 B.R. 30 (Bkrcty.D.Ariz. 2009).

⁴⁷ Statement of Position of the National Football League at 2, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrcty.D.Ariz. 2009) (2:09-bk-09488-RTBP). *See also* Statement of Position of the Office of the Commissioner of Baseball at 2, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrcty.D.Ariz. 2009) (2:09-bk-09488-RTBP); Statement of Position of the National Basketball

A. Relocation of the Coyotes over the Objections of Glendale and the NHL

Under §365 of the Bankruptcy Code, Moyes/Balsillie claimed that the NHL's likely unwillingness to accept Balsillie as an owner, and unlikely acceptance of his request for relocation, were restrictions on the assignment of the interests in the Coyotes.⁴⁸ However, the condition imposed by the NHL was that the Coyotes play all of their home games in Glendale.⁴⁹ The court found that this did not constitute a prohibition that prevented the assignment of the assets.⁵⁰

The court further noted that since the NHL had approved Balsillie as a potential owner of a NHL franchise in 2006, he would likely be approved again, barring any material change in his circumstance, and absent a request from him to relocate a team as a condition of purchase.⁵¹ This is because the NHL is required to deal in good faith with potential franchise owners under *Los Angeles Memorial Coliseum Comm'n v. NFL (Raiders I)*.⁵² The NHL ended up making a decision on Balsillie's application for ownership, a point that will be discussed later.

The major strike against the sale to Balsillie was the requirement under §365 of an "adequate assurance of future performance" under any existing contracts.⁵³ The court stressed that when one assumed contracts, they assumed both the benefits and the burdens.⁵⁴ Therefore, it seems that the Coyotes would be forced to either play out the rest of the lease, or to indemnify Glendale for breaking the lease, an amount that would be about \$700 million under the lease agreement.

Finally, Moyes/Balsillie had requested that if the court found for Balsillie's purchase of the Coyotes, that it order the NHL to allow the team to relocate to Hamilton. This order was asked to be made regardless of the lease with Glendale, and the NHL's opposition to the move based on its interests in Southern Ontario as a market. The court noted that there were "some reported decisions allowing franchises to be relocated short distances within the area of their existing business...." but that none had ever been of the magnitude asked for here, and that:

The assertion here is akin to a purchaser of a bankrupt franchise in a remote location asserting that it can be relocated far from its original agreed site to a highly valuable location, for example to New York City's Times Square, because the contractual geographic

Association at 2, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP).

⁴⁸ Motion for Sale of Coyotes at 17–18, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP).

⁴⁹ *In re Dewey Ranch Hockey*, 406 B.R. at 37.

⁵⁰ *Id.*

⁵¹ *Id.* at 36.

⁵² 726 F.2d 1381 (9th Cir. 1984).

⁵³ *In re Dewey Ranch Hockey*, 406 B.R. at 37.

⁵⁴ *Id.*

requirement/limitation is a restriction, prohibition or condition precluding assignment.⁵⁵

In other words, Balsillie would still be able to purchase the team, and the team would be able to operate, and presumably attempt to be profitable, but he would be unable to move the team out of the Phoenix area.

B. *The Antitrust Claims*

As stated above, §363 of the Code allows for a sale free and clear of interests where “applicable nonbankruptcy law permits sale of such property free and clear of such interests” and when such an interest is in “bona fide dispute.”⁵⁶ In this instance, Moyes/Balsillie argued that antitrust law was applicable nonbankruptcy law, and that the interest affected was his ability to relocate the team upon purchase. Moyes/Balsillie claimed that any restrictions against relocation should be lifted. To meet the second prong of the §363 requirement, they argued that since the NHL asserted that the regulations were valid, and they claimed there was an antitrust violation, a “bona fide dispute” existed.

The court disagreed, and found that there was no such bona fide dispute. Citing *National Basketball Ass’n. v. SDC Basketball Club, Inc.*,⁵⁷ along with *L.A. Memorial Coliseum v. NFL (Raiders II)*,⁵⁸ it upheld the notion that territorial restrictions are not in-and-of themselves a violation of antitrust laws.⁵⁹ Antitrust claims, especially those involving franchise relocation, are fact-driven.⁶⁰ Therefore, to demonstrate that there is a bona fide dispute, there must be a factual basis for the dispute, not simply disputes on points of law. There was no dispute on a factual matter in this case, as there had been no denial of relocation.⁶¹ No petition for relocation was filed until the court strongly hinted that an application should be made to the NHL.⁶² Since there was no denial of an application for relocation, there is no dispute on a point of fact, and on this basis, the court rejected the §363 claim.

⁵⁵ *Id.*

⁵⁶ *Id.* at 38; 11 U.S.C. §363(e) (2006).

⁵⁷ 815 F.2d 562 (9th Cir. 1987).

⁵⁸ 791 F.2d 1356 (9th Cir. 1986).

⁵⁹ *In re Dewey Ranch Hockey*, 406 B.R. at 39 (“Third, the mere existence of terms and conditions for franchise relocations cannot violate antitrust law.”).

⁶⁰ *Id.* (citing *American Ad Management Inc. v. GTE Corp.*, 92 F.3d 781, 788 (9th Cir. 1996)).

⁶¹ *Id.*

⁶² See David Shoalts & David Naylor, *Balsillie Gets Boost as Judge Sets Aside Ownership Issue, Targets Hamilton Move*, *GLOBE AND MAIL*, May 20, 2009, at A1. See also Carrie Watters, *Judge Rejects Sale of Phoenix Coyotes to Canadian Billionaire*, *ARIZONA REPUBLIC*, Jun. 16, 2009, <http://www.azcentral.com/sports/coyotes/articles/2009/06/15/20090615coyotesnosale.html>.

C. Other Issues

The court briefly addressed two further issues. First, it quickly dispensed with the claim by the city of Glendale that relocation should be blocked because the sale and relocation of the team would harm the city more than it would benefit the creditors. Having made a decision on the §365 claim not to grant the sale of the team, the court concluded that it did not need to decide this issue.⁶³ However the court demonstrated its ambivalence towards Glendale's claim by pointing out the obvious benefit to the creditors.⁶⁴

Finally, the court addressed claims by MLB, the NBA and the NFL that the sudden movement of teams via bankruptcy courts, circumventing league rules, would greatly harm the leagues as markets would become unstable and the product would suffer. The court dispensed of these claims by responding that the movement of the Seattle Pilots in 1970, and the Baltimore Colts and San Diego Clippers in 1984, all unapproved by their leagues at the time, did not cause material damage to the leagues.⁶⁵

V. MEANWHILE...

Following the initial hearing on May 19, Balsillie filed applications for ownership and relocation of the Phoenix Coyotes.⁶⁶ On July 29, 2009, the NHL Board of Governors decided on three bids for the Coyotes:⁶⁷ the bid by Jim Balsillie, the bid by Jerry Reinsdorf, and a bid from Ice Edge Holdings, a group of businessmen who were considering having the Coyotes play at least five "home" games each year in a Canadian city, likely one of Winnipeg, Halifax, or Saskatoon, in order to increase revenues.⁶⁸

Before discussing Balsillie's bid, it bears repeating what the court had said scant weeks before. Since, in 2006, the NHL had approved Balsillie, and his holding company PSE Sports and Entertainment, to be an owner of an NHL franchise,

⁶³ *In re Dewey Ranch Hockey*, 406 B.R. at 41–42.

⁶⁴ *Id.* at 42.

⁶⁵ *Id.*

⁶⁶ Debtors' Notice of Submission of NHL Transfer Application of PSE Sports & Entertainment, L.P. and Motion to File NHL Transfer and Relocation Applications Under Seal, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP); Notice of Filing NHL Relocation Application Under Seal, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP).

⁶⁷ Declaration of Craig Leipold at 2, *In re Dewey Ranch Hockey*, 414 B.R. 577 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP).

⁶⁸ *Deadline Passes With One Bid, Letter of Intent to Buy Coyotes*, SPORTS BUSINESS DAILY, July 27, 2009, available at <http://www.sportsbusinessdaily.com/article/132022>. Ice Edge, as of this writing, is still looking to play several "home" games in Saskatoon, which is a condition of signing a long-term lease with Glendale that is supported by the city. Mike Sunnucks, *New Phoenix Coyotes Owners Commit to Long-term Lease*, PHOENIX BUSINESS JOURNAL, Jan. 18, 2010, available at <http://www.bizjournals.com/phoenix/stories/2010/01/18/daily13.html>.

“[a]bsent some showing by the NHL that there have been material changes in PSE’s circumstances since 2006, it appears to the court that the NHL can not object or withhold its consent to PSE becoming the controlling owner of the Phoenix Coyotes.”⁶⁹ The Board of Governors deemed that there had been material changes, and unanimously rejected the application for ownership by Balsillie.⁷⁰ In rejecting Balsillie’s bid, the NHL stated that “[t]he NHL Board of Governors has unanimously voted that Mr. Balsillie is not qualified as a matter of character and integrity to be the owner of an NHL team.”⁷¹ Balsillie shot back in a court filing by stating: “Indeed, the NHL’s recent history is rife with owners who have engaged in criminal and fraudulent behavior that is vastly more severe than *any* allegation levied against Mr. Balsillie,”⁷² and proceeded to document claims made against Jerry Reinsdorf, William “Boots” Del Biaggio III, former Los Angeles Kings owner Bruce McNall, and current Ottawa Senators owner Eugene Melnyk.⁷³ This earned a sharp public reprisal from Melnyk and the NHL.⁷⁴

⁶⁹ *In re Dewey Ranch Hockey*, 406 B.R. at 36.

⁷⁰ Motion of the National Hockey League for a Determination that Debtor’s NHL Membership Rights May Not Be Transferred to PSE or an Affiliate Thereof at 6, *In re Dewey Ranch Hockey*, 414 B.R. 577 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP). Twenty-six teams voted against Balsillie, one team was absent, and three teams abstained. *Id.* The three abstaining teams appear to be Toronto, Buffalo, and Pittsburgh. David Shoalts, *Judge’s decision May Put Owners at Risk; Court Ruling that Coyotes Owner’s Loans Were Equity in Franchise Would Have big Implications for Pro Sports*, GLOBE AND MAIL, Sept. 4, 2009, at S5.

⁷¹ Mark Sutcliffe, *Canada Needs More Entrepreneurs Like Jim Balsillie*, THE VANCOUVER SUN, Aug. 15, 2009, available at <http://www.vancouver.sun.com/sports/Canada+needs+more+entrepreneurs+like+Balsillie/1896973/story.html>. See also, Motion of the National Hockey League for a Determination that Debtor’s NHL Membership Rights May Not Be Transferred to PSE or an Affiliate Thereof, *In re Dewey Ranch Hockey*, 414 B.R. 577 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP). The NHL Bylaws, Section 35, require that an owner be “willing to commit sufficient financial resources to provide for the financial stability of the franchise” and that they be of “good character and integrity.” NHL BYLAWS, Section 35.1.

⁷² Motion for the Determination That the Debtors’ Interests May Be Transferred to PSE Notwithstanding the NHL’s Refusal to Consent (Redacted Version for Public Filing) at 27–28, *In re Dewey Ranch Hockey*, 414 B.R. 577 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP). For example, there were concerns with the purchase of the Predators and the actions Balsillie took, such as setting up season ticket sales for the Predators in Hamilton, using the Predators’ logo, which appeared to have the “purpose and effect of destabilizing the Predators.” Declaration of Craig Leipold at 5, *In Re Dewey Ranch Hockey*, 414 B.R. 577 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP).

⁷³ Motion for the Determination That the Debtors’ Interests May Be Transferred to PSE Notwithstanding the NHL’s Refusal to Consent (Redacted Version for Public Filing) at 27–30, *In re Dewey Ranch Hockey*, 414 B.R. 577 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP). Balsillie pointed out Reinsdorf’s role in the MLB collusion suits in the 1980s, Del Biaggio’s fraudulent behavior in obtaining loans, McNall’s fraud convictions, and Melnyk’s settlement of an alleged Canadian Securities Act violation.

⁷⁴ The statements issued by Eugene Melnyk and the NHL can be viewed at *Eugene Melnyk Responds to Offside Remarks by Jim Balsillie*, PRS NEWSWIRE, Aug. 20, 2009,

The Board decided to accept Reinsdorf's bid after calling the Ice Edge Holdings bid "incomplete".⁷⁵ Unfortunately for the NHL, Reinsdorf backed out of the process in late August, leading the NHL to submit its own bid for the Coyotes.⁷⁶ The bid from Ice Edge Holdings was dropped a couple of weeks later.⁷⁷ As a result, Balsillie emerged as the only bona fide bidder. On September 7, 2009, Balsillie increased his bid from \$212.5 million to \$242.5 million.⁷⁸

VI. SECOND DECISION

On September 30, 2009, the Federal Bankruptcy Court of Arizona came down with its decision on the actual bids for the Coyotes.⁷⁹ The court rejected both Balsillie's new bid as well as the NHL's bid.⁸⁰ Although Balsillie's bid was rejected outright, the NHL was allowed to re-submit its bid, so long as it made several modifications.⁸¹

A. Balsillie's Bid

Recalling that §363 of the Code permits a sale free and clear of any interest if "such interest is in bona fide dispute", Moyes/Balsillie argued that a dispute over the applicability of NHL rules should not bar the sale to him. The court acknowledged that such disputes are normally settled monetarily, and that this could be done here.⁸²

Unfortunately for Moyes/Balsillie, the court found that the NHL has many non-economic interests, which precluded monetary damages, and also precluded Balsillie's bid from succeeding.⁸³ The non-economic interests of the NHL were found to be: the right to admit only new members who meet its written requirements; the right to control where its members play their home hockey games; and the right to a relocation fee when a member relocates. These are interests that cannot necessarily be assessed monetarily, and the court was concerned that during likely litigation over antitrust complaints, if the team was allowed to move to Hamilton, and the NHL

<http://www.prnewswire.com/news-releases/eugene-melnyk-responds-to-offside-remarks-by-jim-balsillie-62276087.html>.

⁷⁵ Don McGowan, *Ice Edge Encouraged by NHL Decision*, THE STAR PHOENIX (Saskatoon, Saskatchewan), July 30, 2009, at B1.

⁷⁶ Carrie Watters, *Reinsdorf Drops Coyotes Bid as NHL Seeks to Buy Team*, THE ARIZONA REPUBLIC, Aug. 26, 2009, <http://www.azcentral.com/sports/coyotes/articles/2009/08/25/20090825nhlcoyotes.html>.

⁷⁷ Kevin McGran, *Ice Edge Drops out of Running*, TORONTO STAR, Sept. 8, 2009, <http://www.thestar.com/Hockey/article/692682>.

⁷⁸ Joe Warmington, *Balsillie Increases Offer for Coyotes*, TORONTO SUN, Sept. 7, 2009, available at <http://www.torontosun.com/sports/hockey/2009/09/07/10782071-sun.html>.

⁷⁹ *In re Dewey Ranch Hockey*, 414 B.R. 577 (Bkrtcy.D.Ariz. 2009).

⁸⁰ *Id.* at 579.

⁸¹ *Id.* 592–93.

⁸² *Id.* at 591.

⁸³ *Id.*

prevailed, there would be irreparable damage.⁸⁴ In other words, the court noted, “[s]uch an ultimate outcome is apropos to the old adages about closing the barn door after the horse is long gone and how do you un-ring the bell. The obvious refrain to the first adage is, ‘it’s too late’, and to the second, ‘you can’t’.”⁸⁵

The court ultimately found that allowing purchase and relocation of the Coyotes to Hamilton would not sufficiently protect the NHL’s interests.⁸⁶ Invoking the language in §363(e) that it “shall prohibit or condition” the proposed sale “as is necessary to provide adequate protection of such interest”,⁸⁷ the court found that it had to deny Balsillie’s bid.⁸⁸

B. *The NHL’s Bid*

Although the court rejected Balsillie’s bid, the court also found the NHL’s bid to be lacking.⁸⁹ Although the NHL’s bid covered all of the secured creditors, it did not cover the unsecured creditors, primarily Jerry Moyes.⁹⁰ Although a buyer in bankruptcy may choose to pay some trade creditors in full over others, this is generally due to commercial factors and to build good will. In this case, however, the court was concerned that the structure of the NHL bid was simply to get a measure of revenge on Moyes for the fiasco.⁹¹

Since this was an easily curable defect, the court denied the NHL’s bid without prejudice, and the NHL was allowed to re-submit its bid.⁹² The NHL did so, and re-submitted a bid that was valued at \$128.4 million.⁹³ The bid covered all of the secured creditors, and granted \$11.6 million to unsecured creditors, namely Jerry Moyes and Wayne Gretzky.⁹⁴ Both Moyes and the court signed off on the sale,⁹⁵ and as of this writing, the NHL is the owner of the least-valuable franchise in the league.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 591–92.

⁸⁷ 11 U.S.C. § 363(e) (2006).

⁸⁸ *In re Dewey Ranch Hockey*, 414 B.R. at 592.

⁸⁹ *Id.* at 592–93.

⁹⁰ *Id.* at 592.

⁹¹ *See id.* at 593.

⁹² *Id.*

⁹³ Stipulated Order Approving Amended and Clarified Bid at 5, *In re Dewey Ranch Hockey*, 414 B.R. 577 (Bkrcty.D.Ariz. 2009) (2:09-bk-09488-RTBP).

⁹⁴ *Id.* at 6. At the time of the bankruptcy filing, Wayne Gretzky was the coach of the Coyotes. However, he was absent from the team’s training camp, and eventually quit as coach. *See* Damien Cox and Kevin McGran, *Gretzky Quits as Phoenix Coyotes’ Coach*, TORONTO STAR, Sept. 24, 2009, <http://www.thestar.com/article/700375>.

⁹⁵ Stipulated Order Approving Amended and Clarified Bid, *In re Dewey Ranch Hockey*, 414 B.R. 577 (Bkrcty.D.Ariz. 2009) (2:09-bk-09488-RTBP).

VII. ANALYSIS

The remaining question, now that the court has decided the fate of the Coyotes, is whether or not there can be a lesson learned from the messy battle. At the outset, many commentators felt that the case would be determined under the *Raiders I* framework.⁹⁶ However, that was clearly not the case. The task here is to disentangle the meaning of the two decisions made by the bankruptcy court.

Raiders I is not the final word in franchise relocation. In fact, it's not even the first word. To go from where Balsillie was in May of 2009 to having a team in Hamilton, three steps need to be completed. First, an owner must own a franchise. The owner must then be a member of a league (these two steps usually go hand-in-hand, but not always). Finally, the owner must be able to move the franchise, with or without league consent. In the words of NHL Commissioner Gary Bettman: "The two most important issues for any sports league are: who's an owner, who's a partner in the league, and where franchises are located."⁹⁷

In regards to the first two steps, a league does not have to grant a franchise if league conditions are not fulfilled.⁹⁸ However, even if a prospective league member already owns a franchise, they require the approval of the league to join play, as demonstrated in *Levin v. NBA*⁹⁹ and *Mid-South Grizzlies v. NFL*.¹⁰⁰ Only then, once there is a franchise owner and they are a league member, can the *Raiders I* analysis can be applied.

The outcome of the case here, however, simply reinforced the position that leagues have the power to prefer purchasers of franchises and who may be a league member, even in a bankruptcy scenario. This case also arguably further weakens the effect of the *Raiders I* case. In the end, owners and potential owners are unable to use bankruptcy law as an end-run around league rules, as they were given a great amount of deference by the bankruptcy court here.

⁹⁶ See Kevin McGran, *Phoenix Coyotes Mess Heads to Court*, THE TORONTO STAR, June 8, 2009, available at <http://www.thestar.com/sports/hockey/article/647063>.

⁹⁷ Eric Duhatschek, *Bettman Extends Olive Branch in Coyotes Debacle; NHL Commissioner Paints Rosy Picture of League's Financial Health, Pushes for Stricter Drug Testing of Players*, GLOBE AND MAIL, June 1, 2009, at S4.

⁹⁸ See *Seattle Totems Hockey Club v. Nat'l Hockey League*, 783 F.2d 1347 (9th Cir. 1986). In *Seattle Totems*, a Western Hockey League team was granted a conditional franchise by the NHL. As a result, they did not seek a World Hockey Association franchise. The NHL rejected the team as it failed to fulfill the conditions precedent to being awarded a franchise. The court rejected all claims, including antitrust claims. See also *Fishman v. Estate of Wirtz*, 807 F.2d 520, 544 (7th Cir. 1986) (finding an antitrust violation in the refusal to grant a lease of a sports arena to an unsuccessful bidder, but finding the NBA's rejection of the prospective owner to not be a violation).

⁹⁹ 385 F.Supp. 149 (S.D.N.Y. 1974).

¹⁰⁰ 720 F.2d 772 (3d Cir. 1983).

A. League Rules Deserve Deference

In *Levin v. NBA*,¹⁰¹ a group of businessmen attempted to purchase the Boston Celtics. However, the group was rejected as potential owners by the league. The official reason given by the NBA was a violation of the “conflict of interest provision.”¹⁰² The “true” reason, as asserted by the potential owners, was that the members of the league were wary of their friendship with the ownership of the Seattle SuperSonics, as the owners of the SuperSonics were not on good terms with many owners. The plaintiffs filed an antitrust action against the NBA. The court summarily dismissed the action, stating that there was no prevention of *competition* with the NBA, just from joining them in their business.¹⁰³

A similar outcome was reached in *Mid-South Grizzlies v. NFL*.¹⁰⁴ Former members of the World Football League wanted to have their team begin play in Memphis, Tennessee, which was far outside the territory of any other team. They were denied by the NFL, and claimed that the motivation for their rejection was “to punish them for having attempted in the past to compete with the NFL in the World Football League...”¹⁰⁵ The court found that the NFL’s decision was actually *pro-competitive*, since the team could compete with the NFL in another league, and upheld the district court’s summary dismissal of the case.¹⁰⁶

Therefore, it seems that leagues can prevent an owner from joining their league for almost any reason, seemingly irrespective of the perceived legitimacy. *Levin* and *Mid-South Grizzlies* seem to be tacitly reaffirmed by the bankruptcy court, as the court was unwilling to force the NHL to accept Balsillie as an owner. The NHL claimed that Balsillie was unfit due to his previous dealings with the Pittsburgh Penguins and Nashville Predators, and Balsillie claimed that the reason was simply personal animus on behalf of the NHL Commissioner. However, the reasons are irrelevant, as the NHL does not have to admit anyone it does not want to.

As a result of *Levin* and this case, it is clear that leagues can choose their owners. While this seems to be an obvious statement in a normal purchase, in a situation such as bankruptcy, the league preference for an owner that was not Balsillie appeared to place a large enough roadblock in front of Balsillie that any other owner who had put up enough money to cover the secured creditors would have likely been acceptable to the court. Thus, it behooves potential franchise owners to be on good terms with the leagues to which they are applying.

Importantly, if the potential owner is not admitted to the league, whether or not they own a team, any discussion of the *Raiders I* line of relocation cases is moot.

¹⁰¹ 385 F. Supp. 149.

¹⁰² *Id.* at 151.

¹⁰³ *Id.* at 153.

¹⁰⁴ 720 F.2d 772.

¹⁰⁵ *Id.* at 786.

¹⁰⁶ *Id.*

B. *Do NHL Rules on Franchise Relocation, and
Specifically on Exclusive Territorial Rights, Violate Antitrust Law?*

The court found that Balsillie could not purchase the Coyotes, which effectively disposed of the case. Since Balsillie could not purchase the franchise, nor become a member of the NHL, the court did not need to directly address whether or not the current NHL rules and practices regarding franchise relocation violate antitrust law. This section will discuss the possibility of a violation.

The Sherman Act, §1 provides that “[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, is hereby declared to be illegal.”¹⁰⁷ In order to demonstrate a violation of the Sherman Act, it must be shown that there is a “combination”, as opposed to a single entity; and that the restraint challenged must be “unreasonable.”¹⁰⁸ Courts have generally held sports leagues to be multiple independent entities.¹⁰⁹ While in some cases a sports league may be seen as a single entity, this is generally reserved for cases where the league is acting in regards to other, external actors.¹¹⁰

Following the finding of a “combination,” the court must then examine the restraint on trade. The court can use either a *per se* analysis, or a “rule of reason” analysis. The *per se* rule is appropriate only when the challenged practice is “entirely void of redeeming competitive rationales.”¹¹¹ However, courts have generally held the “rule of reason” analysis to be appropriate for sports leagues.¹¹² Under a rule of reason, it must be shown that there is a significant anti-competitive effect within a relevant market. If the plaintiff makes that showing, the defendant is then required to demonstrate that the pro-competitive effect of the restraint justifies the anti-competitive injuries. If that is shown, then “the burden shifts back to the plaintiff to show that any legitimate objectives can be achieved in a substantially less restrictive manner.”¹¹³

The relevant market is a somewhat unclear concept. In *San Francisco Seals v. NHL*, the court stated that the market for NHL teams was “the production of professional hockey games before live audiences, and that the relevant geographical

¹⁰⁷ 15 U.S.C. §1 (2004).

¹⁰⁸ Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98 (1984).

¹⁰⁹ See L.A. Mem’l Coliseum Comm’n v. Nat’l Football League, 726 F.2d 1381 (9th Cir. 1984); Nat’l Hockey League v. Plymouth Whalers, 419 F.3d 462 (6th Cir. 2005).

¹¹⁰ American Needle Inc. v. Nat’l Football League, 538 F.3d 736 (7th Cir. 2008) (finding that the NFL is a single-entity for the purposes of licensing intellectual property), *cert. granted*, 77 U.S.L.W. 3326 (U.S. June 29, 2009) (No. 08-661).

¹¹¹ Law v. Nat’l Collegiate Athletic Ass’n, 134 F.3d 1010, 1016 (10th Cir. 1998).

¹¹² Nat’l Hockey League Players’ Ass’n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 719 (6th Cir. 2003) (quoting *Law*, 134 F.3d at 1019) (“courts 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.”).

¹¹³ Nat’l Hockey League v. Plymouth Whalers, 419 F.3d at 469.

market is the United States and Canada.”¹¹⁴ However, the court in *San Francisco Seals* went on to state that NHL teams are “in fact, all members of a single unit competing as such with other similar professional leagues.”¹¹⁵ The Seventh Circuit in *American Needle* has recently stated that the NFL “competes with other forms of entertainment for an audience of finite (if extremely large) size.”¹¹⁶ Therefore, the relevant market could be one of competition across all forms of professional sports and entertainment, and not just professional hockey leagues.¹¹⁷

In regards to competition, NHL teams can only function as a source of economic power when collectively producing NHL hockey games.¹¹⁸ Therefore, while teams are independent entities, they are not economic competitors in a traditional sense, but need to cooperate to ensure their economic survival.¹¹⁹ In fact, the court further stated that:

Plaintiff, of course, wishes to participate in this market, but not in competition with the defendants. It expects to maintain its league membership and enjoy all of the exclusive territorial benefits which the National Hockey League affords. As a member team, it will continue cooperating with the defendants in pursuit of its main purpose, i.e., producing sporting events of uniformly high quality appropriately scheduled as to both time and location so as to assure all members of the league the best financial return. In this respect, the plaintiff and defendants are acting together as one single business

¹¹⁴ 379 F. Supp. 966, 969 (C.D. Cal. 1974).

¹¹⁵ *Id.*

¹¹⁶ 538 F.3d at 743.

¹¹⁷ See, S.M. Oliva, *Coyote Ugly II: The Wrath of Antitrust*, MISES ECONOMIC BLOG, May 8, 2009, <http://blog.mises.org/archives/009924.asp> (“In Washington, where the Capitals have long been the poor stepchild to football’s Redskins, Mike Kardish, an attorney in Gainesville, Va. dumped his Redskins tickets two seasons ago and began attending more Capitals games. ‘It’s just more fun to watch,’ he says, comparing Mr. Ovechkin to longtime Redskins linebacker LaVar Arrington for his bruising hits and speed. Mr. Ovechkin, he says, ‘he’s why people go.’” (internal citation omitted)).

¹¹⁸ *American Needle*, 538 F.3d at 743 (“Certainly the NFL teams can function only as one source of economic power when collectively producing NFL football. Asserting that a single football team could produce a football game is less of a legal argument than it is a Zen riddle: Who wins when a football team plays itself?”); *Bd. of Regents*, 468 U.S. at 101 (“[Some] activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams.” (quoting ROBERT BORK, *THE ANTITRUST PARADOX* 278 (1978))); *Chi. Prof'l Sports Ltd. v. Nat'l Basketball Ass'n.*, 95 F.3d 593, 599 (7th Cir. 1996) (“[T]he NBA has no existence independent of sports. It makes professional basketball; only it can make ‘NBA Basketball’ games....”).

¹¹⁹ *San Francisco Seals*, 379 F.Supp. at 969–70.

enterprise, competing against other similarly organized professional leagues.¹²⁰

There is no reason to believe that the antitrust rules would have been applied any differently in the case of the Phoenix Coyotes attempt to move to Hamilton in 2009 than it was applied to the San Francisco Seals attempt to move to Vancouver in 1974.

It was believed by many that the thrust of the challenge against the NHL would be that restrictions on relocation of the Coyotes would have a significant anti-competitive effect, relying on *Raiders I*.¹²¹ In that case, the Ninth Circuit Court of Appeals upheld a jury verdict that the NFL rule requiring three-quarters approval of team owners to relocate a franchise (regardless of whether or not it was into another team's exclusive territory) was an unlawful restraint of trade under the Sherman Act, §1. However, the majority in the case stated that restrictions may be able to withstand antitrust scrutiny with that proviso that, "[a]n express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities, regional balance, etc., would be well advised."¹²² The court seemed concerned about the personal animosity against Al Davis, the owner of the Raiders, and the possibility that the rule was not connected to its purpose. However, only four years later, the Ninth Circuit said that:

Collectively, the *Raiders* opinions held that rule of reason analysis governed a professional sports league's efforts to restrict franchise movement. More narrowly, however, *Raiders I* merely held that a reasonable jury could have found that the NFL's application of its franchise movement rule was an unreasonable restraint of trade....The Clippers' and the Coliseum's efforts to characterize *Raiders I* as presenting guidelines for franchise movement rules are thus unavailing. Neither the jury's verdict in *Raiders*, nor the court's affirmance of that verdict, held that a franchise movement rule, in and of itself, was invalid under the antitrust laws.¹²³

Therefore, so long as the NHL rules are rationally connected to its goals of franchise stability, etc., then it is likely that they will withstand a rule of reason analysis. This argument will be helped by the decision by the Canadian Competition Bureau on March 31, 2008, that:

[P]roperly circumscribed restrictions on the relocation of sports franchises imposed by the NHL and other professional sports

¹²⁰ *Id.* at 969.

¹²¹ L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984).

¹²² *Id.* at 1397.

¹²³ NBA v. San Diego Clippers Basketball Club, 815 F.2d 562, 567 (9th Cir. 1987) (reversing and remanding summary judgment granted by a district court that stated that the NBA could not impose a charge upon the Clippers for the unilateral usurpation of the "franchise opportunity" in the Los Angeles area).

leagues serve legitimate interests, such as preserving rivalries between teams, attracting a broader audience, providing new franchises with an opportunity to succeed and encouraging investment in sports facilities and related infrastructure by local municipalities.¹²⁴

Yet, in this case, there appears to be an unreasonable restriction on relocation under the NHL Constitution Article 4.3:

No other member of the League shall be permitted to play games (except regularly scheduled League games with the home club) in the home territory of a member without the latter member's consent. No franchise shall be granted for a home territory within the home territory of a member, without the written consent of such member.¹²⁵

This appears to be a veto, and depending on how it is construed, may be unreasonable under *Raiders I*. It is strange, to say the least, that the Canadian Competition Bureau did not comment on this, and neither did the Arizona bankruptcy court. The court merely commented that provisions on relocation are not a *per se* violation of antitrust law.¹²⁶ It is possible that under a rule of reason analysis that this rule in and of itself might be held unreasonable. However, it is not beyond the capability of a court to sever this provision from the rest of the NHL Constitution while keeping the remainder of the relocation provisions intact.

However, there are two potential problems with any antitrust argument. First, Balsillie was not a current owner, unlike Al Davis, and would have had to overcome *Levin* to get to *Raiders*. Second, leagues have adapted since *Raiders*. In *Raiders*, the main concern of the court was the rejection of relocation simply based on animus toward Al Davis.¹²⁷ It suggested the inclusion of objective criteria for the future.¹²⁸ Here, it is likely that there was animus against Balsillie; however, the relocation of the franchise (as well as the ownership) was determined on a set of pre-existing criteria that was largely fact-based. Despite this potential team veto, it was difficult for

¹²⁴ CANADIAN COMPETITION BUREAU, COMPETITION BUREAU CONCLUDES EXAMINATION INTO NATIONAL HOCKEY LEAGUE FRANCHISE OWNERSHIP TRANSFER AND RELOCATION POLICIES (Mar. 31, 2008), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02640.html>.

¹²⁵ CONSTITUTION OF THE NATIONAL HOCKEY LEAGUE, art. 4.3.

¹²⁶ *In re Dewey Ranch Hockey*, 406 B.R. 30, 39 (Bkrcty.D.Ariz. 2009).

¹²⁷ L.A. Mem'l Coliseum, 726 F.2d at 1398.

¹²⁸ *See id.* at 1397 (“To withstand antitrust scrutiny, restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL ‘product’ and competing with other forms of entertainment. An express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities, regional balance, etc., would be well advised. . . . Some sort of procedural mechanism to ensure consideration of all the above factors may also be necessary, including an opportunity for the team proposing the move to present its case.”).

Balsillie to argue that the same animus towards him exists as did towards Al Davis in the *Raiders* cases.

C. Owners Cannot Use Bankruptcy Law to Circumvent League Rules

The thrust of the previous two sections is that bankruptcy law cannot be used as a method of circumventing league rules regarding ownership and relocation. However, this may not have been a model case to test this assertion. First, there was a high liquidated damages provision in the lease with the City of Glendale. Balsillie may have not been willing to pay the several-hundred million dollars in liquidated damages required by the lease. If he had been willing to do so, the lease would not have been a hurdle to his relocation requests. However, the lease was certainly a factor in the court's decision.

Second, Balsillie's inability to make a timely application for ownership and relocation before attempting litigation may have hindered his chances at a successful outcome. The court was less than pleased that Balsillie requested relocation *before* filing for ownership and relocation with the NHL.¹²⁹ Also, the NHL has adapted to a post-*Raiders* world in regards to franchise relocation by requiring a very thorough application for ownership and relocation.¹³⁰ This new process uses some objective factors, such as financial impacts, in addition to more subjective factors, such as "character" issues.¹³¹ However, the NHL may have simply been lucky that *Levin* applied before *Raiders I* and *San Diego Clippers* came into play.

VIII. WHAT NOW?

A. NHL Searches for a New Owner

The NHL is currently searching for an owner for the Phoenix Coyotes. The likely purchaser is Ice Edge Holdings.¹³² However, the group has recently come

¹²⁹ Shoalts & Naylor, *supra* note 62 (stating that Judge Baum "chided the Phoenix lawyer who represented Mr. Balsillie in court, Susan Freeman, for not making a formal application to the NHL to move the team").

¹³⁰ The franchise ownership application can be found in Daly Declaration, app. II, Exhibit O, *In re Dewey Ranch Hockey*, 406 B.R. 30 (Bkrtcy.D.Ariz. 2009) (2:09-bk-09488-RTBP). The relocation rules are in the NHL BYLAWS, Section 36.

¹³¹ The NHL Bylaws put forth the following considerations, amongst others, in contemplating relocation: whether the franchise is financially viable in its current location, historical fan support and profit, whether there are owners who would be willing to operate the club in its present location, the adequacy of the arena, whether there are ways to cut costs, whether the league's credibility would be damaged, whether or not a major market would be deprived of a major league franchise, the potential for liability as a result of relocation, and the interests of the NHL. NHL BYLAWS, Section 36.5.

¹³² *Canada Still Part of Potential Coyotes Buyer's Plans*, THE WALL STREET JOURNAL, Dec. 14, 2009, <http://blogs.wsj.com/bankruptcy/2009/12/14/canada-still-part-of-potential-coyotes-buyers-plans/>. However, as of February 27, 2010, the deal does not appear to be completed.

across some potential problems with financing.¹³³ Whether or not Ice Edge is successful in purchasing the Coyotes, and even if their plan to play some home games in Canada comes to fruition, they or any other potential owner will need to be willing to sustain significant losses for the short term. This may be with NHL support in some form or another, and it is possible that the NHL will allow the team to relocate in the near future.

The NHL, however, is not keen on having teams relocate. Following the relocation of the Québec Nordiques and the Winnipeg Jets, the NHL instituted the Canadian Assistance Plan in an effort to combat the low Canadian dollar.¹³⁴ This, plus assistance to other teams with ownership and financial difficulties demonstrates an unwillingness on behalf of the NHL to have teams relocate if at all possible. In addition, the NHL would not want to leave the thirteenth-largest metropolitan statistical area in the United States without a team.¹³⁵

However, with losses predicted to be \$40–50 million for the 2009–10 season,¹³⁶ which is almost an entire team's payroll, it may be in the NHL's best interest to relocate. Although possibilities for relocation include Oklahoma City, Kansas City, and Seattle, it is unknown whether or not these cities will be willing or able to support an NHL team. While Québec City is working to obtain government funding to build a new arena,¹³⁷ Québec City likely does not have the financial base to support an NHL team.¹³⁸ Thus, it appears for now, that the team will remain in Phoenix.

¹³³ David Shoalts, *Banks Give Ice Edge the Cold Shoulder*, THE GLOBE AND MAIL, Mar. 12, 2010, at S3.

¹³⁴ *Leaving Arizona, NHL Assistance Plan for Canadian Teams OK'd*, SPORTS BUSINESS DAILY, Dec. 9, 1998, available at <http://www.sportsbusinessdaily.com/article/28923>.

¹³⁵ Glendale Supplemental Objection, *supra* note 9, at 9.

¹³⁶ Sunnucks, *supra* note 68; *New Phoenix Coyotes Owners Commit to Long-term Lease*, PHOENIX BUSINESS JOURNAL, Jan. 18, 2010, available at <http://www.bizjournals.com/phoenix/stories/2010/01/18/daily13.html>; Paul Waldie, *Red Ink Flowing at Record Rate*, THE GLOBE AND MAIL, Nov. 20, 2009, at S2.

¹³⁷ *Flaherty Tells Québec City to Reassess NHL-Sized Arena*, NATIONAL POST, Dec. 11, 2009, available at <http://www.nationalpost.com/sports/story.html?id=2331132> (Québec City has asked for \$175 million from the federal and provincial governments, and has offered \$50 million in municipal funding for the proposed \$400 million arena).

¹³⁸ See, e.g., James Mirtle, *The Reality of a Return to Québec City*, FROM THE RINK, Oct. 12, 2009, <http://www.fromtherink.com/2009/10/12/1081818/the-reality-of-a-return-to-quebec>; Ken Campbell, *NHL Back in Québec City? Think Again*, THE HOCKEY NEWS, Oct. 12, 2010, <http://www.thehockeynews.com/articles/28507-Campbells-Cuts-NHL-back-in-Quebec-City-Think-again.html>. See also, Ashok Parmar, *Is the NHL Returning to Québec City?*, INSIDE HOCKEY, Oct. 11, 2009, <http://www.insidehockey.com/columns/4567> (“Unfortunately, many of the concerns that existed when Québec City lost the Nordiques in 1995 also remain concerns today. Passion is rarely a problem when discussing Canadian markets, but sometimes economics is the problem. Québec City does not have the corporate opportunities of some bigger Canadian cities like Toronto Montreal, and Vancouver, so this could pose a bit of an issue. Those corporate dollars could go a long way in selling luxury boxes and contributing sponsorships for your franchise.”) The former co-owner of the Québec Nordiques, Marcel Aubut, “spent years looking for government subsidies, support for a new

B. *Is Phoenix a Viable Market?*

It has become obvious that the Coyotes will remain in deep financial trouble if something does not change soon. To many observers, it seems obvious that hockey in the desert is a failure. At first blush, some might feel that the NHL is fighting a losing battle, and that denying an owner with large financial resources who wanted to relocate that franchise to a potentially more viable market is a large mistake.

To make matters worse, Phoenix is not the only team in financial trouble. The Dallas Stars appear to be heading to bankruptcy court as well, after owner Tom Hicks defaulted on a series of loans;¹³⁹ the Atlanta Thrashers are embroiled in litigation between the owners;¹⁴⁰ the New York Islanders are facing immense hurdles in obtaining the land to build a new arena;¹⁴¹ and the Columbus Blue Jackets¹⁴² and Tampa Bay Lightning¹⁴³ are having financial problems. These are very serious concerns for the NHL in its post-lockout era, an era that was designed to make teams more viable on and off the ice by restricting player salaries to 54%–57% of league revenues.¹⁴⁴ While the financial troubles of the other teams does not bode well for the Coyotes, and may lead other owners to question the support of one team at the expense of others, it demonstrates that there may be other problems aside from just location.

arena and the corporate dollars to fill enough luxury boxes to keep the team in Quebec.” However, Aubut mentioned in 2002: “There is no pocket in this city or province deep enough.” John Branch, *From Quebec, With Love/Avalanche Built on the Nordique Track*, COLORADO SPRINGS GAZETTE, Dec. 9, 2002, available at http://findarticles.com/p/articles/mi_qn4191/is_20021009/ai_n10011159/?tag=content;col1.

¹³⁹ Daniel Kaplan, *Hicks Creditors Look to NHL*, DALLAS BUSINESS JOURNAL, Aug. 17, 2009, <http://www.bizjournals.com/dallas/stories/2009/08/17/daily3.html>.

¹⁴⁰ See Jeff Schultz, *Bettman: Onus on Thrashers’ Owners*, ATLANTA J.-CONST., Feb. 8, 2010, at 1C; Sekou Smith, *Spirit Back to Business ‘As Usual’; Belkin Status Unchanged After Judge’s Ruling on Hawks-Thrashers Group*, ATLANTA J.-CONST., Aug. 19, 2009, at 1C.

¹⁴¹ See The Lighthouse Development Group, *supra* note 21; Stu Hackel, *Wang: Lighthouse Project Still On*, N.Y. TIMES, Oct. 15, 2009, available at <http://slapshot.blogs.nytimes.com/2009/10/15/wang-lighthouse-project-still-on/>.

¹⁴² Post-lockout, the range of yearly losses for the Columbus Blue Jackets are as follows: \$12.9–\$16.6 million in 2006, \$5.5–\$9.9 million in 2007, \$12.0–\$16.5 million in 2008, and \$12.0–\$15.0 million in 2009. STEPHEN A. BUSER, REPORT ON THE BLUE JACKETS 9 (2009).

¹⁴³ It was reported in January 2010 that the NHL had granted the Lightning an advance payment on their revenue-sharing, which is similar to what happened in Phoenix preceding the bankruptcy filing. David Shoalts, *Lightning Hit Another Rough Patch*, THE GLOBE AND MAIL, available at <http://www.theglobeandmail.com/sports/lightning-hit-another-rough-patch/article1439224/>.

¹⁴⁴ COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS’ ASSOCIATION, Art. 50.4(b) (2005).

Secondly, it is possible for franchises to come back from the brink of bankruptcy and survive, and even thrive. As recently as 2003, the Ottawa Senators and Buffalo Sabres were bankrupt, and both currently appear to be financially stable.¹⁴⁵

For critics, the argument comes back to location, location, location. There are many that clamor for the relocation of the Coyotes based on the simple fact that Phoenix is a desert environment, long before the Coyotes declared bankruptcy.¹⁴⁶ Yet, it must also be kept in mind that as of 2000, the Vancouver Canucks (14,642), Calgary Flames (15,322) and the Edmonton Oilers (15,802) were drawing fewer fans than the Nashville Predators (16,600).¹⁴⁷ Therefore, one cannot simply write off a team that has played poorly during its infancy, and say that the location is not viable. Yet, although some say that Phoenix simply needs to start winning,¹⁴⁸ others say there is no hope.¹⁴⁹

¹⁴⁵ John Kreiser, *On Thin Ice: The Recent Bankruptcies of the Senators and Sabres Demonstrate that the NHL Needs More Than a Zamboni to Smooth Over Its Rough Spots*, HOCKEY DIGEST, April 2003, available at http://findarticles.com/p/articles/mi_m0FCM/is_6_31/ai_98565878/. Although Ottawa and Buffalo posted operating losses over the 2008–09 season of \$3.8 and \$5.2 million respectively, this has not necessarily been cause for alarm. *NHL Team Valuations 2009*, *supra* note 211. See also, June 9 Declaration of Gary B. Bettman at 12–13, *Dewey Ranch Hockey*, 406 B.R. 30 (Bkcty.D.Ariz. 2009) (2:09-bk-09488-RTBP).

¹⁴⁶ See, e.g., Jeff Z. Klein & Lew Serviss, *Enthusiasm Cools for Hockey's Foray Into the South*, N.Y. TIMES, Feb. 10, 2008, at 8 (quoting former Los Angeles Kings player Marcel Dionne: “We missed the boat 20 years, 25 years ago...Keep on trying all you want...It ain't [sic] happening.”); Editorial, *A Smaller NHL*, NATIONAL POST, June 9, 2008, at A16 (“Hockey does not play well in these hot-weather locations. Except for the California clubs and Tampa Bay—which count on plenty of ex-pat and vacationing Canadians to fill seats—sunbelt NHL teams are largely a bust. The league should consider pulling most of these franchises.”). One can also find many, many examples on various internet message boards of individuals claiming that hockey cannot, and will not, work in Phoenix, or any other Southern U.S. market.

¹⁴⁷ Jason Brough, *Looking Back, Almost Every Team has Struggled with Attendance*, ORLAND KURTENBLOG, May 20, 2009, <http://communities.canada.com/theprovince/blogs/kurtenblog/archive/2009/05/20/looking-back-almost-every-nhl-team-has-struggled-with-attendance.aspx>. At the end of the 2008–09 season, all three teams were filling their arenas to capacity, while the Predators were filling their arena to 87.7% capacity, for a total of 15,010 fans per game. NHL Attendance Report 2010, ESPN.com, http://espn.go.com/nhl/attendance/_/year/2009. As of the 2009–10 season, the Predators are barely making it past the 14,000 average attendance mark, the minimum required for revenue-sharing. John Glennon, *Predators to Top 14,000 Average Attendance; Season Ticket Prices Rising*, THE TENNESSEAN, Mar. 23, 2010, available at <http://blogs.tennessean.com/predators/2010/03/23/preds-will-top-14000-average-ticket-prices-rising/>.

¹⁴⁸ Paola Boivin, *Only Winners Survive Here*, THE ARIZONA REPUBLIC, May 18, 2009, available at <http://www.azcentral.com/sports/coyotes/articles/2009/05/18/20090518boivin0519.html>.

¹⁴⁹ Craig Harris, *Can Phoenix Ever Be a Hockey Town?*, THE ARIZONA REPUBLIC, May 18, 2009, available at <http://www.azcentral.com/sports/coyotes/articles/2009/05/18/20090518biz-coyotes0518.html>.

IX. CONCLUSION

It is not often that a case in federal bankruptcy court can garner so much attention. While the bankruptcy of the Phoenix Coyotes may not have the impact of *Raiders I*, or the upcoming decision in *American Needle*, it does settle some questions raised regarding franchise relocation and further erodes the supposed strength of *Raiders I*.

Going forward, unless leagues are set to expand, potential franchise owners need to be in good favor with the powers-that-be. Potential owners would do well to remember that a professional league is a partnership, and that it is difficult for a court to force a partnership to accept a member that it does not want. This is being demonstrated in the NHL by a \$61.6 million lawsuit launched by the league against Moyes months after the conclusion of the sale of the Coyotes to the NHL.¹⁵⁰ Although the fight to keep the Coyotes in Phoenix may be only a temporary reprieve for the team before eventual relocation, it was a battle the NHL was required to fight to maintain the integrity of its ownership process.

¹⁵⁰ The NHL is suing Moyes in New York State Supreme Court, seeking damages for \$61.6 million, which includes the costs of filing the case in bankruptcy court, operating losses sustained by the Coyotes in the 2009–10 season, money for other creditors, and other damages. David Shoalts, *At Least the On-Ice Product is Worth Watching*, THE GLOBE AND MAIL, Mar. 10, 2010, at S1.

