



A Less Perfect Union: Why Injury Risk Prevents NFL Players from Driving as Hard a Bargain as MLB Players in CBA and Contract Negotiation

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I. INTRODUCTION

In December 1990, Vincent Edward Jackson, better known as “Bo” Jackson,¹ became the first athlete to be named both a Major League Baseball (“MLB”) All-Star and a National Football League (“NFL”) Pro-Bowler.² He remains the only player to ever achieve such distinction in both professional leagues.³ Even so, Jackson’s prominent place in American sports lore has much more to do with brief, on-field demonstrations of other-worldly physical ability than the accrual of any formal MLB or NFL accolades.

At nearly 230 pounds,⁴ with hand-timed 4.12 forty-yard dash speed,⁵ Jackson could convert short run-plays into 91-yard touchdowns,⁶ snap baseball bats like twigs over his own head,⁷ and altogether transform the routine into the remarkable on any given play.⁸ Even more amazingly, as Jackson himself later revealed, he managed to accomplish these feats without ever

¹ See Michael Martinez, *Bo Jackson Has a Choice: Football or Baseball*, N.Y. TIMES, May 19, 1985, <http://www.nytimes.com/1985/05/19/sports/bo-jackson-has-a-choice-football-or-baseball.html?pagewanted=all>, {<https://perma.cc/2DHY-4EH9>}.

² Michael Martinez, *The Sky’s the Limit with Bo*, N.Y. TIMES, July 11, 1989, http://www.nytimes.com/packages/html/sports/year_in_sports/07.11.htm, {<https://perma.cc/TDT2-W2ZM>}.

³ Thomas Neumann, *Ten things to know on the 25th anniversary of Bo Jackson’s final NFL game*, ESPN (Jan. 12, 2016), http://espn.go.com/nfl/story/_/id/14559718/bo-jackson-10-things-know-25th-anniversary-final-nfl-game, {<https://perma.cc/8SLB-U2BD>}.

⁴ *Bo Jackson, RB*, NFL.COM, <http://www.nfl.com/player/bojackson/2517329/profile>, {<https://perma.cc/72FL-AZB5>} (last visited Nov. 21, 2015).

⁵ See Frank Cooney, *With 40-yard dash times nothing’s quite ‘official’*, USA TODAY, Feb. 24, 2008, http://usatoday30.usatoday.com/sports/football/nfl/2008-02-22-40-yard-dash_n.htm, {<https://perma.cc/NTG4-L2BF>} (“[C]oaches have various approaches for getting the 40 time they use. . . . Some use averages. Some throw out slowest and fastest [times] and then average the rest. . . . [Even so,] Jackson’s time of 4.12 at the Superdome is the best ever, verified by numerous reports that week in 1986, including a front-page story from USA TODAY.”).

⁶ See Associated Press, *Jackson Tramples Seahawks*, N.Y. TIMES, Dec. 1, 1987, <http://www.nytimes.com/1987/12/01/sports/jackson-tramples-seahawks.html>, {<https://perma.cc/6J64-VS3G>}.

⁷ See Ira Berkow, *Sports of The Times; Bo Jackson as Paul Bunyan*, N.Y. TIMES, July 16, 1989, <http://www.nytimes.com/1989/07/16/sports/sports-of-the-times-bo-jackson-as-paul-bunyan.html>, {<https://perma.cc/NL37-YSUK>}.

⁸ See, e.g., Lyle Spencer, *People Still Marveling About Feats of Bo*, MLB.COM (July 13, 2010), <http://m.mlb.com/news/article/12224490/>, {<https://perma.cc/SEJ6-CU92>}.

going through the trouble of lifting weights,⁹ which is particularly astonishing considering the substantial, even illegal, performance-enhancing lengths some of his peers went to just to stay competitive.¹⁰ In other words, as *You Don't Know Bo* director Michael Bonfiglio put it, “the story of Bo Jackson isn't really a sports story. It's a superhero story. A legend.”¹¹

Sadly, on January 13, 1991, even Jackson would succumb to the relentless pounding of the NFL.¹² On a run up the right sideline, playing for the Los Angeles Raiders, he was brought down awkwardly by a diving tackle.¹³ By NFL standards, the play was unextraordinary, as running backs are grappled to the ground by defensive players all the time. For Jackson, however, the play resulted in a fracture-dislocation of his hip and the permanent conclusion of his NFL career.¹⁴

Despite his NFL career-ending injury, Bo Jackson still managed to play professional baseball.¹⁵ After being waived by the Kansas City Royals

⁹ *SportScience: Bo Jackson* (ESPN television broadcast Mar. 10, 2013) (“[L]ifting weights was out of the question. And people always said, ‘how is it that you maintain your size?’ Even in college, we’d have mandatory weight day, the only thing that I would do is go down and strengthen my neck. . . . That’s all I did. I never lifted weights[.]”).

¹⁰ See, e.g., *The Steroids Era*, ESPN (Dec. 5, 2012) http://espn.go.com/mlb/topics/_/page/the-steroids-era, {<https://perma.cc/FNP4-BMGC>} (“‘The steroids era’ refers to a period of time in Major League Baseball when a number of players were believed to have used performance-enhancing drugs, resulting in increased offensive output throughout the game. . . . [The steroids era] is generally considered to have run from the late ’80s through the late 2000s.”); see also Scott Merkin, *Bo Jackson denies steroids use*, MLB.COM (Apr. 6, 2005), <http://m.mlb.com/news/article/1001917/>, {<https://perma.cc/EZ9Q-ZP3P>}.

¹¹ *You Don't Know Bo – ESPN Films: 30 for 30* (ESPN), available at <http://espn.go.com/30for30/film?page=you-dont-know-bo>, {<https://perma.cc/4GVD-D9T9>} (“This film will examine the truths and tall tales that surround Jackson, and how his seemingly impossible feats captured our collective imagination for an all-too-brief moment in time.”).

¹² Ron Flatter, *Bo knows stardom and disappointment*, ESPN, <https://espn.go.com/sportscentury/features/00016045.html>, {<https://perma.cc/UU6Q-G69Q>} (last visited Nov. 21, 2015).

¹³ *Id.*

¹⁴ See Lawrence K. Altman, *Jackson's Case Is Dividing Doctors*, N.Y. TIMES, Mar. 20, 1991, <http://www.nytimes.com/1991/03/20/sports/jackson-s-case-is-dividing-the-doctors.html?pagewanted=all>, {<https://perma.cc/2DVL-M526>}; see also Jesse Fredeen, *Could Modern Medicine Have Saved Bo Jackson's Career?*, DEADSPIN (Oct. 15, 2013), <http://deadspin.com/could-modern-medicine-have-saved-bo-jacksons-career-1443105382>, {<https://perma.cc/E4LP-6PRG>}.

¹⁵ See Flatter, *supra* note 12.

because of his hip injury,¹⁶ the Chicago White Sox signed him to a three-year contract.¹⁷ It took surgery and a full season of physical therapy, but when Jackson returned to MLB action he did so in dramatic fashion, hitting a pinch-hit home run on his very first time back at-bat.¹⁸ He never rekindled the physical virtuosity he often displayed prior to his hip injury, but he was a productive major leaguer nevertheless.¹⁹ Ultimately, Jackson's truncated tenure in professional sports has always left fans wondering what could have been.²⁰ For NFL and MLB team owners, however, his story provides a vivid reminder of what he actually was: a described "superhero"²¹ who was *still* a risky long-term contractual investment in an injury-plagued NFL.²²

This Note discusses the crucial role athlete injury risk plays in MLB and NFL labor relations and, more specifically, explores the notion that the greater potential for injury in football, as compared to baseball, has contributed to a significantly less player-friendly Collective Bargaining Agreement ("CBA") and resultant contract negotiation landscape in the NFL than exists in MLB. As a consequence of these differences, injury risk may also help to explain why MLB contracts remain richer in total achievable compensation, total guaranteed compensation, and total promised years of employment than top NFL contracts, despite the NFL bringing in more total revenue than any other professional sports league in the United States.²³

This Note is organized into three parts: Part I provides relevant background on MLB and the NFL's past labor relations; Part II examines the role of injury risk on the collective bargaining processes of each league; and Part III examines the role of injury risk on MLB and NFL contract negotiation.

¹⁶ *Id.*

¹⁷ Murray Chass, *BASEBALL; White Sox Decide to Gamble on Bo Jackson*, N.Y. TIMES, Apr. 4, 1991, <http://www.nytimes.com/1991/04/04/sports/baseball-white-sox-decide-to-gamble-on-bo-jackson.html>, {<https://perma.cc/66XR-99YK>}.

¹⁸ Flatter, *supra* note 12.

¹⁹ *See id.*

²⁰ *See, e.g., id.*

²¹ *You Don't Know Bo*, *supra* note 11.

²² *See generally N.F.L. CAMPS; Report Details Jackson's Raider Contract*, N.Y. TIMES, Aug. 1, 1987, <http://www.nytimes.com/1987/08/01/sports/nfl-camps-report-details-jackson-s-raider-contract.html>, {<https://perma.cc/FM94-WJ2Z>} (providing the initial details of Bo Jackson's NFL player contract when he agreed to terms with the Los Angeles Raiders and officially launched his NFL career).

²³ *See* Mike Ozanian, *The Most Valuable NFL Teams*, FORBES (Aug. 14, 2013), <http://www.forbes.com/sites/mikeozanian/2013/08/14/the-most-valuable-nfl-teams> ("The National Football League continues to be the most lucrative sports league in the world.").

This Note concludes with a prospective discussion on the crucial role injury risk will almost certainly play in future negotiations over NFL CBA matters.

II. HISTORY OF LABOR RELATIONS IN MLB AND THE NFL

Before analyzing the impact of player injury risk on MLB and NFL collective bargaining and contract negotiation, it is crucial to understand each league's unique historical progression toward its current labor environment. Essential to this understanding is a grasp of the National Labor Relations Act of 1935 ("NLRA")²⁴ and its relationship with Section One of the Sherman Antitrust Act ("Sherman Act").²⁵

Section One of the Sherman Act prohibits "every contract, combination[,], . . . or conspiracy, in restraint of trade."²⁶ Taken at face value, this broad statutory language almost certainly outlaws the practice of unifying an entire industry of employees to collectively bargain against their employers, i.e., forming a union.²⁷ As a consequence, to avoid the permanent undermining of all organized labor practices by the Sherman Act, Congress passed "three pieces of legislation explicitly shielding union activity from antitrust law[.]"²⁸ (1) section six of the Clayton Act of 1914;²⁹ (2) the Norris-LaGuardia Act of 1932;³⁰ and (3) the NLRA of 1935.³¹

Together, these acts form a "statutory labor exemption" from antitrust law that "guarantees employees the right to form a union."³² Nevertheless, while the language of the NLRA explicitly protects the right to collectively bargain, it fails to clearly protect any resulting anti-competitive agreement, e.g., a CBA, from Sherman Act liability.³³

As a result, the Supreme Court of the United States interpreted a "non-statutory labor exemption" to emanate from the NLRA as well.³⁴ This exemption, over years of litigation, has been synthesized into an antitrust exemption immunizing CBAs that meet the following three requirements: (1) the CBA was negotiated in good faith; (2) the CBA only regulates the em-

²⁴ 29 U.S.C. §§ 151–169 (2012).

²⁵ 15 U.S.C. § 1 (2012).

²⁶ *Id.*

²⁷ Nathaniel Grow, *Decertifying Players Unions: Lessons from the NFL and NBA Lockouts of 2011*, 15 VAND. J. ENT. & TECH. L. 473, 478 (2013).

²⁸ *Id.*

²⁹ 15 U.S.C. § 17 (2012).

³⁰ 29 U.S.C. §§ 101–115 (2012).

³¹ Grow, *supra* note 27, at 479.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

ployment relationship between the union members and signatory employer(s); and (3) the CBA does not affect competing companies that are not parties to the agreement.³⁵ The current CBAs of both MLB and the NFL meet these requirements and, as a result, escape antitrust liability.³⁶

However, the function of unions in the context of professional sports is somewhat unique. In most unionized industries, where workers are largely fungible, employees form unions to “achieve wage levels that are higher than would [otherwise] be available in a free market.”³⁷ In professional sports, however, because elite (i.e., rare) physical abilities render athletes less readily replaceable, most players actually command sufficient individual bargaining power to garner lucrative salaries without the aid of a union.³⁸ Instead, the primary reason professional athletes form unions is to “prevent leagues from imposing anticompetitive labor restraints[.]”³⁹ As a consequence, and somewhat paradoxically, this means that professional athletes rely on an anticompetitive labor strategy to ensure the enjoyment of a more competitive, free market labor environment.⁴⁰

A. MLB’s Labor Relations History

The Major League Baseball Players Association (“MLBPA”) is the entity that currently bargains on behalf of all active MLB players during collective bargaining.⁴¹ By MLB’s own admission, the MLBPA is “widely considered one of the strongest unions in the country.”⁴² However, this was not always so. During the early twentieth century, the adolescent years of organized professional baseball, player contracts customarily included “re-

³⁵ *Id.* at 480–81.

³⁶ *Id.*; see also Michael C. Harper, *Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption*, 38 WM. & MARY L. REV. 1663, 1722 (1997) (“[P]rofessional team sport athletes . . . can still free themselves to bring antitrust challenges to league-imposed labor market restraints by decertifying their union[.] . . . thereby eliminating any collective bargaining process with which antitrust challenges could interfere.”).

³⁷ Grow, *supra* note 27, at 481.

³⁸ *Id.* at 482.

³⁹ *Id.*

⁴⁰ See *id.*

⁴¹ *Frequently Asked Questions*, MLBPLAYERS.COM, http://www.mlbplayers.com/ViewArticle.dbml?DB_OEM_ID=34000&ATCLID=211044889, {<https://perma.cc/XR8N-2A8S>} (last visited Dec. 21, 2016).

⁴² *History*, MLBPLAYERS.COM, http://www.mlbplayers.com/ViewArticle.dbml?ATCLID=211042995&DB_OEM_ID=34000, {<https://perma.cc/4ZXR-5ZPL>} (last visited Nov. 21, 2015).

serve clauses.”⁴³ These clauses bound players to the first team they signed with, but still allowed teams to trade, sell, or cut players at their broad discretion.⁴⁴ In other words, baseball initially had no “free agency,”⁴⁵ and players were forced to either accept their current team’s deal or retire from the sport altogether.

Predictably, use of the reserve clause eventually led to an antitrust controversy.⁴⁶ In 1922, MLB’s American and National Leagues managed to buy out and scuttle a fledgling, competitor baseball league.⁴⁷ Irked by MLB’s meddlesome commercial maneuver, Ned Hanlon, owner of a team in the now defunct upstart league, filed an antitrust suit under Section One of the Sherman Act⁴⁸ against MLB, alleging a conspiracy to monopolize professional baseball.⁴⁹

Infamously, in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, the United States Supreme Court found in favor of the National League (i.e., MLB), determining that baseball, despite its revenue production and nationwide reach, was not interstate commerce and, therefore, not subject to federal antitrust law.⁵⁰ For Hanlon, the decision served as a formal eulogy for his gone-too-soon league, a disappointing re-

⁴³ David Greenberg, *Baseball’s Con Game: How did America’s Pastime get an Antitrust Exemption?*, SLATE (July 19, 2002), http://www.slate.com/articles/news_and_politics/history_lesson/2002/07/baseballs_con_game.html, {<https://perma.cc/7BM D-WKKA>}.

⁴⁴ *Id.*

⁴⁵ “Free agency is the system that enables professional athletes to satisfy their contract terms with one team to receive offers from other teams in order to relocate or increase their salaries. It is an important right for an athlete, enabling him [or her] to take advantage of the competition among the teams in the League to receive a fair value for his services.” Bradley S. Albert & Brian K. Albert, *Fourth and Goal: It’s Time for Congress to Tackle the Nonstatutory Labor Exemption*, 2 SPORTS LAW. J. 185, 186 n.3 (1995).

⁴⁶ See Roger I. Abrams, *Before the Flood: The History of Baseball’s Antitrust Exemption*, 9 MARQ. SPORTS L.J. 307, 308 (1999).

⁴⁷ See *id.*

⁴⁸ 15 U.S.C. § 1 (2012).

⁴⁹ See Abrams, *supra* note 46, at 307–08 (“The historical wellspring of baseball’s antitrust exemption was a typical business war among entrepreneurs[.] . . . Federal League owners had created a rival circuit of baseball clubs, enticing some of the major league’s finest talent to jump. . . . [But w]hen American and National League magnates, as big league club owners called themselves, brought ‘reason’ to bear on their competition along with millions in cash, the Federal League folded.”).

⁵⁰ 259 U.S. 200, 207–09 (1922) (“[T]he transport [of teams and equipment] is a mere incident, [and] not the essential thing. That to which it is incident, the exhibition, although made for money[,] would not be called trade of commerce in the commonly accepted use of those words.”).

sult for any entrepreneur with no way to see the fruits of his investment realized. For the professional athletes now confined to MLB, however, the impact of *Federal Baseball* was considerably more profound and devastating.⁵¹ In fact, it would take an iconic uprising by outfielder Curt Flood,⁵² decisive vision from renowned MLBPA leader Marvin Miller,⁵³ and approximately fifty years of tenacious collective bargaining to walk back the effect of *Federal Baseball* and eventually realize the degree of free agency rights modern MLB players experience today.

B. *The NFL's Labor Relations History*

The NFL similarly started with a “reserve system,”⁵⁴ and likewise saw it gradually cast away by collective bargaining.⁵⁵ However, for the NFL, there was never a flagship Supreme Court verification of football’s monopolistic practices to sew deep, interminable seeds of resentment in players, like there was for baseball.⁵⁶ By contrast, the NFL’s most conspicuous free agency legal battle is *Mackey v. National Football League*, an Eighth Circuit decision that actually marked a major victory for NFL players.⁵⁷ In *Mackey*, the Eighth Circuit overturned the free agency-inhibiting “Rozelle Rule”⁵⁸ and, as a consequence, set the NFL down a path leading directly to its cur-

⁵¹ See Abrams, *supra* note 46, at 307–09.

⁵² See Joseph Durso, *Curt Flood is Dead at 59; Outfielder Defied Baseball*, N.Y. TIMES, Jan. 21, 1997, <http://www.nytimes.com/1997/01/21/sports/curt-flood-is-dead-at-59-outfielder-defied-baseball.html>, {<https://perma.cc/M8XG-G367>}; see also Flood v. Kuhn, 407 U.S. 258, 283 (1972).

⁵³ See Marvin Miller: MLBPA Executive Director, 1966–83, MLB.COM, <http://mlb.mlb.com/pa/bios/miller.jsp>, {<https://perma.cc/M8B7-WSS9>} (last visited Nov. 21, 2015).

⁵⁴ See Alvin Dominique, *NFL History: The Road to Free Agency*, BLEACHER REPORT (Apr. 17, 2008), <http://bleacherreport.com/articles/18183-nfl-history-the-road-to-free-agency>, {<https://perma.cc/E6MX-ZMFL>}.

⁵⁵ See Jarrett Bell, *Timeline of NFL Labor Disputes*, USA TODAY, Mar. 3, 2011, http://usatoday30.usatoday.com/sports/football/nfl/2011-03-03-nfl-labor-disputes-timeline_N.htm, {<https://perma.cc/J95E-LXL4>}.

⁵⁶ *Fed. Baseball*, 259 U.S. at 209.

⁵⁷ 543 F.2d 606 (8th Cir. 1976).

⁵⁸ “The Rozelle Rule involved an automatic one-year option clause in the Standard Player Contract that permitted the owner to option their own players for one year at 90% [of] their previous salary. The result was that players were coerced to sign new contracts [with their current team] and get paid more money[, before ever obtaining free agency eligibility,] . . . [to avoid having to] work under the option and get[ing] less.” Genevieve F.E. Birren, *A Brief History of Sports Labor Stoppages: The Issues, The Labor Stoppages and Their Effectiveness (or Lack Thereof)*, 10 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 11 (2014).

rent incarnation of player free agency.⁵⁹ It is particularly important to note that the reason the NFLPA had to take the Rozelle Rule to court was that the union initially failed to vindicate its member-players' free agency rights through collective bargaining.⁶⁰ As a result, the federal courts came out as a champion of NFL free agency, in stark contrast to the conservative roadblock created by the MLB free agency litigation.

C. An Especially Motivated MLBPA

The judicial system's contradictory treatment of baseball and football can be rationally explained by the tremendous evolution in professional sports as an industry between 1922, when *Federal Baseball* was decided,⁶¹ and 1976, when *Mackey* was decided.⁶² What is less easily understood is the Supreme Court's decision to affirm *Federal Baseball's* dubious holding as late as 1972, in *Flood v. Kuhn*.⁶³ Justice Blackmun, writing the majority opinion, explained that while "[p]rofessional baseball is a business and it is engaged in interstate commerce[, the reserve system] . . . is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis[.]"⁶⁴ He goes on to concede that "[o]ther professional sports operating interstate—football, boxing, basketball, and, presumably, hockey and golf—are not so exempt[.]"⁶⁵ In the wake of *Flood*,

[t]hose specializing in sports law have either attacked *Flood* as a ridiculous decision that improperly distinguished between baseball and other professional sports, or have praised it for waging guerilla warfare on the idea that Section 1 of the Sherman Act should apply to intra-league arrangements by owners of professional sports teams.⁶⁶

⁵⁹ *Mackey*, 543 F.2d at 622 (holding that the Rozelle Rule was an unreasonable restraint of trade in violation of the Sherman Act).

⁶⁰ See Birren, *supra* note 58.

⁶¹ *Fed. Baseball*, 259 U.S. at 209.

⁶² *Mackey*, 543 F.2d at 606.

⁶³ 407 U.S. 258, 284–85 (1972); see also *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953).

⁶⁴ *Flood*, 407 U.S. at 282.

⁶⁵ *Id.* at 282–83.

⁶⁶ Stephen F. Ross, *Reconsidering Flood v. Kuhn*, 12 U. MIAMI ENT. & SPORTS L. REV. 169, 171 (1995) ("Those viewing *Flood* through the lens of statutory interpretation perceive the decision as adhering rigidly to the principle of *stare decisis*; this rigidity has been both praised and criticized, and *Flood* has also been attacked for unjustifiably relying on legislative inaction to infer congressional support for earlier precedents.").

What remains indisputable, however, is the simple fact that the Supreme Court repeatedly, and over numerous decades, imposed an exceptional application of federal antitrust law on professional baseball.⁶⁷ As a result, that unpleasant truth has almost certainly served as enduring confirmation of the uniquely crucial nature of MLB collective bargaining in a way not quite matched by the NFLPA's labor relations situation.

Eventually, the Curt Flood Act of 1998 officially eliminated baseball's antitrust exemption for player employment issues.⁶⁸ But by that point, the MLBPA had already largely resolved the issue, through collective bargaining, without Congress' help.⁶⁹ The Act also left team relocation,⁷⁰ the minor leagues,⁷¹ and numerous other non-employment issues untouched and still utterly exempt from antitrust law.⁷² As a consequence, professional baseball remains shielded from antitrust law to a greater degree than any other professional sport in the United States.⁷³ This distinction, though not directly applicable to employment issues anymore, has inevitably created a sense of urgency in the MLBPA.⁷⁴ Professional baseball's unique labor history has contributed to that union's run as arguably the most successful union in United States' history.⁷⁵

⁶⁷ See, e.g., *Fed. Baseball*, 259 U.S. 200; *Flood*, 407 U.S. at 258; *Toolson*, 346 U.S. at 357.

⁶⁸ Curt Flood Act of 1998, Pub. L. No. 105-297, § 3, 112 Stat. 2824 (1998) (codified as amended at 15 U.S.C. § 26b (2012)).

⁶⁹ See Edmund P. Edmonds, *The Curt Flood Act of 1998: A Hollow Gesture After All These Years?*, 9 MARQ. SPORTS L.J. 315, 342 (1999).

⁷⁰ Team relocation refers to the practice of moving a professional sports franchise's home location from one metropolitan area to another. MLB currently imposes substantial restrictions on the free movement of its teams. Ari K. Haber, *Keeping the A's in Oakland: Franchise Relocation, City of San Jose, and The Broad Power of Baseball's Antitrust Exemption*, 22 UCLA ENT. L. REV. 1, 2 (2014).

⁷¹ There are 160 minor league franchises in total; each is affiliated with a major league club and categorized into a class (Triple-A, Double-A, or Single-A) based on level of competition. The overall function of the minor leagues is to gradually develop players, as they progress through the minor league classes, for the eventual rigors of MLB competition. Bradley V. Murphy, *Protecting America's Pastime: The Necessity of Major League Baseball's Antitrust Exemption For The Survival of Minor League Baseball*, 49 IND. L. REV. 793, 797 (2016).

⁷² See Edmonds, *supra* note 69, at 341; see also Garrett R. Broshuis, Note, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 HARV. J. SPORTS & ENT. L. 51, 67 (2013).

⁷³ Edmonds, *supra* note 69, at 317.

⁷⁴ *Id.* at 327.

⁷⁵ See, e.g., RICHARD MCKELVEY, FOR IT'S ONE, TWO, THREE, FOUR STRIKES YOU'RE OUT AT THE OWNERS' BALL GAME: PLAYERS VERSUS MANAGEMENT IN BASEBALL 54 (2001) (describing the creation of the MLBPA and its foundational advo-

III. IMPACT OF INJURY RISK ON COLLECTIVE BARGAINING

In 2007, Steven J. Dubner, of *Freakonomics* fame, posed this question to a handful of sports economists and writers: “It’s a widely held perception that . . . players have more juice in M.L.B., while it’s a team’s ownership that has more power in the N.F.L., often at the expense of individual players. Is this true?”⁷⁶ In response, Andrew Zimbalist, professor of economics at Smith College and a prominent sports economist, simply asked:

Why would anyone ask this question? Major League Baseball and the N.F.L. are organized by the owners. The owners in each league elect a commissioner who acts in the best interests of the owners, or, at least, endeavors to do so. Each league is a monopoly and exercises significant market power by, *inter alia*, extracting significant public subsidies for the construction of facilities. The players in each league share in the monopoly booty. However, since there are 45 active roster players on an N.F.L. team [and] 25 on an M.L.B. team, the average salaries in baseball are roughly twice as high in M.L.B. as they are in the N.F.L.⁷⁷

Is the answer really that simple? Does each MLB player, on average, receive a larger portion of the “monopoly booty”⁷⁸ solely because of smaller rosters? From a mathematical perspective, Zimbalist’s assertion seems undeniably true, dividing up money among less people results in greater relative shares for each person. However, the devil is in the details of a CBA, and in these details is where the impact of injury risk surfaces.

A. *MLB vs. NFL: CBA-Created Differences in League Structure*

The major differences between the NFL’s⁷⁹ (ratified in 2011) and MLB’s⁸⁰ (ratified in 2016) latest CBAs are the differences in revenue-sharing

cates and members’ efforts as ultimately resulting in “the MLBPA arguably becoming the most successful union in history—and not just in sports history.”).

⁷⁶ Stephen J. Dubner, *N.F.L. vs. M.L.B. as a Labor Market: A Freakonomics Quorum*, FREAKONOMICS (Nov. 28, 2007), <http://freakonomics.com/2007/11/28/nfl-vs-mlb-as-a-labor-market-a-freakonomics-quorum/>, {<https://perma.cc/6ATB-2JVU>}.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ NFL Collective Bargaining Agreement, NFL LABOR WORDPRESS (2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>, {<https://perma.cc/85TU-5KTL>}.

⁸⁰ *Details of MLB, MLBPA Labor Agreement*, MLB.COM (Dec. 4, 2016), <http://m.mlb.com/news/article/210125462/-mlb-mlbpa-labor-agreement>, {<https://perma.cc/WXE3-N49X>}. On November 30, 2016, mere hours before the prior 2012 CBA was set to expire, MLB and the MLBPA agreed in principal to a new, five-year

and competitive balance mechanisms. The NFL's revenue-sharing system is much more egalitarian, essentially splitting 80% of all profits evenly among its 32 teams.⁸¹ By contrast, MLB's revenue-sharing system is much more individualistic, with only 25% of the profits being divided evenly among its 32 teams and the remaining 75% staying locally with the team that earned it.⁸² As for competitive balance mechanisms, once again, the NFL employs a more egalitarian "salary cap" structure, requiring that teams keep total salary expense below a strict maximum figure, while MLB allows its teams to spend as much as they want, as long as they are willing to pay an additional luxury tax for exceeding a certain figure.⁸³

CBA. For the purposes of this Article, the general thrust of the 2016 CBA's revenue sharing structure and competitive balance mechanisms remain consistent with those expressed in the 2012 CBA. Even so, there are changes in the 2016 CBA that will inevitably alter, to some degree, the way MLB teams operate in free agency and general roster construction. When appropriate, this Note will discuss those changes and address their relative consequences in more detail. *MLB Avoids Lockout, Reaches CBA Deal with Union*, SPORTS ILLUSTRATED (Dec. 1, 2016), <http://www.si.com/mlb/2016/11/30/mlb-lockout-collective-bargaining-agreement-deal-reached>, {<https://perma.cc/7VTM-2YL7>}; Michael Baumann, *What's in MLB's New CBA?*, THE RINGER (Dec. 1, 2016), <https://theringer.com/whats-in-mlb-s-new-cba-11de1b0e5682>, {<https://perma.cc/E89S-TSRU>}; 2012–2016 Basic Agreement (2011), http://mlb.mlb.com/pa/pdf/cba_english.pdf, {<https://perma.cc/L2GQ-YRF7>}.

⁸¹ Dubner, *supra* note 76.

⁸² *Id.*; see also *Details of MLB, MLBPA Labor Agreement*, *supra* note 80 ("The total net transfer value under the [2016 CBA's] Revenue Sharing Plan, as a percentage of industry revenue, will remain the same [as it was in the 2012 agreement], but the formula by which individual Club's revenue sharing treatment is determined has been revised."); Evan Drellich, *MLB Changes Market Rank Formula in Revenue Sharing*, BOS. HERALD, Dec. 3, 2016, http://www.bostonherald.com/sports/red_sox/club_house_insider/2016/12/mlb_changes_market_rank_formula_in_revenue_sharing, {<https://perma.cc/U24C-5XWD>} ("[In the 2012 CBA,] MLB was essentially divided in two as part of something called market rank disqualification. The top 15 markets, gradually, lost their revenue sharing, [while the] . . . bottom 15 did not. Market rank disqualification still exists in the new [2016] CBA, but how it is calculated has changed. The formula is based on something called market score, which is essentially the relationship of the market to the average MLB market based on population, income and cable households. . . . In the new system, . . . [t]he total number of teams disqualified has dropped from 15 to 13[.]").

⁸³ See Nathaniel Grow, *MLB's Evolving Luxury Tax*, FANGRAPHS (May 1, 2015), <http://www.fangraphs.com/blogs/mlbs-evolving-luxury-tax/>, {<https://perma.cc/9MX2-SAXU>} ("[MLB teams] incur a fine ranging from 17.5% to 50% – depending on how many years in a row the club has exceeded the luxury tax threshold – for every dollar they spend on player salaries over \$189 million per year."); see also David Schoenfield, *Why Baseball's Big Spenders Now Risk a 92 Percent Luxury Tax*, ESPN (Dec. 2, 2016),

The result of these systemic differences is an NFL where revenue is largely tied to league-wide success and salaries are artificially capped, and an MLB where revenue is largely tied to individual team success and extravagant salaries are merely taxed, but not strictly capped.⁸⁴ As sports consultant Vince Gennaro put it, “the lower variability associated with N.F.L. revenues and costs yield[s] a more favorable risk adjusted return than the up-and-down fortunes of an M.L.B. owner.”⁸⁵ Obviously, this is excellent news for NFL owners, but how did it get to be this way? Are NFL owners better at collective bargaining? Is the NFLPA more inept than the MLBPA?

B. *Injury Risk's Effect on CBA Leverage*

In many ways, the MLBPA appears to be better at collective bargaining than the NFLPA.⁸⁶ However, as previously noted, due to the more collectivist nature of the NFL's revenue-sharing system, NFL team owners have largely identical economic interests and incentives.⁸⁷ As a result, they stand substantially more unified than their employee-players, who, despite being represented by a single union, vary in rookie-to-veteran status, position group, and perceived skill level.⁸⁸ Even so, arguably the most important factor contributing to the differences between the two CBAs is injury risk.

Injuries are extremely common in the NFL.⁸⁹ Over a stretch of fifteen recent seasons (2000 through 2014), NFL teams filed 30,186 injury re-

ers-among-big-spenders-likely-hit-hard-by-luxury-tax, {<https://perma.cc/67CL-LVHJ>} (“The . . . [2016] luxury tax threshold was \$189 million. That jumps to \$195 million for 2017, then to \$197 million, \$206 million, \$209 million and \$210 million through 2021, the final season of the [collective bargaining] agreement.”).

⁸⁴ See Dubner, *supra* note 76.

⁸⁵ *Id.*

⁸⁶ See Howard Bryant, *The MLBPA's Power — and the NFLPA's Failings*, ESPN (Apr. 13, 2015), http://www.espn.com/nfl/story/_id/12659451/los-angeles-angels-josh-hamilton-protection-nfl-vets-imagine, {<https://perma.cc/KU9V-93WM>} (identifying persistent infighting and the absence of a “public face of [the] union” to encourage solidarity as key reasons for the NFLPA's relative collective bargaining struggles); see also Malcolm Gladwell, *Talent Grab: Why Do We Pay Our Stars So Much Money?*, NEW YORKER, Oct. 11, 2010, <http://www.newyorker.com/magazine/2010/10/11/talent-grab>, {<https://perma.cc/9FLR-3X4E>}.

⁸⁷ See *supra* text accompanying note 81.

⁸⁸ See Terrence Caldwell, *An Overview and Comparative Analysis of the Collective Bargaining Agreements in the NBA, NFL, and MLB*, CMC SENIOR THESES 2, Paper 62, 28 (2010).

⁸⁹ Zachary O. Binney, *NFL Injuries Part I: Overall View*, FOOTBALL OUTSIDERS (Sept. 25, 2015), <http://www.footballoutsiders.com/stat-analysis/2015/nfl-injuries-part-i-overall-view>, {<https://perma.cc/2UGZ-UK5L>}. Football Outsiders, created

ports⁹⁰ and NFL players missed a combined 51,596 regular-season weeks as a consequence of those reported injuries.⁹¹ From those figures, that means roughly 2,012 injury reports are filed in an average NFL season.

By comparison, 3,072 players were placed on the disabled list (“DL”)⁹² over a recent seven season period (2002 through 2008) in MLB.⁹³ From those figures, that means approximately 439 DL designations are made in an average MLB season. Considering that the MLB regular season extends over a marathon-like 162 games,⁹⁴ while the NFL regular season is a modest 16,⁹⁵ and MLB also has the longest preseason of any major professional American sport,⁹⁶ the disparity between the NFL’s staggering 2,012 injury reports per season and MLB’s 439 DL designations per season is remarka-

by Aaron Schatz, a writer and analyst for ESPN.com and ESPN the Magazine, is a website dedicated to the development of new statistical approaches to analyzing the NFL game. *Meet the Outsiders*, FOOTBALL OUTSIDERS, <http://www.footballoutsiders.com/info/meet>, {<https://perma.cc/8EBS-HGQN>} (last visited Feb. 28, 2016).

⁹⁰ It should be noted that Football Outsiders’ injury data comes from “official” NFL injury reports. However, NFL injury reports do not record every single NFL player injury (e.g., a rookie who gets injured in training camp, then fails to make the 75-man roster, and ultimately never ends up playing an NFL snap would go completely undocumented by official injury reports). As a result, this data is almost certainly an underestimate of the NFL’s true injury toll. *Id.*

⁹¹ *Id.*

⁹² “The disabled list or DL is the place where teams inscribe a player’s name when he is unavailable for a lengthy period of the season due to an injury.” *Disabled List*, BASEBALL-REFERENCE, http://www.baseball-reference.com/bullpen/Disabled_list, {<https://perma.cc/E8JD-7SRF>} (last visited Mar. 6, 2016).

⁹³ Matthew Posner et al., *Epidemiology of Major League Baseball Injuries*, 39 AM. J. SPORTS MED. 1676, 1677 (2011).

⁹⁴ See 2012–2016 Basic Agreement, art. V – Scheduling, sec. A, at 3 (2011), http://mlb.mlb.com/pa/pdf/cba_english.pdf, {<https://perma.cc/HCC6-HEJQ>}; see also Dayn Perry, *MLB, Players Avoid Lockout by Agreeing to New Five-Year CBA, Pending Ratification*, CBS SPORTS (Dec. 1, 2016), <http://www.cbssports.com/mlb/news/mlb-players-avoid-lockout-by-agreeing-to-new-five-year-cba-pending-ratification>, {<https://perma.cc/M9G4-SRVZ>} (“The season will expand from 162 games over 183 days to 162 games spread across 187 days or so.”).

⁹⁵ See NFL Collective Bargaining Agreement, art. 31 – Additional Regular Season Games, at 158 (2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>, {<https://perma.cc/V6J3-PZDD>}.

⁹⁶ See Gil Imber, *Is MLB Spring Training Too Long, Too Short or Just Right?*, BLEACHER REPORT (Mar. 5, 2013), <http://bleacherreport.com/articles/1553909-is-mlb-spring-training-too-long-too-short-or-just-right>, {<https://perma.cc/J942-DGLB>} (“Compared to other sports, MLB’s preseason ritual—which clocks in at 37 days—can be considered lengthy. . . . In terms of actual games, NFL teams play four contests, basketball has eight and the NHL between seven and eight. MLB clubs, on the other hand, play approximately 33.”).

ble.⁹⁷ Put simply, NFL players experience more injuries per competitive contest than MLB players by a tremendous margin.⁹⁸

Thus, because NFL players are exposed to such a high risk of injury, NFL team owners have the benefit of dealing with players who have relatively short career-spans: only 3.3 years on average.⁹⁹ The benefit of bargaining against players with such short average careers is that those players have less time to agree on a deal and are much less likely to use the strongest, last-resort leverage available to any employee union: the strike.¹⁰⁰

The MLBPA, on the other hand, managed to avoid the introduction of a salary cap by striking for 232 days and missing more than 900 total games, including the World Series, during the 1994 season.¹⁰¹ Of course, a major reason why MLB players were able to take such a hard-edge stance is

⁹⁷ Binney, *supra* note 89; Posner et al., *supra* note 93, at 1677. It should be noted that NFL active rosters (53 players) are more than twice the size of MLB active rosters (25 players), which means the NFL (1,696 total active players) has significantly more athletes contributing to its annual injury totals than MLB does (only 750 total active players). Even so, after accounting for this disparity in roster size by looking at the number of injuries *per active player*, the data indicates that roughly 1.2 injuries are reported per active NFL player each season, while only 0.6 DL designations are made per active MLB player each season. Marc Lillibridge, *The Anatomy of a 53-Man Roster in the NFL*, BLEACHER REPORT (May 16, 2013), <http://bleacherreport.com/articles/1640782-the-anatomy-of-a-53-man-roster-in-the-nfl>, {<https://perma.cc/2RCF-8RJV>}; *Roster*, BASEBALLREFERENCE, <http://www.baseball-reference.com/bullpen/Roster>, {<https://perma.cc/YJK9-3XP7>} (last visited April 29, 2017).

⁹⁸ Even outside the context of direct comparison to MLB, the NFL's injury rate is still quite striking when one considers that by week two of the 2015 NFL season almost 15% (250 players) of the league's entire active roster population had already suffered an injury. Judd Legum, *Two Weeks into the Season, 15 Percent of Football Players have Suffered an Injury*, THINK PROGRESS (Sept. 21, 2015), <http://thinkprogress.org/sports/2015/09/21/3703665/the-human-toll-of-2-weeks-of-nfl-football/>, {<https://perma.cc/5LG3-NHJ6>}.

⁹⁹ *Average Playing Career Length in the National Football League*, STATISTA, <http://www.statista.com/statistics/240102/average-player-career-length-in-the-national-football-league>, {<https://perma.cc/HRK4-Q7WT>} (last visited Dec. 21, 2016); *see generally* John Keim, *With average NFL career 3.3 years, players motivated to complete MBA program*, ESPN (July 29, 2016), http://www.espn.com/blog/nflnation/post/_/id/207780/current-and-former-nfl-players-in-the-drivers-seat-after-completing-mba-program, {<https://perma.cc/89YZ-TWF8>}.

¹⁰⁰ *See, e.g.*, Caldwell, *supra* note 88, at 28 (“[U]nlike MLB or [the] NBA, the NFL owners were unified[,] and this unity was so strong because they shared revenues [and] . . . had the advantage of dealing with athletes with relatively short career-spans, which meant they could wait-out player strikes.”).

¹⁰¹ Cliff Corcoran, *The Strike: Who Was Right, Who Was Wrong and How It Helped Baseball*, SPORTS ILLUSTRATED (Aug. 12, 2014), <http://www.si.com/mlb/2014/08/12/1994-strike-bud-selig-orel-hershiser>, {<https://perma.cc/5GGX-PYQ9>}.

because they enjoy an average playing career, about 5.6 years, that nearly doubles that of their NFL counterparts.¹⁰² Therefore, striking for an entire season is a tenable solution for most MLB players, but illogical for the average NFL player. The typical NFL player would not only lose a year's worth of compensation, but he would also be throwing away one-third of his playing career for CBA demands that, even if realized, would only benefit him for a couple of seasons at most. Unless martyrdom for the sake of future NFL players is the objective, such a course of action makes little sense for current NFL players. Thus, the urgency to make the most of fleeting on-field earning potential overshadows the wisdom, or rather the luxury, of thinking long-term during collective bargaining.¹⁰³

C. Lack of Leverage Leads to Short-term Strategy

The NFL's 2011 CBA provides a clear example of the NFLPA's preference for securing small, short-term needs instead of larger, long-term goals. Ever since the most recent CBA was signed in 2011, NFL teams are making money "hand over fist."¹⁰⁴ For example, in the two years prior to the 2011 CBA, the Green Bay Packers reported a combined net income of \$22.3 million; in the two years after the new CBA, the Packers reported a combined net income of \$85.8 million, nearly quadruple its previous earnings.¹⁰⁵ As for the players, since the new CBA, "[t]he rookie pool has been slashed, young players are locked into unfavorable contracts, and the money isn't trickling to the veterans, who are getting priced out of the NFL, even at minimum salaries."¹⁰⁶ In other words, the new CBA lowered the maximum amount of money teams are allowed to pay rookies, made sure those low-

¹⁰² William D. Witnauer, et al., *Major League Baseball Career Length in the Twentieth Century*, 26(4) POPUL. RES. POLICY REV. 371, 371–86 (2007). For a discussion of this study, see Sam Roberts, *Just How Long Does the Average Baseball Career Last?*, N.Y. TIMES, July 17, 2007, <http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html>, {<https://perma.cc/3QLF-AWZW>} ("After studying the 5,989 position players who began their careers between 1902 and 1993 and who played 33,272 years of major league baseball, three demographers have come up with an answer: On average, a rookie can expect to play major league baseball for 5.6 years."). See also Teddy Schall & Gary Smith, *Career Trajectories in Baseball*, 13(4) CHANCE 35, 35–38 (2000).

¹⁰³ See Caldwell, *supra* note 88, at 28.

¹⁰⁴ Ben Volin, *Now More than Ever, We Realize NFL Owners Won*, BOS. GLOBE, July 21, 2013, <https://www.bostonglobe.com/sports/2013/07/20/nfl-owners-destroyed-players-cba-negotiations/ia3c1ydpS16H5FhFEiviHP/story.html>, {<https://perma.cc/ME3E-HPCJ>}.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

earning rookie deals lasted longer, and rendered veteran players unattractive investments by setting relatively high veteran minimum salaries.¹⁰⁷ As an anonymous sports agent bluntly put it, “It’s the worst CBA in professional sports history. It’s pushing the veterans out of the game and cuts the rookie pay in half. How is that a good deal?”¹⁰⁸

The 2011 CBA did manage to score some important benefits for NFL players, most of which are closely related to player health and post-career care. As time passes, however, even those feel like hollow victories.¹⁰⁹ As one writer explained,

[t]o be fair, the players have better post-retirement benefits—medical care, pensions, transition programs, and more—under the new CBA. . . . Players also have a better quality of life, with a shorter offseason program, stricter guidelines on contact in practice, and the elimination of two-a-days in training camp. Then again, the owners probably were happy to cave on those demands. It helps them promote player safety and ward off lawsuits. And do you think [New England Patriots’ owner Robert] Kraft or any owner cares if his players have two-a-days? . . . [W]hen it comes to the serious stuff—splitting up the NFL’s \$9 billion in revenue—the NFLPA “got taken to the woodshed[.]”¹¹⁰

Essentially, instead of pushing for ways to better financially capitalize on earning years (i.e., playing years) by attacking the NFL’s salary cap and egalitarian revenue-sharing mechanisms, the NFLPA settled for retirement benefits that are certainly sorely needed, but are still inferior to the benefits offered by other American sports leagues.¹¹¹ Even further, the NFL’s retire-

¹⁰⁷ See Jason Fitzgerald, *Explaining the NFL Rookie Pool and Its Impact on the Salary Cap*, OVER THE CAP (Mar. 7, 2013) <http://overthecap.com/explaining-the-nfl-rookie-pool-and-its-impact-on-the-salary-cap>, {<https://perma.cc/QRB8-AR3R>} (“Per the current CBA[,], each NFL team is allotted a maximum amount of dollars to spend on their draft picks not only in year 1 [salary] cap charges, but also in total value. . . . [As a result,] rookies are limited to increases that equal 25% of their first year[']s cap charge.”); see also Volin, *supra* note 104 (“[W]hile the CBA promises minimum salaries for veterans[,]. . . many times it works against them. [As one player agent revealed,] ‘I’ve had teams tell me all the time, ‘Your guy is a minimum-salary guy, he’s too expensive,’ . . . [and yet] I have veteran players that would play for \$50,000 if they could.’”).

¹⁰⁸ Volin, *supra* note 104.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See Greg Johnson, *Pensions in Sports: System of Checks and Imbalances*, L.A. TIMES, Feb. 27, 2007, <http://articles.latimes.com/2007/feb/27/sports/sp-pension27>, {<https://perma.cc/DD3U-MZL4>} (“[I]n two years, [former-MLB pitcher Larry] Dierker, 60, will begin to receive \$180,000 in annual retirement benefits[.] . . . Contrast what baseball will pay Dierker to what the NFL will provide former line-

ment benefits only kick in for players with at least three years of NFL service, which renders numerous players ineligible.¹¹² Also, the benefits themselves might have been introduced anyway, without pressure from the NFLPA, to quell mounting public criticism of the NFL's seemingly callous attitude toward the often very substantial¹¹³ health needs of retired football players.¹¹⁴

However, the most troubling aspect of the NFLPA's performance in collective bargaining is that only active players have a vote in union matters, which means increased financial compensation of current players should have been one of the NFLPA's top priorities heading into CBA negotiations.¹¹⁵ As a result, by cutting its losses on player compensation for the receipt of underfunded retirement benefits, the NFLPA ensured a CBA that manages to fail active players in the short-term, while still disappointing all players over the long-term.¹¹⁶

Even so, these collective bargaining losses are ultimately less about any perceived negotiating ineptitude by the NFLPA, and more about the inherent disadvantage of bargaining without the full array of labor relations weaponry, namely the prolonged employee strike. And to reiterate, short playing careers, due in no small part to an exceptionally high rate of player injury in football, is a crucial reason why the NFLPA lacks such leverage.¹¹⁷ As a result, it is no wonder that in 2015, NFL team owners got away with spending no more than their \$148.23 million salary cap,¹¹⁸ while MLB

man Conrad Dobler, who at 56 would receive \$24,000 annually if he were to immediately begin taking his pension—or \$48,000 if he could unsnarl his finances and delay retirement until age 62.”).

¹¹² *Id.*

¹¹³ See, e.g., Sally Jenkins et al., *Do No Harm: Retired NFL Players Endure a Lifetime of Hurt*, WASH. POST, May 16, 2013, <http://www.washingtonpost.com/sf/feature/wp/2013/05/16/do-no-harm-retired-nfl-players-endure-a-lifetime-of-hurt/>, {<https://perma.cc/G69X-V44C>} (“Seventeen years removed from his NFL career, ex-quarterback Don Majkowski says he . . . has undergone nearly 20 surgeries related to football, . . . has a 12-inch scar on his stomach, and he can’t walk very far because his left foot is fused with his ankle by a pair of metal plates and 13 screws. ‘It’s like walking on a pirate peg leg,’ he said.”).

¹¹⁴ See Johnson, *supra* note 111.

¹¹⁵ *Id.*

¹¹⁶ See *id.*

¹¹⁷ See *supra* text accompanying notes 112–14.

¹¹⁸ 2015 NFL Salary Cap and Adjusted Team Positions, NFLPA (Mar. 2, 2015), <https://www.nflpa.com/news/all-news/2015-nfl-salary-cap-and-adjusted-team-positions/>, {<https://perma.cc/7JNU-W4NV>}.

teams, competing in a freer market system, decided, or maybe even felt compelled, to spend upwards of \$314 million on player salaries.¹¹⁹

IV. IMPACT OF INJURY RISK ON CONTRACT NEGOTIATION

A crucial symptom of the NFL's team-friendly structure is a resultant contract negotiation environment between individual players and their respective teams that favors team interests over those of the players. Injury risk is a root cause of (1) a team-friendly CBA, (2) a team-friendly league structure, and (3) a team-friendly contract negotiation climate. However, injury risk plays an even more direct role in shaping NFL contract relationships because it lowers the predictability of projected player performance. This section explores both the root cause and the direct impacts that injury risk has on NFL contract negotiation.

A. Structural Reasons for "Richer" Contracts in MLB

Using MLB as a foil for the NFL once more, one cannot ignore the tendency for top MLB contracts to have longer terms and more guaranteed total salary than top contracts in the NFL.¹²⁰ As the Washington Post reported in the spring of 2015,

Guess how many baseball contracts you have to go through, in total compensation, before you get to the most lucrative in another American team sport[.] . . . You'll never get it. Try 32. *Thirty-two!* Yep, Kobe Bryant's seven-year, \$136.4-million deal with the Los Angeles Lakers, from 2004–11, is trumped by Johan Santana and David Wright and Carl Crawford and Zack Greinke and Todd Helton and on and on and on from baseball. [As for the NFL,] Detroit wide receiver Calvin Johnson signed the richest long-term deal in NFL history at eight years and \$132 million. Of course, all those baseball players will get all the zeroes they signed for . . .

¹¹⁹ \$314 million was the amount of the Los Angeles' Dodgers' 2015 payroll. See *MLB Payroll Tracker*, SPOTRAC, <http://www.spotrac.com/mlb/payroll/2015>, {<https://perma.cc/6QTQ-Q23K>} (last visited Nov. 21, 2015). It should also be noted that MLB teams have 25-man active rosters, while NFL teams have 53-man active rosters. This means the 2015 Los Angeles Dodgers paid *more than double* the NFL's salary cap figure for a roster *half* the size of any found in the NFL. See *id.*; Lillibridge, *supra* note 97; *Roster*, *supra* note 108.

¹²⁰ Barry Svrluga, *Why a \$114 Million NFL Contract Isn't as Good as It Sounds*, WASH. POST, Mar. 10, 2015, <https://www.washingtonpost.com/news/sports/wp/2015/03/10/ndamukong-suh-max-scherzer-and-the-difference-between-lucrative-contracts-in-the-nfl-and-mlb>, {<https://perma.cc/ME9T-RSW7>}.

[, while] Johnson is guaranteed \$60 million of his deal – less than half of the reported total.¹²¹

To clarify, the Washington Post looked solely at the value of a player contract over its full term, not the per season earnings, when it anointed baseball contracts the most lucrative.¹²² In addition, endorsements, while often a significant portion of top athletes' earnings, were ignored because they come from sources other than the team-employer.¹²³ As a result, the report only reveals that MLB teams are willing to contractually promise more guaranteed money *per contract* than the teams of any other American professional sports league.¹²⁴ However, the question remains as to why MLB franchises are willing to guarantee players more total compensation than their apparently richer NFL counterparts when the NFL's average team revenue was nearly \$50 million higher than MLB's in 2013.¹²⁵

One reason, of course, is that the NFL's salary cap ensures a maximum payroll that NFL teams are seriously punished for exceeding.¹²⁶ Another reason is that the NFL's collectivist revenue-sharing system partially severs the tie between winning games and growing revenue and, consequently, pro-

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*; see also Kurt Badenhausen, *The World's Highest-Paid Athletes 2015: Behind the Numbers*, FORBES (June 10, 2015), <http://www.forbes.com/sites/kurtbadenhausen/2015/06/10/the-worlds-highest-paid-athletes-2015-behind-the-numbers/> - 70d eca6b1e99 (“The breakdown between salary/winnings and endorsement income runs the spectrum. . . . [For example, t]he Los Angeles Dodgers paid Zack Greinke \$23.7 million over the last year, but the 2009 Cy Young award winner only made \$50,000 off the field. [By contrast, Usain] Bolt was sidelined for much of 2014 and earned roughly \$15,000 in prize money, but he generated \$21 million from sponsors and appearance fees.”).

¹²⁴ Svrluga, *supra* note 120.

¹²⁵ Cook Gaines, *Chart: NFL and MLB Teams Top Premier League Clubs when It Comes to Making Money*, BUS. INSIDER (May 14, 2014), <http://www.businessinsider.com/chart-nfl-mlb-premier-league-revenue-2014-5> (noting that the NFL's average team revenue was \$286 million in 2013, with the top team pulling in \$539 million and the lowest team earning \$229 million, while MLB's average team revenue was only \$237 million in 2013, with a top end of \$461 million and a low end of just \$159 million).

¹²⁶ See Louis Bien, *The 2015 Salary Cap Explained*, SB NATION (Mar. 2, 2015), <http://www.sbnation.com/nfl/2015/3/2/8134891/nfl-salary-cap-2015-franchise-tag-explained>, {<https://perma.cc/AYW8-MJ29>} (“[NFL t]eams that go over their cap numbers are subject to hefty fines, cancelled contracts and/or lost draft picks.”); see also Dan Graziano, ‘See No Evil, Hear No Evil’ NFL Justice, ESPN (May 22, 2012), http://espn.go.com/blog/nfcast/post/_/id/39329/see-no-evil-hear-no-evil-nfl-justice, {<https://perma.cc/8LBJ-PFZ2>}.

vides an incentive to spend at the “salary floor”¹²⁷ to maximize revenue during non-contending, rebuilding seasons. Combine those league features with a heavily restricted “rookie salary pool”¹²⁸ and expensive veteran minimum salaries,¹²⁹ and most NFL teams have adopted the strategy of continuous roster rebuilding, meaning they constantly release still-productive veterans for unproven but significantly cheaper rookies that are guaranteed bargains.¹³⁰

In MLB, on the other hand, where winning is more closely tied to increased individual team revenue¹³¹ and the luxury tax affords teams more spending flexibility,¹³² roster-building is more about putting as competitive a team on the field as possible. As an article on Nate Silver’s statistics-focused website FiveThirtyEight explained,

If you want to build a winning baseball team, which strategy works best—a balanced roster, or one made up of stars and scrubs? . . . [W]e arrive at this conclusion: Build a balanced roster or a stars-and-scrubs roster. Either way, which players are good, and how good they are individually, doesn’t make any difference after we control for how good the team is in the ag-

¹²⁷ Just as the NFL’s 2011 CBA implemented a salary cap mechanism, it also implemented a salary floor of sorts: “The final eight years of the CBA are broken into four-year periods (2013–’16, 2017–’20) during which teams are required to spend up to 89 percent of the cap, with a guaranteed league-wide spend of 95 percent. If the individual clubs or league fail to hit those thresholds, the league/clubs pay the difference to the players.” Albert Breer, *Salary Cap Rise to \$133 Million Shows How New CBA Is Working*, NFL.COM (Mar. 6, 2014), <http://www.nfl.com/news/story/Oap2000000331237/article/salary-cap-rise-to-133-million-shows-how-new-cba-is-working>, {<https://perma.cc/BU9P-U77S>}.

¹²⁸ See Fitzgerald, *supra* note 107.

¹²⁹ Michael Ginnitti, *NFL Minimum Salaries for 2015 and the Veteran Cap Benefit Rule*, SPOTRAC (Feb. 2, 2015), <https://www.spotrac.com/blog/nfl-minimum-salaries-for-2015-and-the-veteran-cap-benefit-rule>, {<https://perma.cc/DZ39-A7ML>} (specifying that, in 2015, the rookie minimum salary was \$435,000, one year of experience (YOE) was \$510,000, two YOE was \$585,000, three YOE was \$660,000, four to six YOE was \$745,000, seven to nine YOE was \$870,000, and ten or more YOE was \$970,000. Under the 2011 CBA, these minimums rise by \$15,000 each year.).

¹³⁰ See Andrew Brandt, *The New Age of Rookie Contract Negotiations*, SPORTS ILLUSTRATED (May 22, 2014), <http://mmqb.si.com/2014/05/22/nfl-rookie-contract-negotiations>, {<https://perma.cc/CNT7-HBWF>} (“The compensation system implemented by the 2011 CBA has created ready-made deals requiring little to no negotiations [for rookie contracts]. These prefabricated contracts have eliminated any guesswork about compensation, leaving players without any leverage, and caused a sea change in the pace of rookie signings.”).

¹³¹ See Dubner, *supra* note 76.

¹³² *Id.*

gregate. The moral of the story is to find players who generate as much value as possible, in whatever combination, period.¹³³

In other words, while not every MLB team can afford to fill its roster with the most expensive players at every single position (because the individualized revenue-sharing system essentially guarantees a greater disparity in comparative team wealth), every MLB team is incentivized to spend as much as it can to be competitive because its portion of the league's revenue pie is more dependent on its on-field performance.¹³⁴ As a result, successful MLB roster-building often becomes an escalating spending spree in a way that simply cannot happen in the NFL.¹³⁵

B. *The More Direct Impact of Injury Risk on Contract Negotiation*

Focusing entirely on the NFL's CBA-imposed structural features (namely, the salary cap, rookie pool, etc.) and its impact on NFL contracts fails to take into account the more direct influence that injury risk has on NFL contract negotiation. Due to the violence of the sport and the prevalence of injury as a result of it, injury risk is inevitably at the forefront of every NFL general manager's mind when entering into a contract negotiation with a player.¹³⁶ Excluding a few select position groups,¹³⁷ NFL teams, therefore, take tremendous care to structure contracts so as to not commit large total amounts of guaranteed money and employment years.¹³⁸

¹³³ Jonah Keri & Neil Paine, *What's the Best Way to Build a Major League Baseball Team?*, FIVETHIRTYEIGHT (Apr. 25, 2014), <http://fivethirtyeight.com/features/whats-the-best-way-to-build-a-major-league-baseball-team/>, {<https://perma.cc/9634-GAA4>} ("To answer this question, we used a favorite tool of economists: the Gini coefficient. Typically, the Gini coefficient measures income distribution among a large group of people. We can apply the same principle to roster construction[.] . . . The result? Having a larger Gini coefficient (as you'd see in a stars-and-scrubs roster) is ever so slightly associated with better outcomes over the rest of the season. However, the effect wasn't large enough to be statistically significant, so this analysis says a team should probably just be indifferent about which approach it uses to build a roster.").

¹³⁴ See Dubner, *supra* note 76.

¹³⁵ See, e.g., Cork Gaines, *NFL Salaries Still Trail MLB and NBA by a Wide Margin*, BUS. INSIDER (July 15, 2015), <http://www.businessinsider.com/top-salaries-nfl-nba-mlb-and-nhl-2015-7>.

¹³⁶ See, e.g., Arash Markazi, *Why NBA Beats NFL When It Comes to Guaranteed Contracts*, ESPN (July 13, 2015) http://espn.go.com/nfl/story/_/id/13235398/why-nfl-lags-nba-guaranteed-contracts, {<https://perma.cc/B8X5-ZKXQ>}.

¹³⁷ See *infra* text accompanying note 156.

¹³⁸ See Markazi, *supra* note 136.

Before getting into the details of these contracts, it is important to note that injured players still count toward an NFL team's salary cap calculation.¹³⁹ Therefore, putting aside the grim emotional and physical toll injuries take on players, player injuries punish teams in two ways: once, by stripping them of the services of a productive employee for the duration of the injury, and, once more, by forcing them to dedicate valuable cap space to a non-contributing employee. Consequently, NFL teams are not only looking for cheap and productive players, they are also looking for healthy, injury-averse players. Some of the most crucial factors affecting the likelihood of player injury are age, position, and individual injury history.¹⁴⁰ Although a player's personal injury history can be illuminating (especially if it is extensive), the first two factors are more useful for making predictive generalizations about populations of different player types.

Despite there being a number of ways to evaluate the relationship between age and the likelihood of injury in the NFL, studies tend to show that injury rate increases as NFL players age.¹⁴¹ According to research by Football Outsiders, official NFL injury reports from 2000–2014 reflect that the odds of being listed on an injury report rises from about 59% for 22-year-old players (the age many players are when drafted) to more than 70% by age 30.¹⁴² However, the chance of actually missing at least one game due to the injury only rises from about 36%, for players younger than 30, to roughly 41%, for players 30 and older.¹⁴³ For some reason, the more the data focuses exclusively on *substantial* injuries, the less pronounced the injury rate difference is between younger and older players.

Continuing this trend, the study further reveals that the chances of missing "significant time" (i.e., at least four weeks) only goes from 16% for players under 30 years of age to just 20% for players beyond that age.¹⁴⁴ This shows only a 4% difference in the rate of severe injury between so-called "young" and "old" NFL players.¹⁴⁵ But why is this? Are NFL players

¹³⁹ See Jason Fitzgerald, *Explaining Roster Designations*, OVER THE CAP (Sept. 2, 2013), <http://overthecap.com/explaining-roster-designations>, {<https://perma.cc/DC23-ZPJS>} ("Players['] salaries on PUP [the Physically Unable to Perform List] are treated just like IR [Injured Reserve], [and they] count towards the cap[.]").

¹⁴⁰ Zachary O. Binney, *NFL Injuries Part III: Variation by Position and Age*, FOOTBALL OUTSIDERS (Oct. 16, 2015), <http://www.footballoutsiders.com/stat-analysis/2015/nfl-injuries-part-iii-variation-position-and-age>, {<https://perma.cc/2LME-U3H3>}.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

somehow able to better resist significant injuries, as opposed to minor ones, as they age? According to Football Outsiders, the answer lies in the Darwinian nature of the NFL:

You have to be pretty . . . healthy to survive more than a few years in the NFL. When we get into older players, we're only looking at the cream of the crop, health-wise. By the time players hit their 30s, what's left is likely a group of Iron Men with a much lower baseline injury risk (and greater skill) than your average player. . . . [So,] let's eliminate survivor bias by looking at stable cohorts of players who played until at least a certain age in the NFL. . . . [O]nce we eliminate survivor bias we see a much stronger, more consistent, positive effect of age on injury risk. . . . [W]e see the risk of missing any time due to injury rising from around 30 percent in your early 20s to 50 or 60 percent by your mid-30s.¹⁴⁶

Therefore, for NFL teams, older players have to be extremely productive to be justifiable contractual investments. This is so not only because they command a more expensive veterans' minimum salary, but also because the chance of them missing time due to physical incapacity, which wastes valuable salary cap space, is statistically higher.¹⁴⁷

Even so, age is only part of the equation. Second, and equally important, is position group. Since football requires the services of such a diverse array of athletes,¹⁴⁸ the potential for injury can differ dramatically depending on the position one plays on an NFL team. According to another installment of Football Outsiders' NFL injury study, there are "three tiers of positions when it comes to injury risk" in the NFL.¹⁴⁹ These tiers are as follows:

[In the top tier, we have] "mobile" positions. Defensive backs, linebackers, running backs, wide receivers, and tight ends have about a 65 to 70 percent risk of landing on the injury report, a 40 percent chance of missing

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Compare Jeremy Rucker, *Small Size, Big Impact: Best Short Guys in NFL History*, NFL.COM (July 17, 2015, 1:59 PM), <http://www.nfl.com/photoessays/0ap3000000501385>, {<https://perma.cc/W42F-64SE>} ("Trindon Holliday—5' 5"[:]. . . [As t]he shortest player in the NFL, Holliday is known primarily for his speed.") with Des Bieler, *Chiefs' Dontari Poe Becomes Heaviest Player to Score NFL Touchdown*, WASH. POST, Nov. 22, 2015, <https://www.washingtonpost.com/news/early-lead/wp/2015/11/22/chiefs-dontari-poe-becomes-heaviest-player-to-score-nfl-touchdown>, {<https://perma.cc/WNT4-PNY3>} ("The 346-pound Poe took a plunge into the end zone . . . [to become the] heaviest NFL player to ever score a touchdown.")

¹⁴⁹ Zachary O. Binney, *NFL Injuries Part IV: Variation by Position*, FOOTBALL OUTSIDERS (Oct. 23, 2015), <http://www.footballoutsiders.com/stat-analysis/2015/nfl-injuries-part-iv-variation-position>, {<https://perma.cc/S5QX-4AAF>}.

at least a game, and a 15 to 20 percent chance of missing four or more games in a given season.

In the second tier are quarterbacks and linemen on both sides, with about a 60 percent (linemen) or 55 percent chance (quarterbacks) of ending up on the injury report, a 35 percent chance of missing at least a week, and a 15 percent chance of missing four or more games in a given season.

All on their own in relative safety are the special-teams specialists. They only have a 25 percent chance of hitting the injury report, a 10 percent chance of missing time, and a 5 percent chance of missing four or more weeks.¹⁵⁰

With eleven players on offense, eleven on defense, and three punt and kick specialists on every single NFL team's starting roster, typically twelve or thirteen of those players belong to the top "mobile" tier, nine or ten fall in the second tier, and three go in the purely special teams tier.¹⁵¹ That means that nearly 88% of a typical NFL starting lineup falls within the top two tiers of Football Outsiders' injury risk groupings.¹⁵²

Interestingly, when looking at a list of the top ten oldest players under contract at the start of the 2013 NFL season, seven of them were kickers, punters, or long snappers.¹⁵³ In other words, in 2013, 70% of the top ten oldest players in the league played in a position group that made up no more than 12% of the NFL's entire starting lineup population.¹⁵⁴ Even further, since NFL teams rarely employ backups for their kickers, punters, or long snappers, when one considers the full 53-man roster every NFL team employs, the special teams position group likely only makes up about 6% of the NFL's total roster population.¹⁵⁵

Thus, when you take into account the relationship between injury risk and age and the connection between injury risk and position group, even

¹⁵⁰ *Id.* ("However, we should note that only punters, kickers, long-snappers, and a handful of return specialists are tagged 'special teams' in the data, so this doesn't mean that there are actually fewer injuries on special teams *plays*. . . . [W]hen gunners or blockers are injured, they get coded by their normal position on offense or defense[.]").

¹⁵¹ *Id.*

¹⁵² *See id.*

¹⁵³ Sean Smith, *Adam Vinatieri Now the NFL's Graybeard*, BOS. GLOBE, July 14, 2013, <https://www.bostonglobe.com/sports/2013/07/14/adam-vinatieri-now-nfl-graybeard/IZyq3NPdcS9n8cZFcnPgHM/story.html>.

¹⁵⁴ *See supra* text accompanying notes 150–153.

¹⁵⁵ *See* Michael Lombardi, *It's Complicated: How to Get to the Final 53-Man Roster*, NFL.COM, <http://www.nfl.com/news/story/09000d5d81a1e654/printable/its-complicated-how-to-get-to-the-final-53man-roster>, {<https://perma.cc/9GRR-XA3Y>} (last updated Aug. 3, 2012).

though pure special teamers make up such a small percentage of the league as a whole, it is not surprising that in the oldest sector of the NFL they are extraordinarily overrepresented. Put more simply, NFL teams are able to count on the health of players in this position group to a greater degree than any other. As a result, these players have an average playing career of nearly five years, a figure much closer to the MLB average than to the rest of the NFL.¹⁵⁶

By contrast, in MLB in 2015, of the top fifteen oldest players in the league, eight were pitchers and seven were position players.¹⁵⁷ The typical MLB pitching staff has somewhere between 12 to 13 pitchers, leaving 13 or 12 position players to fill out the remainder of the 25-man active roster.¹⁵⁸ Therefore, one could reasonably expect something close to a 52%/48% split between pitchers and position players on an average MLB roster. The fact that the positional distribution of the oldest population is relatively similar to the positional distribution of the league as a whole in MLB speaks volumes. MLB's stable positional distribution shows that, while pitchers and position players may experience different kinds of typical injuries,¹⁵⁹ MLB general managers apparently feel that injury risk within the game as a whole is low enough that specific position groups need not have strict "injury cliff" reputations, like they do in the NFL.¹⁶⁰

Looking at NFL running backs as a particularly apt example, data compiled by ESPN reveals that, "[i]n the NFL's 95-year history, there have been 46 instances of a 1,000-yard season by a running back who is at least 30

¹⁵⁶ See *Average Playing Career Length in the National Football League*, *supra* note 99.

¹⁵⁷ See Will Leitch, *In MLB, Age Ain't Nothin' But a Number*, SPORTS ON EARTH (Apr. 9, 2015), <http://www.sportsonearth.com/article/117185466/oldest-players-in-baseball-latroy-hawkins-bartolo-colon-arod-david-ortiz-ichiro>, {<https://perma.cc/47FW-Q27C>} (estimating the remaining effectiveness of MLB's oldest players, and noting that forty-year-old pitcher Joe Nathan was excluded from this discussion because he was placed on the disabled list for the entirety of 2015).

¹⁵⁸ See *Pitcher*, BASEBALLREFERENCE, <http://www.baseball-reference.com/bullpen/Pitcher>, {<https://perma.cc/BK4U-UW9V>} (last visited April 17, 2017).

¹⁵⁹ See Stephania Bell, *Injury Primer: A Guide to Common Baseball Injuries*, ESPN (May 30, 2009), http://espn.go.com/fantasy/baseball/flb/story?page=mlbdk2k9_injuryprimer, {<https://perma.cc/Y2T2-DD2D>}.

¹⁶⁰ See Kevin Seifert, *Inside Slant: Running Back Cliff After Age 27*, ESPN (Apr. 7, 2014), http://espn.go.com/blog/nflnation/post/_id/123542/inside-slant-running-back-cliff-after-age-27, {<https://perma.cc/U4T3-XUGE>} ("Overall, we see [running-backs'] careers peak at age 27. Afterward, their rushing totals drop by 15 percent in one year, 25 percent in two and almost 40 by the time they are 30. Most decision-makers—whether their background was in scouting, accounting or anything in between—saw that trend as a bad investment. As with any business, they reserve premium contracts for projected growth in production, not a decline.").

years old[,] . . . [but o]nly four times has it happened for one older than 32, and not once since 1984.”¹⁶¹ With precisely that data in mind, NFL general managers have all but guaranteed the extinction of the over-32, 1,000-yard rusher by purposefully avoiding expensive contracts with aging running backs at all costs.¹⁶² As a result, even a running back healthy enough to keep playing into his mid-to-late 30s is going to find it nearly impossible to find an NFL team willing to employ him long enough to actually reach that age.¹⁶³ Rookie running backs, with their cheaper salaries and better age-group injury statistics, are just too attractive of an investment.¹⁶⁴

In contrast, MLB players, even injury-prone ones, are carefully analyzed on an individual basis and ultimately given the benefit of the doubt much more often than NFL players.¹⁶⁵ As a USA Today report explained,

The comprehensiveness of MLB’s statistics and the ability to distinguish individual players’ contributions from those of their teammates mean that baseball players often come with less risk than their colleagues in other sports. An NFL GM can rarely be certain that a wide receiver will provide elite-level production once he is separated from his previous quarterback and offensive coordinator. With a player like [Giancarlo] Stanton, the Marlins take on relatively little risk he will completely collapse anytime soon. Even despite Stanton’s injury history, he’s a safe bet to continue producing huge offensive numbers for the near future because he’s only 25 and baseball players’ aging curves have been so thoroughly mapped.¹⁶⁶

¹⁶¹ Kevin Seifert, *Inside Slant: History Working Against Adrian Peterson, Other RBs*, ESPN (June 1, 2015), http://espn.go.com/blog/nflnation/post/_id/169782/inside-slant-elite-nfl-running-backs-after-30-mmmkay, {<https://perma.cc/7BX5-2K2V>}.

¹⁶² *See id.*

¹⁶³ *See* Mike Tanier, *The Sad State of Running Backs*, SPORTS ON EARTH (Apr. 17, 2014), <http://www.sportsonearth.com/article/72337788/chris-johnson-maurice-jones-drew-running-back-is-worst-job-in-pro-sports>, {<https://perma.cc/A8GH-8NVB>}.

¹⁶⁴ *See id.* (“All rookies sign four-year contracts now, with zero negotiating options for the first three years and minimal maneuverability in the fourth. First-round picks get excellent salaries, but first-round running backs are becoming an endangered species. . . . A four-year contract takes a 21-year old rookie running back through his 25th birthday. By the time he reaches the open market, he is essentially at his peak and ready to decline. General managers are aware of this and increasingly reluctant to hand out huge paydays. . . . Running back is rapidly becoming the worst job in professional sports.”).

¹⁶⁵ *See* Ted Berg, *5 Reasons MLB Stars Make So Much More than Other Pro Athletes*, USA TODAY, Nov. 18, 2014, <http://ftw.usatoday.com/2014/11/giancarlo-stanton-contract-mlb-money-nba-nfl>, {<https://perma.cc/7SHS-KCBy>}.

¹⁶⁶ *Id.*

Instead of exclusively relying on broad generalizations about an entire position group, MLB general managers also look at the specific aging, injury, and production progressions of each individual player.¹⁶⁷ Of course, as just mentioned in the USA Today report, part of the reason MLB teams are able to do this is because baseball, being a more individualistic sport, is simply more conducive to the capturing of accurate individual production statistics.¹⁶⁸ However, with recent advances in on-field athlete analytics, the NFL is already utilizing technology for tactical and training purposes¹⁶⁹ that could actually be used for injury tracking and prevention too. As a Wired article explains,

Think about it this way: The No. 1 driver in fan engagement (and ultimately, team success) is having a star player on the field performing. So, reducing injuries (especially preventable ones) not only keeps players in the game, it keeps fans engaged. Using athlete analytics to spot potential overuse and risk areas will continue to evolve the way teams practice and the way they substitute, keeping players healthy, a win-win-win-win for players, teams, leagues and fans.¹⁷⁰

Giving NFL teams a more reliable way to predict injuries will ultimately allow them to evaluate professional football players on an individual basis, like MLB teams do. The possible result? NFL general managers could finally evolve beyond the rudimentary “injury cliff” rubrics of years past and, potentially, feel more comfortable contractually guaranteeing money over longer durations to players nearing the dreaded “30 year old” benchmark.

Even so, as long as the NFL game remains as violent as it currently is, injury risk will continue to be a weightier concern for NFL general managers than it is for their MLB counterparts, no matter how far injury detection

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See, e.g., Nicola Twilley, *How Will Real-Time Tracking Change The N.F.L.?*, NEW YORKER, Sept. 10, 2015, <http://www.newyorker.com/news/sporting-scene/how-will-real-time-tracking-change-the-n-f-l>, {<https://perma.cc/HAX5-CG7S>} (“The upper deck of each of the league’s stadiums is now encircled with a constellation of small receivers[,] . . . which record the pings emitted by each of a player’s shoulders, twelve for every second that they are on the field. The quarter-sized R.F.I.D. tags contain a battery-powered chip and an antenna that broadcasts a unique identifying code to the receivers, which, in turn, are connected to a server. There, Zebra’s [the maker of this technology] software triangulates the distance between a chip’s bleep and the individual receivers all but instantaneously, thereby discerning a player’s whereabouts on the field.”).

¹⁷⁰ Tim Newcomb, *How Tracking Football Players Can Help Reduce Injuries*, WIRED (Jan. 13, 2016), <http://www.wired.com/2016/01/how-player-tracking-can-reduce-football-injuries>, {<https://perma.cc/3LHD-QARY>}.

technology advances. As a result, at least as things currently stand, it would be economically imprudent, even reckless, for NFL teams to match the levels of fully guaranteed compensation found in MLB contracts.

V. CONCLUSION: HOW TO FLIP THE SCRIPT

Injury risk likely makes collective bargaining and contract negotiation a perpetual uphill climb for the NFLPA and its member-players, especially because injuries continue to be accepted as just “part of the game.”¹⁷¹ Even so, there may be an opportunity for the NFLPA to leverage growing public criticism of concussion injuries to the players’ benefit during the next round of CBA negotiations.¹⁷²

Whether in collective bargaining or individual contract negotiation, NFL teams have the leverage of time and can wait out players, who have fleeting windows of on-field productivity, until they get their way.¹⁷³ As a consequence, the NFLPA’s strategy during the next round of CBA negotiations should be to emphasize player safety to such a feverish degree, capitalizing on the media’s current momentum against head trauma in particular,¹⁷⁴ that it forces the league to alter in-game rules to make NFL football fundamentally safer.¹⁷⁵ In the short-term, this bargaining tactic will

¹⁷¹ See *Violence, Injuries Headline in NFL, NBA and MLB*, NAT’L PUB. RADIO (Dec. 14, 2013) <http://www.npr.org/templates/story/story.php?storyId=250990128> (“[W]hen people talk about safety, they talk about concussions and head trauma and lawsuits, and all these things. But what doesn’t get talked about enough is the impact on the actual game itself. . . . [I]t’s a game of attrition. . . . Injuries are part of the game, as they say.”).

¹⁷² See, e.g., Scott Mendelson, *Why Will Smith’s ‘Concussion’ May Actually Impact the NFL*, FORBES (Dec. 24, 2015, 11:01 AM), <http://www.forbes.com/sites/scottmendelson/2015/12/24/why-will-smiths-concussion-may-actually-make-a-difference/> - 3830615b48f9; Andrew Brandt, *The Conversation the NFL Does Not Want to Have*, SPORTS ILLUSTRATED (June 11, 2015), <http://mmqb.si.com/2015/06/11/nfl-young-players-retirement-problem>, {<https://perma.cc/M9DS-JEXL>}.

¹⁷³ See Caldwell, *supra* note 88, at 28.

¹⁷⁴ Mendelson, *supra* note 172.

¹⁷⁵ See, e.g., Bill Connelly, *Making Football Safe Enough Will Be Awkward and Hard. We Have To Do It Anyway.*, SB NATION (Sept. 24, 2015), <http://www.sbnation.com/college-football/2015/9/24/9391449/football-concussions-cte>, {<https://perma.cc/J7V4-RZUD>} (“Football has become what it is because it offers us a combination of tactical complexity and visceral physicality that no other sport has approached. . . . I can’t imagine what kind of event it would take [to force game-altering safety measures], and I hope we can do it without that event. . . . [But that] would mean the NFL actually acknowledging how serious CTE is and not asking friends with medical credentials to call the threat ‘exaggerated.’ That means actually being willing to stop watching/attending NFL games until they do.”).

do little to guarantee the financial security of active players. However, in the long run, it may lower the NFL's injury rate and, as a result, slowly increase the average NFL player's long-term value and productivity as an employee. Eventually, as a safer NFL game translates into longer NFL playing careers, the threat of a sustained NFLPA strike becomes increasingly legitimate. With that added degree of leverage, the NFLPA can finally start to chip away at the severe financial disadvantages the current NFL structure offers, much like the MLBPA had to do after the infamous *Federal Baseball* decision.¹⁷⁶

Of course, the major hurdle continues to be that the NFLPA will have to somehow convince the current group of active NFL players that pursuing long-term, game-altering safety improvements is more important than scraping as much revenue as possible from the current structure before their brief NFL tenures are up. The NFLPA's best chance of getting players to unify around such safety objectives is to fully educate all its member-players about the severe long-term effects of playing football and to ride the growing media swell of negative attention aimed at the NFL's failure to properly address player health and player compensation.¹⁷⁷

Ultimately, while the NFLPA may not be able to sell the next CBA negotiation as the NFLPA's all-hands-on-deck, 1994-esque¹⁷⁸ stand against the stranglehold NFL team owners hold over league revenue, it can—and likely must—sell it as the critical penultimate struggle for player safety that must take place before any final stand can occur in the future. In truth, the odds are uniquely stacked against the NFLPA by virtue of the particular sport its member-players play, but, much like the MLBPA in the face of an extraordinary antitrust exemption, unique challenges are no excuse for total ineffectiveness. Perhaps Marvin Miller, the MLBPA's most successful leader,¹⁷⁹ framed the necessary mind-set best in an interview with *Fortune* Magazine, not long before his death:

[Interviewer] You had a series of government and union jobs, before becoming a star with the Steelworkers. Why did you want to organize baseball players?

¹⁷⁶ See *supra* text accompanying notes 50–53.

¹⁷⁷ See, e.g., *League of Denial: The NFL's Concussion Crisis* (Frontline television broadcast Oct. 8, 2013), <http://www.pbs.org/wgbh/frontline/film/league-of-denial>, {<https://perma.cc/6QJD-2GAD>}; see also Matthew Futterman, *NFL Withheld Millions From Players*, WALL ST. J., Feb. 23, 2016, <http://www.wsj.com/articles/nfl-withheld-millions-from-players-1456189111>, {<https://perma.cc/EU9Q-8SNF>}.

¹⁷⁸ See Corcoran, *supra* note 101 (describing the MLBPA's 1994 strike to avoid the imposition of a salary cap).

¹⁷⁹ See Marvin Miller, *MLBPA Executive Director*, *supra* note 53.

[Miller] Some of the players sought me out[.] . . . When the offer was made, I knew a lot of it as a fan, but [there was] much I didn't know. As my wife and I studied the history of the game, I realized it would be a tough row to hoe because of the "Reserve Clause." Players and fans had accepted it for 100 years.

[Interviewer] Did you come aboard thinking "I'm going to change this"?

[Miller] Yes.¹⁸⁰

With similarly daunting history against it, the NFLPA will need to be just as resolute.

¹⁸⁰ David A. Kaplan, *Lion of American Labor: A Final Conversation with Marvin Miller*, FORTUNE (Nov. 27, 2012), <http://fortune.com/2012/11/27/lion-of-american-labor-a-final-conversation-with-marvin-miller>, {<https://perma.cc/H59B-WLAG>}.

