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# Taxing Missy: Operation Gold and the 2012 Proposed Olympic Tax Elimination Act

Kathryn Kisska-Schulze\* and Adam Epstein\*\*

## INTRODUCTION

The 2012 London Olympics provided dramatic athletic performances of world champions, including Jamaican sprinter Usain Bolt and American swimmer Michael Phelps, while also introducing the world to new elite champions.<sup>1</sup> U.S. medal-winners at the Olympic Games revel in their successes and cherish the results of their efforts by being awarded gold, silver, or bronze individual or team medals. Team USA has repeatedly succeeded as a powerhouse at the Olympic Games, and the 2012 Summer Olympics proved no exception.<sup>2</sup>

Nationalism, pride, and politics aside, after the close of each Olympic Games, U.S. medal-winners face income tax issues resulting from the Games themselves.<sup>3</sup> Because the United States Olympic Committee (USOC) awards U.S. athletes prize money based on medal performance, medal-winning athletes must pay income taxes on the award or prize money earned.<sup>4</sup>

This article explores the legal and tax effects surrounding the August 1, 2012 bill referred to as the Olympic Tax Elimination Act (OTE), which was introduced in the Senate to exempt from gross income calculations the prize money earned by U.S. Olympians from the USOC for medaling in their respective sport.<sup>5</sup> The OTE emanated

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The authors would like to thank Bridget Niland, J.D., Ed.M, Associate Professor, Business Administration, Daemen College, for her insights into the NCAA history and bylaws.

1. See *Gabby Douglas, Who Won the All-around Title at London Olympics, Edges Missy Franklin as AP's Female Athlete*, N.Y. DAILY NEWS (Dec. 21, 2012), <http://www.nydailynews.com/sports/all-around-champ-gabby-ap-top-female-athlete-article-1.1225131> (recognizing American gymnast Gabby Douglas was named AP Female Athlete of the Year in 2012, winning the Olympic All-Around title in London and edging out swimmer Missy Franklin who won four gold medals and a bronze in London).

2. See generally, *Olympic Games*, OLYMPIC.ORG, <http://www.olympic.org/> (last visited June 7, 2013). The U.S. won first place in the overall medal count at the 2012 Summer London Olympic Games, the 2010 Winter Vancouver Olympics, and the 2008 Beijing Summer Olympics.

3. Catherine Rampell, *Taxing Olympic Medalists*, N.Y. TIMES (Aug. 8, 2012), <http://economix.blogs.nytimes.com/2012/08/08/taxing-olympic-medalists/>.

4. *Id.*

5. *Id.*; see also Kelly Phillips Erb, *President Obama Supports Tax Exemption for Olympic Athletes*, FORBES (Aug. 6, 2012), <http://www.forbes.com/sites/kellyphillipserb/2012/08/06/president-obama-supports-tax-exemption-for-olympic-athletes/>; Press Release, Marco Rubio United States Senator for Florida, Senator Rubio Introduces Bill to Eliminate Tax On Olympic Medal Winners (Aug. 1, 2012), available at

from a time when American economic growth had been relatively stagnant, and income tax issues became a hotly contested political debate for the 2012 Presidential election.<sup>6</sup> Part I of this article serves as a primer and explores how tax issues have weaved their way into sports law. Part II explores the USOC's Operation Gold program, including a discussion of the relationship between the National Collegiate Athletic Association (NCAA) bylaws and USOC with regard to the program and prize money. Part III investigates the proposed OTEA submitted by U.S. Senator Marco Rubio (R-Florida) in an attempt to shelter earnings derived from winning Olympic medals from taxation.<sup>7</sup> This section also addresses alternatives to the OTEA, encouraging other tax-savvy options apart from outright eliminating such income from the Internal Revenue Code (I.R.C.) purview.<sup>8</sup>

## I. TAX ISSUES AND SPORTS LAW

Academic discourse and the practical application of tax-related issues are not new in sports law.<sup>9</sup> For example, in some sports management courses, tax issues are addressed at both the undergraduate and graduate levels.<sup>10</sup> Tax issues in sports law cover an extremely broad range of subjects, of which only a small part involves income earned by individual athletes.<sup>11</sup> For example, scholarly discussions may focus on the tax consequences of compensating a coaching staff rather than the athletes themselves.<sup>12</sup>

Additionally, tax issues in sports law may cover preferential tax breaks to lure professional teams away from their home city, or alternatively, to keep professional teams

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<http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=ea518cca-4667-4771-bee6-3eeda7106aac>.

6. See Erb, *supra* note 5.

7. The authors use the abbreviation OTEA for convenience but actual bill was not proposed as such.

8. This article specifically addresses and analyzes federal income tax options. It does not address applicable state or local income taxes, which could also be imposed on an individual taxpayer's earnings.

9. See, e.g., Sarah K. Fields & Sarah J. Young, *Learning from the Past: An Analysis of Case Law Impacting Campus Recreational Sport Programs*, 20 J. LEGAL ASPECTS OF SPORT 75 (2010) (analyzing cases over the last 30 years that have had an effect on campus recreation programs, including at least four cases whose primary focus was tax related); Rodney L. Caughron & Justin Fargher, *Independent Contractor and Employee Status: What Every Employer in Sport and Recreation Should Know*, 14 J. LEGAL ASPECTS OF SPORT 47 (2004) (discussing a variety of tax subjects including, but not limited to, Federal Insurance Contributions Act (FICA) taxes, Federal Unemployment Tax Act (FUTA) taxes, and federal income tax withholding with particular emphasis on the differences between an employee, contractor, and independent contractor); Laura Misener, *Safeguarding the Olympic Insignia: Protecting the Commercial Integrity of the Canadian Olympic Association*, 13 J. LEGAL ASPECTS OF SPORT 79, 86-7 (2003) (noting that the Canada Business Corporations Act allows public organizations that meet the criteria as charitable organizations to be issued specific tax benefits); Lori K. Miller, Paul M. Anderson & Ted D. Ayres, *The Internship Agreement: Recommendations and Realities*, 12 J. LEGAL ASPECTS OF SPORT 37 (2002) (discussing various legal and financial concerns related to student internships).

10. Sarah J. Young, *A Content Analysis of Legal Aspects Courses in Sport Management*, 11 J. LEGAL ASPECTS OF SPORT 225 (2001).

11. See, e.g., Chad S. Seifried, *The Legality of the Bowl Championship Series (BCS): Examining Pro-Competitive and Anti-Competitive Outcomes on Consumers and Competitors*, 21 J. LEGAL ASPECTS OF SPORT 187, 204-5 (2012) (noting the economic impact of Bowl Championship Series (BCS) football bowl games related to tax revenues from the event); see also Jeffrey S. Fried, *The Sweet Science, Legally Speaking (Professional Boxing)*, 14 J. LEGAL ASPECTS OF SPORT 75, 92 (2004) (emphasizing the importance of avoiding conflicts of interest over boxers' finances, investments and tax considerations by boxing managers).

12. See, e.g., Richard M. Southall, Mark S. Nagel, Paul J. Batista, & James T. Reese, *The Board of Regents of the University of Minnesota v. Haskins: The University of Minnesota Men's Basketball Academic Fraud Scandal-A Case Study*, 13 J. LEGAL ASPECTS OF SPORT 121, 137 (2003) (exploring the case involving former University of Minnesota Men's Basketball Coach Clem Haskins, having been ordered to return \$815,000 of a \$1,075,000 settlement from his contract buyout by the University of Minnesota).

where they are in an effort to prevent them from relocating elsewhere.<sup>13</sup> The discussion of taxable revenue can be quite a divisive subject at times, particularly when the subject involves raising revenue to build sports facilities.<sup>14</sup> The manner in which professional sports leagues might “tax” themselves by instituting a cap on spending or other limits in order to maintain some measure of competitive equity among clubs and teams is an interesting study as well.<sup>15</sup> Tax issues have continued to work their way into collective bargaining agreements and into general contract law.<sup>16</sup> Major League Baseball’s *luxury tax* is discussed on an annual basis.<sup>17</sup>

Other issues in the context of tax and sports law include whether or not private and exclusive country clubs should maintain their tax-free status.<sup>18</sup> Issues involving unrelated business income tax (UBIT) and planned donations to college and university athletic departments have presented athletic administrators with various legal queries and concerns.<sup>19</sup> The right of homeschooled student-athletes to participate in public high school sports has been a relatively recent legal issue and one that focuses in part on the tax revenue that public schools receive from taxpayers, including homeschool families’ contributions.<sup>20</sup> Even the practice of ticket scalping offers opportunities to explore tax issues related to ticket resale regulation.<sup>21</sup> Thus, tax issues in sports law present legal challenges and create

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13. See, e.g., Paul M. Anderson & W.S. Miller, *Sonic Bust: Trying to Retain Major League Franchises in Challenging Financial Times*, 21 J. LEGAL ASPECTS OF SPORT 117 (2011) (discussing the legal and economic issues, including various tax concerns, involving various NBA franchises including the Seattle SuperSonics).

14. *Id.*; see also W.S. Miller & Chad LeBlanc, *Bingo?: An Overview of the Potential Legal Issues Arising From the Use of Indian Gaming Revenues To Fund Professional Sports Facilities*, 19 J. LEGAL ASPECTS OF SPORT 121 (2009).

15. See, e.g., Richard A. Kaplan, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1631-35(2004) (discussing history of the NBA luxury tax); Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS OF SPORT 5,11 (2011) (referencing player compensation concerns and the restrictions in the National Football League’s use of the *Rozelle Rule* which served as a deterrent to trade players).

16. Anderson & Miller, *supra* note 13, at 135-138 (exploring the lease provision of the NBA’s Minnesota Timberwolves); see also Kaplan, *supra* note 15, at 1621-22 (noting that the NFL has a player franchise tag which can only be used once per season and requires teams to make an offer equal to the average of the top five salaries in the player’s position); Michael A. Corgan, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA’s Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 421 (2012) (discussing how the USOC’s current status as a tax-exempt entity generally fosters amateur sports competition).

17. See Ronald Blum, *Yanks’ Luxury Tax Increases \$400k to \$19.3 Million*, YAHOO! SPORTS (Dec. 18, 2012), <http://sports.yahoo.com/news/yanks-luxury-tax-increases-400k-151952634—mlb.html>.

18. Barbara Osborne, *Gender, Employment, and Sexual Harassment Issues in the Golf Industry* 16 J. LEGAL ASPECTS OF SPORT 25, 50-52, 57-58 (2006) (discussing the tax benefits of private country clubs that are classified as non-profit organizations, including property tax exemptions, and noting that a bona fide private membership club is defined as one that has tax exempt status under Section 501(c) of the Internal Revenue Code (I.R.C.)).

19. Anna S. Tharrington & Barbara Osborne, *An Analysis of the Presence and Perception of the Juris Doctorate Degree in Division I College Athletics Administration*, 18 J. LEGAL ASPECTS OF SPORT 309, 323-25 (2008).

20. See Paul J. Batista & Lance C. Hatfield, *Learn at Home, Play at School: A State-by-State Examination of Legislation, Litigation and Athletic Association Rules Governing Public School Athletic Participation by Homeschool Students*, 15 J. LEGAL ASPECTS OF SPORT 213 (2005); see also Kathryn Gardner & Allison J. McFarland, *Legal Precedents and Strategies Shaping Home Schooled Students’ Participation in Public School Sports*, 11 J. LEGAL ASPECTS OF SPORT 25, 28-29 (2001); Joshua Roberts, *Chalk Talk: Dispelling the Rational Basis for Homeschooler Exclusion from High School Interscholastic Athletics*, 38 J.L. & EDUC. 195, 200 (2009).

21. ADAM EPSTEIN, SPORTS LAW 176 (2013) (noting that as of 2010, 28 states regulate the resale of tickets such as by requiring a license, fee, or other tax to work as a ticket reseller).

scholarly interest regarding numerous parties, including individual athletes, coaches, owners, shareholders, teams, leagues, practitioners, and scholars.

### A. NCAA

One of the most controversial tax-related issues in sports law and the sports business involves the NCAA itself.<sup>22</sup> This organization, which maintains its tax-exempt status along with many of its member institutions, has been the subject of academic discussion and critique for years.<sup>23</sup> I.R.C. § 501(c)(3) provides a federal income tax exemption for various types of organizations, primarily those established for religious, scientific, or educational purposes, but also for those that foster national or international amateur sports competition.<sup>24</sup> This exemption includes both the USOC and the NCAA.<sup>25</sup>

It is reasonable to assert that at no time has the NCAA's tax-exempt structure been more scrutinized than today, particularly given that its multi-billion dollar television contract for its *March Madness* basketball tournament apparently remains exempt from the purview of the Internal Revenue Service (I.R.S.).<sup>26</sup> The NCAA and its member institutions sometimes engage in activities not normally associated with a tax-exempt organization, such as the imposition of politically correct standards of tolerance on its member organizations and signing multi-billion dollar television contracts.<sup>27</sup> Some scholars have suggested that collegiate sports (particularly Division I men's basketball and football) more

22. See generally John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109 (2010) (discussing and analyzing the NCAA as a tax-exempt organization especially after the 2006 inquiry by the U.S. Congress asking the organization to justify its exemption); see also *Nat'l Collegiate Realty Corp. v. Bd. of County Comm'r's*, 690 P.2d 1366, 1372 (Kan. 1984) (reasoning that property used by NCAA for its national headquarters was used exclusively for educational purposes within the meaning of state statute granting an exemption); *Nat'l Collegiate Athletic Ass'n v. Kansas Dep't of Revenue*, 781 P. 2d 726, 730 (Kan. 1989) (reasoning that the NCAA was an educational institution within the purview of applicable Kansas statute and therefore exempt from sales taxes in Kansas).

23. See Kadence A. Otto, *Revisiting Tarkanian: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS OF SPORT 243, 276 (2008) (noting that not only is the NCAA exempt from federal income taxes under the I.R.C., but it has been exempt from state taxes as well, exemplified by its 1999 move from Overland Park, Kansas to the Indianapolis, Indiana area, where it secured a 30-year lease in the amount of one dollar annually in addition to funding for the construction of a headquarters).

24. I.R.C. § 501(c)(3) (2012) (exempting from income tax certain types of organizations, including corporations organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment)); see also EPSTEIN, *supra* note 21, at 390 (questioning whether it was a legitimate action for a tax-exempt organization such as the NCAA to wage a campaign in 2005 to eliminate the use of individual school mascots and nicknames that could be perceived as reinforcing negative stereotypes about Native Americans, many of which had been in use for over a century).

25. See Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 576 (2009) (discussing NCAA's tax-exempt status in light of the Andy Oliver case); see also Dionne L. Koller, 50 ST. LOUIS L.J. 91, 129 (2005) (noting that the United States Anti-Doping Agency (USADA) is also tax-exempt).

26. See Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 509 – 20 (2008) (considering the NCAA's tax-exempt status given the billions of dollars television generates for the organization, post-season bowl games and conferences, especially from the rights to broadcast its March Madness basketball tournament).

27. See Corgan, *supra* note 16, at 387 – 394; see also EPSTEIN, *supra* note 21, at 42 – 43 (offering that the NCAA's tax-exempt status appears to be at a crossroads given the intense public scrutiny over whether its primary purpose is educational in nature when its actions clearly are motivated by raising more revenue, noting that the organization is treated no differently than Salvation Army, Goodwill, United Way, Red Cross, or the Ronald McDonald House, none of which have a \$10 billion television contract).



closely resemble professional sports and that, at times, the NCAA has not been able to effectively control itself or its members in maintaining a clear line of demarcation between the amateur and professional ranks regarding student-athletes, coaches, and athletic administration.<sup>28</sup>

## B. INCOME TAXATION OF U.S. ATHLETES

The imposition of taxes on professional athletes' and sports teams' earnings in the U.S. is not a new concept. The I.R.C. dictates that all income, no matter the source, is subject to tax.<sup>29</sup> Because the I.R.S. has an interest in taxpayers' income and earnings on a global scale, U.S. taxpayers are required to report their worldwide income on their individual income tax returns.<sup>30</sup> In fact, many countries tax income that arises in their own jurisdictions under similarly-designed sourcing rules.<sup>31</sup> However, the potential for double-taxation on a U.S. athlete's worldwide income is generally minimized by crediting income taxes paid to other countries on foreign source income.<sup>32</sup>

Professional athletes are subject to various domestic and international taxing regimes based purely on the nature of their business. With the ever-growing international demand for sporting competitions, athletes are beneficiaries of increased international opportunities.<sup>33</sup> Consider, for example, that while arguably the most popular golf tournament, the PGA TOUR, is mainly hosted on U.S. soil, a myriad of top professional golf tournaments are offered around the globe.<sup>34</sup> Even swimming and diving garner considerable international attention at different times throughout the year.<sup>35</sup>

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28. See, e.g., T. Matthew Lockhart, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateuism"*, 35 U. DAYTON L. REV. 175, 186 (2010) (noting the deference that courts have given to the manner in which the NCAA defines and regulates amateurism according to its rules, more formally known as bylaws). This paper references and utilizes the 2012 – 2013 NCAA DIVISION I MANUAL, [hereinafter NCAA Manual], available at <http://www.ncaapublications.com/productdownloads/D113.pdf>; see NCAA Manual art. 12.01.2 (2012) ("Member institutions' athletics programs are designed to be an integral part of the educational program. The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.").

29. I.R.C. § 61(a) (2012).

30. I.R.C. § 862(a) (2012).

31. Carole C. Berry, *Taxation of U.S. Athletes Playing in Foreign Countries*, 13 MARQ. SPORTS L. REV. 1, 4-11 (2002).

32. Double taxation refers to a U.S. athlete being required to pay income tax on earnings made in a foreign country, and thus rightfully taxed per the income tax rules of such country, but also taxed on the same income in the U.S. per the requirements of U.S.C. § 862(a) (2012).

33. Berry, *supra* note 31, at 1.

34. See 2012 Schedule and Results, TIGER WOODS.COM, <http://web.tigerwoods.com/onTour/scheduleAndResults> (last visited June 8, 2013) (showing that Tiger Woods' 2012 tournament schedule included the Duel at Jinsha Lake in China, Abu Dhabi HSBC Golf Championship in United Arab Emirates, Turkish Airlines World Golf Final in Turkey, and the CIMB Classic in Malaysia.).

35. Over the course of his career Michael Phelps has competed at the 2000 Sydney Olympic Games, 2001 World Championships in Japan, 2003 World Championships in Barcelona, 2004 Athens Olympics, 2008 Beijing Olympic Games, and the 2012 London Olympic Games. *Michael Phelps Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/michael-phelps-345192> (last visited July 9, 2013). Further, the FINA Diving World Series events have been held in multiple international locations, to include the UK, China, Russia, Mexico, and the United Arab Emirates. *FINA/Midea Diving World Series 2013*, FINA.ORG, [http://www.fina.org/H2O/index.php?option=com\\_content&view=category&layout=blog&id=47&Itemid=291](http://www.fina.org/H2O/index.php?option=com_content&view=category&layout=blog&id=47&Itemid=291) (last visited July 9, 2013).

The subject of taxing U.S. athletes often appears in literature and news broadcasting as a result of improper tax avoidance by high-profile figures.<sup>36</sup> Outside the Olympic setting, athletes competing in various sporting events must pay income tax on any amounts earned or won. Large-purse sporting events like golf's PGA TOUR or tennis' U.S. Open are only a few of the arenas where the federal government taxes income.<sup>37</sup> In some cases, prominent athletes are charged criminally (or at least publicly reprimanded) for failing to pay taxes regardless of the amount.<sup>38</sup> For example Hawaiian surf champion Sunny Garcia was sentenced in 2005 to three months in federal prison for tax evasion for failure to pay income tax on over \$114,000 in winnings derived from surf competitions.<sup>39</sup> Similarly, professional skier Lindsey Vonn owed the I.R.S. \$1.7 million in back-taxes for her 2010 earnings.<sup>40</sup> Other noted athletes accused of federal tax evasion include baseball star Darryl Strawberry,<sup>41</sup> boxer Mike Tyson,<sup>42</sup> football quarterback Bernie Kosar,<sup>43</sup> and hockey great Jaromir Jagr.<sup>44</sup>

Calculating taxes owed by U.S. athletes for income earned via international sporting events can be challenging for athletes and their accountants. The I.R.C. provides rules concerning what types of income are deemed sourced to the U.S.<sup>45</sup> Not only must the source of the income be determined, but also the character of such income.<sup>46</sup> For example, professional athletes' income might include incentive and signing bonuses, endorsement income and royalties, and monetary purses or awards offered by hosting events.<sup>47</sup> In many

36. See Kadence A. Otto, *Criminal Athletes: An Analysis of Charges, Reduced Charges and Sentences*, 19 J. LEGAL ASPECTS OF SPORT 67, 94 (2009) (reminding that former eight-time All-star Darryl Strawberry was convicted in U.S. District Court of tax evasion and owed the IRS over \$ 430,000 in taxes).

37. See Prize Money, US OPEN, [http://2012.usopen.org/en\\_US/about/history/prizemoney.html](http://2012.usopen.org/en_US/about/history/prizemoney.html) (last visited June 8, 2013) (illustrating that professional golf tournaments offer exceptionally large purses for the top seeded golfers, including the 2012 U.S. Open, which boasted a purse of \$8 million, of which \$1.44 million was awarded to the winner. Tennis is another sport which offers huge purses to tournaments winners, including the 2012 U.S. Open which offered a total purse of over \$25 million.).

38. See William Browning, *Famous Athletes With Income Tax Trouble*, YAHOO! SPORTS (Apr. 8, 2011), <http://sports.yahoo.com/top/news?slug=yen-8248509>.

39. Allison Hoffman, *Sunny Garcia Sentenced to 3 Months For Tax Fraud*, HONOLULUADVERTISER.COM (Oct. 19, 2006), <http://the.honoluluadvertiser.com/article/2006/Oct/19/In/FP610190349.html>.

40. Eamon Murphey, *Gold Medal Skier Lindsey Vonn Owed \$1.7 Million in Back Taxes*, DAILY FINANCE (Apr. 16, 2012, 10:50AM), <http://www.dailyfinance.com/2012/04/16/gold-medal-skier-lindsey-vonn-owed-irs-1-7-million-in-back-tax/>.

41. Browning, *supra* note 38 (recalling how Darryl Strawberry failed to pay individual income taxes from 1989 – 1990 and was subsequently convicted of income tax evasion, eventually agreeing to pay \$430,000 in back-taxes to the I.R.S.).

42. *The Tax Man Cometh*, SPORTS ILLUSTRATED CNN (Sept. 9, 1998 3:59PM), [http://sportsillustrated.cnn.com/more/boxing/news/1998/09/09/tyson\\_lien/](http://sportsillustrated.cnn.com/more/boxing/news/1998/09/09/tyson_lien/) (reporting the IRS placing a \$63 million lien on boxer Mike Tyson's Connecticut mansion in 1998).

43. *Football Great Bernie Kosar Pays Tax Lien*, ACCOUNTINGWEB (Aug. 17, 2008), <http://www.accountingweb.com/topic/tax/football-great-bernie-kosar-pays-tax-lien> (reporting Bernie Kosar's claim that he paid off the \$228,806.21 I.R.S. tax lien placed on him for income taxes owed for 2006).

44. Michael Farber and Don Yaeger, *Capital Losses, A Huge Gambling Debt Preceded Jerome Jagr's IRS Problems*, SI VAULT (Mar. 17, 2003), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1028225/index.htm> (reporting the I.R.S. filing a lien against Jagr in August 2003 for \$350,000 in back taxes owed from tax year 1999).

45. I.R.C. § 861 (2012).

46. Carole C. Berry, *Taxation of U.S. Athletes Playing in Foreign Countries*, 13 MARQ. SPORTS L. REV. 1, 7 (2002).

47. *Id.* at 6-9.

instances, the source and character of such income is unclear and must be assessed and allocated among two or more countries' own tax laws.<sup>48</sup>

To avoid double-taxation by multiple taxing regimes, foreign tax credits and bilateral income tax treaties play key roles.<sup>49</sup> Foreign tax credits are generally available to U.S. citizens and residents who pay income taxes in another country, thus limiting the U.S. tax exposure of certain income already taxed in a foreign jurisdiction.<sup>50</sup> Income tax treaties between the U.S. and foreign countries further limit a taxpayer's exposure to double-taxation.<sup>51</sup> Model tax treaties such as those produced by the U.S. and the Organization for Economic Cooperation and Development (O.E.C.D.) provide specific criteria for taxation of athletes.<sup>52</sup>

### C. U.S. TAXATION OF INTERNATIONAL ATHLETES

In 2011, the U.S. Tax Court held that a South African professional golfer who resided in the United Kingdom was required to pay U.S. income tax on certain endorsement fees and royalty income which he earned in connection with his U.S. trade or business.<sup>53</sup> This decision followed precedent that international athletes are subject to taxation in the U.S.<sup>54</sup>

48. *Id.* at 8 (showing that more than 200 cases were docketed in U.S. courts regarding NHL hockey games played in both Canada and the U.S. in the 1970's in order to deal with the appropriate taxation of the athletes).

49. I.R.C. §§ 901 – 908 (2012) address foreign tax credits. Of particular interest with respect to the 2012 London Olympics, relevant U.K. law taxes athletes pro-rata based on the number of events in which an athlete competes inside the country, as well as a fifty percent tax on appearance fees. However, in order to avoid the possibility of athletes boycotting the London Olympics, British taxing authorities limited their imposition requirements, granting an exemption to those athletes visiting the U.K. in order to compete in the Olympic Games. Thus, U.S. medal winning athletes were exempted from having to pay income tax in the U.K. on their earnings from Operation Gold. Kelly Phillips Erb, *Olympians Get a Free Pass on Taxes at the London Olympic Games*, FORBES (July 28, 2012 10:51AM), <http://www.forbes.com/sites/kellyphillipserb/2012/07/28/olympians-get-a-free-pass-on-taxes-at-the-london-games/>.

50. I.R.C. § 911 (2012); *see also* Berry, *supra* note 46, at 12.

51. I.R.C. § 904 (2012); *see also* Berry, *supra* note 46, at 12.

52. U.S. Model Income Tax Convention art. 16, Nov. 15, 2006, *available at* <http://www.irs.gov/pub/irs-try/model006.pdf> (“Entertainers and Sportsmen. Income derived by a resident of a Contracting State as an entertainer, such as a theater, motion picture, radio, or television artiste, or a musician, or as a sportsman, from his personal activities as such exercised in the other Contracting State, which income would be exempt from tax in that other Contracting State under the provisions of Articles 7 (Business Profits) and 14 (Income from Employment) may be taxed in that other State, except where the amount of the gross receipts derived by such entertainer or sportsman, including expenses reimbursed to him or borne on his behalf, from such activities does not exceed twenty thousand United States dollars (\$ 20,000) or its equivalent in— for the taxable year concerned.”); *see also* Organization for Economic Cooperation and Development, Model Tax Convention on Income and on Capital art. 17, July 22, 2010, *available at* <http://www.oecd.org/tax/treaties/oecdmtcavailableproducts.htm> (follow “2010 Browsable Full Version of the OECD Model Tax Convention” hyperlink).

53. *Goosen v. Comm’r*, 136 T.C. 547 (2011), *appeal dismissed*, 2012 U.S. App. LEXIS 8708 (D.C. Cir. Feb. 28, 2012).

54. *See, e.g., Stemkowski v. Comm’r*, 690 F.2d 40 (2d Cir. 1982) (affirming the U.S. Tax Court’s decision that a Canadian professional hockey player for the New York Rangers was required to pay U.S. allocated income tax on earnings derived during the regular season of hockey when the taxpayer was a resident alien in the U.S., and he was disallowed certain taxpayer deductions for expenses not incurred while pursuing his business in the U.S.); *Hanna v. United States*, 1997 U.S. Claims LEXIS 219 (Fed. Cl. 1997) (denying a professional hockey player from Canada certain U.S. income tax deductions for business expenses not associated with his hockey-playing activities in the U.S.); *see also* Alan Pogroszewski and Kari Smoker, *Cross-Checking: An Overview of the International Tax Issues for Professional Hockey Players*, 22 MARQ. SPORTS L. REV. 187 (2011) (highlighting tax issues surrounding Canadian professional hockey players earning money in the U.S. during the NHL hockey season); John J. Coney’s,

Foreign athletes must pay federal income tax on any money earned while competing on U.S. soil, as well as on any income deemed to be sourced in the U.S.<sup>55</sup>

As scores of professional athletes compete on a worldwide scale, determining the taxation requirements with respect to every country where such athletes train, compete, or earn royalties or endorsement income can be challenging. With respect to U.S. income tax obligations, non-resident aliens, including athletes, are taxed on any income sourced to the U.S.<sup>56</sup> Ascertaining the source of an athlete's income can be complex, especially as numerous athletes are not affiliated with any particular sporting team.<sup>57</sup> Many professional athletes, including swimmers, tennis players, and golfers, need assistance from sports agents or managers to handle their earning opportunities such as endorsement income, royalties, contract incentives, and bonuses.<sup>58</sup> Such income opportunities may be sourced to numerous global locations, and therefore trigger double-taxation on income.<sup>59</sup>

There are certainly challenges to properly sourcing professional athletes' income at an international level. In 2012, the individual athletes with the highest incomes included boxers Floyd Mayweather and Manny Pacquiao, golfers Tiger Woods and Phil Mickelson, tennis stars Roger Federer and Rafael Nadal, and Formula One racecar driver Michael Schumacher.<sup>60</sup> Such individual athletes claim residency in one country, but travel the globe earning money in other countries as part of their competitive schedule.<sup>61</sup> Since the U.S. is a global hub for sports competition, it attracts the world's best athletes to compete in American leagues and sporting events.<sup>62</sup> International players make up a hefty part of the rosters for several U.S. professional sports teams, due in large part to increasingly abundant athletic talent in foreign countries.<sup>63</sup> For example, the New York Yankees and Dallas Mavericks have numerous players who earn money in the U.S. but are citizens and residents

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Jr., *To Tax or Not To Tax: Is a Non-Resident Tennis Player's Endorsement Income Subject to Taxation in the United States?*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 885 (1999) (perusing the tax treatment of a foreign tennis player who had certain U.S. source income with respect to endorsement and royalty income.); Stephanie C. Evans, *U.S. Taxation of International Athletes, A Reexamination of the Artist and Athlete Article in Tax Treaties*, 29 G.W. J. INT'L. L. & ECON., 297 (1995) (analyzing and offering suggestions for modifying the U.S. Model Treaty's Entertainers and Sportsmen article).

55. If a foreign athlete is deemed a resident alien of the U.S., his income is subject to tax in the U.S. as if he were a U.S. citizen. If a foreign athlete is not a resident alien of the U.S., but earns money in the U.S., he is only subject to tax in the U.S. based on any income that is sourced to the U.S. See 26 U.S.C. § 871 (2012).

56. I.R.C. §§ 861-862 (2012).

57. See Berry, *supra* note 46.

58. *Id.* In contrast to sports such as swimming, golf, and tennis, which do not regularly include professional sporting teams, numerous athletes are part of professional sports with teams that travel both nationally and globally, such as soccer, hockey, baseball, and cycling.

59. *Id.* at 12.

60. In 2012, Mayweather earned \$85 million in salary/ winnings, making him the highest-paid athlete of the year, followed by Pacquiao at \$56 million salary/ winnings plus \$6 million in endorsements, Woods (#3) at \$4.4 million salary/ winnings and \$55 million in endorsements, Federer (#5) at \$7.7 million salary/ winnings and \$45 million in endorsements, Mickelson (#7) at \$4.8 million salary/ winnings and \$43 million in endorsements, Nadal (#16) at \$8.2 million salary/ winnings and \$25 million in endorsements and Schumacher (#20) with \$20 million salary/ winnings and \$10 million in endorsements. See *Highest-Paid Athletes 2012 – World's Richest Athletes*, THE RICHEST (June 19, 2012), <http://www.therichest.org/sports/forbes-highest-paid-athletes/>.

61. Berry, *supra* note 46, at 4.

62. Andrew D. Appleby, *Leveling the Playing Field: A Separate Tax Regime for International Athletes*, 36 BROOKLYN J. INT'L L. 605, 615 (2011).

63. Dustin C. Lane, *From Mao to Yao: A New Game Plan for China in the Era of Basketball Globalization*, 13 PAC. RIM L. & POL'Y J., 127, 131-32 (2004).

of foreign countries.<sup>64</sup> Because the sports industry boasts big money and earnings, foreign athletes are ideal targets for the I.R.S. to enforce income tax compliance.<sup>65</sup>

Currently, the U.S. has bilateral income tax treaties with numerous countries, though not every international locale boasts such favorable arrangements. Consider the recent seven-year, \$42 million contract between the Los Angeles Dodgers and Cuban baseball player Yasiel Puig.<sup>66</sup> Puig defected from Cuba in June 2012, establishing temporary residency in Mexico before signing with the Dodgers.<sup>67</sup> While Mexico has a bilateral tax treaty with the U.S., athletes who maintain residency in countries like Cuba, the Dominican Republic, Nicaragua, and Panama, but who play on U.S. professional sports teams can possibly incur double-taxation since no tax treaties exist between the U.S. and their countries of residence.<sup>68</sup> These athletes may be subject to taxation in their own countries because of their foreign citizenship, as well as the U.S. since it is the location of their trade or business.<sup>69</sup>

Even with the protection against double-taxation offered by international tax treaties, it can be difficult to accurately establish proper sourcing of an athlete's income.<sup>70</sup> In 1997, Swedish tennis star Stefan Edberg, a tax resident of the U.K., filed a petition in the U.S. Tax Court contesting the I.R.S.'s determination that his eleven endorsement earnings over a three-year period were sourced to the U.S.<sup>71</sup> Such endorsement deals, which included clothing, shoes, racquets, soft drinks, fitness equipment, and cologne, carried various royalty and personal service characteristics both within and outside the U.S., generating

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64. See *List of Foreign NBA Players*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_foreign\\_NBA\\_players](http://en.wikipedia.org/wiki/List_of_foreign_NBA_players) (last visited Jan 24, 2013); see also *List of Current Major League Baseball Players by Nationality*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_current\\_Major\\_League\\_Baseball\\_players\\_by\\_nationality](http://en.wikipedia.org/wiki/List_of_current_Major_League_Baseball_players_by_nationality) (last visited June 8, 2013).

65. Lane, *supra* note 63.

66. Jesse Sanchez, *Dodgers Sign Cuban Puig To Seven Year Deal*, MLB.COM (June 29, 2012, 8:57PM ET), [http://mlb.mlb.com/news/article.jsp?ymd=20120628&content\\_id=34081436&vkey=news\\_mlb&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20120628&content_id=34081436&vkey=news_mlb&c_id=mlb).

67. Chad Moriyama, *Dodgers Sign Yasiel To 7-Year/ \$42 Million Deal*, ACCORDING TO SOURCES + INFORMATION (June 28, 2012), <http://www.chadmoriyama.com/2012/06/dodgers-sign-yasiel-puig-to-7-year42-million-deal-according-to-sources-information/>.

68. Major League Baseball (MLB) is made up of numerous international players, currently including approximately 20 from Cuba, 128 from the Dominican Republic, 4 from Nicaragua, and 8 from Panama. See *List of Current Major League Baseball Players by Nationality*, WIKIPEDIA, [http://en.wikipedia.org/wiki/List\\_of\\_current\\_Major\\_League\\_Baseball\\_players\\_by\\_nationality](http://en.wikipedia.org/wiki/List_of_current_Major_League_Baseball_players_by_nationality) (last visited June 8, 2013).

69. I.R.C. § 861 (2012).

70. Identifying and analyzing every U.S. statutory law, income tax ruling, and bilateral tax treaty applicable to foreign athletes is cumbersome. Literary debate exists as to whether changes should be made to the existing taxing regime of bilateral income tax agreements between the U.S. and foreign countries with respect to athletes, including the proposition that the current bilateral tax treaty benefits in place for foreign athletes be more uniform, and thus multilateral, with respect to issues in sports rather than by geographic location. Still, current laws and tax treaties dictate that foreign athletes be subject to tax in the U.S. when their income is sourced within the states. See Jeffrey Dunlop, *Taxing the International Athlete: Working Toward Free Trade in the Americas Through a Multilateral Tax Treaty*, 27 NW. J. INT'L L. & BUS. 227, 248 (2006) (suggesting that tax issues surrounding international athletes deserve more consideration.); see also Evans *supra* note 54, at 332 (proposing that "a uniform system will materialize if an agreement is consummated among several countries hosting foreign athletes that specifies the way in which foreign athletes will be treated for tax purposes."); Appleby, *supra* note 62, at 639 (noting that the "tangled web of disparate and inconsistent tax systems is a nightmare for tax administrators and athletes alike" with respect to international athletes and the differing tax regimes in multiple countries).

71. See John J. Coneyes, Jr., *To Tax or Not to Tax: Is a Non-Resident Tennis Player's Endorsement Income Subject to Taxation in the United States?* 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 885, 886 (1999).

questions as to what part of that income should be properly sourced to the U.S.<sup>72</sup> Although an applicable tax treaty applied, the I.R.S.'s specific characterization of Edberg's income did not protect him against taxation in the U.S., and disagreement between Edberg and the I.R.S. arose over the amount of endorsement income that should be sourced to the U.S.<sup>73</sup> The I.R.S. and Edberg eventually settled the case, but had the Tax Court published a decision on the issue, it would have been the leading authority on sourcing and characterizing endorsement income of international athletes as either royalty, personal service, or artiste and athletes.<sup>74</sup> However, without a binding decision from the U.S. Tax Court, there is still a lack of certainty as to how foreign athletes should source income within and outside the U.S.

## II. OPERATION GOLD AND THE NCAA

### A. OPERATION GOLD

The Colorado-based USOC manages Operation Gold, a program that pays monetary awards to U.S. medal-winning athletes at the Olympic Games.<sup>75</sup> To maintain its tax-exempt status, the USOC does not pay salaries to those athletes participating in the Olympics, though many athletes representing the U.S. are deemed professionals in their respective sports.<sup>76</sup> The current USOC Operation Gold program awards \$25,000 for each gold medal,

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72. *Id.* at 886.

73. Edberg calculated his U.S. source income by allocating his worldwide endorsement income on the basis of days in the U.S. to total days and allocated U.S. source income equally between taxable personal service income and royalty income. His multiple endorsement contracts were with both U.S. and non-U.S. companies, and royalties and endorsement fees were for the use of his name and services in both the U.S. and abroad. The IRS alleged that Edberg's U.S. source income was materially understated and that 100% of the U.S.-source income was personal service income subject to U.S. tax. Edberg's position was that all of his U.S.-source income was tax free under the U.K. treaty, either as personal service income or royalty income, rather than taxable under the Artistes and Athletes article. *Id.* at 886-87.

74. *Id.* at 887.

75. See Nicole Sauches, *USOC Unveils Plan for "America Supports Team USA" Initiative*, THE MAT.COM (May 28, 2010), [http://www.themat.com/section.php?section\\_id=3&page=showarticle&ArticleID=22060](http://www.themat.com/section.php?section_id=3&page=showarticle&ArticleID=22060). The concept of offering monetary rewards to athletes medaling at an Olympic Games, however, is not limited or unique to the U.S. See e.g., Ami Afriatni, *Gold Medals Will Come With Bonus of Rp 2.5 Billion*, JAKARTA GLOBE (Apr. 12, 2012), <http://www.thejakartaglobe.com/sports/gold-medals-will-come-with-bonus-of-rp-25-billion/511002> (reporting that Indonesia agreed to pay each gold-medal winning athlete at the London Games US\$272,500); Belinda Goldsmith, *Olympics - Gold Medals Can Give Athletes the Midas Touch* (July 30, 2012 (6:49 PM IST)), <http://in.reuters.com/article/2012/07/30/oly-goldvalue-day-idINL6E8IT1Q320120730> (reporting that Italy promised US\$182,000 for each gold medal won by an Italian athlete and Russia pledged US\$135,000); *China To Reward Top Olympians With US \$51,000 Each*, CHINA DAILY (Aug. 26, 2008, 16:59), <http://www.gmanetwork.com/news/story/116194/sports/china-to-reward-top-olympians-with-us-51-000-each> (noting that Chinese gold medalists were offered US\$51,000 per gold medal won at the Olympic Games).

76. See Howard Gleckman, *Why is the U.S. Olympic Committee Tax-Exempt?*, TAXVOX, THE TAX POLICY CENTER BLOG, URBAN INST. AND BROOKINGS INST. (Feb. 26, 2010, 13:59 EST), <http://taxvox.taxpolicycenter.org/2010/02/26/why-is-the-u-s-olympic-committee-tax-exempt/> (noting that the USOC remains exempt from taxes because of its designation as an organization that fosters amateur sports competition despite the fact that an overwhelming majority of Olympians are actually professional athletes); see also Corgan, *supra* note 16, at 421-22 (noting that the USOC qualifies as a tax-exempt organization because it "fosters national or international amateur sports competition," even though it allows professional basketball and hockey players who make millions of dollars to participate in the Olympic games).

\$15,000 for each silver medal, and \$10,000 for each bronze medal won.<sup>77</sup> This program has rewarded U.S. athletes handsomely for their Olympic medal-winning efforts.<sup>78</sup>

Operation Gold was established in direct response to a poor showing at the 1988 Calgary, Alberta Winter Olympics where Team U.S.A. finished ninth.<sup>79</sup> The program, however, remains somewhat mysterious; published legal research pertaining to Operation Gold is so limited that, at present, only one published decision at the state or federal level specifically mentions the USOC's Operation Gold program.<sup>80</sup>

## B. NCAA BYLAWS

As delineated in the NCAA Manual and discussed throughout the literature, "amateurism" is a driving theme for the NCAA and those student-athletes who wish to remain eligible to compete among NCAA member institutions.<sup>81</sup> In order to maintain their NCAA amateur standing, student-athletes may not have agents, accept product endorsement sponsorship or income, or receive any extra benefit from their participation in college sports.<sup>82</sup> For example, the NCAA dictates that accepting a sponsorship from a private swimwear manufacturer such as Speedo, Nike, or Arena would violate the organization's fundamental principles of amateurism as found in the NCAA Manual article 2.9, *Principles of Amateurism*.<sup>83</sup> However, this so-called "clear line of demarcation" between professional and amateur status can be blurry at times; in some cases prize money is acceptable, whereas endorsement income is unacceptable.<sup>84</sup>

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77. See Randy Harvey, *USOC Sets New Gold Standard*, L.A. TIMES (Oct. 21, 2001), <http://articles.latimes.com/2001/oct/21/sports/sp-59910> (noting that beginning in 2002 with the Salt Lake City Olympics, the bounty for a medal increased).

78. See Darren Rovell, *Operation Gold Proves Costly to USOC*, ESPN.COM (Feb. 25, 2002), <http://sports.espn.go.com/oly/winter02/gen/story?id=1340433>.

79. See Larry Siddons, *Olympic Medals Mean Instant Cash*, THE SEATTLE TIMES (Jan. 23, 1994), <http://community.seattletimes.nwsourc.com/archive/?date=19940123&slug=1891039> (stating that the USOC established the Operation Gold program to pay \$2,000 to any U.S. athletes who finished in the top eight in an Olympic, world-championship or other major event, a pittance relative to today's program).

80. See *Shepherd v. U.S. Olympic Comm.*, 94 F. Supp. 2d 1136, 1139 n.1 (D. Colo. 2000).

81. See generally Adam Epstein & Paul Anderson, *Utilization of the NCAA Manual as a Teaching Tool*, 26 J. LEGAL STUD. EDUC. 109 (2009) (highlighting that the word "amateurism" is mentioned almost 40 times in the 2012-13 NCAA Manual).

82. NCAA Manual art. 16.02.3 (2012) ("Extra Benefit. An extra benefit is any special arrangement by an institutional employee or a representative of the institution's athletics interests to provide a student-athlete or the student-athlete's relative or friend a benefit not expressly authorized by NCAA legislation. Receipt of a benefit by student-athletes or their relatives or friends is not a violation of NCAA legislation if it is demonstrated that the same benefit is generally available to the institution's students or their relatives or friends or to a particular segment of the student body.") Amateurism is a major theme that is found throughout the NCAA Manual; see, e.g., NCAA Manual art. 2.9 (2012) ("The Principle of Amateurism. Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."); NCAA Manual art 12.3.1 (2009) ("General Rule. An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.")

83. See NCAA Manual art. 2.9 (2012) ("The Principle of Amateurism").

84. Steve Eubanks, *Olympic Cash Muddles NCAA Eligibility Waters*, FOX SPORTS (Aug. 22, 2012),

However, much to the credit of the NCAA, student-athletes who compete for the U.S. in the Olympic Games (or attempt to make an Olympic team in their respective sports) are afforded the opportunity to train and receive certain benefits from the USOC without jeopardizing their intercollegiate career.<sup>85</sup> Laudably, the NCAA also has exempted prize money for medals earned from the USOC or a student-athlete's National Governing Body (NGB) (e.g., USA Swimming) when determining NCAA amateur eligibility for student-athletes.<sup>86</sup> However, the NCAA has not yet expanded this exemption to student-athletes who earn other similar bonuses from their NGB for feats like setting world records.<sup>87</sup>

The 2012-2013 NCAA Division I Manual specifically mentions the Operation Gold program several times.<sup>88</sup> Importantly, the NCAA provides that income earned as a result of this program does not result in a student-athlete losing eligibility in their sport.<sup>89</sup> At the 2012 London Olympic Games, U.S. swimmer Missy Franklin became an American icon by earning five medals.<sup>90</sup> As a result of her efforts, she earned \$110,000 in Operation Gold funds from the USOC.<sup>91</sup> Although she earned Operation Gold awards, Missy was free to commit to a collegiate sports team, and she accepted an athletic scholarship with the

<http://www.foxsportsouth.com/08/22/12/Olympic-cash-muddles-NCAA-eligibility-wa/landing.html?blockID=779435> (explaining that Operation Gold payouts for Olympic Medals do not violate NCAA eligibility rules, but endorsement money does); see also Associated Press, *Zbikowski Will Make Pro Boxing Debut at MSG*, ESPN.COM (Mar. 29, 2006), <http://sports.espn.go.com/ncf/news/story?id=2389473> (noting that the University of Notre Dame's Tom Zbikowski (football) was allowed to keep prize money for a professional boxing tournament held at Madison Square Garden as long as he did not accept commercial endorsements). However, University of Colorado's Jeremy Bloom (football) had to relinquish his eligibility in football if he was to accept endorsements for his exploits as an Olympic skier. See *infra* p. 13 and notes 96-97.

85. See NCAA Manual art. 12.1.2.4.9 (2012) ("Exception for Training Expense. An individual (prospective or enrolled student-athlete) may receive actual and necessary expenses [including grants, but not prize money, whereby the recipient has qualified for the grant based on his or her performance in a specific event(s)] to cover developmental training, coaching, facility usage, equipment, apparel, supplies, comprehensive health insurance, travel, room and board without jeopardizing the individual's eligibility for intercollegiate athletics, provided such expenses are approved and provided directly by the U.S. Olympic Committee (USOC) or the appropriate national governing body in the sport (or, for international student-athletes, the equivalent organization of that nation).").

86. See Michael Rand, *Missy Franklin Can Get Paid for Swimming Accomplishments But Stay an Amateur. Say What?*, STAR TRIBUNE (Aug. 13, 2012), <http://www.startribune.com/sports/blogs/166003656.html>.

87. *Id.* Thus, prize money is acceptable to the NCAA in this context, but not additional bonuses for setting a world record. This may be due to the complex relationship between the NCAA, the USOC and its numerous NGBs, which govern their own sport in the U.S. See also E-mail from Bridget Niland, Assoc. Professor of Business Administration, Daemen College (Feb. 4, 2013) (on file with author).

88. For example, specific references to the USOC's Operation Gold program are found in the bylaws related to *Amateurism* (12.1.2.1.4.1.2; 12.1.2.1.4.3.3; 12.1.2.1.5.1) and *Financial Aid* (15.02.4.2 (d); 15.02.4.5; 15.1.2 (e)). See also, e.g., NCAA Manual art. 15.2.6.4 (2012) ("Educational Expenses-U.S. Olympic Committee or U.S. National Governing Body"). Interestingly, one might consider whether or not the NCAA bylaws which exempt Operation Gold grants are skewed in favor of U.S. athletes since only the USOC program is mentioned and not similar programs from other nations which may have student-athletes competing for NCAA schools. The NCAA bylaws related to the Operation Gold program demonstrate the willingness between the USOC and the NCAA in the late 1990s to assist non-revenue ("Olympic") sports with funding without jeopardizing intercollegiate eligibility. Telephone Interview with Bridget Niland, Associate Professor of Business Administration, Daemen College (Jan. 14, 2013).

89. See NCAA Manual art. 12.1.2.1.4.1.2 (2012) ("An individual (prospective student-athlete or student-athlete) may accept funds that are administered by the U.S. Olympic Committee pursuant to its Operation Gold program."). The same words are used in subsequent NCAA bylaws 12.1.2.1.4.3.3 and 12.1.2.1.5.1.

90. See Cheryl Preheim & Jamiel Lynch, *Olympic Gold Medalist to Swim on High School Team*, USA TODAY (Nov. 28, 2012), <http://www.usatoday.com/story/sports/olympics/2012/11/28/missy-franklin-to-swim-high-school-team/1731537/> (mentioning that Missy decided to attend the University of California-Berkeley).

91. Bob Highfill, *Olympic Glory Comes with a Price*, RECORDNET.COM (Aug. 7, 2012), [\\$25,000 for each gold medal won \(equating to \\$100,000\) and \\$10,000 for her bronze medal.](http://www.recordnet.com/apps/pbcs.dll/article?AID=/20120807/A_SPORTS0203/208070323/-1/A_SPORTS0203)



University of California-Berkeley.<sup>92</sup> In contrast, world-renowned swimmer Michael Phelps is not eligible to accept an athletic scholarship at any NCAA college or university because he earns endorsement income.<sup>93</sup> Phelps has signed sponsorships with at least fifteen companies, including Subway, Hilton, Omega, Speedo, Visa, Procter & Gamble, and Under Armour, which expressly violates the NCAA's bylaws against receiving endorsements.<sup>94</sup> Thus, while Phelps trained with Club Wolverine in Ann Arbor, Michigan, he did not swim for the University of Michigan.<sup>95</sup>

The NCAA's bylaws against hiring agents and receiving endorsements have forced premier student-athletes like multi-sport athlete Jeremy Bloom to choose between remaining an amateur athlete or pursuing a professional career.<sup>96</sup> Bloom, an All-American football player and world-class skier, contended that financial endorsements were required in order to afford to stay competitive in freestyle moguls skiing at the international level.<sup>97</sup> The NCAA declared Bloom ineligible after he sued the NCAA in a Colorado state court in order to obtain an injunction against this NCAA bylaw.<sup>98</sup> In response, Bloom quit playing football at the University of Colorado, kept his endorsement agreements, pursued a spot on the Olympic team, and competed for the U.S. in the 2006 Turin Olympics in the moguls.<sup>99</sup> Bloom eventually became a fifth round pick for the Philadelphia Eagles in the 2006 NFL draft.<sup>100</sup>

### III. THE OTEA: THE BILL, CONCERNS AND ALTERNATIVES

At the inception of London's Summer Olympic Games, the Americans for Tax Reform Foundation revealed that U.S. athletes are required to pay income tax on monetary awards earned for winning Olympic medals.<sup>101</sup> In response, Senator Marco Rubio (R-FL) introduced Bill S.3471 (also referred to as the Olympic Tax Elimination Act) which proposed to exclude "the value of any prize or award won by the taxpayer in athletic competition in the Olympic Games" from gross income tax calculations.<sup>102</sup>

92. Preheim, *supra* note 90.

93. See NCAA Manual art. 12.5.2.1 (2012) ("Advertisements and Promotions After Becoming a Student-Athlete"); see also Kurt Badenhausen, *Michael Phelps Locks Up Olympic Immortality And Post-Career Millions*, FORBES (Aug. 1, 2012), <http://www.forbes.com/sites/kurtbadenhausen/2012/08/01/michael-phelps-locks-up-olympic-immortality-and-post-career-millions/>.

94. Badenhausen, *supra* note 93.

95. Jo-Ann Barnas, *Michigan Club Draws Some of World's Top Swimmers*, USA TODAY (May 21, 2012), <http://usatoday30.usatoday.com/sports/olympics/london/swimming/story/2012-05-21/michael-phelps-former-club-wolverine-thriving/55120602/1>.

96. See *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621 (Colo. App. 2004) (affirming trial court's decision not to allow request for waivers of NCAA rules that restricting Bloom from receiving endorsement income).

97. *Id.*; see also EPSTEIN, *supra* note 21, at 35-6 (discussing the case of Jeremy Bloom).

98. EPSTEIN, *supra* note 21, at 35-6.

99. *Id.*

100. *Id.*

101. Hugh Johnson, *Win Olympic Gold, Pay the IRS* (July 31, 2012, 1:49 PM EDT), <http://atr.org/win-olympic-gold-pay-irs-a7091>.

102. S. 3471, 112th Cong. (2012) ("Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, SECTION 1. ELIMINATION OF TAX ON OLYMPIC MEDALS. (a) In General.--Section 74 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection: '(d) Exception for Olympic Medals and Prizes- Gross income shall not include the value of any prize

Interestingly, on the same day that Bill S.3471 was introduced, a House Bill (H.R. 6250) was also introduced, proposing to exclude from gross income “the value of any medal awarded in, or any prize money received from the United States Olympic Committee on account of, competition in the Olympic Games.”<sup>103</sup> Though H.R. 6250 was submitted for review to the House Ways and Means Committee, it stalled and did not progress past its referral in August 2012.<sup>104</sup> Furthermore, H.R. 6250 did not receive the amount of publicity that the OTEA did when introduced by Senator Rubio, although its language is more concise than the OTEA in dictating what type of income, and perhaps more importantly which specific sources of income, are to be exempt from gross income tax. It is unclear at this time whether the OTEA will move closer to becoming law.

#### A. CONCERNS ASSOCIATED WITH THE OTEA

The term “gross income” includes all income derived from any source, including amounts received as prizes and awards.<sup>105</sup> Prizes and awards include amounts received not only from radio, television, and door prizes, but also include awards won in contests of all types.<sup>106</sup> Based on the express language of the I.R.C. and U.S. Treasury Regulations, any prize or award money won in a sporting event of any type, including the Olympic Games, constitutes gross income and is therefore subject to taxation.<sup>107</sup> This includes money received via Operation Gold, as well as the value of each Olympic medal awarded to athletes.<sup>108</sup>

The biggest concern with the language of the OTEA is that it is extremely broad. As proposed, the OTEA exempts “any prize or award won by the taxpayer in athletic competition in the Olympic Games.”<sup>109</sup> If the OTEA were to become law as written, it is foreseeable that athletes and their agents could exploit the ambiguity in the OTEA’s language and claim that if endorsement contracts provide large bonuses as a reward for medals won in the Olympics, those bonuses should be tax-exempt.<sup>110</sup>

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or award won by the taxpayer in athletic competition in the Olympic Games.” (b) Effective Date- The amendment made by this section shall apply to prizes and awards received after December 31, 2011.”)

103. H.R. 6250, 112th Cong. (2012). H.R. 6250 was sponsored by Rep. Blake Farenthold (TX-27). Another bill, H.R. 6252, 112th Cong. (2012), was introduced on August 1, 2012 containing the same language as H.R. 6250. H.R. 6252, sponsored by Rep. Mary Bono Mack (CA-45), was also referred to the House Committee on Ways and Means with no further action to the date of this publication. H.R. 6287, 112th Cong. (2012), submitted on August 2, 2012 by Rep. Laura Richardson (CA-37), mimics the language in H.R. 6250 and H.R. 6252, but also includes prizes or awards received from the USOC “on account of, competition in the Olympic Games or Paralympic Games.” See also H.R. 6359, 112th Cong. (2012), submitted by Rep. Sylvestre Reyes (TX-16) on August 7, 2012.

104. *Bill Summary and Status 112<sup>th</sup> Congress (2011-2012), Bill H.R.6250*, THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.06250>: (last visited July 5, 2013).

105. Treas. Reg. §§1.61-1(a), 1.74-1(a) (1960).

106. Treas. Reg. §1.74-1(a) (1960).

107. See Treas. Reg. §§1.61-1(a), 1.74-1(a) (1960).

108. K. Sean Packard, *The Truth On Taxation of Olympic Gold Medals*, TAX TV, <http://www.taxtv.com/the-truth-on-taxation-of-olympic-gold-medals/#.UM9fiHfNmSo> (last visited June 8, 2013) (explaining that U.S. income tax is also imposed on the market value of each Olympic medal given to U.S. winning-athletes, but because the value of such medals is de minimis as compared to the income and endorsement opportunities afforded most Olympic athletes, the value of such medals is generally not taxable).

109. See *supra* note 102.

110. See Packard, *supra* note 108.

To illustrate, consider Michael Phelps, winner of four gold and two silver medals at the 2012 London Games.<sup>111</sup> Through Operation Gold, Phelps earned \$130,000 for his medal-winning performances.<sup>112</sup> The OTEA exempts from taxation prizes or awards won by taxpayers in athletic competitions in the Olympics.<sup>113</sup> Consequently, if each of Phelps' numerous endorsements contracts<sup>114</sup> included a clause drafted to ensure that he would earn bonuses from each of his sponsors for every medal won, Phelps could be in a position to exclude from taxable income not only any money awarded to him per Operation Gold, but also any endorsement bonuses triggered by his medal-winning achievements at the Olympic Games.<sup>115</sup>

The concern raised in the Phelps illustration exists with many highly-paid professional Olympic athletes.<sup>116</sup> Other U.S. Olympic athletes with high net worth include Ryan Lochte, Shaun White, and Lindsey Vonn; all of whom have annual earnings in the multi-millions.<sup>117</sup> Numerous Olympians earn a significant portion of their income through endorsements from corporate sponsors, prompting many to question whether many Olympic athletes should receive the legislative tax-break afforded by the OTEA.<sup>118</sup>

There are however, many medal-winning athletes participating in the Olympic Games who rarely, if ever, earn endorsements or monetary awards outside the amount earned via Operation Gold. At the 2012 London Olympics, the U.S. men's archery team won silver.<sup>119</sup>

111. *Michael Phelps Biography*, *supra* note 35.

112. Phelps' four gold and two silvers equate to \$130,000 per Operation Gold [ $\$130,000 = (4 \times \$25,000 + 2 \times \$15,000)$ ].

113. *See supra* note 102.

114. Phelps' endorsement sponsors include Subway, Hilton, Omega, Speedo, Visa, PowerBar, AT&T, Kellogg, Rosetta Stone, PureSport, SwimRoom.com, Nike, Head & Shoulders, Under Armour, and Louis Vuitton. *Michael Phelps Net Worth, Salary, Endorsements*, CELEBRITY NETWORK (July 28, 2012), <http://celebnetworth.org/michael-phelps-net-worth-salary>; *see* Packard, *supra* note 108.

115. Assume, for example, that each of Phelps' 15 endorsement contracts listed in note 114, *supra*, contained language that allowed for "bonus awards won by Michael Phelps in athletic competition in the Olympic Games." If each sponsor awarded Phelps with a monetarily-equivalent award matching those earned per Operation Gold (and assuming that the OTEA was in effect during the 2012 London Olympic Games), Phelps would have received \$130,000 tax-free from the USOC [ $4 \text{ golds} \times \$25,000 + 2 \text{ silvers} \times \$15,000$ ], as well as \$130,000 from each of his 15 sponsors, for a total tax-free award amount of \$2,080,000 for winning Olympic medals at the 2012 London Olympics.

116. *See* PAYWIZARD.ORG, [http://www.paywizard.org/main/VIPPaycheck/VIPPAYchecksport/sport-salaries/vip\\_details?id=michael-phelps](http://www.paywizard.org/main/VIPPaycheck/VIPPAYchecksport/sport-salaries/vip_details?id=michael-phelps) (last visited July 5, 2013) (showing estimates that Michael Phelps earns an annual income of approximately \$10,000,000).

117. Ryan Lochte's net worth is \$2 million. Shaun White is estimated to earn \$8 million per year. Lindsey Vonn earns approximately \$3 million annually. *Ryan Lochte Net Worth, Salary, Endorsements*, CELEBRITY NETWORK (July 28, 2012), <http://celebnetworth.org/ryan-lochte-net-worth-salary>; PAYWIZARD.ORG, <http://www.paywizard.org/main/VIPPaycheck/salaries> (last visited July 5, 2013).

118. Consider gymnast Nastia Liukin's endorsements from Proctor & Gamble, Subway, General Mills, and GK Elite Sportswear; gymnast Gabby Douglas' sponsorship by Proctor & Gamble and Kellogg; and skier Julia Mancuso's endorsement by Head. *Nastia Liukin Net Worth, Salary, Endorsements*, CELEBRITY NETWORK (July 28, 2012), <http://celebnetworth.org/nastia-liukin-net-worth-salary-endorsements>; Darren Rovell, *Endorsements Lucrative for Gabby Douglas*, ESPN (Aug. 6, 2012, 2:52 PM), [http://espn.go.com/blog/playbook/dollars/post/\\_id/835/endorsements-lucrative-for-gabby-douglas](http://espn.go.com/blog/playbook/dollars/post/_id/835/endorsements-lucrative-for-gabby-douglas); Justin Keppler, *American Skiing Champion Julia Mancuso Inks Three-Year Deal with Head Skis*, THE SKI CHANNEL (Apr. 2, 2012, 7:37 PM), <http://www.theskichannel.com/news/featured/20120402/american-skiing-champion-julia-mancuso-inks-three-year-deal-with-head-skis/>.

119. Bill Chappell, *Team USA Wins First Medals of London 2012 Games; More Results From Saturday*, NPR.ORG (July 28, 2012, 1:23 PM), <http://www.npr.org/blogs/thetorch/2012/07/28/157533788/team-usa-wins-first-medal-of-london-2012-games-more-results-from-saturday>.

However, the men's archery event was given minimal televised network time.<sup>120</sup> Similarly, less popular Olympic sports such as rowing, shooting, judo, and taekwondo all contributed to the overall medal count for the U.S. in the 2012 Olympic Games, but they did not receive as much media publicity as other events.<sup>121</sup> Generally, to attract the lucrative endorsement offers, an athlete must win gold medals, be friendly, physically attractive, and have a clean reputation.<sup>122</sup> The opportunities for athletes in less-popular events to receive endorsement contracts are incredibly sparse, if not completely non-existent.<sup>123</sup> Thus, for many U.S. medal-winning athletes participating in the Olympic Games, the only money they might earn from their performance is through Operation Gold. These athletes could benefit from a tax break on such earnings.

## B. TAXING MISSY FRANKLIN

Consider the case of seventeen-year-old Missy Franklin. Franklin, a high school senior, became a media sensation with her rigorous competition schedule and overall medal-winning success at the 2012 Olympics.<sup>124</sup> While her notoriety in the pool afforded her the opportunity to earn millions in endorsements after her Olympic debut, Franklin opted to maintain amateur status in order to pursue eligibility to swim under NCAA rules, and signed a letter of intent with UC-Berkeley in October 2012.<sup>125</sup> Because the money she earned in 2012 via Operation Gold does not undermine her NCAA eligibility,<sup>126</sup> Franklin opted to swim collegiately before accepting sponsorships and turning pro.<sup>127</sup>

Franklin is an anomaly with respect to the tax concerns associated with the OTEA. Unlike her other relatively young and popular U.S. Olympic teammates, Franklin chose to take the amateur collegiate route in lieu of earning millions of dollars in endorsement contracts.<sup>128</sup> She is an example of how Olympic-winning athletes might benefit from new tax legislation with respect to their earnings via Operation Gold.

120. See *2012 London Olympics TV Schedule on NBC, NBCSN, MSNBC, CNBC, and Bravo*, SPORTS MEDIA WATCH, <http://www.sportsmediawatch.com/2012-london-olympics-tv-schedule-on-nbc-nbc-sn-msnbc-cnbc-and-bravo/> (last visited June 8, 2013).

121. In 2012 Team USA won 1 gold and 2 bronze medals in rowing, 3 gold and 1 bronze in shooting, 1 gold and 1 bronze in judo, and 2 bronze medals in taekwondo. *Official Olympic Games Results*, OLYMPIC.ORG, <http://www.olympic.org/olympic-results> (search "Choose Games" for "London 2012" and search "Choose Sport" for each of the following: "Rowing", "Shooting", "Judo", and "Taekwondo"; then follow "Event Results" hyperlink); see also *id.*

122. TJ Walker, *10 Rules for Olympic Athletes on Turning Medals in Real Gold*, FORBES (Aug. 5, 2012, 11:58 AM), <http://www.forbes.com/sites/tjwalker/2012/08/05/10-rules-for-olympic-athletes-on-turning-gold-medals-into-real-gold/>.

123. See *id.*

124. Franklin swam a total of seven events, achieving bronze in the 4 x 100 freestyle relay, and gold in the 100-meter individual backstroke, the 4 x 200 medley relay, the 200-meter individual backstroke, and the 4 x 100 medley relay. *Missy Franklin*, BIOGRAPHY.COM, <http://www.biography.com/people/missy-franklin-20903291> (last visited Jul 10, 2013).

125. Cheryl Preheim, *Missy Franklin Commits to UC Berkeley*, 9NEWS.COM (Oct. 20, 2012, 8:48PM), <http://www.9news.com/news/article/295274/345/Missy-Franklin-commits-to-UC-Berkeley>.

126. Warren K. Zola, *Why Missy Franklin retains her NCAA eligibility: The Operation Gold Exception*, SPORTS LAW BLOG, (Aug. 13, 2012) <http://sports-law.blogspot.com/2012/08/why-missy-franklin-retains-her-ncaa.html>; See also NCAA Manual art. 12.1.2.1.4.1.2 (2012) ("An individual (prospective student-athlete or student-athlete) may accept funds that are administered by the U.S. Olympic Committee pursuant to its Operation Gold program").

127. See Preheim, *supra* note 125.

128. Popular professional U.S. teammates include Michael Phelps, Ryan Lochte and Gabby Douglas. See

The OTEA would certainly offer Franklin the benefit of tax-free earnings from Operation Gold, but it also opens the door for professional Olympic athletes to take advantage of a tax elimination offering. As previously mentioned, athletes who are already millionaires or have lucrative endorsement offers may see the OTEA's vague language as an opportunity to reduce their taxable income by including Olympic bonus clauses in their corporate sponsorship contracts.<sup>129</sup> Thus the OTEA, as written, may not be the best approach to limiting or eliminating tax on Operation Gold earnings.

### C. ALTERNATIVES TO THE OTEA

Federal legislation to eliminate income tax on money earned by Olympic athletes is not the only route by which medal-winning athletes can try to limit federal income tax on Operation Gold funds. Because the USOC maintains responsibility for U.S. Olympic and Paralympic teams, it is in a position to consider implementing options to help reduce or eliminate taxation on Operation Gold earnings.

As a single entity working in tandem with the NCAA to ensure amateur eligibility for Olympic athletes wishing to compete at the collegiate level, the USOC can offer strategic financial opportunities to Olympic athletes to ensure that they net the total amount of Operation Gold earnings following each Olympic Games, either in the form of cash or through qualified scholarships. Outside the parameters of the USOC's authority, the current language of the I.R.C. already affords avenues for those athletes not in the position to consider NCAA eligibility to reduce or eliminate federal income tax on their Operation Gold earnings.<sup>130</sup> The following three options present alternatives to the OTEA as written.

#### 1. OPTION 1 – THE USOC COULD PAY A FLAT TAX ON OPERATION GOLD DISBURSEMENTS

As previously mentioned, due to Team U.S.A.'s poor performance at the 1988 Winter Olympics the USOC initiated Operation Gold to award financial bonuses for each medal won by a U.S. athlete at an Olympic Games.<sup>131</sup> Today, those bonuses amount to \$25,000 for each gold medal, \$15,000 for each silver medal, and \$10,000 for each bronze medal won.<sup>132</sup>

One option to assist Olympic athletes in limiting their individual exposure to federal income tax on amounts earned via Operation Gold is to encourage the USOC to award each medal-winning athlete a monetary bonus that would include a flat-rate tax covering the awards earned. Such a financial offering would allow medal-winning athletes to effectively keep the net amount of the awarded bonus money, while the USOC would cover the tax imposed on such awards.

Since the USOC is a not-for-profit organization and does not deem athletes representing the U.S. as being *employees* of the USOC, it is not required to withhold income

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*supra* Part III.A.

129. See *supra* note 115; see also Packard, *supra* note 108.

130. See U.S. INTERNAL REVENUE SERVICE, TAXABLE FRINGE BENEFIT GUIDE 8 (2012).

131. See Harvey, *supra* note 77.

132. *Id.*

taxes on bonuses paid to athletes.<sup>133</sup> If the USOC were to add a 33% tax-inclusive rate increase to each amount awarded to winning athletes, this increase would effectively offset the tax each athlete would be required to pay to the I.R.S. on their Operation Gold earnings. Hence, for each gold medal won the USOC would actually pay an athlete \$33,250; for each silver medal won the distributable amount would be \$19,950; and for each bronze medal won the USOC would allocate \$13,300.<sup>134</sup>

One might consider whether the USOC can afford to add the supplemental wage tax to the existing Operation Gold award money paid during an Olympic year. To assess the USOC's financial ability to cover the added 33% expense on Operation Gold funds dispersed, an analysis of the 2010 and 2012 Olympic Games is helpful. During the London Olympics, Team U.S.A. won 46 gold, 29 silver, and 29 bronze medals.<sup>135</sup> Per the current model utilized under Operation Gold, the USOC awarded a total of \$1,875,000 to its medal-winning athletes.<sup>136</sup> Had the USOC added a 33% tax rate to each medal won in order to cover each athlete's income tax on such earnings, it would have paid a total amount of \$2,493,750 to the medal-winning athletes.<sup>137</sup> The payout difference between the current Operation Gold method and the 33% tax-inclusive Operation Gold method is \$618,750.

As the USOC's 2012 Annual Report is unpublished at the time of our research, the USOC's 2010 *Annual Report*<sup>138</sup> can serve as a basis to determine the organization's financial ability to cover the additional 33% payout, since 2010 was also an Olympic year. Per its 2010 *Annual Report*, the USOC had total revenue of approximately \$251 million and total expenses of approximately \$191 million, thus generating positive revenue of approximately \$59 million during the 2010 Olympic Games.<sup>139</sup> Furthermore, per its 2010 I.R.S. Form 990, "Return of Organization Exempt From Income Tax", the USOC paid a total of \$2,884,976 in Operation Gold funds that year.<sup>140</sup> If 33% had been added to such disbursements to cover the athletes' tax liabilities on these earnings, the USOC would have paid an additional \$952,042. This payout difference amounts to less than one percent of the total revenue that the USOC earned in 2010. Thus, it does not seem unreasonable to assume that in an Olympic year the USOC is in a financial position where it can afford the

133. See Gleckman, *supra* note 76; see also I.R.C. § 3402 (2012); Treas. Reg. §§ 31.3402(g)-1 (as amended in 2007), 31.3501(a)-1T (as amended in 1985); U.S. Olympic Comm., *2012 Athlete Support Designee Form*, USA TRACK & FIELD (2011), [http://www.usatf.org/groups/HighPerformance/AthleteSupport/pdf/2012\\_Athlete\\_Support\\_Designee\\_Form\\_R.PDF](http://www.usatf.org/groups/HighPerformance/AthleteSupport/pdf/2012_Athlete_Support_Designee_Form_R.PDF) ("All USOC financial benefits provided to athletes will be reported to the IRS and are subject to federal and state income tax, with the exception of tuition grants. The USOC will issue an IRS Form 1099. Since no taxes are withheld by the USOC, athletes may have a tax liability at the time they file their tax returns. If an athlete anticipates such liability, he/ she should consider setting aside some funds for this purpose. The USOC is not, by this document, providing tax advice and readers are advised to retain their own professionals to advise them about the tax treatment of the receipt of USOC funding and benefits.").

134.  $\$25,000 * .33 = \$8,250 + \$25,000 = \$33,250$ ;  $\$15,000 * .33 = \$4,950 + \$15,000 = \$19,950$ ;  $\$10,000 * .33 = \$3,300 + \$10,000 = \$13,300$ .

135. *United States of America*, OLYMPIC.ORG, <http://www.olympic.org/united-states-of-america> (last visited July 5, 2013) (open "Olympic Summer Games" menu).

136.  $46 \text{ gold medals} * \$25,000 = \$1,150,000$ ;  $29 \text{ silver medals} * \$15,000 = \$435,000$ ;  $29 \text{ bronze medals} * \$10,000 = \$290,000$ .

137.  $(46 * \$33,250) + (29 * \$19,950) + (29 * \$13,300) = \$2,493,750$ .

138. See U.S. Olympic Comm., *2010 USOC Annual Report*, TEAM USA.ORG (2011), [http://www.teamusa.org/~media/TeamUSA/Documents/Financial/2010\\_USOC\\_Annual\\_Report.pdf](http://www.teamusa.org/~media/TeamUSA/Documents/Financial/2010_USOC_Annual_Report.pdf).

139. *Id.* at 50.

140. U.S. Olympic Comm., *Form 990 Return of Organization Exempt From Income Tax*, TEAM USA.ORG, 50 (2010), [http://www.teamusa.org/~media/TeamUSA/Documents/Financial/2010X\\_USOC\\_990\\_Public%20Disclosure%20Copy.pdf](http://www.teamusa.org/~media/TeamUSA/Documents/Financial/2010X_USOC_990_Public%20Disclosure%20Copy.pdf).

additional 33% payout on Operation Gold disbursements in order to assist medal-winning athletes in taking home the specified net reward amount of their winnings.

2. OPTION 2 – THE USOC COULD AWARD OPERATION GOLD FUNDS AS QUALIFIED SCHOLARSHIPS FOR STUDENT-ATHLETES RATHER THAN OUTRIGHT CASH DISTRIBUTIONS

A second option to potentially mitigate athletes' federal income tax obligations on funds earned via Operation Gold is for the USOC to disburse award money through qualified scholarships to student athletes.<sup>141</sup> This option is more complex than the first proposed option, as it raises the possibility of future judicial interpretation of the I.R.C. with respect to athletic scholarships.<sup>142</sup> However, it is a plausible option to consider, as the I.R.C. and applicable U.S. Treasury Regulations do not specifically limit nonprofit organizations from granting qualified scholarship money to athletes winning sporting events.<sup>143</sup>

Per the I.R.C., a taxpayer's gross income does not include money received as qualified scholarships if they are individuals who are degree candidates at educational organizations.<sup>144</sup> To be considered a *qualified scholarship*, any money received by individuals must be used specifically for tuition and fees, or related educational expenses including other fees, books, supplies, and equipment.<sup>145</sup>

Like the NCAA, which also qualifies for I.R.C. § 501(c)(3) tax-exempt status, the USOC must meet two tests in order to maintain its charitable organization status – the

141. Under Option 2, the term *qualified scholarship* means a qualified scholarship under I.R.C. § 117 (2012). The term *qualified scholarship* as used in Option 2 is a tax term, not to be confused with an NCAA athletic scholarship, counter, or qualifier as found in the NCAA bylaws (e.g., NCAA Manual art. 14.02.11.1 (2012) ("Qualifier")). Further, per I.R.C. § 117, only athletes pursuing educational degrees are in a position to request and accept Operation Gold funds in the form of qualified scholarships should such option become available. However, it is important to note that should the USOC adopt this Option, those athletes eligible for qualified scholarships need not also be NCAA eligible (though they can be, and such analysis will be discussed later in this Section). The sole requirement for athletes interested in pursuing Option 2, if it were made available, is that they be candidates for a degree at an educational organization described in I.R.C. § 170(b)(1)(A)(ii) (2012). It is also important to note that a number of Olympians who participated in the 2012 London Games are currently collegiate athletes. In track and field alone, of the confirmed entries for the sport in the 2012 Olympic Games, 350 were current, former, or committed student-athletes in the U.S. (although not all of these student-athletes represent Team USA). Of the 350 athletes with collegiate ties, 123 represented Team USA, and 18 of those athletes attended a college or university in 2012. See Tom Lewis, *Athletics Olympians With Collegiate Ties Number 350*, US TRACK & FIELD AND CROSS COUNTRY COACHES ASS'N (July 21, 2012), <http://www.usfccca.org/2012/07/featured/olympians-with-collegiate-ties-number-350>.

142. At press, there are no published cases with respect to the IRS pursuing the taxation of athletic qualified scholarships. See Adam Hoeflich, *The Taxation of Athletic Scholarships: A Problem of Consistency*, U. ILL. L. REV. 581 (1991); Robert W. Lee, *The Taxation of Athletic Scholarships: An Uneasy Tension Between Benevolence and Consistency*, 37 U. FLA. L. REV. 591 (1985).

143. I.R.C. § 117(c) (2012) limits the applicability of the exclusion of qualified scholarship money from gross income. Such limitation holds that the exclusion will "not apply to that portion of any amount received which represents payment for teaching, research, or other services by the student required as a condition for receiving the qualified scholarship or qualified tuition reduction." Treas. Reg. §1.117-2(a)(1) (as amended in 1964) explains the rule in more detail, documenting that such exclusion will "not apply to that portion of any amount received as payment for teaching, research, or other services in the nature of part-time employment required as a condition to receiving the scholarship or fellowship grant."

144. I.R.C. §117(a) (2012).

145. I.R.C. §117(b)(1)-(2) (2012).

*organizational test* and the *operational test*.<sup>146</sup> The *organizational test* requires that the organization observe certain technicalities, which include being organized as a state-law nonprofit organization, limiting its authorized activities to charitable ones, and containing a provision in its organizational documentation stating that its assets will be transferred to a charity or the government should it go out of business.<sup>147</sup> The *operational test* requires that the USOC primarily engage in charitable activities, including educational activities.<sup>148</sup> Because the USOC satisfies both tests, it is eligible to offer scholarship money to Olympic athletes.

Per the U.S. tax code, *qualified scholarship* awards are limited with respect to their exclusion from gross income – but if an educational institution requires services of a student in exchange for a monetary grant, then that student cannot exclude amounts received from such scholarship from their gross income.<sup>149</sup> Similarly, the USOC, in granting Operation Gold in the form of scholarships to collegiate candidates, may not grant such money in exchange for services on behalf of athlete-recipients.<sup>150</sup> Although the term “services” is not defined in the I.R.C., the U.S. Treasury Regulations limit services to those “in the nature of part-time employment required as a condition to receiving the scholarship.”<sup>151</sup> Per the *USOC’s Athletes’ Advisory Council Bylaws*, “[a]thletes may not be paid employees of the USOC” so long as they are “still competing and receiving benefits from the USOC.”<sup>152</sup> Thus, funds received by athletes via Operation Gold as qualified scholarships should fall outside the services limitation for tax purposes, and thus be excluded from recipients’ individual income taxes.

Finally, should the USOC consider pursuing this option, any scholarship money received under Operation Gold would not adversely affect a student-athlete’s NCAA eligibility. “Educational expenses awarded by the U.S. Olympic Committee which count against an institution’s sport-by-sport financial aid limitations and against the individual’s full-grant-in-aid-limit” are allowed under current NCAA rules.<sup>153</sup> Furthermore, the NCAA

146. See Colombo, *supra* note 22, at 114.

147. Treas. Reg. § 1.501(c)(3)-1(a), 1(b) (as amended in 2008); see also *id.*

148. Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 2008); see also Colombo, *supra* note 22, at 114.

149. Treas. Reg. § 1.501(c)(3)-1(c)(1) (as amended in 2008); see also Colombo, *supra* note 22, at 114; Adam Hoeflich, *The Taxation of Athletic Scholarships: A Problem of Consistency*, U. ILL. L. REV. 581, 592 (1991); Thomas R. Hurst & J. Grier Pressly III, *Payment of Student-Athletes: Legal & Practical Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55, 74 (2000) (documenting that while I.R.C. § 117 does not exclude portions of athletic scholarships constituting room and board from gross income, few student-athletes report room and board as income, and the IRS has not pursued the issue. “It is widely recognized that all portions of athletic scholarship do not meet the exclusionary requirements of section 117 because scholarship recipients are required to perform athletic services as a condition of receiving their scholarships. Still, athletic scholarships remain untaxed, and there is case law to support this aberration.” (citing Mike Schinner, *Are Athletic Scholarships Merely Disguised Compensation?*, 8 AM. J. TAX. POL’Y 127, 144-148, 155 (1990); see also Lee, *supra* note 142, at 595 (noting I.R.C. § 117(c) applies to athletes on scholarship because they must be degree candidates)); Schinner at 139 (stating that since enactment of section 117 forty-five years ago, no court has specifically addressed issue of whether athletic scholarships constitute taxable income).

150. Treas. Reg. § 1.117-2(a)(1) (as amended in 1964).

151. *Id.*

152. See *USOC Athletes’ Advisory Council Bylaws*, § II(C)(4), (as amended in 2007), available at TEAM USA.ORG, [http://www.teamusa.org/~media/Athlete%20Ombudsman/AAC/Updated\\_AAC\\_Bylaws\\_12\\_3\\_07\\_Attachment\\_approved.pdf](http://www.teamusa.org/~media/Athlete%20Ombudsman/AAC/Updated_AAC_Bylaws_12_3_07_Attachment_approved.pdf) (defining the term “paid employee” as “anyone who is employed on a regular basis. This provision shall not apply to 1) individuals who are engaged on an occasional or temporary basis, which shall include, but not be limited to coaching at a clinic or training camp, making a paid appearance for a sponsor, or working on a finite or discrete project, and 2) athletes who are still competing and receiving benefits from the USOC, the USP or any NGB in his/her capacity as a competing athlete.”).

153. NCAA Manual art. 15.02.4.2(d) (2012) (“Other Permissible Financial Aid”).



provides that educational expenses awarded by the USOC to student-athletes count against the maximum number of team scholarship awards that an institution may grant.<sup>154</sup> Thus, qualified scholarships offered by the USOC to Olympic athletes should not run afoul of a student-athlete's NCAA eligibility, nor pose concerns with respect to the total number of NCAA athletic scholarships that a college or university is allotted.<sup>155</sup>

### 3. OPTION 3 – TRAINING FOR THE OLYMPICS COULD ENTAIL PARTICIPATING IN A TRADE OR BUSINESS FOR FEDERAL INCOME TAX PURPOSES

A third option to reduce or eliminate federal income taxes for Operation Gold recipients is encouraging them to take the position that their involvement in sporting events is an act of participation in a trade or business rather than a hobby.<sup>156</sup> Characterizing their participation in this way might allow medal-earning athletes to write off applicable expenses associated with their sport, thus offsetting some or all of the income taxes imposed on Operation Gold earnings.<sup>157</sup>

Characterizing a taxpayer's participation in an activity deemed a trade or business as opposed to a hobby carries significant income tax consequences.<sup>158</sup> If an activity is a hobby, the taxpayer must include all revenue generated from that activity in their gross income and can only deduct certain expenses associated with that activity subject to a two percent floor.<sup>159</sup> Thus, before deductions can be made for expenses associated with the cost of participating in a hobby, such expenses must exceed two percent of the taxpayer's adjusted gross income.

The I.R.C. considers participation in a hobby as engaging in an activity not-for-profit.<sup>160</sup> The U.S. Tax Court in *Ruth N. Nelson v. Commissioner of Internal Revenue* further identified a hobby as "an activity for primarily pleasurable purposes . . . that differs greatly from experiences provided in . . . daily professional lives . . . a mental and physical

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154. See NCAA Manual art. 15.2.6.4(d) (2012) ("Educational Expenses-U.S. Olympic Committee or U.S. National Governing Body").

155. See NCAA Manual art. 14.02.11 (2012) ("Qualification Status").

156. However, Operation Gold recipients considering this Option cannot also be student-athletes seeking NCAA eligibility. Taking the position that an athlete's participation in a sport is a trade or business probably violates the principle of amateurism as defined by the NCAA. See *supra* note 83 (enforcing the requirement that *amateurism* is a driving theme for the NCAA and student-athletes who want to remain eligible to compete among NCAA member institutions). Making the argument that an athlete's participation in a sport is a trade or business contrasts with the amateur athlete parameters set by the NCAA. Further, the authors acknowledge that some Olympians may already take this position with respect to the filing of their Form 1040 *Individual Income Tax Return*. However, as numerous Olympic athletes are not deemed *professional* with respect to endorsement contracts and/or other earnings associated with their sports, we include this option in our analysis.

157. See I.R.C. §§ 162, 183 (2012).

158. *Id.*

159. See I.R.C. §§ 67, 183 (2012). As an example, Taxpayer participates in swimming as a hobby, and over the course of 2012 had swimming expenses of \$800. If Taxpayer's adjusted gross income (AGI) in 2012 was \$80,000, Taxpayer would not be able to write off any expenses associated with their swimming hobby because such expenses amounted to less than 2% of their total AGI. To meet the 2% floor rule, Taxpayer would have to have swimming expenses of more than \$1,600. Further, Taxpayer would only be eligible to write off those swimming expenses, which exceeded \$1,600 during 2012.

160. I.R.C. § 183(b) (2012). The Code does not specifically use the word "hobby" in I.R.C. § 183. However, the treasury regulations which discuss deductions not allowable under I.R.C. §§ 152 or 212 include "activities which are carried on primarily as a sport, hobby, or for recreation." Treas. Reg. § 1.183-2(a) (1972).

respite from the rigors of a career.”<sup>161</sup> Such characterization is distinguished from that of a trade or business, which requires that an individual engage in an activity “with the actual and honest objective of making a profit.”<sup>162</sup> If an activity is deemed to be a trade or business, then the taxpayer can deduct all expenses that are ordinary and necessary for carrying on that trade or business.<sup>163</sup>

One benefit of characterizing an activity as a trade or business as opposed to a hobby with respect to Olympic athletes is that an athlete participating in their sport as a trade or business can write off numerous ordinary and necessary expenses associated with that activity including training and travel costs, meet and race fees, equipment, coaching fees, and attire for training and competition.<sup>164</sup> Another benefit is that an athlete can write off such expenses without the two percent floor limitation, thus minimizing or possibly eliminating the income tax imposed on Operation Gold earnings.<sup>165</sup>

While some Olympians hold jobs outside of their training regimes, for many athletes, training for a spot on an Olympic team is their full-time job.<sup>166</sup> Full-time athletes include Michael Phelps, whose swimming regime required that he practice up to six hours per day for six days a week, Olympic gymnasts who generally train forty hours per week to reach

161. *Nelson v. Comm’r*, 81 T.C.M. (CCH) 1632, 1637-38 (2001). A list of relevant factors provided to assist in characterizing an activity as a hobby include: the manner in which a taxpayer carries on his activities, the taxpayer’s expertise, the time and effort expended in carrying on the activity, the success of the taxpayer in carrying on other activities, the taxpayer’s income or losses with respect to the activity, the amount of occasional profits, if any, which are earned, the taxpayer’s financial status, and the elements of personal pleasure or recreation obtained by the taxpayer in participating in such activity. *Treas. Reg.* § 1.183-2(b) (1972)

162. *Dreicer v. Comm’r*, 78 T.C. 642, 645 (1982), *aff’d without opinion* 702 F. 2d 1205 (D.C. Cir. 1983).

163. I.R.C. § 162(a) (2012). For example, Taxpayer participates in the sport of swimming as her trade or business and, over the course of 2012, had swimming expenses of \$8,000, which are deemed to be ordinary and necessary to her participation in the sport. If Taxpayer had an adjusted gross income (AGI) in 2012 of \$80,000, Taxpayer can write off the entire \$8,000.

164. *Id.*

165. To date, the U.S. Tax Court has not published a case involving an athlete taking the position that their participation in a sport be characterized as a hobby versus a trade or business for tax purposes. However, two California cases have discussed such characterization, though not specific to the area of tax. In *Kevin Okura v. U.S. Cycling Fed’n*, 186 Cal. App. 3d 1462 (1986), Okura was injured while participating in a cycling race and sued race organizers for negligence. While this case did not itself characterize an individual’s participation in a sport as being a “hobby”, it was cited in *Barbara Buchanan v. U.S. Cycling Fed’n*, 227 Cal. App. 3d 134 (1991) to such affect. In *Buchanan*, defendant United States Cycling Federation (“Federation”) appealed an original action suit filed by Barbara Buchanan, a cyclist, against the Federation for negligence which resulted in Buchanan’s injury. Unlike Okura, who Buchanan dubbed a “Sunday Cyclist”, Buchanan was an amateur athlete seeking to obtain a spot on the 1984 U.S. Olympic Cycling Team. Buchanan argued that her entry in the bike race at issue was “a practical necessity” to meeting her Olympic goals, as opposed to the participation in activities to include scuba diving, skydiving, motor cross racing, or motorcycle dirt-bike racing, each of which the California Court of Appeals have previously held to have “no practical necessity” for participants (*See Norman Madison v. The Superior Court of the County of Los Angeles*, 203 Cal. App. 3d 589, 599 (1988) (citing *McAtee v. Newhall Land & Farming Co.*, 169 Cal. App. 3d 1031 (1985); *Hulsey v. Elsinore Parachute Center*, 168 Cal. App. 3d 333 (1985); *Kurashige v. Indian Dunes, Inc.*, 200 Cal. App. 3d 606 (1988)). The California Appellate Court reversed and remanded the lower court’s decision, finding in favor of the Federation. The Dissent cited key features which set Buchanan, as an Olympic-hopeful, apart from athletes participating in sports for sheer enjoyment, noting, “she [Buchanan] decided to devote full time to amateur cycling . . . but as she progressed in the sport of cycling, the travel and training requirements required her to give up [her] job and become a full-time athlete. In her view, bicycle racing was her career. . . The evidence shows these goals were objectively realistic, not simply ‘dreams’. . . It clearly took more than ‘dreams’ to be invited to train at the Olympic Training Center.” *Buchanan*, 227 Cal. App. 3d at 144-45. The Dissent’s argument is important, as it focuses on the element that requires an Olympic athlete to be a “career athlete”, not merely a participant in a sporting event.

166. Vivian Giang and Samantha Cortez, *What 36 Olympic Athletes Do For a Job*, BUSINESS INSIDER (Aug. 3, 2012, 3:24 PM), <http://www.businessinsider.com/what-36-olympic-athletes-do-for-a-living-2012-8?op=1>.

peak elite form, and even skeleton sliders who practice up to eight hours each day in order to earn a spot on the Olympic team.<sup>167</sup> The success of Olympic athletes, combined with the time, effort, and money required to become an elite athlete, might be enough to distinguish a part-time athlete participating in a hobby from an Olympian participating in a trade or business. Thus, while current law requires that medal-winning athletes pay income tax on their earnings from Operation Gold, by claiming on their federal income tax return that their involvement in their sports equates to participating in a trade or business as opposed to a hobby, athletes could write off all ordinary and necessary expenses associated with their sports, minimizing or even eliminating the income tax imposed on their Operation Gold earnings.

## CONCLUSION

For U.S. athletes, earning a medal at the Olympic Games results in additional taxes on prize money awarded. As part of the USOC's Operation Gold program, Olympic medalists are paid a modest five-figure sum for every medal-winning effort. Accepting this program's financial prizes, however, does not invalidate eligibility under NCAA bylaws, which exempt earnings from the Operation Gold program from counting against its fundamental principle of amateurism. Thus, U.S. athletes such as Missy Franklin can earn prize money for a gold, silver, or bronze medal at the Games without giving up their amateur eligibility by accepting reward money through this program, even though accepting endorsement income or a bonus for setting a world record would prevent them from competing for an NCAA member institution.

In response to the continued success of the U.S. team at the Olympics in 2012, Senator Marco Rubio proposed the OTEA, which would exempt prize money won by a U.S. athlete in the Olympics from taxation. However, Senator Rubio's efforts have not yet resulted in a change in law. Still, there are alternative solutions to reduce or eliminate federal income tax on athletes for winning Olympic medals, such as recommending that the USOC pay the tax on the prize money awarded to athletes, proposing that the USOC award Operation Gold funds as qualified scholarships for student-athletes, and suggesting that athletes could claim on their individual income tax returns that their participation in their sport should be characterized as participation in a trade or business, as opposed to a hobby, which would allow for the deduction of all ordinary and necessary expenses of their participation, resulting in the reduction or elimination of the tax imposed on Operation Gold earnings.

If the record number of viewers of the London 2012 Games is any indication, the world will once again tune in to the Winter Olympics when it descends on Sochi, Russia in 2014, as well as the 2016 Summer Games in Rio de Janeiro. Without a change in legislation, U.S. medal-winning athletes may once again face income tax imposition resulting from their successes at each of these Games. However, should the USOC implement a more tax-friendly option to assist athletes, or should athletes utilize the I.R.C. as currently written to claim favorable tax positions on their income tax returns, in the

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167. See *Michael Phelps Workout and Diet*, MUSCLE PRODIGY, <http://www.muscleprodigy.com/michael-phelps-workout-and-diet-arcl-1142.html> (last visited June 8, 2013); see also Amy Van Deusen, *Your Road to the Olympic Team - How To Become An Olympic Gymnast*, ABOUT.COM GYMNASTICS, [http://gymnastics.about.com/od/majorcompetitions/ss/roadtoolympics\\_4.htm](http://gymnastics.about.com/od/majorcompetitions/ss/roadtoolympics_4.htm) (last visited June 8, 2013); Lindsey Reu, *What It Takes To Be an Olympic Athlete*, FITNESS MAGAZINE, <http://www.fitnessmagazine.com/workout/real-plans/celebrity/what-it-takes-to-be-an-olympic-athlete/?page=2> (last visited June 8, 2013).

future, athletes like Missy Franklin might be in a position to bring home all of their Operation Gold earnings.

# Restoring Integrity to America's Pastime: Moving towards a More Normative Approach to Cheating in Baseball

Garrett R. Broshuis\*

*After being tarnished by steroid scandals, professional baseball has taken extensive steps to curb cheating by players. Yet these steps narrowly focus on steroid use and similar drugs, allowing traditional types of cheating—such as altering bats and baseballs—to remain rampant in baseball. Although baseball's formal rules prohibit these behaviors, the rules have not been enforced, and the behaviors have been exhibited throughout organized baseball's history. Thus, a culture of deceit plagues the game.*

*This article fully examines baseball's culture of deceit and the validity of its rulemaking. By applying the legal philosophy of Dworkin and Fuller to this problem, it becomes apparent that baseball's duplicitous approach is untenable: it undermines the validity of baseball's response to steroids, it removes integrity from the game, and it does little to deter new forms of cheating. Instead, baseball should adopt a more normative and harmonious approach to cheating that merges the game's purpose with its rules, a step that would return integrity to America's pastime.*

## INTRODUCTION

According to legend, the ancient Greek philosopher Diogenes used to wander the streets of Athens with a lantern guiding his way.<sup>1</sup> He would do so in broad daylight,<sup>2</sup> and the curious use of the lantern undoubtedly drew many confused looks. When asked his purpose for this seemingly inexplicable behavior, Diogenes replied, "I am looking for a [honest] man."<sup>3</sup>

If Diogenes were to attend a baseball game today, he might sport a lantern in each hand and a flashlight attached to his head, such is the reputation of the game of baseball. Tainted by steroid scandals and infested with manipulators of baseballs, base paths, and bats, a culture of deception and cheating hangs a shroud over America's pastime.

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1. James Grout, *Diogenes the Cynic*, ENCYCLOPAEDIA ROMANA, [http://penelope.uchicago.edu/~grout/encyclopaedia\\_romana/nexuspage.html](http://penelope.uchicago.edu/~grout/encyclopaedia_romana/nexuspage.html) (last visited Oct. 22, 2012); see also Mark Hamilton, *There's No Lying in Baseball (Wink, Wink)*, in *BASEBALL AND PHILOSOPHY* 126, 126 (Eric Bronson ed., 2004) (providing example that for many, Diogenes epitomizes classical Cynicism); LUIS E. NAVIA, *DIOGENES OF SINOPE: THE MAN IN THE TUB* 2-3 (1998) (according to legend, he spent his days living in a tub near the Athenian marketplace).

2. Grout, *supra* note 1.

3. *Id.* The more literal translation of this phrase simply states that he was looking for "a man." NAVIA, *supra* note 1, at 1.

I can personally attest to the pervasiveness of dishonesty in baseball. During the spring of 2009—the last year of my short and dismal career in professional baseball—one of my coaches in the San Francisco Giants’ organization thought he had the prescription for the dying flicker of my baseball career.

“Have you ever thought about cheating?” my coach asked.

“No,” I stated simply.

“Well, it might be time to start,” he replied. “Lots of pitchers do it. Lord knows I did it—wouldn’t have pitched in the big leagues without it.”

I refused to cheat, and many of my other teammates refused to cheat as well. Yet some succumbed to the dark side. Some pitchers altered the ball or applied a foreign substance to it; a few hitters altered their bats; some players used steroids; still others undoubtedly invented other unknown, even crazier methods. Even the most honest of teammates occasionally caved to the omnipresent temptation; such was the extent of the hypocrisy.

Though the forms of cheating are many, this article examines two broad groups of cheating: traditional cheating and new age cheating. The alteration of the ball or bat will be called *traditional cheating*. Despite being prohibited by baseball’s official rules many decades ago, such practices are as old as the game itself.<sup>4</sup> And while some players have been caught and have served short suspensions,<sup>5</sup> the behaviors remain prevalent. Indeed, several players have reached the cherished heights of the Hall of Fame by way of doctoring the baseball.<sup>6</sup>

Actions referred to as *new age cheating* in this article became prevalent during the steroid era of the 1990s and early 2000s.<sup>7</sup> For a short period of time, this form of cheating perhaps became even more prevalent and gained more acceptance in the game than traditional cheating, as the use of performance enhancing drugs (PEDs) clouded nearly every noteworthy performance of the late 1990s and early 2000s.<sup>8</sup> Yet the acceptance was short-lived. Fueled by public outrage and congressional hearings over the revelations that several superstar players—Ken Caminiti, Jose Canseco, and Mark McGwire among them—used such performance enhancing drugs en route to winning major awards, Major League Baseball (MLB) instituted stringent testing and penalties to curb the use of PEDs.<sup>9</sup> The testing significantly curtailed such usage, although some new age cheating continues today.<sup>10</sup>

Part I of this article discusses the problem of cheating in baseball by examining both traditional and new age cheating. Part II assesses the approach taken by MLB towards both

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4. See *infra* Part I.A.

5. See *infra* Part I.C.1.

6. See *infra* Part I.A.

7. See *infra* Part I.B.

8. The chase of the home run record by Mark McGwire, Sammy Sosa, and Barry Bonds supplies the most well-known example of the clouded nature of achievement in baseball during this period, but other achievements remain under similar scrutiny. See *infra* Part I.B.

9. See *infra* Part I.C.2.

10. For instance, Melky Cabrera and Bartolo Colon, two stars of the game, served suspensions after testing positive for testosterone during the 2012 season. See *infra* Part I.C.2. My former teammates are not immune from this either. During my last spring training in 2009, only a few days after a coach asked me if I had ever considered cheating, one of my good friends in the game, Kelvin Pichardo, stood in front of all of us one Sunday morning and confessed to steroid use. He had tested positive, and he served a subsequent suspension. See *Prospect Kelvin Pichardo Suspended 50 Games for Violating MLB Drug Policy*, BASEBALL’S STEROID ERA (Mar. 24, 2009), <http://thesteroidera.blogspot.com/2009/03/kelvin-pichardo-suspended-50-games-for.html>.

varieties of cheating, which remains duplicitous. While MLB has moved to correct the perceived problem of new age cheating in the form of PED use, it simultaneously continues to ignore traditional cheating in the form of doctoring a baseball or altering a bat. This perplexing duplicity supports a culture of deceit in the game, as it undermines the penalties designed to deter new age cheating and affects the overall integrity of the game. Part III of this article then examines the validity of MLB's rules against cheating: first by discussing positivistic approaches to rulemaking and then by discussing natural law<sup>11</sup> approaches to rulemaking. It determines that positivism alone fails to provide a sufficient solution to baseball's culture of cheating, as the separation of rulemaking from morality fails to provide a necessary, guiding norm for the process. Finally, by leaning on the works of Professors Fuller and Dworkin, a more normative<sup>12</sup>—yet still practical—approach will be offered that furthers the purpose of the game: to provide an honorable and even-handed environment for competition.

## I. THE PROBLEM OF CHEATING IN BASEBALL

Children learn at an early age that cheating is wrong. In fact, it might be argued that knowledge of cheating is acquired even earlier, as it lies within our innate, moral instinct.<sup>13</sup> As part of this moral instinct, human beings naturally seek to expose and punish cheaters.<sup>14</sup> But before cheaters can be punished, one must identify the behaviors that constitute cheating.

With many simple behaviors, such as using a cheat sheet on a closed book test, identifying cheating is intuitive and easy. Yet society teems with complex interactions, and identifying cheating within these complex interactions becomes more difficult.<sup>15</sup> The game of baseball, with its rich rule structure and historical practices, presents an environment ripe for complex interactions. Further, its long history of rule interpretation has led many legal commentators over the last few decades to study baseball.<sup>16</sup> Here, baseball will provide

11. Given the vast differences between theorists—ranging from Plato to Ronald Dworkin—that fall within this camp, some prefer to use a broader term than “natural law” to encompass these theorists. See William N. Eskridge, Jr., *Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 ST. LOUIS U. L.J. (forthcoming 2013) (preferring the term “normativism” over “natural law theorists”). For this article, the more traditional phrase of *natural law theorists* will be retained.

12. Normative in this context will refer to a rule or system of rules that encourages behavior to reflect a certain value or purpose within a given society. Cf. STEFANO BERTEA, *THE NORMATIVE CLAIM OF LAW* 28 (2009) (defining the normative claim of law as having “a directive capacity to hold us duty-bound to act or refrain from acting in certain ways given certain conditions for certain reasons”).

13. Steven Pinker, *The Moral Instinct*, NY TIMES, Jan. 13, 2008, §6, at 32 (stating that “we are born with a moral grammar that forces us to analyze human action in terms of its moral structure, with just as little awareness” and “morality emerge[s] early in childhood.”).

14. *Id.* (stating that people everywhere “reward benefactors and punish cheaters” and that “[a]nger protects a person against cheaters . . . by impelling him to punish the ingrate”).

15. Cf. STEVEN PINKER, *THE BLANK SLATE* 167-68 (2002) (“Human societies . . . have become more complicated and cooperative over time. Again, it is because agents do better when they team up and specialize in pursuit of their shared interests, as long as they solve the problems of exchanging information and punishing cheaters.”).

16. See, e.g., *Aside, The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474 (1975); Paul Finkelman, *Baseball and the Rule of Law Revisited*, 25 T. JEFFERSON L. REV. 17 (2002); Neil B. Cohen & Spencer Weber Waller, *Taking Pop-ups Seriously: The Jurisprudence of the Infield Fly Rule*, 82 WASH. U. L. Q. 453 (2004); Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227 (1994); Garrett R. Broshuis, Comment, *Deterring Opportunism Through Clawbacks: Lessons for Executive Compensation*

insight into the very foundations of what constitutes a valid approach to ridding a society of the ignominious behavior of cheating.

#### A. EXAMPLES OF TRADITIONAL CHEATING

On June 3, 2003, Chicago Cubs' star Sammy Sosa shattered his bat in a game against the Tampa Bay Devil Rays.<sup>17</sup> Noticing something unusual in the shattering, the umpires gathered together to examine the bat.<sup>18</sup> The examination revealed that the bat was corked, and the violation of the rules resulted in the ejection of Sosa.<sup>19</sup> Responding to the incident, the Cubs' team president, Andy MacPhail, stated that "[t]here is a culture of deception" in baseball that has been in the game "for 100 years."<sup>20</sup>

The type of cheating engaged in by Sosa is a familiar form of traditional cheating in baseball. While Sosa altered his bat, many types of traditional cheating involve altering the baseball in some way to produce movement, which the movie *Major League* parodied magnificently.<sup>21</sup> The fictional account portrayed in the movie is somewhat close to reality. During my final spring training when my coach asked me if I had considered cheating, he went through a litany of examples. When he played, he stated, he always had different substances in two or three places to further deceive the umpire and the opposing team. He would place Vaseline on his belt, rub soap on his undershorts (sweat mixed with the soap during the game to make the side of his pants slick), and pine tar on the bill of his hat. He could then alternate between the substances throughout the game, allowing him to gain the advantage of added movement<sup>22</sup> on his pitches while avoiding detection.

Far from being limited to journeymen pitchers, Hall of Famers have openly admitted to the practice as well. Gaylord Perry, who attained 314 wins in his Hall of Fame career,<sup>23</sup> notoriously used an illegal spitball to achieve his wins.<sup>24</sup> Yankees' Hall of Famer Whitey

from *Minor League Baseball*, 57 SAINT LOUIS U. L.J. 185 (2012). Indeed, a Westlaw search done on November 21, 2012, revealed that the Aside entitled "The Common Law Origins of the Infield Fly Rule" has been cited eighty-one times, and seven cases even cited to it.

17. *Unsplendid splinter*, SPORTS ILLUSTRATED (June 3, 2003 8:42 PM), [http://sportsillustrated.cnn.com/baseball/news/2003/06/03/sosa\\_ejected\\_ap/](http://sportsillustrated.cnn.com/baseball/news/2003/06/03/sosa_ejected_ap/).

18. *Id.*

19. *Id.*

20. Jason Turbow & Michael Duca, 'Everyone cheats in baseball', THE WEEK, Mar. 19, 2010, <http://theweek.com/article/index/201036/everyone-cheats-in-baseball>. See also Randolph Feezell, *Baseball, Cheating, and Tradition: Would Kant Cork His Bat?*, in *BASEBALL AND PHILOSOPHY* 110-11 (Eric Bronson ed., 2004) (similar statements regarding the indelible nature of cheating in baseball); Turbow & Duca, *supra* (A few years after the Sosa incident, then-White Sox manager Ozzie Guillen said: "Everyone cheats. If you don't get caught, you're a smart player. If you get caught, you're cheating.").

21. MAJOR LEAGUE (Mirage Enterprises 1989). When the young star pitcher in the movie, Rick Vaughn, asks the veteran pitcher, Eddie Harris, about the substance on Harris' chest, Harris replies that it's Crisco. Major League Quotes, *BASEBALL ALMANAC*, [http://www.baseball-almanac.com/quotes/major\\_league\\_quotes.shtml](http://www.baseball-almanac.com/quotes/major_league_quotes.shtml) (last visited Sep. 23, 2012). He then goes on to place "Bardol" on his waistline and Vagisil on his head, saying, "Any one of them will give you another two to three inches drop on your curve ball. Of course, if the umps are watching me real close I'll rub a little jalapeno up my nose, get it runnin' . . ." Vaughn incredulously asks, "You put snot on the ball?" *Id.* Harris replies, "I haven't got an arm like you, kid. I have to put anything on it I can find. Someday you will too." *Id.*

22. See generally ROBERT K. ADAIR, *THE PHYSICS OF BASEBALL* 63 (1990) (discussing the way in which a baseball moves and the added movement that a modified ball can produce).

23. *Gaylord Perry*, NATIONAL BASEBALL HALL OF FAME AND MUSEUM, <http://baseballhall.org/hof/perry-gaylord> (last visited Sep. 23, 2012).

24. Feezell, *supra* note 20, at 110.



Ford stored a deodorant container in his locker containing a ball-doctoring concoction of turpentine, baby oil, and rosin.<sup>25</sup> Hall of Famer Don Sutton and All-Star Tommy John were known to use sandpaper to scuff the ball during games, increasing the wind resistance of one side of the ball to produce more movement.<sup>26</sup>

Not to be outdone, hitters, managers and even grounds crew captains have all utilized various forms of traditional cheating during baseball games. Prodigious sluggers such as Sammy Sosa, Albert Belle, and Norm Cash all doctored their bats.<sup>27</sup> Managers routinely attempt to steal signs.<sup>28</sup> Grounds crews have altered the baseball diamond itself: shortening base paths for a speedy home team, overwatering the base paths for a speedy opposing team, and keeping the infield grass too high for home pitchers with a proclivity for inducing groundballs.<sup>29</sup>

Almost all of these behaviors are against the official rules of baseball.<sup>30</sup> Yet, the mere outlawing of these practices has not halted their use. Players and managers rarely incur penalties for any of these behaviors, and the practices continue.<sup>31</sup> The prevalence of traditional cheating in baseball has led some to practically accept it as part of the game. As former Tigers manager Sparky Anderson once said, "If a guy [can] cork his bat, then good for him . . . . Guys for eternity have been using pine tar on baseballs, cutting baseballs . . . . This stuff has been going on since the beginning of time."<sup>32</sup>

This "stuff" that was "going on since the beginning of time" set the stage for a new type of cheating that became rampant in the 1990s: the use of steroids.

#### B. EXAMPLES OF NEW AGE CHEATING

The single-season home run record remains one of the most cherished records in all of baseball.<sup>33</sup> In 1927, Yankee Hall of Famer Babe Ruth hit an astonishing sixty home runs in a single season.<sup>34</sup> The record would stand for thirty-four years until Roger Maris hit sixty-one home runs in 1961.<sup>35</sup> Few approached the record in the coming decades, but in 1998, the record came crashing down when not one but two hitters demolished the record.<sup>36</sup>

Mark McGwire hit seventy home runs in 1998,<sup>37</sup> besting Maris's record by fifteen percent despite having eighty-nine fewer at-bats.<sup>38</sup> On his heels was Sammy Sosa, who

25. Turbow & Duca, *supra* note 20.

26. *Id.*

27. *Id.*

28. *Id.*

29. Feezell, *supra* note 20, at 110.

30. *E.g.*, Turbow & Duca, *supra* note 20 (illustrating that the spitball has been illegal since 1920.).

31. *See infra* Part I.C.1.

32. Paul Sullivan, *Cleveland slugger suspended 10 games*, CHI. TRIB., July 19, 1994, available at <http://www.chicagotribune.com/sports/cs-030603bellestory2,0,3351511.story?page=2>.

33. *See* Rick Morrissey, *Sosa will hop into history as Bonds pouts*, CHI. TRIB., Aug. 28, 2001, available at [http://articles.chicagotribune.com/2001-08-28/sports/0108280314\\_1\\_mark-mcgwire-sound-hop](http://articles.chicagotribune.com/2001-08-28/sports/0108280314_1_mark-mcgwire-sound-hop) (describing the record as "one of baseball's most cherished treasures").

34. *Single-Season Leaders & Records for Home Runs*, BASEBALL REFERENCE, [http://www.baseball-reference.com/leaders/HR\\_season.shtml](http://www.baseball-reference.com/leaders/HR_season.shtml) (last visited Oct. 16, 2012).

35. *Id.*

36. *Id.*

37. *Id.*

managed sixty-six.<sup>39</sup> The next year yielded similar home run numbers, with McGwire blasting sixty-five home runs and Sosa launching sixty-three.<sup>40</sup> The inflated record would be short-lived, as San Francisco Giants' star Barry Bonds hit seventy-three home runs—the current record—in 2001.<sup>41</sup> Incredibly, Bonds produced this prodigious record at the age of thirty-six, far beyond the typical peak of home run production.<sup>42</sup>

The abnormalities extended further. Before 1995, a player had surpassed fifty home runs in a single season only seventeen times in the entire history of the game, a period of more than 100 years.<sup>43</sup> In the period between 1996 and 2005, a mere ten-year span, the fifty-home run mark was surpassed *eighteen* times.<sup>44</sup> As the saying goes, the numbers were too good to be true, as steroids were rampant in the game, and many commentators and scientists agree that steroid use will lead to an increase in home runs.<sup>45</sup>

Close observers of the game began suspecting steroid use in baseball as early as 1988. That summer, Olympic officials stripped Ben Johnson, a Canadian sprinter, of a gold medal due to steroid use.<sup>46</sup> Just days later, Washington Post baseball writer Thomas Boswell stated on national television that the slugger Jose Canseco had conspicuously “made himself great with steroids.”<sup>47</sup>

Two years later, All-Star center fielder Lenny Dykstra became the subject of speculation after crediting “real good vitamins” for the addition of thirty pounds of muscle in a single off-season.<sup>48</sup> By the mid-1990s, some baseball officials estimated that the usage of steroids was as high as thirty percent, causing future Hall of Famer Tony Gwynn to call steroids “the big secret we’re not supposed to talk about . . . .”<sup>49</sup>

In hindsight, the big secret makes one thing apparent: when McGwire and Sosa shattered the home run record in 1998, steroid use was rampant in baseball. Indeed, in the first year MLB tested for steroids in 2003, Sosa tested positive, along with 104 other

38. Compare Roger Maris Player Page, BASEBALL REFERENCE, <http://www.baseball-reference.com/players/m/marisro01.shtml> (last visited Oct. 22, 2012) with Mark McGwire Player Page, BASEBALL REFERENCE, <http://www.baseball-reference.com/players/m/mcgwima01.shtml> (last visited Oct. 22, 2012).

39. *Single-Season Leaders & Records for Home Runs*, *supra* note 34.

40. *Id.*

41. *Id.*

42. Jeff Zimmerman, *How Do Star Hitters Age?*, FANGRAPHS (Nov. 28, 2011), <http://www.fangraphs.com/blogs/index.php/how-do-star-hitters-age/>.

43. See *Single-Season Leaders & Records for Home Runs*, *supra* note 34.

44. See *id.*

45. See, e.g., Roger Tobin, *On the potential of a chemical Bonds: Possible effects of steroids on home run production in baseball*, 76 AM. J. PHYSICS 15 (2008) (finding, among other conclusions, that a ten percent increase in muscle mass can lead to a fifty percent increase in home run production for elite hitters); Alan M. Nathan, *The possible effect of steroids on home-run production*, 38 BASEBALL RESEARCH J. (2009) (agreeing with Tobin's assessments); Patrick Hruby, *616\* (\* no asterisk required)*, ESPN (Nov. 6, 2006), <http://sports.espn.go.com/espn/page2/story?page=hruby/060512>. But see Matthew Pouliot, *Steroids do not help hitters hit home runs*, NBC SPORTS (Aug. 6, 2010, 11:33 A.M.), <http://hardballtalk.nbcsports.com/2010/08/06/steroids-do-not-help-hitters-hit-home-runs/> (summarizing some of the views of those who believe that the spike in home runs was caused by other factors such as a livelier baseball, smaller parks, and the expansion of teams).

46. GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 61 (2007).

47. *Id.*

48. *Id.* at 66.

49. *Id.* at 70-71.

players.<sup>50</sup> Although McGwire retired in 2001 prior to the inception of testing, he later admitted to using steroids throughout the 1990s.<sup>51</sup> And their eventual home run successor, Barry Bonds, was later linked to BALCO, an advanced steroid production lab.<sup>52</sup>

Steroid use caused public outrage that extended beyond the sports world. Congress responded by launching at least two Congressional investigations into steroid use in baseball, using subpoena powers to bring top players—including Sosa and McGwire—to Capitol Hill.<sup>53</sup> Also, baseball's writers continue to castigate players of the steroid era during Hall of Fame voting, with McGwire gaining a mere 16.9% of votes in the most recent Hall of Fame ballot, and Sosa a mere 12.5%.<sup>54</sup>

The problem of rampant steroid use clouded the achievements of all the players of the era. Baseball eventually responded to the problem by instituting PED testing and suspensions.

### C. PENALTIES FOR BOTH TRADITIONAL AND NEW AGE CHEATING IN BASEBALL

The use of steroids and other PEDs represent a new type of cheating in baseball. As opposed to scuffing a ball or using a corked bat, which involve an external modification to an object used in the game, the use of PEDs represents an internal modification to the actual players using the objects. This difference, combined with the public outrage towards PED use, perhaps explains the difference in penalties for the two forms of cheating. This disparity will be examined below.

#### 1. PENALTIES FOR TRADITIONAL CHEATING

Rule 3.02 of MLB's Official Baseball Rules states the following: "No player shall intentionally discolor or damage the ball by rubbing it with soil, rosin, paraffin, licorice, sand-paper, emery-paper or other foreign substance."<sup>55</sup> If a player is caught altering the

50. Howard Bryant, *Sosa news calls for special outrage*, ESPN (June 16, 2009), [http://sports.espn.go.com/mlb/columns/story?columnist=bryant\\_howard&id=4264973](http://sports.espn.go.com/mlb/columns/story?columnist=bryant_howard&id=4264973).

51. Tyler Kepner, *McGwire Admits That He Used Steroids*, NY TIMES, Jan. 12, 2010, at B10.

52. *Bonds exposed: Shadows details superstar slugger's steroid use*, SPORTS ILLUSTRATED (Mar. 7, 2006 12:55 PM), <http://sportsillustrated.cnn.com/2006/baseball/mlb/03/06/news.excerpt/index.html>.

53. *Steroid Use in Professional Baseball and Anti-Doping Issues in Amateur Sports: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism*, 107th Cong. (2002); *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the Comm. on Gov. Reform*, 109th Cong. (2005).

54. Adam McCalvy, *McGwire Slides in Hall Vote for Third Straight Year*, MLB.COM (Jan. 9, 2013 3:00 PM), [http://mlb.mlb.com/news/article.jsp?ymd=20130109&content\\_id=40901286&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20130109&content_id=40901286&c_id=mlb); Lynn Zinser, *Hall of Fame Voters to Judge Stars Marred by Steroid Scandals*, NY TIMES, June 18, 2012, [http://www.nytimes.com/2012/06/19/sports/baseball/clemens-bonds-and-sosa-to-be-judged-by-baseball-hall-of-fame-voters.html?\\_r=0](http://www.nytimes.com/2012/06/19/sports/baseball/clemens-bonds-and-sosa-to-be-judged-by-baseball-hall-of-fame-voters.html?_r=0). One prominent writer, Buster Olney, decided to vote for McGwire, Sosa, Bonds, and others, saying that to "hold it against a handful of individuals now is, to me, retroactive morality." Zinser, *supra*. Another prominent writer, Tom Verducci, however, stated that he would never vote for a known steroid user, saying that "[v]oting for a known steroid user is endorsing steroid use." Tom Verducci, *Why I'll Never Vote for a Known Steroids User for the Hall of Fame*, SPORTS ILLUSTRATED (Jan. 8, 2013 12:36 PM), <http://sportsillustrated.cnn.com/mlb/news/20130108/hall-of-fame-ballot-steroids-mark-mcgwire-barry-bonds-roger-clemens/>. So far, more voters appear to have followed Verducci's stance.

55. Official Baseball Rules § 3.02 (2011).

baseball in such a manner, “the offender shall be suspended automatically for 10 games.”<sup>56</sup> Moreover, a pitcher “cannot expectorate on the ball” or even have “on his person, or in his possession, any foreign substance” during the course of a game.<sup>57</sup> The penalty for these infractions is immediate ejection and a suspension of ten games.<sup>58</sup>

The rules also ban the altering of bats. Rule 1.10 states that “[t]he bat shall be one piece of solid wood,” and that any indentation in the end of the bat must be less than one inch in depth and free of “any foreign substance.”<sup>59</sup> The Rule also notes that pine tar is not permitted beyond eighteen inches from the lower end of the bat, but failure to comply with this requirement “shall not be grounds for declaring the batter out, or ejected from the game.”<sup>60</sup> Moreover, a “player shall be ejected from the game” for altering a bat in an effort “to improve the distance factor,” and a player will also be subject to other penalties at the discretion of the League President.<sup>61</sup>

Players have occasionally endured punishment for traditional cheating. Hall of Famer Gaylord Perry, who remarked in his autobiography that he doctored the baseball his entire career,<sup>62</sup> was suspended ten games and fined \$250 for using Vaseline on a baseball during a game in 1982.<sup>63</sup> After Albert Belle used a corked bat during a game in 1994, the All-Star slugger was suspended ten games.<sup>64</sup> In 1987, pitcher Joe Niekro served a ten-game suspension after having emery board in his pocket and sandpaper glued to a finger while pitching, a violation so blatant that the umpire later likened it to “a guy walking down the street carrying a bottle of booze during Prohibition.”<sup>65</sup> In 1974, Graig Nettles hit a broken-bat single, and six super-balls came bouncing out of the broken bat.<sup>66</sup> Nettles was ejected from the game, but he served no suspension and, incredibly, his earlier home run in the game—which proved to be the game-winning run—was allowed to stand.<sup>67</sup> Not to be outdone, pitcher Rick Honeycutt served a ten-game suspension in 1980 for pitching with a

56. *Id.*

57. *Id.* § 8.02.

58. *Id.*

59. *Id.* § 1.10.

60. *Id.* This rule became the subject of much controversy when Hall of Famer George Brett was ejected from a game after hitting a potential game-winning home run with a bat containing excessive pine tar on the surface. *See, e.g.,* Commentary, In re Brett: *The Sticky Problem of Statutory Construction*, 52 *FORDHAM L. REV.* 430, 430-31 (1983).

61. Official Baseball Rules § 6.06(d). Assumedly, the Commissioner of Baseball would also have authority to assess penalties under “the best interests of baseball” clause in the Major League Constitution, which grants the Commissioner broad punitive powers ranging from fines to suspensions. MAJOR LEAGUE CONSTITUTION, art. II § 3 (1921). The broad powers granted by the “best interests of baseball” clause have been upheld by courts. *See, e.g.,* Milwaukee Am. Ass’n v. Landis, 49 F.2d 298, 302 (N.D. Ill. 1931) (holding that the clause “intended to vest in the commissioner jurisdiction to prevent any conduct destructive of the aims of the code”).

62. GAYLORD PERRY, *ME AND THE SPITTER: AN AUTOBIOGRAPHICAL CONFESSION* (1974).

63. *Illegal Pitch Brings Gaylord Perry Ban*, *NY TIMES*, Aug. 25, 1982, at B7.

64. Paul Sullivan, *Cleveland slugger suspended 10 games*, *CHI. TRIB.*, July 19, 1994, available at <http://www.chicagotribune.com/sports/cs-030603bellestory2,0,3351511.story>. After the umpires confiscated the bat, Belle’s teammate, Jason Grimsley, wriggled through a crawl space and dropped into the umpire’s locker room in order to replace the corked bat with another one. However, the replacement bat had a different signature on it, and the umpires and the league demanded the return of the original. The team complied, and testing revealed that Belle had corked the bat. Another teammate, Omar Vizquel, noted that the problem “was that all of Albert’s bats were corked.” *Biggest cheaters in baseball*, *ESPN*, <http://espn.go.com/page2/s/list/cheaters/ballplayers.html> (last visited Oct. 17, 2012).

65. *Biggest cheaters in baseball*, *supra* note 64.

66. *Id.*

67. *Id.*

thumbtack glued to his finger in order to cut the ball.<sup>68</sup> How did the umpires discover it? Honeycutt had a gash in his forehead after accidentally rubbing his face with his hand.<sup>69</sup>

Although these players were caught, the rate of detection remains remarkably low. According to one baseball writer, only three pitchers were suspended over an eight-year span in the 1980s for altering baseballs, and no hitters were suspended for altering bats over the same span.<sup>70</sup> And while pitcher Joel Peralta was suspended in 2012 for having pine tar on a glove, seven years had passed since a pitcher had previously been suspended for altering a baseball.<sup>71</sup> Despite widespread acknowledgment from players that traditional cheating remains a regular occurrence, detection and enforcement is practically nonexistent. As the above examples demonstrate, baseball detects and punishes only the most stupid and obvious perpetrators in a manner almost akin to the approach taken by society towards jaywalkers.

Because the rate of detection and subsequent enforcement for traditional cheating is so low to render it virtually negligible, traditional cheating remains rampant. Moreover, the penalties assessed vary from a mere ejection to a suspension of ten games. These penalties pale in comparison to the suspensions assessed for new age cheating in the form of PEDs.

## 2. PENALTIES FOR NEW AGE CHEATING

In 1971, MLB prohibited “the illegal use, possession, or distribution of drugs, including the unauthorized use of prescription drugs.”<sup>72</sup> For many years, cocaine use ranked as the chief drug concern of MLB commissioners.<sup>73</sup> Not until 1991, in a memorandum from the Commissioner, did MLB’s drug policy expressly prohibit the use of steroids in baseball.<sup>74</sup> Even then, however, MLB had little power to enforce the policy, as methods of enforcement had not been adopted through collective bargaining.<sup>75</sup> This lack of bargained-for enforcement mechanisms laid the groundwork for the explosion of PED use in the 1990s.

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68. *Id.*

69. *Id.*

70. Murray Chass, *How to Cork a Bat: The Inside Story*, NY TIMES, Aug. 8, 1987, <http://www.nytimes.com/1987/08/08/sports/how-to-cork-a-bat-the-inside-story.html>.

71. Scott Boeck, *Rays reliever Joel Peralta ejected for pine tar in glove*, USA TODAY, June 20, 2012, <http://content.usatoday.com/communities/dailypitch/post/2012/06/joel-peralta-ejected-for-pine-tar-in-glove/1#.UH7hyhjd7TM>. The opposing manager requested that umpires inspect Peralta’s glove, which brought much criticism. *See, e.g.*, Jason Turbow, *Peralta technically broke a rule, but Johnson handled it the wrong way*, SPORTS ILLUSTRATED (June 25, 2012), [http://sportsillustrated.cnn.com/2012/writers/jason\\_turbow/06/25/peralta-maddon-johnson-pinetar/index.html](http://sportsillustrated.cnn.com/2012/writers/jason_turbow/06/25/peralta-maddon-johnson-pinetar/index.html).

72. MITCHELL, *supra* note 46, at 25.

73. *Id.* at 29-37. All-Star pitcher Pascual Perez provides an example of a player who continually battled cocaine use throughout his career. *See Former Pitcher Is Killed in Dominican Republic*, NY TIMES, Nov. 2, 2012, at B12, available at [http://www.nytimes.com/2012/11/02/sports/baseball/former-pitcher-pascual-perez-is-killed-in-dominican-republic.html?\\_r=0](http://www.nytimes.com/2012/11/02/sports/baseball/former-pitcher-pascual-perez-is-killed-in-dominican-republic.html?_r=0). Perez was suspended multiple times for cocaine use. *Id.* He recently died in his home country of the Dominican Republic during an apparent robbery. *Id.*

74. MITCHELL, *supra* note 46, at 41.

75. *See id.* at 41-43; *see generally* Garrett R. Broshuis, *Touching Baseball’s Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 HARV. J. SPORTS & ENT. L. 51 (2013) (providing an overview of the history of collective bargaining in baseball).

Following numerous allegations of steroid use and a Congressional investigation, MLB and the Major League Baseball Players Association (MLBPA) finally included a formal drug-testing program in their 2002 Basic Agreement.<sup>76</sup> The program called for the testing of players during the 2003 season, but players would not be penalized for testing positive.<sup>77</sup> If more than five percent of players tested positive during 2003 testing, the program would continue, with the assessment of penalties beginning during 2004 testing.<sup>78</sup>

The 2003 testing resulted in 104 players testing positive,<sup>79</sup> which MLB stated was at a rate of between five and seven percent.<sup>80</sup> Testing resumed in 2004, with twelve positive results out of 1,133 tests.<sup>81</sup> MLB suspended no players, since the agreed-upon “program did not provide for discipline for a *first-time offender* at that time.”<sup>82</sup> Following another Congressional hearing and the mention of steroid use in sports in President George W. Bush’s 2004 State of the Union address, MLB and MLBPA began agreeing to several changes to MLB’s drug policy.<sup>83</sup> Beginning in 2005, the program dictated a ten-day suspension for a first-time offender’s positive test, followed by longer suspensions for subsequent positive tests.<sup>84</sup> Following the 2005 season, the parties agreed to further changes, increasing the penalties to a fifty-game suspension for a first positive test, a 100-game suspension for a second offense, and a lifetime ban for a third offense.<sup>85</sup> Aside from additional human growth hormone testing,<sup>86</sup> the system remains largely unchanged today.

Since testing began, many players have been suspended after testing positive for PEDs. In 2005, perennial All-Star Rafael Palmeiro tested positive and served a ten-game suspension.<sup>87</sup> In 2006, the Commissioner used his “best interests of baseball” powers to suspend pitcher Jason Grimsley fifty games for the illegal possession of human growth hormone.<sup>88</sup> More recently, 2011 National League MVP Ryan Braun tested positive for PEDs during the winter of 2011, although the suspension was later overturned on appeal.<sup>89</sup> MLB suspended outfielder Melky Cabrera fifty games during the 2012 season after he

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76. MITCHELL, *supra* note 46, at 53.

77. *Id.* at 54.

78. *Id.*

79. Michael McCann, *Now that Alex Rodriguez's name is out, will 103 others follow?*, SPORTS ILLUSTRATED (Feb. 10, 2009), [http://sportsillustrated.cnn.com/2009/writers/michael\\_mccann/02/10/steroids.list/index.html](http://sportsillustrated.cnn.com/2009/writers/michael_mccann/02/10/steroids.list/index.html). Per the Basic Agreement, the names of the players testing positive were to remain secret. *Id.* However, names eventually leaked out, and they included such stars as Alex Rodriguez. *Id.*

80. MITCHELL, *supra* note 46, at 55.

81. *Id.*

82. *Id.* (emphasis added).

83. *Id.* at 55-57.

84. *Id.* at 57.

85. *Id.* at 58.

86. See Summary of Major League Baseball Players Association-Major League Baseball Labor Agreement, MLB.COM, available at [mlb.mlb.com/mlb/downloads/2011\\_CBA.pdf](http://mlb.mlb.com/mlb/downloads/2011_CBA.pdf) (last visited Oct. 17, 2012). MLB became the first league to test for human growth hormone. Maury Brown, *MLB Becomes the First League to Implement HGH Testing*, FORBES (June 12, 2012), <http://www.forbes.com/sites/maurybrown/2012/06/12/mlb-becomes-the-first-league-to-implement-hgh-testing/>.

87. MITCHELL, *supra* note 46, at 103. Palmeiro had testified before Congress the same year, saying he had “never used steroids, period.” *Id.* at 104.

88. *Id.* at 107.

89. *Ryan Braun wins appeal of suspension*, ESPN (Feb. 24, 2012, 2:24 PM), [http://espn.go.com/mlb/story/\\_id/7608360/milwaukee-brewers-ryan-braun-wins-appeal-50-game-suspension](http://espn.go.com/mlb/story/_id/7608360/milwaukee-brewers-ryan-braun-wins-appeal-50-game-suspension). Braun was the first player to successfully challenge a drug-related suspension. *Id.* Braun did not demonstrate tampering but successfully showed that a proper chain of custody had not been followed according to protocol. *Id.*

tested positive for PEDs.<sup>90</sup> Cabrera led the National League in hits at the time and ranked second in batting average.<sup>91</sup> Also suspended by MLB in 2012 was former Cy Young Award winner Bartolo Colon, who sat out fifty games for a positive test.<sup>92</sup>

The heavy enforcement of the ban on PED use has resulted in dramatically reduced usage and a decreased rate of positive tests since testing began.<sup>93</sup> As a result, the number of home runs,<sup>94</sup> and the distance of home runs,<sup>95</sup> has decreased dramatically since the implementation of testing. However, the above suspensions demonstrate that some players—sometimes superstars—continue to use PEDs despite testing and the resulting harsh penalties. New age cheating has become far less frequent than traditional cheating,<sup>96</sup> but it has left an indelible stain upon the game.

## II. THE POSITIVISM-NATURALISM DEBATE

Although new age cheating has decreased, both forms of cheating continue to be exhibited in the game today. The penalties assessed for each type of cheating differ, with the detection of traditional cheating resulting in a much more lenient suspension than new age cheating. Similarly, the dichotomy continues in enforcement, as MLB does little to detect traditional cheating but routinely tests for PEDs.

The near acceptance of traditional cheating as part of the game has led many to no longer even consider it cheating. For some, the low rate of enforcement and the longstanding prevalence of traditional cheating behaviors signify that it is simply a

90. *Melky Cabrera suspended 50 games*, ESPN (Aug. 15, 2012, 11:10 PM), [http://espn.go.com/mlb/story/\\_/id/8271981/melky-cabrera-san-francisco-giants-suspended-50-games](http://espn.go.com/mlb/story/_/id/8271981/melky-cabrera-san-francisco-giants-suspended-50-games).

91. *Id.*

92. Lynn Zinser & Serge F. Kovaleski, *Another Player Receives 50-Game Ban*, NY TIMES, Aug. 22, 2012, at B10.

93. For instance, the initial year of testing in 2003 produced positive results in five to seven percent of all tests, the following year of testing yielded only twelve positive results out of 1,183 tests: approximately one percent. See *Drug Policy in Baseball: Event Timeline*, MLB.COM, [http://mlb.mlb.com/mlb/news/drug\\_policy.jsp?content=timeline](http://mlb.mlb.com/mlb/news/drug_policy.jsp?content=timeline) (last visited Oct. 17, 2012).

94. See *Offense drops to two-decade low*, ESPN (Sep. 29, 2011 4:32 P.M.), [http://espn.go.com/mlb/story/\\_/id/7035635/major-league-baseball-offense-2011-dropped-two-decade-low](http://espn.go.com/mlb/story/_/id/7035635/major-league-baseball-offense-2011-dropped-two-decade-low) (stating that home run levels in 2011 dropped to .94 per team per game, “the lowest in 19 years and a sharp drop from 1.17 in 2000); Jim Albert, *A Graphical View of the SABR Era*, SABR.ORG, <http://sabr.org/research/graphical-view-sabr-era> (last visited Nov. 26, 2012) (showing a “gradual decrease in” home runs during the years preceding 2010).

95. The longest home run of the 2012 season traveled 494 feet. *Home Run Tracker*, ESPN, <http://www.hittrackeronline.com/index.php> (last visited Nov. 26, 2012). During his career, McGwire hit ten home runs over 500 feet, all occurring during the 1997 and 1998 seasons. *Ten Longest Mark McGwire Home Runs*, BASEBALL ALMANAC, [http://www.baseball-almanac.com/charts/mcgwire/mark\\_mcgwire\\_home\\_runs.shtml](http://www.baseball-almanac.com/charts/mcgwire/mark_mcgwire_home_runs.shtml) (last visited Nov. 26, 2012).

96. Most players with whom I discussed this topic agree with this statement, but one high profile person in the drug industry would disagree. The former founder of BALCO, Victor Conte, estimated after the Cabrera suspension that as many as half of MLB players use synthetic testosterone. Bob Nightengale, *Column: Victor Conte says Melky Cabrera far from alone*, USA TODAY, Aug. 15, 2012, <http://usatoday30.usatoday.com/sports/baseball/story/2012-08-15/Victor-Conte-Melky-Cabrera/57076430/1>. MLB disputed this claim, saying that Conte was just “making that up.” *Id.* According to Conte, players are finding new ways of cheating that avoid detection in the form of micro-dosing. *Id.* After talking with many players, I am convinced that Conte vastly overestimates the current usage rates. Indeed, the decrease in home runs since the height of the steroid era, and the decrease in the distance of home runs, adds support to this assertion. See *supra* notes 93, 94.

strategy.<sup>97</sup> Once accepted as such, any clever player can do it—so long as it remains somewhat concealed. Thus, many argue that there is nothing wrong with traditional cheating.<sup>98</sup>

Others go even further, claiming not only that traditional cheating is not cheating, but that new age cheating is not cheating either. Many philosophers, journalists, and fans hold these views.<sup>99</sup> Some argue that the taking of PEDs differs little from lifting weights, as both simply make the player stronger.<sup>100</sup> Others argue that the use of PEDs does not implicate any core, traditional, constitutive rules of the game.<sup>101</sup>

Given the variance in opinions regarding the controversy, it is necessary to discuss the nature and validity of MLB's rules against cheating. How do we decide what constitutes cheating? Is MLB's response to cheating sufficient? Should MLB even have rules against traditional cheating? How can MLB improve its response to cheating?

Such an exercise is similar to examining the validity of law in society. After all, the rules of baseball govern its micro-society—those playing the game of baseball. Legal philosophers for centuries have struggled with such examinations within law, and two major branches of legal philosophy—legal positivism and natural law theory—will guide our current quest.

97. See, e.g., Randolph M. Feezell, *On the Wrongness of Cheating and Why Cheaters Can't Play the Game*, 15 J. PHIL. SPORT 57, 65 (1998) (“[C]ustom seems the great guide in life. The spitball is part of baseball . . . . [Gaylord] Perry was playing the game . . . . But he wasn't cheating . . . . [T]he conventions or customs . . . allow for the possibility of such behavior . . . . The risks are clear to everyone.”); see also *infra* note 169.

98. See Feezell, *supra* note 97. But see Hamilton, *supra* note 1, at 127 (“The coaches and players who participate [in traditional cheating] pretend that nothing seriously immoral is involved. They fail to face up to the harsh reality that it is cheating and may even hold the false belief that this is an acceptable strategic play in the game. This inner lie of believing something one knows to be false . . . is similar to white-collar crime . . . . This creates an atmosphere where there is no disgrace or shame among those who practice this type of cheating or immorality in the game. The burden of proof certainly rests on these deceivers to justify the morality of these actions, which they cannot do.”).

99. See *infra* notes 167-69.

100. See Simon Eassom, *Should Steroids Be Banned? No.*, in *BASEBALL AND PHILOSOPHY* 355 (Eric Bronson ed., 2004) (“Substances such as steroids . . . are performance-enhancing technologies just like relaxation techniques, mental rehearsals, diets, . . . and weight-training sessions.”); cf. Sharon Ryan, *What's So Bad About Performance-Enhancing Drugs?*, in *FOOTBALL AND PHILOSOPHY* 83 (Michael W. Austin ed., 2008) (arguing that the playing advantage created by PED use is not unfair partly because “[s]ome athletes have more free time to train than others” anyways).

101. See, e.g., Alva Noe, *Doping: It's Just Part of the Game*, NPR (Aug. 31, 2012, 9:55 AM), <http://www.npr.org/blogs/13.7/2012/08/31/160359815/doping-its-just-part-of-the-game> (distinguishing between “constitutive” rules and secondary, non-constitutive rules). For these commentators, an example of a constitutive rule is the prohibition of drugging your opponent or taking a bus to cross a finish line. *Id.* But, these philosophers argue, using PEDs is internal to the taker of the drug, so it is not a constitutive rule. *Id.* In fact, the philosopher Alva Noe argues that games such as baseball encourage PED use, as testing internal limits “is actually what is required of any player who aims at excellence.” *Id.* Moreover, “[a]sking an athlete not to dope is like asking him to hold back while running the bases.” *Id.* Thus, using PEDs does not place one outside the constitutive rules of the game any more than making the sacrifice of “getting up at 3:30 every morning” to work out. *Id.*; see also Eassom, *supra* note 100, at 317 (“Substances such as steroids . . . are performance-enhancing technologies just like relaxation techniques, mental rehearsals, diets . . . and weight-training sessions.”).



## A. LEGAL POSITIVISM

Legal positivism arose in the post-Renaissance period and strove to explain law through a rational, empirical lens.<sup>102</sup> To grossly generalize, legal positivism states that a law attains the status of valid law simply by being posited by those with the power to make a law.<sup>103</sup> Importantly, what law “is” differs from the moral question of what law “ought” to be, as morality is simply used to evaluate a law.<sup>104</sup>

The objectivity offered by the view allowed it to gain widespread popularity among legal philosophers in the past two hundred years.<sup>105</sup> While a complete review of positivism remains beyond the scope of this article, a brief introduction will further the current quest.<sup>106</sup>

### 1. FROM BENTHAM TO AUSTIN: CLASSICAL LEGAL POSITIVISM

Jeremy Bentham, one of the founders of positivism, sought to ground legal philosophy in the same roots as natural science.<sup>107</sup> Writing in the late eighteenth century, his discerning eye rejected any notion of fundamental, natural rights, such as those described in the Declaration of Independence, stating that any and all rights do not stem from nature but only from positive law.<sup>108</sup>

Utilitarianism dominated Bentham's political philosophy, which he defined as “that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question.”<sup>109</sup> On a community scale, Bentham's utilitarianism thus sought to maximize aggregate happiness instead of individual happiness.<sup>110</sup> Consequently, the individual did not inherently possess rights by nature in Bentham's theory, as any rights stemmed solely from positive law that promoted community utilitarianism.<sup>111</sup>

102. ISAAK I. DORE, *THE EPISTEMOLOGICAL FOUNDATIONS OF LAW* 451 (2007).

103. See DAVID A. REIDY, *ON PHILOSOPHY OF LAW* 13-14 (2007).

104. DORE, *supra* note 102, at 451.

105. See *id.* at 497 (stating that positivism temporarily eclipsed naturalism in popularity).

106. See generally MATTHEW H. KRAMER, *IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS* (2003) (supplying a more complete overview of legal positivism); See also H.L.A. HART, *THE CONCEPT OF LAW* (1961).

107. DORE, *supra* note 102, at 452.

108. *Id.* at 452-53. Bentham, upon examining the natural rights accorded in the French Declaration, refuted every one of these rights. Jeremy Bentham, *Anarchical Fallacies: Being an Examination of the Declaration of Rights Issued During the French Revolution*, reprinted in DORE, *supra* note 102, at 454-58. In discussing the supposed right that “all men are born free,” Bentham stated: “[N]ot a single man that ever was, or is, will be. All men . . . are born in subjection, and the most absolute subjection—the subjection of a helpless child to the parents on whom he depends every moment for his existence.” *Id.* at 455. He also called this notion of a natural right “[a]bsurd and miserable nonsense.” *Id.*

109. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATIONS*, CHAPTER I, reprinted in DORE, *supra* note 102, at 465.

110. DORE, *supra* note 102, at 464.

111. See *id.* at 470 (quoting Bentham that “reasons for wishing there were such things as rights, are not rights;—a reason for wishing that a certain right were established is not that right—want is not supply—hunger is not bread.”).

With utilitarianism in mind, Bentham defined law as “an assemblage of signs declarative of a volition conceived or adopted by the *sovereign* in a state, concerning the conduct to be observed in a certain case by a certain persons or class of persons, who in the case in question are or are supposed to be subject to his power.”<sup>112</sup>

The sovereign broadly included any person or persons whom the community obeyed.<sup>113</sup> This sovereign could be partial or divided, but laws gained their meaning and power solely by means of emanating from the sovereign.<sup>114</sup> Thus, morality played no role in the legitimacy of law, as law as it *is* differed from law as it *ought* to be.<sup>115</sup>

John Austin, a follower of Bentham,<sup>116</sup> continued this distinction between the “is” and “ought” in his stricter form of positivism based on commands.<sup>117</sup> Austin claimed that law is valid “if it correctly reports the past command of some person or group occupying the position of sovereign in that society.”<sup>118</sup> The sovereign is a person or persons issuing commands that are habitually obeyed and who does not habitually obey anyone else.<sup>119</sup>

In Austin’s view, the sovereign issues commands and the populace obeys these commands due to the threat of sanction for noncompliance.<sup>120</sup> While there may often be overlap between commands and morality, the commands do not need to be grounded in morality in order to be valid.<sup>121</sup> Again, law as it *is* differs from what law *ought* to be.<sup>122</sup> The coercive force, derived from the sovereign, produces valid law and moral backing is not necessary.<sup>123</sup>

Both Austin and Bentham took an analytical approach to legal theory and insisted on the distinction between law and morality.<sup>124</sup> This laid the bedrock for future positivist thought that would emerge in the twentieth century.

## 2. HART’S LEGAL POSITIVISM

Professor H.L.A. Hart, like Bentham and Austin, maintained that law and morality need not be intertwined.<sup>125</sup> Unlike Bentham and Austin, however, Hart’s version of positivism placed less emphasis on the sovereign issuing commands and more emphasis on rules and the reason for the rules.<sup>126</sup> According to Hart’s more nuanced approach, power alone does not make a legal right.<sup>127</sup>

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112. JEREMY BENTHAM, OF LAWS IN GENERAL 1, *reprinted* in DORE, *supra* note 102, at 471 (emphasis in original).

113. DORE, *supra* note 102, at 477.

114. *Id.* at 484.

115. *Id.*

116. REIDY, *supra* note 103, at 11.

117. DORE, *supra* note 102, at 485.

118. RONALD DWORKIN, LAW’S EMPIRE 33 (1986).

119. *Id.*

120. REIDY, *supra* note 103, at 12.

121. *Id.*

122. *Id.*

123. *Id.*

124. DORE, *supra* note 102, at 495.

125. REIDY, *supra* note 103, at 16.

126. *Id.*

127. *Id.*

Despite this departure, Hart insisted that “[r]ules that confer rights, though distinct from commands, need not be moral rules or coincide with them.”<sup>128</sup> Moreover, rules that confer rights do not need to “be just or morally good rules.”<sup>129</sup> Laws therefore remain separate from morality, even though there might often be an intersection between the two. The true ground of law in Hartian positivism lies in the rule of recognition, meaning that once a community devises and accepts the scheme of authority making the rules within the community, the rules enunciated by the authority become valid.<sup>130</sup> After all, a gunman might coerce a person to act in a certain way, “but only officials acting for reasons given by rules can subject persons to legal ‘obligations’ to act in various ways.”<sup>131</sup>

Professor Hart’s version of positivism presents a more flexible view of the law and a view more suited to a complex society, but many of the basic tenets first described by Bentham and Austin remain. Importantly, he retained the separation between law and morality and defended the analytical study of law.<sup>132</sup>

## B. NATURAL LAW THEORY

Natural law theorists traditionally aim to provide normative guidance.<sup>133</sup> These theorists place great emphasis on the human ability to reason, as the ability to reason allows a person to discover certain universal truths.<sup>134</sup>

Much like the discussion of positivism, a full examination of naturalism is well beyond this article.<sup>135</sup> Hopefully a fleeting glance at its tenets—especially those of modern natural law—will suffice for this quest.

### 1. THE FOUNDATIONS OF NATURAL LAW: THE ANCIENT GREEKS

Natural law theories date to the ancient Greek philosophers.<sup>136</sup> Indeed, Plato in *The Republic* enunciated his theory of forms, which stated that absolute truths existed in a

128. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606 (1957).

129. *Id.*

130. DWORKIN, *supra* note 118, at 34 (1986). In discussing the rule of recognition in a primitive society, Hart states that “what is crucial is the acknowledgment of reference to the writing or inscription as *authoritative*, i.e. as the *proper* way of disposing of doubts as to the existence of the rule.” H.L.A. HART, *THE CONCEPT OF LAW* 92 (1961). These secondary rules of recognition serve as the backbone for primary rules of obligation, which ultimately bind the persons within a society to act in a certain manner. *See id.* at 97 (“Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation.”).

131. REIDY, *supra* note 103, at 35; *see also* Hart, *supra* note 128, at 603 (“These fundamental accepted rules specifying what the legislature must do to legislate are not commands habitually obeyed, nor can they be expressed as habits of obedience to persons. They lie at the root of a legal system . . .”).

132. DORE, *supra* note 102, at 640.

133. REIDY, *supra* note 103, at 44.

134. *Id.*

135. *See generally* JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) (examining more thoroughly natural law theory).

136. Although Plato rarely used the term “natural law” in his writings, many consider his works to be foundational for natural law. *See, e.g.,* *Natural Law Theories*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, § 1.2, <http://plato.stanford.edu/entries/natural-law-theories/> (last visited Nov. 23, 2012) (“The texts that are earliest . . .

reality apart from the physical world.<sup>137</sup> These truths could be accessed by the philosopher through reason, as demonstrated by Plato's three metaphors: the image of the sun, the divided line, and the allegory of the cave.<sup>138</sup> As Plato states, "[T]his power [to learn] is in the soul of each."<sup>139</sup> If properly trained, knowledge of the good and the universal can be accessed through reason.<sup>140</sup> Further, Plato states "that a city founded according to nature would be wise as a whole,"<sup>141</sup> which illustrates his belief in the utility of the laws of nature.

Somewhat similar is Aristotle's teleological view, in which humans naturally move toward governance in the form of a state.<sup>142</sup> The law crafted by the state is both "natural and moral, and its value is its power to make citizens good and just."<sup>143</sup> For this and other reasons, many have actually stated that Aristotle is the "father of natural law."<sup>144</sup>

Through reason, the good citizen contemplates choices and strives toward a virtuous mean that produces happiness.<sup>145</sup> As Professor Isaak Dore explains in his discussion on Aristotle, "When reason triumphs over the passions and controls the irrational part of the soul, morality triumphs over immorality."<sup>146</sup> And since humanity naturally moves towards this triumphant state of good, law is natural.<sup>147</sup>

The writings of Plato and Aristotle thus provided the foundations for later natural law theorists such as Saint Thomas Aquinas.<sup>148</sup> While natural law theories retained much influence for generations after Aquinas,<sup>149</sup> they encountered sharp opposition from the legal

and most foundational (e.g., Plato's *Gorgias*, *Republic*, and *Laws*, and Aristotle's *Politics*) in the tradition of natural law theory remind their readers of the evident evils of anarchy . . .").

137. DORE, *supra* note 102, at 124.

138. *Id.* at 125-39.

139. PLATO, *THE REPUBLIC* 518 c (Allan Bloom trans., 2d ed. 1991).

140. See DORE, *supra* note 102, at 132 ("True knowledge, or what Plato calls 'Understanding,' can be attained only . . . through dialectical reasoning.") Plato, however, was skeptical that all would embrace such knowledge, as is evidenced in the allegory of the cave. When Plato's hypothetical prisoner returns to his cave after seeing the truth during his escape, the other prisoners ridicule him, saying "[W]ouldn't it be said of him that he went up and came back with his eyes corrupted, and that it's not even worth trying to go up? And if they were somehow able to get their hands on and kill the man who attempts to release and lead up, wouldn't they kill him?" PLATO, *supra* note 139, at 517 a. Thus, Plato does not expect the ideal state to be a democracy ruled by all, as not all will embrace the truth. Instead, the ideal state will be ruled by philosopher kings. See DORE, *supra* note 102, at 139 ("Knowledge of the forms as eternal truths was of most immediate relevance to the guardians of the state. These are the philosopher-kings who would be able to make just laws for all only if they were armed with such knowledge.").

141. PLATO, *supra* note 139, at 428 e.

142. DORE, *supra* note 102, at 224-25. (quoting Aristotle, "[The city] is the end or consummation to which those associations move, and the 'nature' of things consists in their end or consummation; for what each thing is when its growth is completed we call the nature of that thing . . . [I]t is evident that the city belongs to the class of things that exist by nature, and that man is by nature a political animal. He who is without a city, by reason of his own nature and not some accident, is either a poor sort of being, or a being higher than man . . ." ARISTOTLE, *POLITICS* 10 (Ernest Barker trans., Oxford Univ. Press 1995)).

143. DORE, *supra* note 102, at 227.

144. Max Salomon Shellens, *Aristotle on Natural Law*, 4 NAT. L.F. 72, 72 (1959) ("When discussing law and justice philosophers and historians almost invariably claim that Aristotle is the father of natural law.").

145. DORE, *supra* note 102, at 228 ("[T]he happy life can only be led by a certain kind of person, namely, the virtuous person contemplating choices based on reason . . . and because reason . . . naturally strives toward excellence, the excellence toward which humans are naturally inclined is *human* excellence or virtue . . . . The idea of the [virtuous] mean has much to do with moral virtue . . .").

146. *Id.* at 229.

147. *Id.*

148. See DORE, *supra* note 102, at 282-84.

149. See DORE, *supra* note 102, at 342-52 (exemplifying natural law influences found in John Locke's philosophy); See also Steven Forde, *John Locke and the Natural Law and Natural Rights Tradition*, NLNRC.org,

positivists. The last half of the twentieth century, however, brought a resurgence of natural law.

## 2. LON FULLER'S PURPOSIVE NATURALISM

The brand of legal positivism championed by Hart in the mid-twentieth century precipitated a stern rebuke from Lon Fuller. Professor Fuller, responding directly to Hart, stated that law must have a connection to morality in order to be valid.<sup>150</sup> Fuller attacked the entire approach of legal positivism, saying, "In its concern to assign the right labels to the things men do, this school seems to lose all interest in asking whether men are doing the right things."<sup>151</sup>

Fuller found that "the authority to make law must be supported by moral attitudes that accord to it the competency it claims."<sup>152</sup> This external morality makes law possible, but the authority making the law must also possess an internal morality for a society to have good order.<sup>153</sup> The "external and internal moralities of law reciprocally influence one another; deterioration of the one will almost inevitably produce deterioration in the other."<sup>154</sup>

Professor Fuller illustrated his point by examining the German Nazi regime's lawmaking behaviors. Nazi lawmaking relied extensively on retroactive statutes and secret laws in compelling and assisting in the killing of millions of innocent persons.<sup>155</sup> In the vein of positivism, these laws would seem to be valid laws issued by those with power to make laws, and the subjects within the Nazi society would therefore be obliged to obey these valid laws.

According to Fuller, the Germans viewed positivism as "the only theory of law that could claim to be 'scientific' in an Age of Science."<sup>156</sup> Anyone believing otherwise was considered naïve.<sup>157</sup> With morality being separate from lawmaking, "[t]he German lawyer . . . accept[ed] as 'law' anything that called itself by that name . . ."<sup>158</sup> This dogmatic acceptance of positivism, stated Fuller, may have helped usher in Nazi atrocities, as their "exploitation of legal forms started cautiously and became bolder as power was consolidated."<sup>159</sup>

Professor Fuller provides an answer to this dilemma by infusing morality in a purposive view of law. In his view, a person cannot understand a law if the law is separated from its purposeful effect on human lives.<sup>160</sup> The legal system therefore becomes an

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<http://www.nlrac.org/earlymodern/locke> (last visited Nov. 26, 2012).

150. DORE, *supra* note 102, at 499.

151. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 643 (1957).

152. *Id.* at 645.

153. *Id.*

154. *Id.*

155. *Id.* at 650-52 (including reports "that the wholesale killings in concentration camps were made 'lawful' by a secret enactment").

156. *Id.* at 659.

157. *Id.*

158. *Id.*

159. *Id.*

160. See DORE, *supra* note 102, at 503 ("[Fuller] views law as an instrument designed to effect some purpose(s) of human life and cannot be understood apart from its purpose.").

“enterprise of subjecting human conduct to the governance of rules,” and is “the product of a sustained purposive effort.”<sup>161</sup> Moreover, moral discovery is a social endeavor, and through this shared experience the collective purposes of society become known.<sup>162</sup>

Professor Fuller’s natural law theory focuses on procedure over substance, as the internal morality of law guides “the entire purposive enterprise of the law.”<sup>163</sup> Professor Fuller therefore espouses eight principles of legality—eight dangerous failures—that can undermine the internal morality of law:

[F]irst . . . a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. . . . (2) a failure to publicize . . . the rules he is expected to observe; (3) the abuse of retroactive legislation . . . which undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally (8) a failure of congruence between the rules as announced and their actual administration.<sup>164</sup>

A failure in these eight principles “results in something that is not properly called a legal system at all.”<sup>165</sup> While all legal systems will have defects, some defects will insidiously begin to strip the system’s moral backing, reducing it to little more than a series of commands and threats.<sup>166</sup>

This procedural approach towards natural law theory did not articulate substantive principles.<sup>167</sup> Yet the purposive approach can yield substance, as a society may access universal moral guideposts by articulating a shared purpose.<sup>168</sup> When this shared purpose guides lawmaking and the procedural principles are followed, morality and law will be properly aligned.

### 3. DWORKIN’S LAW AS INTEGRITY

Ronald Dworkin’s natural law theory focuses more on adjudication than on lawmaking, but it also provides a powerful critique of positivism while advancing natural theory. Professor Dworkin urges us to “shake ourselves loose from this model of rules” enunciated by Hart and to build a truer model.<sup>169</sup> According to Professor Dworkin, in mature legal systems, law is interpretive:<sup>170</sup> participants in any mature legal system will at some point ponder the purpose behind a rule, as disputes will inevitably arise that do not fall

161. LON L. FULLER, *THE MORALITY OF LAW* 106 (1964).

162. See Lon Fuller, *A Rejoinder to Professor Nagel*, 3 *NATURAL L.F.* 83, 84 (1958).

163. DORE, *supra* note 102, at 509.

164. FULLER, *THE MORALITY OF LAW*, *supra* note 161, at 39.

165. *Id.*

166. REIDY, *supra* note 103, at 58.

167. See DORE, *supra* note 102, at 510 (“What is unique about Fuller’s ‘natural law theory’ is the absence of substance principles . . .”); *Natural Law Theories*, *supra* note 136, § 1.4 (“Fuller offered a merely procedural natural law theory, though he did not deny that a substantive natural law theory is possible and appropriate.”).

168. DORE, *supra* note 102, at 511.

169. Ronald Dworkin, *The Model of Rules*, 35 *CHI. L. REV.* 1, 46 (1967).

170. See REIDY, *supra* note 103, at 70; see also DWORKIN, *supra* note 118, at 46-48 (describing how an interpretive society will behave with a rule regarding courtesy).

directly within an existing rule.<sup>171</sup> Thus, law is not just a system of rules and rule-following behavior as the positivist would assert, but it is interpretive and reflective.<sup>172</sup>

Law as an interpretive practice leads to disagreements among the participants, but law as integrity offers a way out of the disagreement. Law cannot be interpreted by merely looking at past political decisions (what Dworkin calls conventionalism), and it cannot be interpreted by simply looking towards a forward-looking goal (pragmatism).<sup>173</sup> Instead, law as integrity offers a vision of law that is not just a state's coercive force but is instead morally principled from an internal point of view.<sup>174</sup> As Dworkin states,

[A] political society that accepts integrity as a political virtue thereby becomes a special form of community, special in a way that promotes its moral authority to assume and deploy a monopoly of coercive force . . . . Integrity provides protection against partiality or deceit or other forms of official corruption . . . .<sup>175</sup>

Law as integrity therefore melds the backward-looking lens of conventionalism with the forward-looking ideals of pragmatism and injects a dose of morality.<sup>176</sup> In sum, the interpretive society that commits to integrity "expresses a concern by each for all that is sufficiently special, personal, pervasive, and egalitarian to ground communal obligations according to standards for communal obligation we elsewhere accept."<sup>177</sup>

### III. WHAT CONSTITUTES CHEATING?

#### A. BASEBALL'S CURRENT APPROACH TO CHEATING—THE FAILURE OF POSITIVISM

Some commentators take a positivist approach when evaluating whether a certain behavior constitutes cheating, saying that cheating is the mere breaking of a rule to gain an unfair advantage.<sup>178</sup> In the classical positivist sense, MLB is the sovereign, issuing commands with the threat of coercive action for not complying with the command. For the

171. REIDY, *supra* note 103, at 70; DWORKIN, *supra* note 118, at 47 ("Everyone develops a complex 'interpretive' attitude toward the rules of courtesy, an attitude that has two components. The first is the assumption that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle . . . . The second is the further assumption that the requirements of courtesy . . . are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point. Once this interpretive attitude takes hold, the institution of courtesy ceases to be mechanical; it is no longer unstudied deference to a runic order. People now try to impose *meaning* on the institution—to see it in its best light—and then to restructure it in the light of that meaning.")

172. REIDY, *supra* note 103, at 70.

173. See generally DWORKIN, *supra* note 118, at 114-75 (illustrating that conventionalism is often associated with positivist theories, while pragmatism is associated with realist legal theories); see also REIDY, *supra* note 103, at 75.

174. See REIDY, *supra* note 103, at 76.

175. DWORKIN, *supra* note 118, at 188.

176. REIDY, *supra* note 103, at 76-77.

177. DWORKIN, *supra* note 118, at 216.

178. See, e.g., Feezell, *supra* note 20, at 112 (stating that some define cheating as breaking "a rule with the intention of gaining an unfair advantage"); Feezell, *On the Wrongness of Cheating*, *supra* note 97, at 59 ("In all cases there is the intention on the part of players, coaches, or interested personnel to gain an unfair advantage by altering certain conditions of competitive equality.")

classical positivist, this alone makes the rule valid, and this command from the sovereign must be followed.

In the Hartian version of positivism, the mere issuance of the rule retains significance, but more so because of the recognition that MLB had the power to issue this rule. Thus, the fact that PED testing and punishment came about through a mutually accepted collective bargaining process, and this process led to widespread acceptance of the rule, adds much significance. Those in charge followed an agreed-upon process of rulemaking, and, because of this recognition of the power to make this policy, the valid rule should be followed regardless of whether it is a moral rule or not.

Yet neither classical nor Hartian positivism proves satisfactory, because the reliance on rules alone is problematic. For instance, prior to the implementation of testing in 2003 and punishment in 2004, the rule against the use of PEDs in baseball was murky. Yes, PEDs had been formally abolished in 1991, but no enforcement policy had been instituted.<sup>179</sup> The use of PEDs, mainly in the form of steroids, became rampant, with some estimating that usage topped fifty percent.<sup>180</sup>

This is the problem of conventionalism for positivism, as described by Dworkin.<sup>181</sup> If a player, a coach, or an arbiter in the year 2000 were to look at past practices alone in deciding whether or not to take steroids or to allow the use of steroids, the interpretive practice of conventionalism would guide this person to say yes. After all, steroids had gained acceptance in the game. Even though a technical rule was in place stating that PEDs should not be used, the rule was not being enforced. Convention had arguably changed the rule;<sup>182</sup> the rule was simply not clear.

Similarly, doctoring the baseball and other traditional forms of cheating are still commonplace in the game today. Yes, formal rules forbid such behaviors, but the rules lack enforcement, so many players ignore the rules.<sup>183</sup> This convention would lead some to believe that the formal rules have, in a sense, been amended by convention.<sup>184</sup> Consequently, doctoring a ball or corking a bat is no longer cheating according to conventionalism's tenets.<sup>185</sup>

Positivism suffers from two other problems related to conventionalism: 1) if a rule is not in place, then a behavior cannot be illegal no matter the egregious nature of the behavior; and 2) if current rules are changed by those with the power to make rules, a currently illegal behavior will cease to be illegal.<sup>186</sup> Regarding the first problem, if new

179. See *supra* Part I.C.2.

180. See David Luban & Daniel Luban, *Cheating in Baseball*, in THE CAMBRIDGE COMPANION TO BASEBALL 192 (Leonard Cassuto ed., 2011) (stating that statistician Bill James estimated that between forty and eighty percent of players used steroids during the era); Hal Charnofsky, *Sport and Moral Relativity*, 41 PHIL. NOW (2003), available at [http://philosophynow.org/issues/41/Sport\\_and\\_Moral\\_Relativity](http://philosophynow.org/issues/41/Sport_and_Moral_Relativity) (stating that one player estimated steroid use at fifty percent, while another player estimated it at eighty-five percent).

181. See DWORKIN, *supra* note 118, at 114-50.

182. Cf. Luban & Luban, *supra* note 180, at 193 ("Taken to its logical conclusion, James's argument would lead us . . . to the idea that the roiders weren't cheating at all. (And of course, the argument wouldn't apply going forward, now that there are clearcut rules and scrutiny and enforcement procedures about PEDs.)").

183. See *supra* Part I.C.

184. See Feezell, *On the Wrongness of Cheating*, *supra* note 97, at 65 (stating that custom is "the great guide of life" and that "conventions or customs . . . allow for the possibility of such behavior" as doctoring a baseball. According to Feezell, such behavior does not constitute cheating due to convention.).

185. *Id.*

186. See Dworkin, *The Model of Rules*, *supra* note 169, at 17-18 ("The set of these valid legal rules is exhaustive of 'the law' . . . [t]o say that someone has a 'legal obligation' is to say that his case falls under a valid legal rule . . .").



technology allowed a player to morph into a superhuman through genetic modification tomorrow,<sup>187</sup> a positivist stance towards cheating would not condemn such a behavior. After all, no rule or even closely analogous rule would be in place to forbid this action. The player might swat 120 home runs in a single season, and, until the powers that be enacted a rule, such a behavior would not constitute cheating.<sup>188</sup> This presents a significant problem, as new technologies continually and inevitably develop. In fact, the modification of athletes through gene doping may soon be upon us,<sup>189</sup> and pure positivism will not deter an embrace of such modifications.

Regarding the second problem, the use of PEDs provides an example: if MLB instituted a new rule tomorrow declaring half of the substances on its banned substance list to no longer be banned, the use of them would no longer be cheating in the positivist sense. That means that what is considered cheating today would cease to be cheating tomorrow merely because of a rule change, and a player could subsequently use these substances to access the hitting prowess of Bonds and McGwire without positivistically cheating.<sup>190</sup> After all, if every athlete were allowed to use PEDs, then the gaining of an unfair advantage would disappear, as all would share the advantage.<sup>191</sup> Thus, the line on permissible versus impermissible substances could be drawn arbitrarily, inconsistently, and without principle. Further, it could change repeatedly. In the positivist sense, such an arbitrary, inconsistent, unprincipled, and ever-changing rule would retain its validity, and whether a behavior constituted cheating would depend on the state of the ever-changing rule.

These problems suffer from an underlying failure in positivism: the lack of normative guidance in rulemaking. All rulemaking must be guided by some norm,<sup>192</sup> yet positivism

187. See Maureen Salamon, *Could Gene Doping Be Part of Future Olympics?*, US NEWS, July 26, available at <http://health.usnews.com/health-news/news/articles/2012/07/26/could-gene-doping-be-part-of-future-olympics>; *Genetically Modified Olympians?*, ECONOMIST, July 31, 2008; see also D.J. Wells, *Gene Doping: the hype and the reality*, 154 BR. J. PHARMACOLOGY 623 (2008) (stating that “the prospects for gene doping remain essentially theoretical at present” but “the field . . . should continue to be closely monitored”). But see Brandon Keim, *Athletes Beware, Scientists Hot on Gene Doping*, WIRED (Feb. 4, 2010 2:27 P.M.), <http://www.wired.com/wiredscience/2010/02/gene-doping-detection/> (illustrating that while detecting such a genetic modification may be difficult, scientists are developing modes of detection).

188. Dworkin, *The Model of Rules*, *supra* note 169, at 17-18 (showing that positivism states that when the law runs out, it should be decided by someone exercising discretion; but when the official exercises this discretion, it is not an enforcement of a legal obligation.).

189. See *supra* note 187.

190. Cf. Ryan, *supra* note 100, at 82 (2008) (stating that the “against the rules” argument only shows “that using PEDs is wrong given the current rules” and “does not show that using PEDs *should* be against the rules because using PEDs is fundamentally wrong.”).

191. Some commentators have stated that this presents no problem, and they have indicated a preference for the total allowance of PED use in sports. See, e.g., Bennett Foddy, in *Do Athletes Gain an Unfair Advantage by Using Performance Enhancing Drugs?*, PROCON.ORG, <http://sportsanddrugs.procon.org/view.answers.php?questionID=001236> (last visited Oct. 24, 2012) (“By allowing everyone to take performance enhancing drugs, we level the playing field. We remove the effects of genetic inequality. Far from being unfair, allowing performance enhancement promotes equality.”). Similarly, others have argued that the abolition of doctoring a baseball should be formally repealed. Many in baseball advocated for this in the 1960s without success. See Herman Weiskopf, *The Infamous Spitter*, SPORTS ILLUSTRATED, July 31, 1967, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1080112/6/index.htm> (quoting American League President Joe Cronin as saying “rather than have pitchers live under a cloud of talk that they are cheating, I would like to bring the pitch back,” and stating that baseball’s rules committee discussed the possibility of changing the rule).

192. See STEFANO BERTEA, *THE NORMATIVE CLAIM OF LAW 1* (2009) (“Normativity is widely regarded as an element lying at the very core of the law and so one that is to be accounted for by any legal theory seeking to be comprehensive.”); see also Kenneth K. Ching, *Methodological Versus Naturalistic Legal Objectivity*, 57 ST. LOUIS

does not provide guidance as to what this norm should be. For the strict positivist, it matters not what the norm is; instead it matters only that that rule is in place.<sup>193</sup> After all, positivism strips morality from rulemaking, as the *is* differs from the *ought*.<sup>194</sup>

These problems demonstrate that legal positivism alone provides an unsatisfying answer to our questions regarding the validity of rules against cheating in baseball. Stripped clean of morality, this approach to cheating offers a lens that is neither prescriptive nor descriptive. Moreover, it fails to advance the current approach to cheating in the game. One must look beyond positivism for a more normative approach to cheating.

## B. FINDING THE PURPOSE OF BASEBALL THROUGH THE LENS OF NATURALISM

The positivist view of cheating—the gaining of an unfair advantage by breaking the rules—is unsatisfying. However, if one analyzes cheating in baseball through the lens of modern natural law theory, a much more satisfying solution appears.

Professor Fuller's views will be applied to our quest first. Immediately, one notices that baseball's current approach to cheating fails to meet at least two of his eight principles.<sup>195</sup> First, MLB's current approach clearly violates the eighth principle: "a failure of congruence between the rules as announced and their actual administration."<sup>196</sup> After all, MLB's official rules have long outlawed traditional cheating behaviors, yet MLB has completely failed to administer these rules, as baseball has done almost nothing to enforce them.<sup>197</sup> Similarly, it took more than a decade for MLB to enforce the rule against PED use.<sup>198</sup> This incongruence between pronouncement and administration confuses participants and detracts from the validity of not only this rule but all similar rules. Second, the current approach also fails Fuller's principle number five: "the enactment of contradictory rules."<sup>199</sup> The nonexistent enforcement of rules against traditional cheating undermines the current rigid enforcement of rules against new age cheating. How can one type of cheating be permitted while another type of cheating is strictly enforced? The approach is contradictory, confusing, and, again, it detracts from the validity of all the rules.

Professor Fuller's approach not only reveals problems with MLB's confusing approach to cheating; it also brings one closer to a solution. His theory—that lawmaking is a collective exercise that conforms to a communal purpose<sup>200</sup>—has much to offer and deserves examination. The community must first be defined. Here, the players, coaches, and those front office personnel with powers to affect players and coaches will be included in the central community of baseball.<sup>201</sup> The fans will play a role, but a lesser role, since they remain on the periphery of the game.

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U. L.J. 59 (stating that norms are essential to rule making, even when based on science).

193. See *supra* Part II.A.

194. See *supra* Part II.A.

195. See FULLER, THE MORALITY OF LAW, *supra* note 161, at 39.

196. *Id.*

197. See *supra* Part I.C.1.

198. See *supra* Part I.C.2.

199. FULLER, THE MORALITY OF LAW, *supra* note 161, at 39.

200. See Fuller, *A Rejoinder to Professor Nagel*, *supra* note 162, at 84.

201. The fans are not active participants in the sport but are spectators. It might also be argued that coaches, owners, and general managers should therefore be excluded, but they too retain an insider status within the sport. Even if they do not participate on the field in the sense of pitching, hitting, and catching, they interact with players on a constant basis and help shape the rules and norms of the game.

For those making the rules within this community, there exists an external morality supporting the very nature of rulemaking and an internal morality extending to the rules themselves.<sup>202</sup> The shared experiences and shared purpose of the community reveal this morality. Thus, what is the shared purpose of baseball?

In answering a related question, Justice Antonin Scalia took a narrow approach in *PGA Tour v. Martin*, a Supreme Court case about a disabled golfer seeking to use a golf cart in professional golf tournaments.<sup>203</sup> Justice Scalia indicated that sports at the highest level have the mere purpose of entertaining fans.<sup>204</sup> Tangentially discussing baseball, he stated that baseball players “are themselves the entertainment that customers pay to watch.”<sup>205</sup> Moreover, professional athletes do not play sports to recreate or exercise; they play sports to make money.<sup>206</sup> After all, “it is the very nature of a game to have no object except amusement (that is what distinguishes games from productive activity),” making all of a game’s rules arbitrary and nonessential.<sup>207</sup>

Justice Scalia correctly states that baseball has the purpose of entertaining fans, and he also correctly states that players play sports to make money. But surely this cannot be the sum of the purpose of professional sports, including the sport of baseball. If Justice Scalia were correct in his assessment, then almost any rule change leading to increased entertainment would be justified. Similarly, any change that led to players making more money would be justified. For instance, according to many, baseball provides more entertainment to more people when players hit more home runs and score more runs. Thus, this approach would warrant the creation of Paul Bunyan-esque players through the endless stacking of PEDs or through genetic modification. Similarly, Scalia’s approach might warrant a rule allowing a pitcher to, once an inning, shoot a baseball out of a bazooka at 120 mph, or to even place a pit of live Bengal tigers at a random, hidden spot in the outfield.<sup>208</sup> After all, this might increase the entertainment value of the game.

But Justice Scalia’s narrow approach focuses too much on the fans, who are the peripheral component of the community of baseball. While entertaining fans and earning a nice living no doubt constitute some elements in the shared purpose of baseball, other elements also exist. Even at the highest level, baseball is not just about entertaining people, and it is not just about making money.<sup>209</sup> It is about competing against others of similar talents. It is about rewarding and recognizing athletic excellence. And not just any athletic excellence will satisfy this purpose. Instead, it must be a certain type of excellence recognized within the longstanding norms of the game.

This important distinction separates baseball from spectacles—spectacles such as professional wrestling. For professional wrestling, the main motivating purpose is

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202. Lon L. Fuller, *Positivism and Fidelity to Law*, *supra* note 151, at 645.

203. 532 U.S. 661 (2001) (Scalia, J., dissenting). Golfers are not permitted to use carts in professional tournaments, and the PGA refused to make an exception for the disabled Casey Martin. He then brought suit under the Americans with Disabilities Act.

204. *Id.* at 695.

205. *Id.*

206. *Id.* at 696.

207. *Id.* at 700-01.

208. It is also worth noting that positivism would allow such a rule change as well, if the people with the power to make such a rule did in fact make it.

209. See *Justice: What's the Right Thing to Do? Episode 10, Part One: The Good Citizen*, JUSTICEHARVARD.ORG, <http://www.justiceharvard.org/2011/02/episode-10/> (last visited Oct. 22, 2012) (discussing the Martin case, arguing that golf is about more than mere entertainment: it is also about honor).

entertainment. The entire spectacle becomes a charade of chairs hitting heads and of artificially strong men in tights jumping on one another. The surreal replaces the real, and people are entertained. But baseball has a purpose beyond that of a spectacle. It is *not* just a farcical frolic through grass and dirt. Far from surreal, it *is* real for every participant in the community.

After missing the previous year due to an elbow surgery, Jaime Moyer returned to pitch in the major leagues in 2012 at the age of forty-nine. Although he became the oldest pitcher to ever win a game in the major leagues in April of 2012,<sup>210</sup> he struggled during the second month of the season and was released by the Colorado Rockies.<sup>211</sup> Despite being released, he refused to retire. He instead signed a minor league deal with the Baltimore Orioles. He found himself traveling on minor league buses, sitting in minor league clubhouses, and pitching in front of small minor league crowds, even though he had 269 career MLB victories.<sup>212</sup>

Why did Moyer do this? Did he need the money? Surely not. After over two decades in baseball, he had plenty of money. Was he simply seeking to entertain the fans? No. Instead, something else compelled Jaime Moyer to return to the game.

“You can’t buy this,” Moyer said after making his second minor league start in the 2012 season. “You can’t go to the golf course. You can’t go to the basketball court. You can’t re-create the thoughts, the feelings, the emotions that you have as a player.”<sup>213</sup> Even though he has eight children at home, he “still feel[s] like [he] can contribute,” so he keeps on playing.<sup>214</sup>

Thus, the purpose baseball shares with its community demands much more than mere entertainment for the spectator—it demands an honorable atmosphere of competition for its participants. Baseball’s many rules do not gain validity merely by being uttered by the Commissioner; instead, baseball’s rules gain validity because they *support the very nature of creating an honorable atmosphere* for competition. Thus, morality and integrity *must* be thrust into the mix, and the entire community of baseball will benefit in an egalitarian way, including the fans.<sup>215</sup>

210. Erik Malinowski, *Jaime Moyer Becomes Oldest Player in Baseball History to Win a Game*, DEADSPIN (Apr. 17, 2012), <http://deadspin.com/5902915/jamie-moyer-becomes-oldest-pitcher-in-baseball-history-to-win-a-game>.

211. Norm Wood, *Thrill of Baseball Keeps Jaime Moyer Going for Norfolk Tides*, DAILY PRESS (June 16, 2012), [http://articles.dailypress.com/2012-06-16/sports/dp-spt-feature-jamie-moyer-norfolk-tides-0617-20120616\\_1\\_norfolk-tides-tides-debut-tides-cap](http://articles.dailypress.com/2012-06-16/sports/dp-spt-feature-jamie-moyer-norfolk-tides-0617-20120616_1_norfolk-tides-tides-debut-tides-cap).

212. *Id.*

213. *Id.*

214. *Id.*

215. Indeed, it could be argued that many of baseball’s fans, as traditionalists (or purists), expect such an honorable atmosphere as well, which will lead to an actual increase in entertainment value. These fans expect more than any type of entertainment; they expect a certain *kind* of entertainment. Cf. Robert Pacheco, *To the Baseball Purist, the Game Has Passed Us By*, BLEACHER REPORT (June 3, 2010), <http://bleacherreport.com/articles/401058-to-the-baseball-purist-the-game-has-passed-us-by> (lamenting the deterioration of the pure game, saying, “We have burnt the game to the ground and built something new.”). This may explain the outcry over the steroid era, as it defied the expectation of the type of entertainment. Fans themselves felt cheated by the cheating. Cf. *Steroid Scandal: Fans, Public React*, MARIST POLL (Apr. 6, 2009), <http://maristpoll.marist.edu/steroid-scandal-fans-public-react/> (showing that seventy percent of baseball fans believe that users of PEDs should not be permitted in baseball’s Hall of Fame); *Does cheating in Major League Baseball matter to fans?*, HELIUM, [http://www.helium.com/debates/88583-does-cheating-in-major-league-baseball-matter-to-fans/side\\_by\\_side](http://www.helium.com/debates/88583-does-cheating-in-major-league-baseball-matter-to-fans/side_by_side) (last visited Nov. 26, 2012) (showing in an unscientific poll that cheating mattered to approximately eighty percent of fans).

It should be noted that even though this approach demands purposive rules and uniform enforcement of these rules, it does not demand egalitarian extremism. The athletic community clearly understands that not all human beings innately begin with the same talents. Indeed, both participants and observers not only recognize inherent genetic differences but derive enjoyment from them. Insiders and observers alike can appreciate the cultivation and the utilization of talent. Through hard work, some deficit in talent can be overcome, especially if a slightly more talented individual exhibits laziness. Similarly, a less talented player with wits can optimally utilize talent during the course of a competition to overcome some deficit. This is the beauty of sports, and the beauty of the intricate matchup between hitter and pitcher. Like Hemingway enjoying a good bullfight, there exists perhaps no better exhibition than watching a pitcher such as Moyer, at the age of forty-nine, craftily besting a supremely talented hitter through wit alone.

While the integrity-centered community of baseball accepts these differences in natural talent, both PED use and traditional cheating constitute artificial changes that lie outside this appreciation for the cultivation of raw talent. Former manager Tony LaRussa once stated that Jose Canseco “would laugh about the time that other guys were spending [in the gym] and how he didn’t have to” because he was using steroids.<sup>216</sup> This undermines the expectations the baseball community possesses for the game, as the game becomes less about hard work and the cultivation of talent into artful skill and more about who has the best chemist. When modification of talent stems from the use of a needle, it results not in cultivation but in mutation.

For this reason, cheating cannot be solely the positivistic breaking of a rule to gain an unfair advantage. Instead, it should be any conscious behavior that 1) undermines the community-centered purpose of the game, and 2) leads to an unfair advantage. Usually a rule will be broken when cheating occurs under this definition, but not necessarily. After all, rules will at times fail to explicitly contemplate all behaviors that should be deemed cheating. What matters more than the rule is the purpose of the game and the purpose of the behavior. Yet, as Fuller points out, societies require rules to prevent deciding issues on an ad hoc basis.<sup>217</sup> Thus, baseball’s rules should be formulated with this definition in mind, and a more normative approach towards cheating will result.

### C. NATURAL LAW THEORY LEADS TO A MORE NORMATIVE APPROACH TOWARDS CHEATING IN BASEBALL

While Fuller’s theory assists in determining the purpose of baseball, Dworkin’s thesis offers much in developing a more normative approach towards cheating in baseball. Naturally, if a community commits to Dworkin’s integrity, they will “express a concern by each for all that is sufficiently special, personal, pervasive, and egalitarian.”<sup>218</sup> By fusing the conventions of baseball and the purpose of the game with a dose of Dworkin’s integrity, a single answer emerges: both traditional cheating and new age cheating indeed constitute cheating, and both should be actively banned.

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216. MITCHELL, *supra* note 46, at 64.

217. See FULLER, *THE MORALITY OF LAW*, *supra* note 161, at 39.

218. DWORKIN, *supra* note 118, at 216.

One might argue that traditional cheating in the form of doctoring a baseball or a bat should not constitute cheating since it has been an accepted part of the game for so long.<sup>219</sup> While it is true that many players have ignored the rule against using Vaseline on a ball or spitting on a ball throughout the history of the game, not all players have exhibited this behavior. In fact, a majority of players do not engage in these behaviors, which seems a bit irrational. With little fear of detection or punishment, and with so many peers exhibiting the behavior, why would anyone not engage in such practices?

The answer relates to integrity. The behaviors simply conflict with providing an honorable environment for competition, which matters to the majority of players. The participants in the game expect certain elements to be uniform, such as the base paths being ninety feet. If a team with speedy baserunners decided to alter the base paths, surely this would be unacceptable. Similarly, participants in the game expect the baseball to be a uniform “sphere formed by yarn” weighing “not less than five nor more than” 5.25 ounces.<sup>220</sup> Altering the ball is an abuse related to the very object at the center of the game. Therefore, it constitutes a behavior that undermines the purpose of the game, and players gain an unexpected, unacceptable, and unfair advantage through this behavior. Players recognize such behavior is cheating, and most voluntarily abstain from these behaviors even though some of their peers in the same clubhouse exhibit the behavior.

Throughout this article, traditional cheating and new age cheating have been discussed separately but sometimes treated in tandem. This has been intentional, as both are related. Yes, one represents an external modification while the other represents an internal modification, but both go to the expectations of the community to provide an honorable means of achievement, a means in balance with the expectation of a uniform ball meeting a semi-uniform bat used by a non-uniform but non-artificially-enhanced man. And the allowance of one undermines the forbiddance of the other.<sup>221</sup> The lack of enforcement against traditional cheating led to a win-at-all-costs sector within baseball that welcomed new age cheating. This led to MLB’s complicity in the rise of PED use in the 1990s. The culture of deceit and acceptance had gone on for too long, and many welcomed a new form of cheating as an acceptable extension of traditional cheating.

Baseball now vigorously enforces a policy suppressing the use of PEDs, but if baseball is seeking to protect the integrity of the game by preventing PED use, then how can they simultaneously continue to look the other way when it comes to doctoring a baseball? This two-faced approach towards cheating cannot continue, and one should apply an integrity-based theory towards cheating to correct this approach.

A more normative approach must be taken. Baseball must strictly enforce not only its rules against PED use but also its rules against traditional cheating. The practical application of this enforcement will face some difficulties, but MLB can surmount these hurdles. For instance, an umpire could routinely inspect a ball for signs of alteration. A rule could be instituted stating that an umpire must check the ball for such alterations at least every eight pitches at random intervals. If an umpire sees signs of alterations, the umpire must inspect the pitcher’s uniform, hat, and glove for foreign substances. Similarly, a rule could be instituted that requires umpires to, at the end of a game (or perhaps prior to a game), temporarily confiscate all bats used during the game. Within an hour, every single one of these bats could be X-rayed to detect alterations, and the bats could then be harmlessly returned.

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219. See Feezell, *supra* note 97, at 65.

220. Official Baseball Rule 1.09.

221. See *supra* Part III.B.

The penalties that players face for this type of cheating should also be increased to correspond more closely with the penalties players face for new age cheating. Faced with a greater likelihood of detection and greater penalties, the rate of abuses would decrease, just as the rate of abuse has decreased for PEDs.

To summarize, the following Table provides an example of such congruence:

Table: A More Congruent Cheating Policy

	<b>Current Penalties</b>	<b>Current Means of Detection</b>	<b>Recommended Penalties</b>	<b>Recommended Means of Detection</b>
<b>New age Cheating</b>	1st offense: 50 games 2nd offense: 100 games 3rd offense: lifetime ban	Urine testing for most substances; blood testing for Human Growth Hormone.	Same as current. Re-evaluate as needed to ensure proper deterrence.	Same as current with modes of detection continually updated as needed.
<b>Traditional Cheating</b>	Altering a baseball: 10 games Altering a bat: discretionary	Virtually none; only obvious and stupid behaviors are detected somewhat serendipitously.	Same as the scale for new age cheating: 50, 100, and 150 games.	Routine inspections of balls during games; inspection of uniforms upon suspicion. Routine inspection of bats with X-ray devices used.

These changes will result in a more harmonious policy towards cheating—a policy that harmonizes the traditional with the new, and a policy in harmony with the very purpose of the game. As Dworkin would state, this will reflect a concern by each for all as the entire community commits to integrity.<sup>222</sup> The entire game will benefit through this commitment to integrity and expulsion of cheaters, from minor leaguers striving to reach the big leagues for the first time, to big leaguers hanging on at the age of forty-nine.

This commitment to integrity will not only better the game in the present, but it will protect the game for the future. The next wave of new age cheating—most likely in the form of gene modification—will soon be upon us.<sup>223</sup> In order to prevent a repeat of the steroid era, and all of its mistakes and dishonors, a more congruent approach with more normative guidance must be adopted, and the subculture of deceit must be extinguished. Otherwise the national pastime may very well soon come to resemble the farcical spectacle of professional wrestling, and the beautiful game of Ruth and Gehrig, of Mantle and Dimaggio, will be nothing but a memory.

222. See DWORKIN, *supra* note 118, at 216.

223. See *supra* note 186.

## CONCLUSION

Cheating in sports can be traced back to the very first Olympic games of 776 B.C., when athletes used cola plants and sheep testicles in an attempt to gain an advantage.<sup>224</sup> For some, this might suggest that the fight against cheating is a fight not worth fighting, as it is a fight that cannot be won. But such nihilism cannot be accepted. Some athletes will no doubt attempt to cheat no matter the circumstances; such is human nature. But success in fighting this war is not measured only in completely eliminating cheating. Instead, success is measured in preserving a purpose, and in preserving the expected environment for performance that permits this honorable purpose.

Baseball is a hopeful game; a game in which the winningest of teams succeed only sixty percent of the time.<sup>225</sup> It is a game in which Hall of Fame hitters reach base at less than a forty percent rate,<sup>226</sup> a game in which scrappy and undersized second basemen can become MVPs,<sup>227</sup> a game in which underdogs win the World Series.<sup>228</sup> It is this hope that compels fans to stay for the ninth inning in a 6-1 ballgame; it is this hope that compels a journeyman minor leaguer to continue playing the game with little chance of a promotion; and it is this hope that compels a formerly prolific left-handed pitcher to keep performing at the age of forty-nine.

This hope stems not from inherently equal players, but it does stem from an even and honorable playing field. Both traditional cheating and new age cheating undermine this honorable playing field, and thus undermine the hope, integrity, and desires at the center of the game. More must be done to not only rid these behaviors from the game, but to change the subculture of deceit within the game. Only then will the purpose of baseball be protected not only from the present, but also from the future. Maybe then Diogenes will finally end his quest, and watch a ballgame in peace.

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224. Jessie Burdick, *Sports and Drugs (and rock and roll?)*, 41 *PHILOSOPHY NOW* (2003), available at [http://philosophynow.org/issues/41/Sports\\_and\\_Drugs\\_and\\_rock\\_and\\_roll](http://philosophynow.org/issues/41/Sports_and_Drugs_and_rock_and_roll); see also Christopher Klein, *5 Myths About the Ancient Olympics*, *HISTORY* (Aug. 10, 2012), <http://www.history.com/news/5-myths-about-the-ancient-olympics> (“Although ancient Olympians stood before a menacing statue of Zeus and swore to play fair, some athletes were willing to evoke divine wrath for the thrill of victory.”).

225. *MLB Standings-2012*, ESPN, <http://espn.go.com/mlb/standings> (last visited Nov. 26, 2012) (reporting that in 2012, the Washington Nationals had the best winning percentage in baseball at .605).

226. Cf. *Career Leaders for On Base Percentage*, *BASEBALL ALMANAC*, <http://www.baseball-almanac.com/hitting/hiobp1.shtml> (last visited Nov. 26, 2012) (showing around fifty batters in the history of baseball with a career on base percentage above forty percent).

227. See Tyler Kepner, *Pedroia is American League M.V.P.*, *NY TIMES*, Nov. 18, 2008, at B11 (discussing the winning of the MVP award by the supposedly 5’9” Dustin Pedroia).

228. See *Giants beat Tigers, win World Series*, *FOX SPORTS* (Oct. 29, 2012 11:58 A.M.), <http://msn.foxsports.com/mlb/story/san-francisco-giants-beat-detroit-tigers-four-games-win-world-series-02812>; see also *Cardinals Beat Rangers to Win World Series* (Oct. 29, 2011), *FOX SPORTS* <http://www.foxnews.com/sports/2011/10/29/cardinals-beat-rangers-to-win-world-series/>.



# Beyond Brady and Anthony: The Contemporary Role of Antitrust Law in the Collective Bargaining Process

Kemper C. Powell

## INTRODUCTION

In 2011, after nearly two decades of labor peace in the National Football League (“NFL”), turmoil between players and management arose during negotiations of the 2011 NFL Collective Bargaining Agreement (“CBA”), leading to the widely-publicized NFL lockout of 2011.<sup>1</sup> Though many of football fans around the globe were immediately perturbed by the ensuing work stoppage and the potential for a missed season of America’s most popular sport,<sup>2</sup> the lockout brought great potential to resolve legal issues that prior jurisprudence had consistently left unsettled. Following the players’ decertification of the National Football League Players Association (“NFLPA”), the players turned to the courts for relief, alleging that the NFL’s conduct violated antitrust law. The resulting class-action lawsuit brought by lead plaintiff Tom Brady, quarterback for the New England Patriots, presented the courts with the opportunity to finally determine the issues surrounding the so-called “nonstatutory labor exemption,” which serves to address the inconsistencies between antitrust and labor law. In short, the nonstatutory labor exemption protects certain conduct in the collective bargaining process from being scrutinized under the watchful eye of antitrust law. The exemption will be discussed in detail below.

Shortly following the labor disruption in the NFL, similar tension arose during negotiations for the impending National Basketball Association (“NBA”) collective bargaining agreement. Following the expiration of the League’s then-existing collective bargaining agreement, the NBA locked out its players, “becoming the second pro sports league shut down by labor strife.”<sup>3</sup> Shortly thereafter, following a series of failed attempts to reconcile, the NBA players proceeded to follow in the footsteps of their NFL counterparts. The players, led by New York Knicks forward, Carmelo Anthony, disclaimed interest in their union, the National Basketball Players Association (“NBPA”), and proceeded to file suit, declaring the NBA shutdown to be illegal under the principles of antitrust law.<sup>4</sup> Having had the opportunity to observe the NFL lockout proceedings from

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1. Alex Marvez, *NFL Owners Lock Out Players*, FOX SPORTS (Mar. 12, 2011, 12:57), <http://msn.foxsports.com/nfl/story/NFL-Players-Association-union-decertifies-labor-talks-owners-031111>.

2. See Regina A. Corso, *While Gap Narrows, Professional Football Retains Lead over Baseball as Favorite Sport*, HARRIS INTERACTIVE (Jan. 20, 2011), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/675/ctl/ReadCustom%20Default/Default.aspx> (indicating that professional football was the favorite sport of 31% of adults polled in 2010).

3. Chris Sheridan, *CBA Expires, NBA Locks Out Its Players*, ESPN (Jun. 1, 2011), <http://sports.espn.go.com/nba/news/story?id=6723645> (last updated July 1, 2011, 1:56 PM).

4. See *infra* note 98.

afar, the NBA players were able to adapt their litigation strategy accordingly to avoid specific problems that presented themselves in the NFL players' suit.

Not to be left out of the recent lockout trend in professional sports, the National Hockey League ("NHL") found itself entangled in its own labor disturbances in 2012. As the parties consistently failed to reach a middle ground in negotiations, NHL commissioner Gary Bettman warned the players that the League intended to lock them out if a new deal was not reached before the pending expiration of the 2005 collective bargaining agreement. Then, on September 16, 2012, the League followed through with its threats and locked out the players after the agreement expired at midnight the night before, imposing "the sport's second work stoppage in eight years."<sup>5</sup> Initially, experts were doubtful that the NHL lockout would lead the players to pursue the decertification tactic used by their peers in the NBA and NFL. Though ultimately the players never officially dissolved their union, the National Hockey League Players Association ("NHLPA"), they did take steps which indicated that doing so was a realistic possibility. The players voted to authorize the executive board of the NHLPA to file a disclaimer and disband the union if necessary.<sup>6</sup> Anticipating that the players may file such a disclaimer, the League struck first, filing suit in the United States District Court for the District of New York seeking declaratory relief to establish that the lockout was legal.<sup>7</sup> Thus, the NHL lockout threatened to bring the nonstatutory exemption into the picture once again.<sup>8</sup>

This recent series of labor stoppages and subsequent union dissolutions—or potential dissolutions—may indicate an increase in the role of antitrust law in the collective bargaining process in professional sports. A powerful bargaining tool, the threat and possible outcome of litigation plays an important role in these negotiations. Therefore, analyzing the authorities that oversee dispute resolution of failed negotiations is necessary to assess the relative bargaining power of the parties involved and to effectively predict how negotiations will evolve in years to come. Accordingly, the contemporary status of the nonstatutory labor exemption will likely play an important role in the structure of future collective bargaining agreements in professional athletics.

This article will discuss the history and development of the nonstatutory labor exemption from its initial formation to its application under modern jurisprudence. Specifically, this article will provide a detailed examination of the principles underlying the litigation that resulted from the labor stoppages in professional football and basketball during 2011. This article will then propose that the district court in *Brady v. National Football League* reached the proper conclusion in determining that the application of the nonstatutory labor exemption terminates upon dissolution of a collective bargaining union. This article will next address the policy implications, both positive and negative, of this position and explain why the benefits of terminating the exemption outweigh any potential negative consequences. Finally, this article will evaluate how the implications of the results of *Brady v. National Football League* and *Anthony v. National Basketball Association* will affect collective bargaining negotiations in the professional sports industry going forward.

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5. Katie Strang, *NHL Imposes League-Wide Lockout*, ESPN, [http://espn.go.com/nhl/story/\\_/id/8382911/nhl-officially-locks-players-cba-expires](http://espn.go.com/nhl/story/_/id/8382911/nhl-officially-locks-players-cba-expires) (last updated Sept. 16, 2012, 11:18 AM).

6. Katie Strang, *NHLPA Gives Board OK On Dissolution*, ESPN, [http://espn.go.com/nhl/story/\\_/id/8770368/nhlpa-votes-authorize-move-disband-sources-say](http://espn.go.com/nhl/story/_/id/8770368/nhlpa-votes-authorize-move-disband-sources-say) (Dec. 22, 2012).

7. Associated Press, *NHL Lockout: NHL Files Complaint Against NHLPA in Court, Seeks to Have Lockout Declared Illegal*, SPORTINGNEWS NHL (Dec. 14, 2012), <http://www.sportingnews.com/nhl/story/2012-12-14/nhl-lockout-nhl-files-complaint-labor-talks-gary-bettman-donald-fehr>.

8. Joe Haggerty, *Players Considering NHLPA Decertification as An Option*, COMCAST SPORTSNET, <http://www.comcastsportsnet.com/landing?blockID=806789&t> (last visited Mar. 29, 2013).

## I. THE INHERENT TENSION BETWEEN ANTITRUST LAW AND THE COLLECTIVE BARGAINING PROCESS

Any time the collective bargaining process comes up in the context of professional sports, the tension between the goals of antitrust law and labor law will arise. Section 1 of the Sherman Act provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal.”<sup>9</sup> Hence, the antitrust laws are intended to promote competition and eliminate anticompetitive agreements from the marketplace.<sup>10</sup> Pursuant to this competitive purpose, antitrust case law has specifically categorized as anticompetitive certain agreements referred to as “concerted refusals to deal” or “group boycotts.”<sup>11</sup> Such agreements typically involve industry competitors coming together to collectively refuse to do business with some third party involved in the market.<sup>12</sup> As will be discussed below, certain conduct in the context of collective bargaining may, in effect, be deemed an anticompetitive “group boycott” and therefore antitrust law comes into the picture. In short, antitrust law—in the sports industry and elsewhere—disfavors the concentration of economic power in the hands of any individual market participant or group of market participants.<sup>13</sup>

At the same time, however, a primary goal of labor law is to facilitate cooperation between market participants by “encouraging the practice and procedure of collective bargaining . . . .”<sup>14</sup> The National Labor Relations Act (“NLRA”), passed in 1935, was the initial authority governing the collective bargaining process between employers and employees.<sup>15</sup> The NLRA was subsequently amended after the enactment of the Taft-Hartley Act in 1947, also known as the Labor-Management Relations Act (“LMRA”).<sup>16</sup> The stated purposes of the NLRA, as amended, are to support unions and employees in gaining leverage at the bargaining table, to create a process for resolving labor disputes, and to maximize the likelihood of ongoing labor peace.<sup>17</sup>

The provisions of the NLRA aim to accomplish these goals in a number of ways. First, the NLRA requires good faith bargaining between employers and employees with regard to mandatory subjects.<sup>18</sup> Additionally, the NLRA explicitly provides employees with the right to organize as a union and bargain collectively.<sup>19</sup> Clearly, therefore, federal labor law

9. 15 U.S.C. §1 (2006).

10. *See id.*

11. *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 290 (1985) (recognizing that “[t]his Court has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act”).

12. *Id.* at 294.

13. *See id.*

14. 29 U.S.C. § 151 (2006).

15. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006).

16. Labor Management Relations Act, *Id.* §§ 141–197 (2006).

17. *See id.* § 151 (“It is hereby declared to be the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining and . . . protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection”).

18. *Id.* § 158(d).

19. *Id.* § 157 (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or

encourages the concentration of economic power amongst individual groups.<sup>20</sup> Indeed, a union is, by definition, a group of individual competitors coming together to suppress competition for the purpose of increasing their bargaining position.<sup>21</sup>

Along these same lines, employers dealing with unions often belong to similar associations that bargain as a whole for the union members' terms of employment, known as multiemployer bargaining units.<sup>22</sup> Multiemployer agreements generally arrange for "uniform wages and benefits across an industry and locality for all association employers."<sup>23</sup> Problematically, therefore, the notion that employees and employers are expressly permitted to engage in concerted activity conflicts with federal antitrust law, which disallows agreements among competitors which harm competition.<sup>24</sup>

Consequently, courts have been forced to counterbalance these two sources of law in order to reconcile their inherent conflicts and provide for their coexistence.<sup>25</sup> As such, courts have recognized that certain concerted activity in the context of labor negotiations must be outside the reach of the antitrust laws.<sup>26</sup> Thus, courts "have carved out two categories of labor exemptions to the antitrust laws: the so-called statutory and non-statutory exemptions."<sup>27</sup>

The statutory exemption, contained in Sections 6 and 20 of the Clayton Antitrust Act, expressly shields certain union activity from antitrust scrutiny.<sup>28</sup> Section 6 of the Clayton Act provides the following:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.<sup>29</sup>

The statutory labor exemption thereby permits employees to come together to form unions and to engage in concerted conduct—such as striking or picketing—once a union has been formed, without having to fear subjection to an antitrust suit.<sup>30</sup> However, the statutory exemption only applies under very limited circumstances.<sup>31</sup> To be immune from

other mutual aid or protection"). Importantly, the NLRA also provides employees with the negative right to refrain from these activities. *Id.* ("[Employees] shall also have the right to refrain from any or all of such activities . . .").

20. *See id.*

21. *See id.* §152 (5) (defining "labor organization" as "any organization . . . in which employees participate and which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work").

22. Anthony B. Sanders, *Multiemployer Bargaining and Monopoly: Labor-Management Collusion and a Partial Solution*, 113 W. VA. L. REV. 338, 339 (2011).

23. *Id.* at 344.

24. *See* 15 U.S.C. §1. By agreeing to engage in collective bargaining, employees are acting as competitors for the purposes of affecting price, thereby harming competition. *See id.*

25. *See, e.g.*, *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

26. *Id.*

27. *Clarett v. Nat'l Football League*, 369 F.3d 124, 130 (2d Cir. 2004).

28. 15 U.S.C. §17; 29 U.S.C.A. § 52.

29. 15 U.S.C. § 17.

30. *See id.*

31. *See U.S. v. Hutcheson*, 312 U.S. 219, 232 (1941).

antitrust scrutiny, a union must “act in its own self-interest and . . . not combine with other non-labor groups.”<sup>32</sup> By its very nature, therefore, the statutory exemption fails to fully insulate the collective bargaining process from the reach of antitrust law.<sup>33</sup>

As a result, the courts inferred the existence of a nonstatutory labor exemption “from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining.”<sup>34</sup> The nonstatutory exemption represents the courts’ recognition that, to give full effect to federal labor laws and policies and to “allow meaningful collective bargaining to take place,” some restraints on competition imposed through the bargaining process, which don’t fall under the express terms of the statutory exemption, must be shielded from antitrust sanctions.<sup>35</sup> Accordingly, courts have consistently held the doctrine to preclude employees from pursuing remedies under antitrust law when the dispute involves issues that were addressed during collective bargaining.<sup>36</sup> In this way, professional athletes are often left without remedy when antitrust claims are brought regarding league rules that restrain player activity.<sup>37</sup> However, as the Supreme Court has never precisely defined the boundaries of the exemption, its scope—including the point at which it terminates—has been a significant source of disagreement and a battleground for parties seeking to bring antitrust claims.

Initially, the prevailing test used to evaluate the competing roles of antitrust and labor law in applying the nonstatutory exemption was to balance the impact of the challenged restraint on the “interests of union members” against “its relative impact on the product market.”<sup>38</sup> If the impact on the union members outweighed the impact on the product market, the restraint would “fall[] within the protection of the national labor policy,” and therefore the restraint would be exempt from antitrust scrutiny.<sup>39</sup> Over time, the nonstatutory labor exemption has become significantly more complex, and, in recent history, the exemption has developed substantially through cases emerging out of the sports industry.<sup>40</sup> An analysis and explanation of the contemporary developments of this unique judicial doctrine will be discussed in the following section.

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32. *Id.*; See also *H.A. Artists & Associates, Inc. v. Actors’ Equity Ass’n*, 451 U.S. 704, 717 (1981) (holding that the exemption only applies to “bona fide labor organizations”).

33. *Brown v. Pro-Football, Inc.*, 518 U.S. 231, 237 (1996) (“[I]t would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make . . . any of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable”).

34. *Id.* at 236.

35. *Id.* at 237.

36. See, e.g., *Clarett v. Nat’l Football League*, 369 F.3d 124 (2d Cir. 2004) (After being excluded from entering the NFL draft based on the league’s age restrictions, former Ohio State running back Maurice Clarett brought suit, arguing that the rule was a concerted refusal to deal, or group boycott, in violation of antitrust law. The Court determined that injecting antitrust law would “unduly undermine” federal labor policy, and therefore upheld the rule).

37. See *id.*

38. *Local No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 690 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657, 665 (1965).

39. *Id.* at 689-90.

40. See *Mackey v. Nat’l Football League*, 543 F.2d 606 (8th Cir. 1976); *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979); *Bridgeman v. Nat’l Basketball Ass’n*, 675 F. Supp. 960 (D.N.J. 1987); *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954 (2d Cir. 1987); *Powell v. Nat’l Football League*, 930 F.2d 1293 (8th Cir. 1989); *McNeil v. Nat’l Football League*, 790 F. Supp. 871 (D.Minn. 1992); *Brown v. Pro-Football, Inc.*, 518 U.S. 231 (1996).

## II. THE SPORTS INDUSTRY AND THE MODERN DEVELOPMENT OF THE NONSTATUTORY LABOR EXEMPTION

In 1976, the nonstatutory labor exemption arose in the context of professional sports in *Mackey v. National Football League*.<sup>41</sup> In *Mackey*, an NFL player brought suit against the League, arguing that the “Rozelle Rule,” a restriction on the interleague mobility of players, unreasonably restrained trade in violation of Section 1.<sup>42</sup> The rule stipulated that if a player were to sign with a new team, that team may be required to compensate the players’ former team.<sup>43</sup> As a result of the rule, player movement between teams was drastically reduced.<sup>44</sup> In defense of the rule, the NFL argued that it “was the subject of an agreement with the players union and that the proper accommodation of federal labor and antitrust policies require[d] that the agreement be deemed immune from antitrust liability.”<sup>45</sup> The players argued, however, that the rule should not be immune, as it was “the product of unilateral action by the clubs.”<sup>46</sup>

In evaluating the application of the nonstatutory labor exemption, the United States Court of Appeals for the Eighth Circuit developed a three-pronged test for balancing the two sources of law, based on a number of principles deduced from “decisions governing the proper accommodation of the competing labor and antitrust interests.”<sup>47</sup> Under this test, the federal “labor policy favoring collective bargaining” is implicated sufficiently to trump enforcement of the antitrust laws only where three requirements are fulfilled: (1) the challenged agreement “primarily affects only the parties to the collective bargaining relationship,” (2) the agreement “concerns a mandatory subject of collective bargaining,” and (3) the agreement “is the product of bona fide arm’s-length bargaining.”<sup>48</sup> Applied to the facts of the case, the *Mackey* court determined that the third prong had not been satisfied, finding that “there was no bona fide arm’s-length bargaining over the Rozelle Rule.”<sup>49</sup> As such, the court proceeded to scrutinize the rule under the antitrust laws, and ultimately determined that the rule unreasonably restrained trade, in violation of the Sherman Act.<sup>50</sup>

The NFL found itself in the trenches of the nonstatutory exemption battleground once again in *Powell v. National Football League*.<sup>51</sup> This dispute developed around a rule that had been included in the 1982 collective bargaining agreement but became a source of tension during the negotiations for the subsequent agreement.<sup>52</sup> Ultimately, the players and the League could not reach an agreement on the provision, and, when negotiations reached the point of impasse, the League unilaterally implemented the rule as authorized in conjunction with its rights set forth under federal labor law.<sup>53</sup> Specifically, federal labor law

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41. 543 F.2d 606 (8th Cir. 1976).

42. *Id.* at 609.

43. *Id.* at 611.

44. *Id.* at 620.

45. *Id.* at 612.

46. *Mackey*, 543 F.2d at 612.

47. *Id.* at 614.

48. *Id.*

49. *Id.* at 616.

50. *Id.* at 622.

51. 930 F.2d 1293 (8th Cir. 1989).

52. *Id.* at 1296.

53. Prior to the point of impasse in negotiations, employers are required to “maintain the status quo as to wages and working conditions.” *Producers Dairy Delivery Co. v. W. Conference of Teamsters Trust Fund*, 654

permits employers to continue adhering to the status quo “as to wages and working conditions” after the parties reach an impasse in negotiations.<sup>54</sup>

In response to the League’s actions, the players brought suit, alleging that the nonstatutory labor exemption was inapplicable beyond the point of impasse.<sup>55</sup> Instead, the Eighth Circuit determined that no such limitation exists.<sup>56</sup> The court based its decision on the notion that the parties can still resolve their differences through the use of the offsetting tools assigned to them under labor law—including strikes, lockouts, and petitions for intervention by the National Labor Relations Board (“NLRB”).<sup>57</sup> Thus, in an attempt to protect agreements “conceived in an ongoing collective bargaining relationship,” the court determined that as long as the collective bargaining process remains in place, the nonstatutory labor exemption will continue to shield concerted conduct from antitrust scrutiny.<sup>58</sup>

When controversy arose surrounding a labor dispute in professional football once again, the Supreme Court of the United States addressed the nonstatutory labor exemption in *Brown v. Pro-Football, Inc.*, the seminal case governing modern application of the doctrine.<sup>59</sup> Specifically, the Court confronted an NFL plan to pay players on developmental squads a fixed salary of \$1,000 per week.<sup>60</sup> Once again, the players and the League could not reach an agreement during negotiations, and once again the NFL unilaterally implemented its own plan.<sup>61</sup> The difference this time, however, was that the plan was not the status quo from the previous CBA, but a term of the NFL’s “last best bargaining offer.”<sup>62</sup> This too was consistent with the principles of federal labor law, which permit an employer to implement such an offer after the point of impasse.<sup>63</sup> In its analysis of the case, the Court cemented the notion that the exemption extends beyond the point of impasse—including the NFL’s implementation of its last best offer.<sup>64</sup>

The Supreme Court in *Brown* established that a union wishing to pursue an antitrust claim against management will not be able to circumvent the nonstatutory exemption unless and until the parties’ collective bargaining relationship ceases.<sup>65</sup> The Court cautioned, however, that their decision was “not intended to insulate from antitrust review every joint imposition of terms by employers,” noting specifically that “an agreement among employers could be sufficiently distant in time and in circumstances from the collective bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.”<sup>66</sup>

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F.2d 625, 627 (9th Cir.1981) (quoting *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir.1981)).

54. *Id.*

55. *Powell*, 930 F.2d at 1296.

56. *Id.* at 1304.

57. *Id.*

58. *Id.* at 1303. The court explicitly cautioned that their holding was not intended to “entail that once a union and management enter into collective bargaining, management is forever exempt from the antitrust laws, and we do not hold that restraints on player services can never offend the Sherman Act.”

59. 518 U.S. 231 (1996).

60. *Id.* at 234.

61. *Id.*

62. *Id.*

63. *Producers Dairy*, 654 F.2d at 627.

64. *Brown*, 518 U.S. at 249 (“[W]e hold that the implicit (“nonstatutory”) antitrust exemption applies to the employer conduct at issue here”).

65. *Id.* at 250.

66. *Id.* at 249 (emphasis added).

Importantly, the Court in *Brown* referenced the decision of the lower court as “suggesting that the exemption lasts until the collapse of the collective bargaining relationship, as evidenced by decertification of the union.”<sup>67</sup> However, the Court left the scope of the rule unclear, choosing to defer to the NLRB to decide the boundaries of the collective bargaining relationship, whose “specialized judgment” would aid in their decision.<sup>68</sup> This language at the end of the Court’s decision would ultimately become the battleground and the impetus for the players’ 2011 lawsuit against the NFL.<sup>69</sup>

### III. RECENT LABOR STOPPAGES IN THE PROFESSIONAL SPORTS INDUSTRY: *BRADY V. NFL*, *ANTHONY V. NBA*

On May 20, 2008, NFL owners unanimously voted to opt out of their existing CBA, which they renewed in 2006.<sup>70</sup> The League cited three major reasons for their decision: high labor costs, problems with the rookie pool, and the League’s inability to recoup bonuses of players who subsequently breached their contract or refused to play.<sup>71</sup> Essentially, the owners believed that players were receiving too great a share of their revenues and wanted to reduce the players’ share.<sup>72</sup> Specifically, a number of owners wanted a CBA that accounted for the investments they made on new stadiums and other capital expenditures.<sup>73</sup> To achieve this, the owners wanted to limit compensation for first-round draft picks and reduce existing players’ revenue share.<sup>74</sup> Naturally, the players objected to the notion of taking any significant pay cut and were skeptical of the owners’ claims that they were facing such vastly reduced profit margins.<sup>75</sup> Thus, as is typically the case, the major issue that stirred labor relations in the NFL can be summed up in one word—money.<sup>76</sup>

Anticipating that a League-imposed lockout was looming, the players—presumably guided by the implications of the *Brown* and *Powell* decisions—voted to decertify their union prior to the expiration of the CBA if an extension could not be reached.<sup>77</sup> This, the players hoped, would allow them to circumvent the nonstatutory labor exemption and to successfully bring suit against the league under the antitrust laws in the event of a lockout.<sup>78</sup>

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67. *Id.* at 250 (citing *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 (D.C. Cir. 1995) *aff’d*, 518 U.S. 231 (1996)) (emphasis added).

68. *Id.* at 249.

69. See *Brady v. Nat’l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011), *vacated*, 644 F.3d 661 (8th Cir. 2011).

70. John Clayton, *NFL Owners Vote Unanimously to Opt Out of Labor Deal*, ESPN (May 20, 2008), <http://sports.espn.go.com/nfl/news/story?id=3404596> (“The agreement signed two years ago was to last until 2013 with the option to terminate in 2011, which is what the owners did . . .”).

71. *Id.*

72. Michael Silver, *Fans’ Guide to NFL Labor Battle*, YAHOO! SPORTS (Sep. 8, 2010), <http://sports.yahoo.com/nfl/news?slug=ms-laborquestions090810>.

73. *Id.*

74. *Id.*

75. *Id.*

76. To clarify, the players were not entirely motivated by monetary incentives alone. Mark Maske, *Time Is Short For NFL, Players*, THE WASHINGTON POST (Dec. 15, 2010), [http://www.washingtonpost.com/wpdyn/content/article/2010/12/14/AR2010121407094\\_2.html](http://www.washingtonpost.com/wpdyn/content/article/2010/12/14/AR2010121407094_2.html). The players also sought to implement changes to better address player health and safety issues, including additional benefits for former players. Specifically, the players objected to the NFL’s proposed extension of the regular season, citing the increased opportunity for injury. *Id.*

77. Alex Marvez, *Source: NFLPA Ready for Drastic Move*, FOX SPORTS (Feb. 27, 2011), <http://msn.foxsports.com/nfl/story/NFL-Players-Association-union-plan-to-decertify-labor-March-022611>.

78. The CBA contained a provision which stipulated that the NFLPA would be forced to wait six months



When negotiations failed after two weeks of mediation between the players and the league, the players informed the league that they renounced their collective bargaining rights and would no longer be represented by the NFLPA, just before the expiration of the CBA.<sup>79</sup> Then, as anticipated, the owners locked out the players, “triggering the league’s first work stoppage in 24 years.”<sup>80</sup> As expected, the players proceeded to bring suit in *Brady v. National Football League*.<sup>81</sup>

#### A. *BRADY V. NATIONAL FOOTBALL LEAGUE*

As discussed, the decisions in *Brown* and *Powell* essentially stipulate that the nonstatutory labor exemption will remain in force until a collective bargaining relationship ceases to exist.<sup>82</sup> Thus, by dissolving the NFLPA, the players could claim in theory, that the collective bargaining relationship had terminated, the exemption was no longer applicable, and, therefore, they could bring a claim under antitrust law. Accordingly, on April 25, 2011, the players brought suit in the United States District Court for the District of Minnesota, alleging that the lockout violated Section 1 of the Sherman Act as an anticompetitive agreement not to employ any of the players.<sup>83</sup> In so doing, the players sought to enjoin the owners from continuing the lockout.<sup>84</sup>

In response, the League defended itself by arguing, inter alia, that despite the players’ purported decertification, the nonstatutory labor exemption continued to shield the lockout from antitrust scrutiny because the collective bargaining relationship remained in place.<sup>85</sup> Through this argument, the League claimed that the decertification of the NFLPA was a

before filing any antitrust claim against the League in the case of a lockout. Gabriel A. Feldman, *NFL Lockout: The Legal Issues Behind the NFL-CBA Negotiations*, THE HUFFINGTON POST (Feb. 9, 2011), [http://www.huffingtonpost.com/gabriel-a-feldman/the-legal-issues-behind-t\\_b\\_820579.html](http://www.huffingtonpost.com/gabriel-a-feldman/the-legal-issues-behind-t_b_820579.html). Accordingly, the players were forced to decertify prior to the expiration of the agreement in order to eliminate the NFLPA’s role in the suit and allow the players to bring suit immediately. *Id.* Specifically, the CBA provision stated that: “Following the expiration of the express term of this Agreement . . . if the NFLPA is in existence as a union, the Parties agree that none of the Class Members . . . nor any player represented by the NFLPA shall be able to commence an action, or assert a claim, under the antitrust laws for conduct occurring, until either: (i) the Management Council and the NFLPA have bargained to impasse; or (ii) six (6) months after such expiration, whichever is later.” NFL Collective Bargaining Agreement 2006-2012, art. LVII, § 3(a) (2006) (emphasis added).

79. Sam Farmer, *NFL Players Decertify Their Union*, LOS ANGELES TIMES (Mar. 11, 2011), <http://articles.latimes.com/2011/mar/11/sports/la-sp-nfl-labor-talks-fail>.

80. Alex Marvez, *NFL Owners Lock Out Players*, FOX SPORTS (Mar. 12, 2011), <http://msn.foxsports.com/nfl/story/NFL-Players-Association-union-decertifies-labor-talks-owners-031111>.

81. 779 F.Supp.2d 992 (D. Minn. 2011).

82. *Powell v. Nat’l Football League*, 930 F.2d 1293, 1303 (8th Cir. 1989) (“[T]he nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws.”); *Brown v. Pro-Football, Inc.*, 518 U.S. 231, 249 (1996) (holding that an agreement among employers would only be outside the scope of the exemption if it is “sufficiently distant in time and in circumstances from the collective-bargaining process”).

83. *Id.* The players argued that [the] lockout “constitute[d] an agreement among competitors to eliminate competition for the services of major league professional football players” in the relevant United States market, which operates “as a perpetual horizontal group boycott and price-fixing agreement” that is either a per se violation of Section 1 or, under the Rule of Reason, a concerted refusal to deal that constitutes an unreasonable restraint of trade. *Id.* After the Supreme Court decision in *American Needle v. National Football League*, the NFL was definitively incapable of asserting a defense that the 34 individual teams should be considered a “single entity” incapable of conspiring with itself in violation of the antitrust laws. 176 L. Ed. 2d 947 (2010).

84. *Id.*

85. *Brady*, 779 F. Supp. 2d at 1019.

“sham,” that the players only decertified for the purpose of bringing suit, and that the players were still effectively operating as a union.<sup>86</sup> Essentially, the owners believed—possibly accurately—that the players were only dissolving their union as a litigation tactic to gain leverage at the bargaining table, and would reform as a union as soon as the parties resolved the dispute. However, the players denied these allegations, asserting that any decision to disclaim their union was necessarily legitimate, considering the serious and potentially risky consequences that come along with such a decision.<sup>87</sup>

Ultimately, the District of Minnesota agreed with the players, finding that “the dissolution of the Players’ former Union provides a clear boundary demarcating the end of collective bargaining under labor law.”<sup>88</sup> The court determined not only that the players’ disclaimer was adequate, but also that the intent of the players was irrelevant to any determination of the applicability of the nonstatutory exemption “because it results in serious consequences for the Players.”<sup>89</sup> Therefore, the court concluded that “[t]he body of labor law governing collective bargaining . . . [was] no longer in play.”<sup>90</sup> And, upon finding that absent relief the players would continue to suffer irreparable harm, the court issued a preliminary injunction prohibiting the League from continuing to lockout the players.<sup>91</sup>

The district court’s decision provided the players with highly positive language indicating that the exemption decisively terminates at the point of dissolution of a union.<sup>92</sup> Unfortunately for the players, however, their victory in *Brady* was short-lived. Immediately following the district court’s decision to enjoin the lockout, the League filed an appeal to the Eighth Circuit.<sup>93</sup> Disagreeing with the lower court’s decision, the Eighth Circuit stayed the injunction and eventually vacated the decision on May 16, 2011.<sup>94</sup> Nevertheless, the court did not directly invalidate the district court’s findings on the applicability of the nonstatutory exemption. Rather, the court circumvented any discussion of the exemption altogether, finding instead that a separate issue on appeal precluded any inquiry into the exemption’s applicability.<sup>95</sup> Specifically, the court determined that the players would be unlikely to bypass the impediments of the Norris-LaGuardia Act, which limits the jurisdiction of federal courts to issue injunctions in cases “involving or growing out of a

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86. Defendant’s Memorandum In Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 36, *Brady v. Nat’l Football League*, 779 F. Supp. 2d (D.Minn. 2011) (No. 0:11-cv-00639-SRN-JJG) (“[G]iven the history of this Union . . . plaintiffs cannot make a clear showing that the collective bargaining relationship is, indeed, actually over, let alone that it is not likely to be in full operation soon”).

87. *Brady*, 779 F. Supp. 2d at 1017.

88. *Id.* at 1020. Though the District Court opinion contained language which strongly supported the players’ position, the court did not actually decide the issue of the nonstatutory labor exemption. *Id.* at 1041, n.32. Rather, the purpose of the preliminary proceedings was merely to determine whether the players’ suit was likely to succeed on the merits in later proceedings. *Id.*

89. *Id.* at 1017. The court continued to state that “the fact that the disclaimer was motivated by ‘litigation strategy,’ . . . and to free the players to engage in individual bargaining for free agency, is irrelevant so long as the disclaimer is otherwise unequivocal and adhered to.” *Id.* (citing *In re Pittsburgh Steelers*, 1991 WL 144468, at \*2 n.8) (emphasis added).

90. *Id.* at 1020.

91. *Id.* at 1042-43.

92. *See id.*

93. *Brady v. Nat’l Football League*, 638 F.3d 1004 (8th Cir. 2011).

94. *Id.* The court initially awarded the League an emergency stay, and then a temporary stay, before eventually vacating the district court decision. *Id.*; *Brady v. Nat’l Football League*, 640 F.3d 785 (8th Cir. 2011); *Brady v. Nat’l Football League*, 644 F.3d 661 (8th Cir. 2011).

95. *Brady*, 640 F.3d at 793.

labor dispute.”<sup>96</sup> As a result, the parameters of the nonstatutory labor exemption continue to remain uncertain, even after *Brady*.

### B. *ANTHONY V. NBA*

To the dismay of many interested parties—likely including employers and employees in the sports industry—the Eighth Circuit’s decision in *Brady* did little to clarify the applicability of the antitrust laws and the scope of the nonstatutory labor exemption following the dissolution of a players’ union. The *Brady* decision did, however, make one thing clear: the Norris-LaGuardia Act presents a legitimate hurdle for professional athletes seeking to enjoin employer-imposed lockouts.<sup>97</sup> When labor unrest developed in the NBA shortly thereafter, the owners anticipated that the players would dissolve their union and bring an antitrust suit. As such, when the 2005 NBA collective bargaining agreement expired on June 30, 2011, the NBA decided to take the offensive and filed a complaint for declaratory relief arguing, inter alia, that the nonstatutory labor exemption precluded the players from bringing an antitrust claim.<sup>98</sup> Ultimately, however, this did not prevent the players from bringing a claim.

Confirming the owners’ suspicions, once negotiations between the NBA and the players proved unsuccessful, the players dissolved their union.<sup>99</sup> The players then proceeded to sue the NBA for antitrust violations stemming from the lockout under a group boycott theory, just like the players in *Brady*.<sup>100</sup> However, rather than seeking to enjoin the NBA from continuing the lockout, the players sued the NBA for damages incurred as a result of the lockout.<sup>101</sup> In so doing, the players presumably sought to avoid the obstacles created by the Norris-LaGuardia Act, under which the Eighth Circuit was precluded from granting injunctive relief for the NFL players.<sup>102</sup> Again, however, the lockout-driven litigation did nothing to clarify the foggy parameters of the nonstatutory exemption. Although the players’ litigation strategy would have enabled the players to bypass the impediments of the

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96. *Id.*; 29 U.S.C. § 101. The Eighth Circuit accepted the League’s—rather novel—argument that the Norris-LaGuardia Act prohibits Federal courts from issuing injunctions against employer-imposed lockouts, though the Act was likely initially intended to protect strikes. *Brady*, 640 F.3d at 792.

97. *Id.*

98. Complaint at 17-21, *Nat’l Basketball Ass’n v. Nat’l Basketball Players Ass’n*, (No. 11 Civ. 5369) (S.D.N.Y. 2011).

99. Marc Stein, *NBA Players Reject Owners’ Offer*, ESPN (Nov. 15, 2011), [http://espn.go.com/nba/story/\\_/id/7234180/nba-lockout-players-not-accept-deal-seek-disband-billy-hunter-says](http://espn.go.com/nba/story/_/id/7234180/nba-lockout-players-not-accept-deal-seek-disband-billy-hunter-says) (“[NBA Players Association Executive, David] Hunter announced that the team representatives....voted unanimously to file a ‘disclaimer of interest’ that will dissolve the union and signals the players’ intent to take their battle with the owners into federal court”).

100. Brian McIntyre, *NBA Lockout: Players File Antitrust Suit in California*, SBATION (Nov. 16, 2011), <http://www.sbnation.com/2011/11/16/2567067/nba-lockout-players-file-antitrust-suit-in-california>.

101. The players actually filed two lawsuits, one in California and one in Minnesota—both seeking damages allegedly resulting from the lockout. Complaint, *Anthony v. Nat’l Basketball Ass’n*, No. 11-5525 (N.D.Cal. Nov. 15, 2011); Complaint, *Anthony v. Nat’l Basketball Ass’n*, No. 11-3352 (D.Minn. Nov. 15, 2011). The California complaint specifically alleged: “As part of their group boycott . . . Defendants have conspired and agreed to prevent NBA teams from negotiating, or even communicating with, or employing NBA players, thereby eliminating a competitive market for player services.” Complaint, *Anthony v. Nat’l Basketball Ass’n*, No. 11-5525 (N.D. Cal. Nov. 15, 2011).

102. By suing for damages, the NBA players would have been able to circumvent the Norris-LaGuardia Act entirely while still establishing a large negotiation tool through the threat of antitrust treble damages.

Norris-LaGuardia Act, the parties settled the lawsuit before the court was able to address the issues presented by the nonstatutory labor exemption.<sup>103</sup>

#### IV. WHY THE LABOR EXEMPTION SHOULD END UPON DISSOLUTION OF A UNION

Inevitably, a court will be forced to address the critical question that courts to date have succeeded in evading: When does the nonstatutory labor exemption terminate? The exemption cannot persist in perpetuity,<sup>104</sup> and modern jurisprudence has left little flexibility in defining a point at which the exemption can conclusively be said to no longer apply. Therefore, the nonstatutory labor exemption should terminate upon dissolution of a union because there is no other logical landmark at which it could be said that the collective bargaining relationship ends. Such a rule would provide a number of benefits. First, it would create the obvious benefits of eliminating ambiguity and providing a concrete, reliable benchmark for interested parties. More importantly, termination of the exemption at the point of dissolution is supported by the very policy governing the collective bargaining process expressed in the NLRA. Accordingly, once a union ceases to exist, so too does the underlying conflict between antitrust and labor law that necessitates the application of the nonstatutory exemption.

Extending the nonstatutory labor exemption beyond the point of dissolution would infringe upon the labor rights of the individual employees involved. To do so would require courts to treat a group of unaffiliated employees as an entity to the effect of a de facto union. This would be in clear conflict with the NLRA. Section 7 of the NLRA provides employees with the explicit right “to refrain from any or all” activities involving labor organizations and collective bargaining.<sup>105</sup> It is undeniable, therefore, that employees are free to choose to unionize or not to unionize.<sup>106</sup> Thus, by treating individual employees as members of a union, despite their affirmative decision to disassociate themselves from the union, the judiciary would be infringing the rights explicitly given to employees by the NLRA. Such a standard could not have been intended by the legislature and, in fact, would directly undermine the federal government’s stated labor policy of “protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing. . . .”<sup>107</sup>

Moreover, such a policy would effectively create a double-edged sword for employees who would be denied access to the rights provided to them under alternative sources of law, despite having sacrificed the benefits of collective bargaining and other rights established for union members under federal labor law. Following the dissolution of a labor union, individual employees may be subject to a great degree of risk. Upon dissolution, employers are free to “fire employees, lower wages, and alter workplace rules in fundamental ways that otherwise would violate the NLRA’s ban on unfair labor practices if the employees were still unionized.”<sup>108</sup> Notwithstanding being subject to a less stable work environment,

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103. Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales after Brady v. NFL and Anthony v. NBA*, 45 U.C. Davis L. Rev. 1221, 1252 (2012).

104. *Brady v. Nat’l Football League*, 779 F. Supp. 2d 992, 1020 (D. Minn. 2011) *vacated*, 644 F.3d 661 (8th Cir. 2011) (“The body of labor law governing collective bargaining . . . plainly must be circumscribed by some boundary . . .”).

105. 29 U.S.C. § 157.

106. *See id.*

107. 29 U.S.C. § 151.

108. Brief for Plaintiff-Appellees at 63-64, *Brady v. Nat’l Football League*, 640 F.3d 785 (8th Cir. 2011) (No.

these individual employees would also be unable to seek judicial relief under the antitrust laws. Such a policy, whereby recently de-unionized employees are left without remedy for anticompetitive injury, is untenable.

Further, relevant case law, including the decision of the Supreme Court in *Brown*, supports the position that the exemption terminates upon dissolution. As previously mentioned, the Supreme Court in *Brown* explicitly referenced the holding of the lower court as “suggesting that the exemption lasts until the collapse of the collective bargaining relationship, as evidenced by decertification of the union.”<sup>109</sup> Though the facts in *Brown* did not require the Court to reach a final determination on the issue, this language provides strong support that the Court’s position is consistent with a rule terminating the exemption upon dissolution.<sup>110</sup> The lower court in *Brown* noted further that “[a]s a general matter, the antitrust laws may apply to restraints on competition in non-unionized labor markets.”<sup>111</sup> Thus, once a labor union dissolves, it would seem that the antitrust laws would apply just as if the union had never been in place at all.

The decision of the District of Minnesota court in *Brady* also embraces this position. As mentioned above, though the court’s decision was ultimately vacated, the Eighth Circuit’s decision to do so was based on its contrary findings regarding the Norris-LaGuardia Act, not the nonstatutory labor exemption. Accordingly, the district court’s decision on the exemption still provides a valuable reference. Indeed, the plaintiffs in *Anthony* cited the district opinion as persuasive authority on the matter.<sup>112</sup> Importantly, the district court opinion states explicitly that “in contrast to the murky boundaries presented by an impasse that occurs within an ongoing collective bargaining process, the dissolution of the Players’ former Union provides a clear boundary demarcating the end of collective bargaining under labor law.”<sup>113</sup> In defense of its position, the court properly noted, among other things, that “employees have the right not to be a union as much as they have the right to be or organize as a union.”<sup>114</sup>

A steadfast rule terminating the exemption upon dissolution does, however, carry a number of negative implications as well. First, such a black-letter rule could give too much power to unions and potentially lead to abuse. As the NFL argued in *Brady*, “[i]f the leverage associated with potential antitrust claims were added to a union’s arsenal, its incentives to bargain in good faith and to reach agreements would be diminished.”<sup>115</sup> In addition to the already substantial litigation costs associated with complex antitrust litigation, such suits also threaten to subject the defendant to treble damages.<sup>116</sup> Such a powerful bargaining tool on one side of the table could lead unions to behave in precisely

11-1898), 2011 WL 2179414.

109. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996) (citing *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 (D.C. Cir. 1995), *aff’d*, 518 U.S. 231 (1996)).

110. *See id.* (“[A]n agreement among employees could be sufficiently distant in time and circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process”); *see also* Powell, 930 F.2d at 1305 (Heaney, dissenting) (finding that under the majority’s opinion, “the labor exemption will continue until the bargaining relationship is terminated either by a NLRB decertification proceeding or by abandonment of bargaining rights by the union”).

111. *Brown*, 50 F.3d at 1054 (citing *Radovich v. Nat’l Football League*, 352 U.S. 445, 449-452).

112. Complaint at 18, *Anthony v. Nat’l Basketball Ass’n*, No. 11-3352, (D.Minn. Nov. 15, 2011).

113. *Brady*, 779 F. Supp. at 1020.

114. *Id.* at 1021.

115. Brief for Defendant-Appellants at 47, *Brady v. Nat’l Football League*, 640 F.3d 785 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG), 2011 WL 2003085 (C.A.8).

116. 15 U.S.C. § 1.

the manner of which the NFL warned, permitting them to perpetually evade any sacrifices in negotiations.

Moreover, such a rule could threaten the very existence of multiemployer bargaining units, in conflict with stated objectives of federal labor policy. In other words, as the League argued in *Brady*, the “risk of instantaneous and unpredictable antitrust exposure, triggered at will by the union, would be a powerful disincentive for employers to engage in multiemployer bargaining at all.”<sup>117</sup> Such a consequence “would undermine federal labor policy, which strongly favors multiemployer bargaining.”<sup>118</sup> Additionally, though it is not likely in practice, there is potential for abuse in that union members would be capable of dissolving their union on a whim, knowing with full confidence that such a decision would definitively allow them to circumvent the exemption.

Notwithstanding these concerns, however, the nonstatutory labor exemption cannot be extended to incorporate disputes that continue after a union has been dissolved. The clearly defined policy set forth by the NLRA must override any alternative goals of federal labor policy. Thus, when a union dissolves, so does the conflict between labor law and antitrust law. Upon dissolution, any ongoing dispute among employees and management must necessarily be “sufficiently distant in time and in circumstances from the collective bargaining process,”<sup>119</sup> because the employees “have moved beyond collective bargaining entirely.”<sup>120</sup> As such, applying the provisions of the NLRA is no longer appropriate and the nonstatutory labor exemption should definitively end.

#### V. THE IMPACT OF *BRADY* AND *ANTHONY* ON FUTURE LABOR NEGOTIATIONS IN PROFESSIONAL SPORTS

Following the NFL-imposed lockout and the subsequent decisions of the District of Minnesota and the Eighth Circuit in *Brady*, the players began negotiating an antitrust settlement with the owners to try and get themselves back on the playing field. Ultimately, the players were able to secure a number of benefits out of the ordeal, including increased medical benefits—such as the opportunity to stay in the NFL medical plan for life after playing in a single game during the term of the agreement—and enhanced guarantees on contracts in case of injury.<sup>121</sup> The players also avoided a potential move to an 18-game schedule and secured \$1 billion in additional benefits to retirees.<sup>122</sup> However, the owners walked away with a number of benefits as well. They were able to avoid having to pay \$320 million in benefits that went unpaid during the 2010 season because there was no salary cap, pursuant to the previous collective bargaining agreement.<sup>123</sup> Additionally, the League maintained the elimination of judicial oversight in disputes between players and management.

Perhaps because of their willingness to forego their antitrust suits in *Anthony*, the NBA players ended up reaching a deal that greatly benefits the owners in a number of

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117. Brief for Defendant-Appellants at 47, *Brady v. Nat'l Football League*, 640 F.3d 785 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG), 2011 WL 2003085 (C.A.8).

118. *Id.*

119. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996).

120. *Brady*, 779 F. Supp. at 1020

121. Peter King, *Making Sense of the New CBA and How It Will Affect the Game*, SI.COM (Jul. 25, 2011, 6:40 PM), [http://sportsillustrated.cnn.com/2011/writers/peter\\_king/07/24/labor/index.html#ixzz1bp6uBWom](http://sportsillustrated.cnn.com/2011/writers/peter_king/07/24/labor/index.html#ixzz1bp6uBWom).

122. *Id.*

123. *Id.*

ways.<sup>124</sup> In the new agreement, the players receive a decreased percentage of Basketball Related Income (“BRI”), dropping from 57% in the 2005 agreement to 51.15% in the new agreement.<sup>125</sup> The owners also secured beneficial changes to standard player contracts, which provide the NBA with more cost control.<sup>126</sup> However, the players were able to obtain a few victories. For example, rather than reducing salaries in upcoming seasons to ensure players receive no more than the collectively bargained-for revenue split, the NBA agreed to take the money out of the players’ post-career benefits pool and sacrifice taking any shortfall from the players’ salaries the following season.<sup>127</sup> Additionally, the players were able to secure an increased cap percentage spending requirement for player salaries.<sup>128</sup> Pursuant to the new agreement, the teams are required to spend 85% of the cap from 2011 until 2013 and at least 90% thereafter.<sup>129</sup>

The results of the lockouts seemingly confirmed some of the allegations of the leagues in *Brady* and *Anthony*. At the same time, however, the outcomes also indicate that some of the leagues’ concerns may be unfounded. It is apparent—as the leagues alleged—that by dissolving their unions the players primarily intended to gain bargaining power in negotiations. This is evidenced by the fact that the players did in fact re-form their unions shortly thereafter. But the fact that the players failed to walk away from the lockouts with drastically increased benefits, despite having dissolved their unions and having brought antitrust claims, may indicate that players’ threats of an antitrust suit may not be as powerful of a negotiation tool as the leagues allege.

When approached in light of the practical realities surrounding an antitrust lawsuit, the ongoing battle over the parameters of the nonstatutory labor exemption begins to appear rather artificial—at least in terms of its application to the sports industry, due to the unique career considerations of professional athletes. Even if a definitive decision is issued proclaiming that the exemption terminates at dissolution, it may not have the substantial impact on future negotiations that the Leagues allege. The obvious concern is that the threat of antitrust treble damages would provide the players with an immensely valuable bargaining tool, enabling them to further their interests in future collective bargaining agreements to the detriment of League management. The problem with this concern, however, is that the players themselves have no legitimate interest in pursuing the litigation either. In fact, the players may actually have a larger incentive to avoid the litigation than the league.

The careers of professional athletes span over tremendously short periods of time compared to those of employees in other industries.<sup>130</sup> Meanwhile, the proceedings of complex antitrust litigation can—and typically will—span over the course of a number of years. If the players were to truly pursue litigation—thereby keeping themselves off the playing field throughout its duration—they would be risking the sacrifice of possibly their entire careers as professional athletes. The players badly need those valuable years in which their athletic skill is peaking, and they would therefore not be willing to risk the potential

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124. Larry Coon, *Breaking Down Changes in the New CBA*, ESPN (Nov. 28, 2011), [http://espn.go.com/nba/story/\\_/page/CBA-111128/how-new-nba-deal-compares-last-one](http://espn.go.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compares-last-one).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales after Brady v. NFL and Anthony v. NBA*, 45 U.C. DAVIS L. REV. 1221, 1236 (2012).

salary increases and endorsement earnings they could gain from putting themselves back on the field. Though the players could possibly attempt to package these additional losses into the suit itself, such damages would be highly speculative and unlikely to be awarded. Moreover, there is always the possibility that the players could end up losing the case on the merits. By its very nature, therefore, the strategy of professional athletes dissolving their unions and bringing an antitrust suit appears fundamentally flawed.

If the exemption terminates upon dissolution and players are permitted to bring suit—so the argument goes—the threat of treble damages will disrupt the balance of power created by the collective bargaining process in the sports industry. Therefore, the players will superficially dissolve their union for the purpose of bringing suit, and then immediately re-form upon obtaining a favorable settlement agreement. Though this “sham dissolution” argument may represent a legitimate concern regarding the conduct of employees following the dissolution of a union, this concern is balanced by the fact that the lawsuits brought by labor unions in professional sports are “shams” themselves. Just as the players’ dissolution is a mere means to gaining access to an antitrust courtroom, so is the suit itself a mere means of getting the players back onto the playing field. Thus, the relative bargaining power of the parties will likely not be impacted as greatly as the sham dissolution argument seems to imply.

Moreover, the cost of litigation itself provides a strong disincentive for players to pursue the decertification route, absent extreme circumstances. For example, because the NFL players more aggressively pursued their antitrust lawsuit, the NFL lockout ended up costing them \$3.6 million more than the NBA players spent to end their lockout.<sup>131</sup> This is true despite the fact that the NFL lockout was actually nearly a month shorter in duration.<sup>132</sup> Therefore, taking these litigation expenses into consideration, “the players must fully assess the bargaining strength of their union” before making the drastic decision to dissolve it.<sup>133</sup> Accordingly, the players are not likely to constantly “flip the switch” between being unionized and not being unionized.

## CONCLUSION

The controversy surrounding the nonstatutory labor exemption has reached a tipping point. Case law to date has consistently held that more and more conduct falls within the scope of the exemption. At a certain point, however, concerted conduct stemming from collective bargaining negotiations must be found to lie outside the reach of federal labor policy and within the reach of federal antitrust law. Based on the implications of cases and policy interests delineated above, the nonstatutory labor exemption cannot persist beyond the point of dissolution of a labor union. Such persistence would directly contravene the stated policy behind federal labor law and undermine the goals of federal antitrust law under the Sherman Act.

Though the nonstatutory exemption may not have as great of an impact on the professional sports industry as the parties seem to think, it is important for the judiciary to resolve this dispute nonetheless. The recent NHL lockout created a nightmarish scenario for

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131. Alicia Jessop, *Legal Options in the United States To End the Lockout May Prove Costly for the NHLPA*, FORBES (Sep. 30, 2012), <http://www.forbes.com/sites/aliciajessop/2012/09/30/legal-options-in-the-united-states-to-end-the-lockout-may-prove-costly-for-the-nhlpa/>.

132. *Id.*

133. *Id.*



hockey fans in the United States, Canada, and abroad. However, the lockout also had some potentially positive implications in that it nearly allowed the courts to once again address a legal issue which has been lingering for decades. The NHL had already expressed its belief that the nonstatutory exemption should continue beyond the point of dissolution prior to the labor unrest of 2012. The League filed an amicus brief in *Brady* arguing, among other points, that “an immediate and unilateral conversion from union to ‘association’ of employees” should not qualify as a proper circumstance for ending the nonstatutory exemption.<sup>134</sup> Thus, had the NHL players ended up dissolving their union in order to file an antitrust suit against League management, the lockout would have given the courts another stab at resolving the judicial quagmire that has been created by the nonstatutory labor exemption. To the delight of hockey fans, however, the lockout never reached that point, and the outlying parameters of the nonstatutory labor exemption remain undefined.

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134. Brief for National Hockey League as Amicus Curiae Supporting Defendants-Appellants at 13-14, *Brady v. Nat'l Football League*, 640 F.3d 785 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG), 2011 WL 2003085 (C.A.8).



# Collective Sanctions: Learning from the NFL's Justifiable Use of Group Punishment

Laura Peterson

## INTRODUCTION

The Pittsburgh Steelers accumulated 101 total penalties, resulting in a loss of 854 yards, in the 2011 season.<sup>1</sup> These penalties were incurred by a single player violating an NFL rule, yet the penalties are listed as a team aggregate in ESPN's NFL statistics.<sup>2</sup> This is unlikely to raise many eyebrows. For many people, it is perfectly acceptable to sanction the entire team through lost yards, even though only one player caused the violation.

Contrast this scenario with that of Shelly Anderson, a 33-year-old woman with stage five renal failure and three children under the age of 15.<sup>3</sup> Anderson faced eviction from her home in Virginia's public housing system for crimes she did not commit.<sup>4</sup> Her mother and children's father were arrested for possession of drugs and drug paraphernalia when they were in Anderson's home while she received dialysis treatment.<sup>5</sup> Under the "One Strike and You're Out" eviction policy enacted by the Department of Housing and Urban Development, public housing authorities across the country can evict residents and their families if any member of the household or any guest engages in certain types of criminal activity.<sup>6</sup>

Anderson's story is not unique. According to *The Chicago Reporter*, eighty-six percent of Chicago's one-strike evictions in 2010 were not due to criminal activity by the person named on the lease.<sup>7</sup> Even amidst widespread criticism for stories like Anderson's, the United States Supreme Court upheld the "One Strike" policy in 2002.<sup>8</sup> These seemingly unrelated anecdotes – Steelers' penalties and the "One Strike" eviction policy – share the same classification as forms of *collective sanctions*.<sup>9</sup>

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1. The Steelers were chosen at random from ESPN's statistics, not because they had the most or least penalties. *Pittsburgh Steelers Statistics 2012*, ESPN, [http://espn.go.com/nfl/team/stats/\\_type/team/name/pit/pittsburgh-steelers](http://espn.go.com/nfl/team/stats/_type/team/name/pit/pittsburgh-steelers) (last visited April 18, 2013).

2. *Id.*

3. Arin Greenwood, 'One Strike' Public Housing Policy Hits Virginia Woman Who Needs Kidney Transplant, HUFFINGTON POST (Dec. 22, 2011), [http://www.huffingtonpost.com/2011/12/22/one-strike-policy-housing-alexandria-virginia-kidney-transplant\\_n\\_1151639.html](http://www.huffingtonpost.com/2011/12/22/one-strike-policy-housing-alexandria-virginia-kidney-transplant_n_1151639.html).

4. *Id.*

5. *Id.*

6. See U.S. Department of Housing and Urban Development, "One Strike and You're Out" Screening and Eviction Policies for Public Housing Authorities (HAs), HUD.GOV (1996), [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_10981.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_10981.pdf).

7. Angela Caputo, *One and done*, THE CHICAGO REPORTER (Sept. 04, 2011), <http://www.chicagoreporter.com/news/2011/09/one-and-done>.

8. See *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002).

9. For purposes of this article, collective sanctions are defined as forms of punishment imposed not only on the responsible individual, but also their relevant group.

While both the NFL and Department of Housing and Urban Development employ collective sanctions, the former imposes them on a regular basis without challenge, whereas the latter's use clashes with our moral intuitions of just punishment. Our likely reaction to Shelly Anderson's story is that she should not be held responsible for the actions of her mother and children's father because she is innocent, or lacks ill-desert, and thus should not be punished with eviction from her home.<sup>10</sup>

The question that follows is why the discrepancy? After all, the teammates of an NFL player who violates a rule are also innocent of wrongdoing. Should the punishment be considered unjust? Should current NFL penalties be altered to bring them in line with the individually targeted sanctions that comprise the majority of punishment systems? One potential lesson of this comparative inquiry is that there should be less tolerance of collective sanctions as used in the NFL. Conversely, if the NFL structure is acceptable, perhaps distaste for collective sanctions in life in general deserves revisiting and revising. Sports may be sufficiently distinguishable, rendering the aforementioned discrepancy entirely defensible. On the other hand, sports may possess adequate commonality with collectives elsewhere, allowing the NFL model and principles derived from it to become a more broadly applicable tool for sanctioning systems in general.

In aiming to resolve this discrepancy, this article will continue as follows:

Part I provides general principles governing the legitimacy of collective sanctions, including the various types of collective sanctions used, reasons for opposing the use of collective sanctions, and a counterargument defending collective sanctions. In insisting on the justifiability of collective sanctions, the defense will rely on two principles: hidden responsibility in commission or omission of the offense and a general consequentialist calculus. Part II outlines the types of sanctions used in the NFL. Part III folds the NFL typology into a larger analysis of collective sanctions, leading to a two-part recommendation. First, a specific consideration of the NFL's current goal of curbing violent hits is analyzed in light of the principles discussed in Parts I and II. Second, the general recommendation is made that collective sanctions can be a viable option for punishment structures outside of sports so long as the appropriate precautions are in place.

## I. GENERAL PRINCIPLES GOVERNING THE JUSTIFIABILITY OF COLLECTIVE SANCTIONS

Part I provides the basis for the inquiry at issue – determining normative principles that govern the justifiability of collective sanctions.

In general, sanctions are meant to both deter and punish. Most sanctions can be converted into a price-based system where the benefit received by violating a rule is weighed against the cost imposed by the punishment.<sup>11</sup> In the ideal sanctioning system, no sanction would have to be imposed, as the threat of the sanction would effectively deter the

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10. The concept of ill-desert and its use as a justification of punishment stems from the popular theory of negative retributivism. See Mitchell N. Berman, *The Justification of Punishment*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 151 (Andrei Marmor ed., 2012).

11. Robert Cooter's article on prices and sanctions distinguishes prices from sanctions by defining the former as "a payment of money which is required in order to do what is permitted." Robert Cooter, *Prices and Sanctions*, 84 *COLUM. L. REV.* 1523, 1525 (1984). By contrast, this note considers monetary sanctions that impose a cost for violating a rule. These are distinguishable from Cooter's definition of price, and it is necessary to recognize the difference when describing sanctions as a "price-based system," as Cooter admits when he points out that his definitions "are not always consistent with ordinary speech." *Id.*

prohibited conduct from occurring in the first place. In considering any system of punishment, including collective systems, it is important to keep the ideal goal in mind.

#### A. TYPES OF COLLECTIVE SANCTIONS

Collective sanctions are widely utilized. Daryl Levinson, in his thorough analysis highlighting their varied use, provides examples of collective sanctions that we routinely categorize in different terms (i.e. joint and several liability, vicarious liability, Superfund waste schemes).<sup>12</sup> Despite their varying formal names, each of these commonly used modes of punishment fit within a type of collective sanction. Douglas Heckathorn defines collective sanctions generally as “systems where rewards or punishments extend not only to the actor but [also] to the actor’s group.”<sup>13</sup> Within this all-encompassing definition, there are subcategories of collective sanctions based on whom the punishment initially targets.

The first, and most commonly considered category, is *pure collective sanctions* – those imposed against the group as a whole, with no individual target. Heckathorn defines such sanctions as “strictly collective,” basing his classification on the equal impact the sanction has on the responsible individual and group members.<sup>14</sup> Pure collective sanctions are present in an array of controversial and non-controversial contexts: team sports jurisprudence, tort and contract law (through joint and several liability), international law (through economic sanctions or reprisals), and even in national security efforts.<sup>15</sup>

The second category, *indirectly collective sanctions* are those that impose punishment directly on an individual who then disperses the effect of the punishment outwards to the relevant group.<sup>16</sup> Levinson notably argues that “[s]anctions directed against a single group member chosen at random will have the same expected disutility for all group members as sanctions divided evenly among all group members.”<sup>17</sup> This prediction, that the sanction will bear an equal burden on the group whether imposed on the group as a whole or a random group member (assuming that the group member is not chosen based on culpability), is based on the fundamental concept in Levinson’s functional model that the “costs of sanctions are transmitted to individual wrongdoers.”<sup>18</sup>

However, the individual targeted in an indirect collective sanction may also be responsible for the offense, requiring further parsing of this category. If the individual targeted is responsible, the collective effect will be collateral to the initial punishment. This subcategory of indirectly collective sanctions will be referred to as *collateral indirectly collective sanctions*.

12. See Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 361-372 (2003).

13. Douglas D. Heckathorn, *Collective Sanctions and Compliance Norms: A Formal Theory of Group-Mediated Social Control*, 55 AM. SOC. REV. 366, 366 (1990).

14. *Id.*

15. See generally *Korematsu v. U.S.*, 323 U.S. 214 (1944) (*Korematsu* concerned the constitutionality of Executive Order 9066, which ordered Japanese Americans into internment camps during World War II regardless of citizenship. The Supreme Court’s now-appalling decision exemplifies the use of pure collective sanctions in national security efforts.).

16. See Levinson, *supra* note 12, at 377 (“Sanctions applied formally and initially to an individual often become collective in their incidence as the costs are spread to others.”).

17. *Id.*

18. While there are doubts about this proposition, it is a necessary consideration to create the subcategory of random collective sanctions. *Id.*

If the individual targeted is randomly selected and is not responsible for the commission of the violation, then according to Levinson, the collective consequence will impose the same cost as a pure collective sanction.<sup>19</sup> This second subcategory will be referred to as *random indirectly collective sanctions*. While there is certainly room for argument regarding its equivalence to pure collective sanctions, this section is not concerned with the effectiveness of each type of collective sanction, but rather with the classification of the various types.

Classifications as collateral or random notwithstanding, indirectly collective sanctions are responsible for what Heckathorn and Jeffrey Brand-Ballard have recognized as the spillover effects of individual punishment.<sup>20</sup> As Heckathorn points out, “to the extent that members of a group are interdependent, sanctions directed at any individual have consequences for other group members. . .virtually all sanctions generate externalities.”<sup>21</sup> This concept must be considered when arguing either for or against collective sanctions.

## B. REASONS AGAINST THE USE OF COLLECTIVE SANCTIONS

Regardless of the type of sanction imposed, collective sanctions have proven to be controversial. This section aims to pinpoint exactly what characteristics make collective sanctions particularly problematic or disagreeable. “[L]iberal conceptions of morality insist that agency and responsibility be attributed only to individuals, not groups,” and thus call the legitimacy of collective sanctions into doubt immediately.<sup>22</sup> Strong moral inclinations go against punishing innocent individuals as a means of deterrence for the greater population. The heightened standard of proof in criminal trials versus civil trials reflects this normative judgment regarding the seriousness of deprivation of liberty.

At a more fundamental level, distaste for collective sanctions is rooted in widely accepted theories regarding the justification of punishment.<sup>23</sup> The major opponents of collective sanctions are retributivists, who focus on whether punished individuals possess sufficient ill-desert, as opposed to consequentialists, who justify punishment “by the good states of affairs that the practice produces or may reasonably be expected to produce.”<sup>24</sup> Consequentialists have been criticized for violating Kant’s mandate: “Always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”<sup>25</sup> This ideal counsels against treating punishment of those in the collective who are innocent of wrongdoing as a necessary measure to achieve the desired deterrent end. Furthermore, consequentialism justifies a

19. See Levinson, *supra* note 12, at 377 (“That is, threatening a group of ten members with a fine in the amount of \$100 will have the same deterrence effect whether the fine will be imposed by collecting \$10 from each of the members or, instead, by choosing one member at random and fining her the full \$100 (literally decimating the group).”).

20. See Jeffrey Brand-Ballard, *Innocents Lost: Proportional Sentencing and the Paradox of Collateral Damage*, 15 *LEGAL THEORY* 67, 71 (2009) (finding that our approval “of policies that inflict collateral damage, such as the ubiquitous policy of excluding the family members of inmates from prison facilities outside visiting hours” is either unjust or “we should put less stock in generalization arguments”); see also Heckathorn, *supra* note 13, at 367 (discussing the spill-over effect of individual to collective sanctions).

21. Heckathorn, *supra* note 13, at 367.

22. Levinson, *supra* note 12, at 348.

23. “Punishment” is defined for these purposes as “inflicting hard treatment on people for their supposed or claimed wrongdoing with the intention that that treatment cause the supposed or claimed wrongdoer to suffer.” Berman, *supra* note 10, at 143.

24. *Id.* at 144.

25. *Id.* at 150 (citing Immanuel Kant, *CRITIQUE OF PURE REASON* 429 (Kessinger, 1998)).

utilitarian type of cost-benefit analysis, tipping the scale in favor of net social benefits, or the good of others, often at the cost of punishing a sacrificial scapegoat.<sup>26</sup> Not surprisingly, collective sanctions have consequentialist characteristics, suggesting that the criticism directed towards consequentialism is also responsible for suspicion regarding the legitimacy of collective sanctions.

Nevertheless, this disfavor of collective sanctions can be explained even further by the mixed theory of desert-constrained consequentialism (also known as negative retributivism), which endorses the view trending currently that “the reasons to punish are consequentialist while pursuit of consequentialist goals must be constrained by a principle that forbids the knowing infliction of punishment on persons who lack ill-desert or in excess of their ill-desert.”<sup>27</sup> The two primary desert-based constraints, or limits on punishment, are that it is impermissible to “(1) intentionally inflict suffering on one known to be innocent, or lack ill-desert, and (2) to intentionally inflict suffering in excess of an offender’s ill-desert.”<sup>28</sup> Most consequentialists and almost all retributivists agree on the first constraint, which means that the crux of the argument against collective sanctions lies in the widely shared view that punishing those who lack ill-desert is unjustifiable.<sup>29</sup>

From a functional perspective, opposition to use of collective sanctions may be justifiable simply because of the unique problems they create. Groups threatened with punishment can rebel against the collective sanction.<sup>30</sup> If not sufficiently incentivized to comply, groups have utilized their solidarity to engage in cover-up schemes to evade detection or deceive authorities.<sup>31</sup> Furthermore, holding the collective liable facilitates a collective action problem where some members are encouraged to free ride off the efforts of others.<sup>32</sup>

### C. REASONS FOR THE USE OF COLLECTIVE SANCTIONS

The purpose of this section is to refute the reasons presented above for finding collective sanctions unjustifiable.<sup>33</sup> Two principles are explored herein: (1) hidden responsibility in the form of commission or omission, and (2) a general consequentialist calculus that the net social benefit outweighs the cost of punishing the innocent.<sup>34</sup> The first principle occurs under circumstances in which the relevant group members share in responsibility for the wrongdoing, such that they are not truly innocent. Group members can possess hidden responsibility either by having encouraged or contributed to the wrongful act or by failing to take the appropriate measures to prevent its commission. The second

26. *Id.*

27. *Id.* at 151.

28. *Id.* at 154.

29. *See id.* at 155. This note relies on the theoretical argument for the justifiability of punishment, not its realistic application. Those who lack ill-desert are punished quite frequently “either because the system convicts legally innocent defendants or because the relevant legal doctrines fail to ensure that all persons who are legally guilty are morally blameworthy too.” Berman, *supra* note 10, at 155.

30. Heckathorn, *supra* note 13, at 366.

31. *See id.* at 367 (“[P]eer group members may also have incentives to help violators avoid detection and to assist rebels in their struggle. Here intragroup normative controls weaken and oppose the external sanction.”).

32. *See* Levinson, *supra* note 12, at 374.

33. *See supra* Part I.B.

34. These principles are not meant to comprise an exclusive list of reasons for using collective sanctions; they are simply general principles to further this comparative inquiry.

principle derives from consequentialism, under which it may be permissible to impose a nominal punishment on innocent individuals if the consequence will serve a greater deterrent function.

As a prelude, consider the general benefits of collectives as deterrent mechanisms. Many collectives are well-established, homogeneous groups of individuals who voluntarily enter into an explicit or implicit agreement to work toward a common goal or collective good. The group often wields significant persuasive power over the conduct of its members, and it has an inside track into information that may not be readily disclosed to the public (or, more importantly, an external sanctioning agent).<sup>35</sup> Additionally, in order to reach the common goal or obtain the collective good, groups must have sufficient solidarity.<sup>36</sup> To achieve solidarity, they must agree on and disseminate the social norms that will influence and constrain their individual behavior.<sup>37</sup>

## 1. HIDDEN RESPONSIBILITY

The strength of group solidarity also calls into question the notion that group members are fully innocent of wrongdoing. The assumption made in the preceding section is that aside from the actor who directly triggers the violation, the rest of the group is entirely without fault. Such an assumption ignores the significant possibility that the group may be causally implicated in a way that justifies their punishment.

### a. COMMISSION

The most obvious reason for holding the group responsible occurs when they have somehow aided, encouraged, or contributed to the wrongdoing. This principle applies regardless of whether the group participated in the commission of the offense or acted after the fact to conceal it. Some collectives are structured so that committing a violation would not be possible unless the individual acted within the scope of his role as an agent of the group. In many cases, this requires assistance or complicity with the offense. For instance, the team dynamic of football is such that players' infractions are generally considered to have been aided in some degree by the rest of the team, justifying the initial collective penalty. It may also then be permissible to hold the group accountable for the social norms that they have implicitly agreed to and internalized that perpetuate wrongdoing.

Under these circumstances, some opponents of collective sanctions should be satisfied because desert-constrained consequentialism is satisfied; members are punished on the basis of their ill-desert. Furthermore, even if punished in excess of their ill-desert (considering that individual levels of participation within the group may vary), Levinson would argue that after the punishment has been handed down, the group can redistribute the excess to the more deserving individuals within the collective.<sup>38</sup> This sort of *trickledown* theory, if

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35. See Levinson, *supra* note 12, at 348 (arguing that “[groups] are in an advantageous position to identify, monitor, and control responsible individuals, and can be motivated by the threat of sanctions to do so”).

36. *Id.* at 373 (defining solidarity as “the ability of group members to cooperate with one another in pursuit of collective ends.”).

37. See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 662, 662–63 (1998) (citing social norms—internalized and reinforced by the community—as one of the four types of constraint that regulate behavior).

38. See Levinson, *supra* note 12, at 377 (“A central feature of the functional model of collective sanctions is



successful, lowers investigative and administrative costs for the external sanctioning agent, who can rely on the collective to apportion punishment proportionately within itself.

The trickle down concept is well illustrated by NFL teams, where the initial penalty is often collective, but coaches and teammates presumably dole out proportionate punishment for infractions during the game or in post-game practices or meetings. This secondary form of punishment is usually imposed through alternative methods such as shaming, extended workouts, or being pulled from the game.

#### b. OMISSION

Collective punishment may also be justifiable when the group fails to exercise their capacity to monitor and control its members, and it has a responsibility, legal or otherwise, to do so. The omission principle is most commonly applied in situations like vicarious liability, corporate liability, and law firm discipline. These are contexts where responsibility is relatively easy to find, as those occupying supervisory positions are clearly in an advantageous position to monitor and control the behavior of the collective. The same can be said for coaches, general managers, and owners of NFL teams. Punishing management personnel who knew or reasonably should have known of a group member's wrongdoing is unlikely to be met with criticism precisely because of the position of influence management personnel hold within the collective.

Outside of civil liability cases, defining the boundaries of an affirmative duty to act has been a point of contention.<sup>39</sup> Should an affirmative duty be imposed on the entire collective to constrain and control one another, as opposed to just supervisory positions? This article argues that such a duty should be imposed, subject to the qualification that all members of the collective possess sufficient oversight and influence over their fellow members.<sup>40</sup> In other words, group solidarity is critical in justifying collective punishment based on the omission principle.

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that the costs of sanctions are transmitted to individual wrongdoers. As in any other sanction [scheme], the impact point is not necessarily the final resting point, or incidence, of the burden").

39. Consider the following discrepancy: In 1997, David Cash witnessed the beginning of his friend's sexual assault of seven-year-old Sherrice Iverson. He failed to stop the assault and then failed to report the child's death. Cash was not, and could not, be prosecuted for any legal crime. See Andrew D. Kaplan, "Cash-ing Out": *Regulating Omissions, Analysis of the Sherrice Iverson Act*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 67, 67-68 (2000). Not too long ago, Penn State was rocked by news that assistant coach Jerry Sandusky had allegedly sexually molested a number of young boys on campus and that members of the program witnessed or knew of the crimes but failed to take legal action. As a result, legendary head coach Joe Paterno was fired in the midst of the season, largely because he had been told of the assaults and failed to report them. *Paterno Fired Over Penn St. Child Abuse Scandal*, CBS SPORTS NEWS (Nov. 9, 2011), [http://www.cbsnews.com/8301-400\\_162-57321984/paterno-fired-over-penn-st-child-abuse-scandal/](http://www.cbsnews.com/8301-400_162-57321984/paterno-fired-over-penn-st-child-abuse-scandal/). While discussion of the legal implications of a duty to assist is outside the scope of this note, these cases illustrate the difficulty in defining the boundaries of an affirmative duty to act under the omission principle.

40. Levinson, *supra* note 12, at 426 ("[I]t seems reasonable to argue that group members who fail in their delegated 'duty' to deter primary wrongdoing should bear some responsibility for that wrongdoing, and perhaps enough to justify the imposition of collective sanctions. Members of groups who are well situated to deter misconduct but fail to do so cannot claim entirely clean hands.").

## 2. GENERAL CONSEQUENTIALIST CALCULUS

From a purely consequentialist standpoint, it may be permissible to hold group members liable for the collective's wrongdoing despite their lack of responsibility. Assuming *arguendo* that group member X did not contribute in any way to the wrongdoing nor possess any knowledge that the relevant offense would occur, consequentialism, as a forward-looking theory, would justify X's punishment so long as it results in a more satisfactory state of affairs for society overall. The calculus – punishment imposed versus benefit gained – becomes more readily acceptable the more nominal the punishment and the more pressing the need for deterrence. As a result, the strength of this proffered justification is contingent on the beneficial consequences significantly outweighing the cost of the punishment.

The notion of “bittersweet benefits” – a fairness argument that if members derive benefits from the group, or a group member's, efforts, then, conversely, the members should be held liable when the group or an individual member's efforts violate a rule – also fits within this calculus.<sup>41</sup> For example, famously talented running back Barry Sanders contributed immense gains to his Detroit Lions teammates.<sup>42</sup> If Sanders advanced the team 40 yards in one possession and then drew a flag in the next, the theory of bittersweet benefits dictates that the subsequent collective penalty of lost yards is fairly imposed. Since the team benefitted from Sanders' 40-yard gain, the team should also share the cost of his penalty.

In response to previously discussed criticism of consequentialism, Kant's mandate that humanity be treated as both a means and end is satisfied if considered in light of the following example: “An offender is not only an offender, but also a potential victim to other offenders. So to punish him to achieve general deterrence treats him as a means (*qua* punishee), but also as an end (*qua* potential victim).”<sup>43</sup> In the context of collective sanctions, the punishment imposed on the collective might be viewed as an acceptable cost in exchange for general deterrence of other, similar collectives.<sup>44</sup> In this sense, the cost to the offending collective also works to its benefit, as it is protected from future harm caused by another collective committing the same offense.

## II. USE OF COLLECTIVE SANCTIONS IN THE NFL

Part II provides a typology of the current NFL penalty structure as it relates to the more general types of collective sanctions outlined in Part I. The NFL structure includes three categories: (1) collective sanctions, (2) indirectly collective sanctions, and (3) individual sanctions.

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41. This author credits Professor Berman for creating the theory of bittersweet benefits.

42. See *Barry Sanders*, PRO FOOTBALL HALL OF FAME, [http://www.profootballhof.com/hof/member.aspx?player\\_id=187](http://www.profootballhof.com/hof/member.aspx?player_id=187) (last visited July 16, 2013).

43. Berman, *supra* note 10, at 150.

44. Nations, teams, and corporations, are each examples of collectives that regularly interact and compete.

## A. COLLECTIVE SANCTIONS

Contrary to most punishment systems, pure collective sanctions seem to be the most commonly used form of penalty in the NFL, especially on the field. Holding, pass interference, and false starts all result in a collective sanction of distance penalties against the team whose player commits the violation.<sup>45</sup> Identifying the individual who committed the infraction is unnecessary, as the same penalty will be imposed on the team regardless of who violated the rule. Therefore, there is no individual component to a purely collective sanction; it is imposed against the entire team as a single unit.

The NFL's use of pure collective sanctions is justified by the commission principle.<sup>46</sup> The player could not have committed the violation unless he was acting within his role as an agent of the team, since pure collective sanctions are imposed for on-field conduct occurring during the course of the game. Football players are typically viewed less as individuals and more as an integral component of one larger body, the team. This was identified earlier as a reason to generally consider players' infractions as aided or encouraged by the rest of the collective.<sup>47</sup>

An individual player's actions may also be viewed as furthering the team's common goal of winning, thus justifying pure collective sanctions in the NFL through the general consequentialist calculus. The concept of bittersweet benefits proposes that if the player was acting with the purpose of advancing the team's interests, fairness demands that the team share equally in the disadvantage imposed, as they would have shared equally in the benefits had the player's efforts been successful.<sup>48</sup> This follows the formerly discussed Barry Sanders analogy.<sup>49</sup>

Flagrant fouls draw double sanctions – one collective and one indirectly collective. For example, in the case of malicious unnecessary roughness, the team is assessed a collective penalty of fifteen yards, and the responsible player can be disqualified.<sup>50</sup> Dual sanctions therefore acknowledge that the player was acting as an agent in furtherance of the team in committing the maliciously rough violation. As a result, the team must bear some responsibility. On the other hand, the indirectly collective sanction is intended to deter the individual player specifically. The NFL typically does not use pure collective sanctions alone to punish “the kinds of behavior that pose abnormal risk of injury or that are likely to inflame volatile tempers.”<sup>51</sup>

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45. OFFICIAL PLAYING RULES AND CASEBOOK OF THE NATIONAL FOOTBALL LEAGUE, 96-98 (2012), available at *Penalty Summary*, NFL.COM, [http://static.nfl.com/static/content/public/image/rulebook/pdfs/24\\_2012\\_Penalty\\_Summary.pdf](http://static.nfl.com/static/content/public/image/rulebook/pdfs/24_2012_Penalty_Summary.pdf) [hereinafter *Penalty Summary*].

46. See *supra* Part I.C.1.a.

47. See *supra* Part I.C.1.a.

48. See Robert L. Bard & Lewis Kurlantzick, *Knicks-Heat and the Appropriateness of Sanctions in Sport*, 20 CARDOZO ARTS & ENT. L.J. 507, 512 (2002) (discussing pure collective sanctions as “‘rectificatory’ rules,” which “perform two key restorative functions . . . enabl[ing] the continuation of a game that has been interrupted by a violation . . . [and] offer[ing] [compensation] to negate, or minimize, any gain secured through rule breaking”).

49. See *supra* Part I.C.2.

50. *Penalty Summary*, *supra* note 44, at 96.

51. Bard & Kurlantzick, *supra* note 47, at 512.

## B. INDIRECTLY COLLECTIVE SANCTIONS

The NFL employs indirectly collective sanctions in the form of disqualifications and suspensions.<sup>52</sup> The penalty is imposed on the individual player, but by precluding the team from any further contributory benefit from that player, the team is also indirectly collectively punished. Disqualifications and suspensions fall under the subcategory of collateral indirectly collective sanctions, as the individual targeted is responsible for the offense.

Indirectly collective sanctions govern more severe offenses than pure collective sanctions. Players are disqualified for flagrant violations such as striking, kicking, or maliciously roughing an opponent as well as fairness-based violations like “unsportsmanlike conduct” and “palpably unfair acts,” which are determined at the referee’s discretion.<sup>53</sup> The flagrant violations have the potential to cause player injuries, which may explain why the NFL is interested in affecting the more severe (and likely more costly) penalty through the individual – as a means of imposing additional responsibility for the wrongdoing.

Pure collective sanctions control the gamesmanship of players and are intended to facilitate play of the game within the bounds of its constituent rules.<sup>54</sup> Unsportsmanlike conduct and palpably unfair acts are distinguishable in that they supersede these bounds, affecting the ethos, or overarching standards, of the game.<sup>55</sup> The NFL has a valuable interest in preserving the game’s essence, potentially justifying use of a more severe punishment.

In *Knicks-Heat and the Appropriateness of Sanction in Sport*, Robert Bard and Lewis Kurlantzick criticize the use of this type of sanction for its variant collateral punishment on the team.<sup>56</sup> They make a negative retributivist argument that suspensions have the potential to penalize the team in excess of their ill-desert.<sup>57</sup> However, the collateral cost imposed seems dependent on the relevant player’s value to the team and the timing of the disqualification in the game or suspension in the season.

## C. INDIVIDUAL SANCTIONS

Individual sanctions are those imposed on the player directly without the spillover effects of indirectly collective sanctions. This type of sanction is most routinely employed

52. See *supra* Part II.A.; see also *Penalty Summary*, *supra* note 44.

53. See *Penalty Summary*, *supra* note 44.

54. *Id.*

55. Note that only unsportsmanlike conduct above a certain undefined threshold appears to be distinguishable, since unsportsmanlike conduct can also draw a 15-yard penalty. See *Penalty Summary*, *supra* note 44.

56. This form of sanction was harshly criticized after the NBA issued a one-game suspension of four Knicks players for leaving the bench during an on-court altercation in Game 5 of the 1997 Eastern Conference Semifinals between the Knicks and the Miami Heat. Bard & Kurlantzick, *supra* note 47, at 512–14. NBA Rule 12.A, § VII, states: “During an altercation, all players not participating in the game must remain in the immediate vicinity of their bench. Violators will be suspended, without pay, for a minimum of one game and fined up to \$20,000.” *Rule No. 12-Fouls and Penalties*, NBA.com (2001), [http://www.nba.com/analysis/rules\\_12.html?nav=ArticleList](http://www.nba.com/analysis/rules_12.html?nav=ArticleList). The one-game suspension “significantly disadvantaged [the Knicks] in games six and seven, and it is likely that enforcement of this rule led to their loss of the series.” Bard & Kurlantzick, *supra* note 47, at 510.

57. *Id.*

in the NFL as a monetary fine.<sup>58</sup> Team-enforced punishments such as shaming sanctions or being pulled from the game for poor performance are also considered individual sanctions.<sup>59</sup>

Internal team sanctioning methods can be used preemptively, as a means of preventing future penalties, or retroactively, in response to a violation of the league rules.<sup>60</sup> When the latter occurs, we are once again reminded of Levinson's theory that the group is capable, and potentially better suited, to apportion individual responsibility within the group after incurring a collective sanction.<sup>61</sup> Alternatively, the team may use various individual sanctions as a tool for shaping behavior and enhancing performance.

Individual monetary sanctions have recently seen increased use, as the NFL has been doling out individual fines on those players who exhibit especially violent hits.<sup>62</sup> Affected players do not welcome the change, as they contend that the league is overstepping the "fine line" between "curbing a player's intensity and style of play" and stunting their purpose on the field altogether.<sup>63</sup> Some fans further argue that the NFL is ruining the ethos of the game.<sup>64</sup>

The question raised by recent health concerns – how the NFL can successfully make the game safer when individual deterrent measures clash with the clearly embedded norm in football of aggression and violence – is considered below.<sup>65</sup> However, it is worthwhile to highlight the unusual nature of the issue as it relates to this article. Based on commonly accepted theories regarding the justification of punishment and their emphasis on individually tailored sanctions, one would assume that the most individualized form of punishment in the NFL penalty structure would be met with the least hostility. Instead, strictly individual and indirectly collective sanctions are currently being protested, whereas the typically controversial pure collective sanctions seem to garner few complaints.

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58. See, e.g., Jason La Canfora, *Unhappy Suh Plans to Appeal \$20K Fine for Hit On Dalton*, NFL (Aug. 17, 2011), <http://www.nfl.com/news/story/09000d5d82188b22/article/unhappy-suh-plans-to-appeal-20k-nfl-fine-for-hit-on-dalton>; NFL Fines Harrison, Meriweather, Robinson \$175K Total for Hits, NFL NEWS (Oct. 19, 2010), <http://www.nfl.com/news/story/09000d5d81b74d6e/article/nfl-fines-harrison-meriweather-robinson-175k-total-for-hits>.

59. See generally Levinson, *supra* note 12, at 374 (explaining the types of non-legal sanctions available to closely-knit groups whose members interact frequently (like sports teams)).

60. See generally *Penalty Summary*, *supra* note 44 (illustrating the different types of possible penalties for violating league rules).

61. See *supra* note 35.

62. The NFL's actions appear to be an effort to increase its perceived concern for player safety in response to former players' lawsuits over the head trauma they sustained while in the League. See *supra* note 58 (discussing the hefty fines recently assessed against Pittsburgh Steelers linebacker James Harrison (\$75,000) and Detroit Lions defensive tackle Ndamukong Suh (\$20,000)).

63. See La Canfora, *supra* note 58; See also *NFL Fines Harrison*, *supra* note 58. Victims of violent hits are also unsatisfied with the fines. As Mohamed Massaquoi's agent, Brian Ayrault, put it, "Harrison has made \$20 million over the past three years, and they only fined him \$75,000? I don't think that fine is a deterrent or fair to competitive balance. . . the punishment did not fit the crime." *Id.*

64. Fan comments left on La Canfora's article: "Maybe the little girls that are getting hit by Suh and other aggressive defen[s]e players should go play a sport like volleyball if they can't handle getting hit. Give me a break he is doing his job. You can't fine a guy for being good at what he does;" Another fan: "They [the NFL] are ruining the game, its history, and future." *NFL Fines Harrison*, *supra* note 57.

65. See *infra* Part III.

### III. ANALYSIS FOR RECOMMENDATION

Continuing this analysis requires a two-part inquiry. The first involves analyzing the specific puzzle of collective sanction use within the NFL and proposing an alternative resolution to the League's current course of imposing individual fines. The principles discussed thus far yield two distinct approaches to solving the NFL's predicament of attempting to change the game to prioritize player safety when violence has historically been a central part of football. This leads to the second, more general step of the inquiry, returning to the discrepancy posed at the beginning of this article: what can be learned from the NFL's use of collective sanctions as it relates to life in general?

#### A. OPTIONS FOR THE NFL

The first option for the NFL follows the position that the use of collective sanctions is unjustifiable.<sup>66</sup> Under desert-constrained consequentialism, to achieve the end goals of general deterrence (dissuading other players from excessively violent hits) and specific deterrence (detering the individual who committed the prohibited hit) within the limits imposed (not punishing individuals who are innocent of wrongdoing and ensuring that the punishment does not exceed the offender's ill-desert), the use of individual fines is a legitimate means of punishment.

The NFL typology demonstrates that individual responsibility increases with the severity of the offense.<sup>67</sup> Although the League utilizes pure collective sanctions, the sliding scale evident in the typology suggests that the NFL subscribes to the desert-constrained consequentialist approach. In determining the appropriate punishment for curbing this particular problem, it is certainly plausible to think that targeting repeat offenders will send a message to all teams about what kind of behavior will be tolerated going forward. Furthermore, supplementing fines with suspensions and disqualifications adds a collective component that seemingly minimizes the cost on the team. Some may argue that the minimal collective effect is desirable, as it satisfies our inclination towards proportional punishment based on an individual's ill-desert.

However, a more critical examination reveals the problematic nature of the collateral consequences of indirectly collective sanctions. Disqualifications and suspensions as used in team sports produce highly variable results. The collective cost can be very high or very low, depending on which player incurs the penalty at what time in the game and at what point in the season. Admittedly, yardage penalties can also be more costly at certain junctures in the game, but they are distinguishable in that their cost can be predicted *ex ante* and does not fluctuate based on the team and/or individual punished. In other words, if both the Patriots and the Lions received a 15-yard penalty late in the fourth quarter, the cost to both teams would be the same.

All teams do not suffer equally, however, with disqualifications and suspensions precisely because the initial impact point is individual and the collective consequence is collateral. Returning to the Patriots/Lions analogy – the cost to the team of ejecting Lions star Ndamukong Suh from a playoff game would be much higher than that of ejecting a

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66. See *supra* Part II.B.

67. See discussion *supra* Part II.

Patriots rookie with little to no previous playing time from the same game.<sup>68</sup> Therefore, the use of indirectly collective sanctions over pure collective sanctions is worth reconsidering. Such considerations are also useful outside the context of sports. Jeffrey Brant-Ballard comes to a similar conclusion on the moral justifiability of the indirectly collective consequences on families of prisoners, which he terms “the paradox of collateral damage.”<sup>69</sup>

Furthermore, the first approach fails to take the strong solidarity of NFL teams into account. The second approach incorporates this powerfully persuasive tool by advocating for the increased use of purely collective sanctions, either alone or in tandem with individual fines. As previously discussed, one of the reasons the use of collective sanctions may be seen as permissible is that the collective possesses hidden responsibility for commissioning the wrongdoing.<sup>70</sup> Approval of excessive violence is a social norm that the collective is responsible for repeatedly fostering through its internal mechanisms, which is why it has been so deeply engrained in the sport. The New Orleans Saints bounty program provides further proof that the collective is often at least partially responsible for the targeted wrongdoing.<sup>71</sup> Purely collective sanctions are not only justifiable, but may also be necessary in order to reverse the longstanding and pervasive violent football culture.

## B. GENERAL RECOMMENDATION FOR THE USE OF COLLECTIVE SANCTIONS

The second approach, with its recommendation of increased use of collective sanctions for the NFL’s specific problem, transitions us into the second part of the inquiry – advancing a general recommendation for the use of collective sanctions. In answer to the discrepancy raised at the start of this article, either of two conclusions now appear plausible: (1) sports are distinguishable from life, rendering our disparate treatment of collective sanctions in one domain (life in general) as compared to another (the NFL and other team sports) entirely defensible; or (2) we should be more tolerant of collective sanctions in life based on their prevalence in the NFL.<sup>72</sup>

### 1. CONCLUSION 1 - COLLECTIVE SANCTIONS SHOULD BE TREATED DIFFERENTLY IN SPORTS THAN IN OTHER AREAS OF LIFE

In terms of the first possible conclusion, NFL teams as a collective certainly appear to possess unique characteristics that make teams more receptive to collective sanctions. As Levinson recognizes, the efficacy of collective sanctions turns on a number of factors, the most important being group solidarity.<sup>73</sup> Solidarity is especially strong within NFL teams,

68. See generally *Ndamukong Suh*, ESPN, [http://espn.go.com/nfl/player/\\_id/13234/ndamukong-suh](http://espn.go.com/nfl/player/_id/13234/ndamukong-suh) (last visited July 17, 2013) (illustrating how valuable Suh has been to the Lions).

69. See Brand-Ballard, *supra* note 15, at 71.

70. See *supra* Part II.C.

71. See Mike Florio, *NFL finds that Saints violated “bounty rule”*, NBC SPORTS (Mar. 2, 2012, 3:44 PM), <http://profootballtalk.nbcsports.com/2012/03/02/nfl-finds-that-saints-violated-bounty-rule/>.

72. This article rules out a possible third conclusion that the NFL’s use of collective sanctions is unjustifiable, based on the first part of this analysis, which demonstrated the reasons for caution in moving toward a mix of strictly individual and indirectly collective sanctions and why collective sanctions are both justifiable and potentially necessary in the League.

73. See Levinson, *supra* note 12, at 375–376; see also, Heckathorn, *supra* note 13, at 369 (stating that the three requirements for Levinson’s model of intragroup control are “actors must possess a rigorously specifiable

as members are homogenous in their lifelong profession and level of income. In addition, the competitive nature of the game requires extreme cooperation toward the collective goal of winning.

By possessing these characteristics, it becomes relatively easy to apply the two principles governing justifiability of collective sanctions, delineated earlier.<sup>74</sup> Hidden responsibility can be found under both the commission and omission categories, as the team first instills the norms for behavior in its members and then is often required to assist in order for the offense to occur. When the team fails to prevent wrongdoing, it is typically acceptable to hold the team responsible primarily because strong solidarity places its group members in positions to monitor and control one another. Finally, the general consequentialist calculus comes into play with the concept of bittersweet benefits. If group members gain from efforts of the collective, it is fair to subject them to punishment costs that group members incur.

In light of these characteristics and principles, it is clear why some efforts to use collective sanctions have been criticized.<sup>75</sup> In upholding the “One Strike” eviction policy discussed at the beginning of this article, Chief Justice Rehnquist determined there would be no innocent tenant exception to the policy based on a general consequentialist calculus, arguing that “[s]trict liability maximizes deterrence and eases enforcement difficulties.”<sup>76</sup> The rub with this conclusion can be explained by the Court’s application of the general consequentialist calculus to a situation where the cost to innocent family members or friends is arguably too high. If family members and friends do not benefit from collective efforts, the bittersweet benefits theory does not apply either. Although the Court did not utilize hidden responsibility reasoning, it is useful to note how oftentimes family members in this situation lack sufficient influence and control over wrongdoers to justify their responsibility under the first two principles. This reinforces the importance of group solidarity to the efficacy of collective sanctions.

At first, it seems difficult not to conclude that sports are simply too different from life in general – the stakes are lower, the camaraderie is higher. However, this article ultimately rejects conclusion one in hopes of advancing a change to the status quo. Halting the analysis

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capacity to affect one another’s behavior; exercising such control must entail a specifiable cost to each participating actor; and control structures must be treated as social products, with each individual actor’s contribution having a specifiable impact on that structure”).

74. See *supra* Part II.B.

75. For another account of a controversial use of collective sanctions, see Amy Howlett, *Getting Smart: Crafting Economic Sanctions that Respect All Human Rights*, 73 *FORDHAM L. REV.* 1199, 1217 (“[G]eneral economic sanctions have been criticized as blunt mechanisms, analogous to blowing up an entire airplane with innocent passengers on board to kill just one terrorist”). The thrust of Howlett’s argument is for use of “smart” sanctions, which shrink the target group to more justifiably responsible individuals because citizens of the state are not homogenous, nor are they in an advantageous position to be able to influence individual wrongdoers. *Id.* Civilians bear the brunt of the punishment while more powerful culprits continue on in their violations. See also Tony Karon, *U.S. Suffers Iraq ‘Smart Sanctions’ Setback*, *TIMEWORLD* (May 31, 2001), <http://www.time.com/time/world/article/0,8599,128606,00.html> (“While his civilian population bears the brunt of the suffering, Saddam and his cronies profit from a sanctions-busting economy believed to be worth around \$3 billion a year — and the propaganda value of being able to blame Iraqis’ suffering on the West, coupled with the lucrative business opportunities created by the sanctions gives Baghdad plenty of reason to resist ‘smartening’ them”).

76. Rehnquist went on to explain: “Regardless of knowledge, a tenant ‘who cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project. . . it was reasonable for Congress to permit no-fault evictions in order to ‘provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs.’ Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002); see also *supra* Introduction.



at conclusion one ignores the insight the NFL provides into the type of structure that has successfully incorporated the use of collective sanctions.<sup>77</sup>

2. CONCLUSION 2 – THE USE OF COLLECTIVE SANCTIONS IN SPORTS SHOULD BE A GUIDE TO THE USE OF COLLECTIVE SANCTIONS IN OTHER AREAS OF LIFE

Conclusion two acknowledges the possibility that the characteristics that justify collective sanctions as they are used in the NFL occur en masse within other collectives. Moreover, the basic principles at work in team sports that create a receptive environment for collective sanctions should serve as a functional model for their use in life. This article therefore recommends a more tolerant attitude for the use of collective sanctions outside of sports, so long as the prerequisite characteristics are in place to justify their use under at least one of the two principles outlined in this paper: (1) hidden responsibility in the form of commission or omission, or (2) a general consequentialist calculus that the net social benefit outweighs the cost of punishment.

CONCLUSION

In sum, this article recommends two uses of collective sanctions. Specifically, the NFL should consider including pure collective sanctions in its approach to decreasing violence and head injuries in the NFL. Generally, the NFL team structure can be used as a model elsewhere, as long as the relevant collective sufficiently conforms to the characteristics and principles that justify the use of collective sanctions in sports jurisprudence.

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77. See Heckathorn, *supra* note 13, at 377 (“[A] more promising approach is to see whether group dynamics that bolster social control have been overlooked. Collective sanctions that generate compliance norms provide just such a dynamic by serving to reinforce intragroup normative constraints.”).



# Fan Activities from P2P File Sharing to Fansubs and Fan Fiction: Motivations, Policy Concerns, and Recommendations

Tiffany Lee

## INTRODUCTION

Illegal derivative uses of copyrighted works range from deleterious peer-to-peer file sharing to translations and relatively innocuous, socially beneficial fan fiction. The prevalence of illegal uses and purported motivations behind these uses indicates that copyright law does not fit with consumers' and fans' expectations and senses of fairness. Fans are demonstrating that media such as music, film, and television must be accessible and manipulable, but current copyright law simply does not allow enough fan participation.

This article describes a range of infringing uses of namely U.S. and Japanese media products (anime and manga), some of which arguably should be permissible. The article also explores the varying motivations of infringers as well as factors that prevent access to copyrighted works, to the detriment of the public good. Part I describes various illegal uses of American television and film, similar uses of Japanese manga and anime, and the mixed reactions from rights holders and creators<sup>1</sup> in both countries. Part II provides an overview of fan works and fair use defenses, some of which have more support than others, as well as murky areas where rights holders use the derivative work of fans for their own purposes. This part includes a discussion of for-profit fan works, a topic that articles defending fan works tend to eschew. Part III examines infringers' motivations as well as industry factors that lead to illegal uses, in order to devise in Part IV solutions and recommendations for the creative industries and policy makers.

## I. INFRINGING FAN ACTIVITIES AND THEIR IMPACT

### A. TYPES OF INFRINGING FAN ACTIVITIES

Infringing fan activities run the gamut of acceptability. Among illegal uses of copyrighted content, few would dispute the inclusion of *peer-to-peer file sharing*.<sup>2</sup> This is probably the fan use that is most harmful to the original creators or rights holders, and the

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1. This article discusses rights holders (often studios) and creators (often writers that hand over their rights to studios) largely synonymously, because creators are the original rights holders before they sell the rights to studios. Thus, they often share similar interests.

2. Several major court cases have addressed the issue of peer-to-peer file sharing. See, e.g., *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (U.S. 2005); *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. Cal. 2001).

activity that is most tantamount to facilitating theft.<sup>3</sup> Giving one purchased copy of a product to another is not problematic, but making it available to millions of people to own is another matter.<sup>4</sup>

There is general agreement that *fansubs* – anime products subtitled in assorted non-Japanese languages for non-domestic audiences – are illegal, especially when the Japanese original on which the subtitled version is based is obtained illegally. Even if the original is purchased legitimately, creating a fansub is still an infringing activity because in Japanese copyright law, as in American copyright law, the copyright holder has the exclusive right to make derivative works such as translations.<sup>5</sup> Fansubs may intrude on the original copyright owner's ability to license the anime to various distributors who will translate the material, though fans argue that some anime is never licensed to many countries or in their languages.<sup>6</sup>

*Scanlations*, translated versions of Japanese manga, present a similar situation. Some fans present the argument that scanlations are less harmful to rights holders than fansubs are, as the culture of scanlations is more akin to the culture of *dōjinshi* (self-published amateur manga), which is widely tolerated and possibly beneficial to the rights holders of original works.<sup>7</sup> But in principle the activities are similar; both fansubbing and creating scanlations infringe on the rights of copyright owners to reproduce and translate their works. And as fansubs may be blamed in part for declining anime DVD sales, scanlations may play a part in the 43% drop in manga sales in America from 2007 to 2011.<sup>8</sup> Moreover, large-scale fansubbing and scanlation websites have become increasingly for profit, often incorporating advertisements.<sup>9</sup> The for-profit element makes these larger operations more likely to be seen by the law as an economic substitute intruding on the market of the original work.

Fan-made music videos, combining copyrighted songs with images from anime, manga, television shows, and films, present another infringing activity. In one sense, this type of work should be entitled to protection because of the creative effort involved; even mere compilations of facts, when assembled in a creative way, may be given protection.<sup>10</sup>

3. See *Grokster*, 545 U.S. at 961 (Breyer, J., concurring).

4. See *Grokster*, 545 U.S. at 923.

5. See Ryu Kojima, *5. Exploitation of Works, Japanese Copyright Law*, TRANSPARENCY OF JAPANESE LAW PROJECT, <http://www.tomeika.jur.kyushu-u.ac.jp/ip/index.html#5c> (last visited July 29, 2013); see also Lauren Yamamoto, *Copyright Protection and Internet Fan Sites: Entertainment Industry Finds Solace in Traditional Copyright Law*, 20 LOY. L.A. ENT. L. REV. 95 (2000) (discussing in depth various ways in which fan works infringe under the U.S. Copyright Act).

6. See Jordan S. Hatcher, *Of Otakus and Fansubs: A Critical Look at Anime Online in Light of Current Issues in Copyright Law*, SCRIPT-ED, 2:4 (2005); see also Hye-Kung Lee, *Cultural Consumers and Copyright: A Case Study of Anime Fansubbing*, CREATIVE INDUSTRIES JOURNAL, 3:3 (2010) (discussing the infringing nature of fansubs); David Barboza and Michael Cieply, *In China, Foreign Films Meet a Powerful Gatekeeper*, NYTIMES.COM (April 29, 2012), <http://www.nytimes.com/2012/04/30/business/media/china-film-group-acts-as-a-powerful-gatekeeper.html?pagewanted=all> (describing the difficulties of legally bringing foreign films into China).

7. Hye-Kyung Lee, *Between Fan Culture and Copyright Infringement: Manga Scanlation*, MEDIA, CULTURE & SOCIETY 36(6), 1011–1022 (2009).

8. Jason Thompson, *Why Manga Publishing Is Dying (And How It Could Get Better)*, IO9.COM (Jan. 23, 2012), <http://io9.com/5874951/why-manga-publishing-is-dying-and-how-it-could-get-better>. Although it is reported that manga sales have been falling in the U.S. since 2007, the percentage of the drop is debatable. See *id.* Some calculations focus on printed manga, and may not take into account digital sales, such as Square Enix's online manga store or Viz Media's manga app, various iPhone and Kindle manga, or international digital magazines such as Gen Manga and Comic Loud. See *id.*

9. See, e.g., MANGAHERE.COM, <http://www.mangahere.com/> (last visited July 23, 2013) (an example of a typical scanlation site).

10. See *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991); see also Digital

However, this scenario is closer to mashups (blends of pre-recorded songs), since the videos are compilations of images from works already copyright protected. Mashups may be protected by the fair use doctrine if they are transformative, such as when they provide critical commentary on the samples they use.<sup>11</sup> Also, most of these fan-made videos are not for profit, which cuts in the favor of the fan.

Finally, *fan fiction*, stories based off of often copyright protected stories and characters, are probably the most innocuous of fan works. Most fan fiction is non-commercial and does not seem to intrude on any market that rights holders would like to exploit, such as stories in which originally heterosexual characters are depicted in homosexual relationships.<sup>12</sup> The above categories of fan works are the main topics that will appear throughout this article.

## B. RIGHTS HOLDERS' REACTIONS

Rights holders have reacted to infringing fan activities differently in America and Japan. Professor Rebecca Tushnet, commenting on major studio reactions in the U.S., points out that fans are reasonably confused by rights holders' mixed reactions, and she generally argues that illegal fan uses (particularly the writing of fan fiction) should be protected by a fair use defense.<sup>13</sup> Fan culture scholar Henry Jenkins notes that while many entertainment corporations have tolerated fan fiction, a few have attempted to suppress unauthorized use of their characters.<sup>14</sup> Also confusing to fans may be shifts within a single company's attitudes. Twentieth Century Fox Films became notorious for their attempts to shut down fan sites revolving around their shows.<sup>15</sup> By contrast, Paramount made early attempts to suppress *Star Trek* fan fiction, but eventually grew to support the fan community.<sup>16</sup>

Particularly common is negative studio reactions to homosexual depictions of characters.<sup>17</sup> Tushnet cites a letter discussing a cease and desist letter served on a seller of

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Millennium Copyright Act, 17 U.S.C. §§ 512, 1201–1205, 1301–1332; 28 U.S.C. § 4001 (1998) (providing the law governing digital works, such as music videos online).

11. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The fair use doctrine is discussed further in discussed in Part II, *infra*.

12. Whether a fan work is commercial is a significant factor in analyzing a possible fair use defense. See *infra* Part II.A.

13. Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651, 654 (1997) (arguing that fan works deserve fair use protection because they involve creative labor, are non-commercial, and are not an economic substitute for the original).

14. Henry Jenkins, *TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE*, 30-31 (1992) (discussing Lucasfilm's initial attempts to suppress erotic stories in *Star Wars* fan fiction).

15. Sean Kirkpatrick, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us about the Use of Strategic Selective Copyright Enforcement*, 21 TEMP. ENVTL. L. & TECH. J. 131, 131 (2003).

16. Tushnet, *supra* note 13, at 653 (referencing a letter from Lori L. Bloomer to [fictalk@chaos.taylored.com](mailto:fictalk@chaos.taylored.com) (Oct. 28, 1996) (on file with the *Loyola of Los Angeles Entertainment Law Journal*)).

17. Studios are usually the rights holders because they require, as part of their contracts with writers, that writers sign over all rights. See *supra* note 1.

*Quantum Leap* homoerotic fan fiction.<sup>18</sup> Another example is Lucasfilm's attempts to keep portrayals of *Star Wars* relationships in fan fiction heterosexual.<sup>19</sup>

Fan reactions often appeal to rights holders. Fan fiction authors (and artists of fan art) tend to include disclaimers on their works, stating that they do not own the characters, or even identifying the rights holders and/or creators.<sup>20</sup> Fans have identified these disclaimers and credits as a fair way to (1) ensure people do not confuse their work with the original or authorized derivatives; (2) let viewers know who created or owns rights to the characters; and (3) explain that they have no harmful or greedy intentions. While these notices may not appease all copyright owners, especially in the few occurrences where the work is for profit, they do help protect fans against trademark dilution claims and state law charges of passing off or other types of trademark infringement.<sup>21</sup>

To evaluate current copyright law and whether fan activities are reasonable, it is also essential to consider the logic of the studios. Initial studio reactions were to attempt to control their stories and images, and one of the most understandable instances would be controlling characters for children, such as Disney's Mickey Mouse.<sup>22</sup> Rights holders have good reason to worry about maintaining these characters' relatively wholesome image.

But as reasonable as studio concerns may be, their desire to control images is not guaranteed by U.S. copyright law. Their aspiration to control the integrity of their characters more closely resembles a moral rights argument, referring to the rights of an author to attribution and protection of the moral integrity of the work; however, moral rights are not protected by American law outside of visual art.<sup>23</sup>

Today, studios largely view fan fiction and even fan videos as inevitable and innocuous, although certain uses may be more innocuous, or even encouraged, by rights holders than others. The creator of *Star Trek*, Gene Roddenberry, though not the official rights holder of the franchise, approved of fan uses, namely theatrical plays, as long as credit was given to the source materials, and as long as any profit made was primarily in the service of community theatre programs.<sup>24</sup> Roddenberry's view is evocative of a Creative Commons license.<sup>25</sup> It would indeed be preferable to fans and to society if creators or rights holders could authorize certain fan uses and tether the uses to requirements such as attribution or delegation of profits to specific causes.

18. Tushnet, *supra* note 13, at 653 (referencing a letter from Leigh M. to slashpoint@ucdavis.edu (Oct. 27, 1996) (on file with Tushnet)).

19. *Id.* at 674 (referencing Joan Marie Verba, *BOLDLY WRITING: A TREKKER FAN AND ZINE HISTORY, 1967-1987*, at 39, 55-56 (1996)).

20. For instance, on *Star Trek* fan fiction, authors often note that Paramount owns all rights and that Gene Roddenberry is the original creator. *See, e.g.*, KIRK/SPOCK FANFICTION ARCHIVE, <http://ksarchive.com> (last visited July 29, 2013).

21. *See* Federal Trademark Dilution Act, 15 USC § 1125 (1995); *see also* Meredith McCardle, *Fan Fiction, Fandom, and Fanfare: What's All the Fuss?*, 9 B.U.J. SCI. & TECH. L. 434 (2003) (discussing commercial fan works and trademark claims).

22. *See generally* *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. Cal. 1978) (illustrating Disney's lawsuit against underground cartoonists Air Pirates after they produced a comic depicting Mickey and Minnie Mouse engaging in explicit sexual behavior and consuming drugs).

23. *See* Visual Artists Rights Act, 17 U.S.C. § 106A (1990).

24. Tushnet, *supra* note 13, at 673.

25. Creative Commons licenses allow creators to communicate which rights they reserve, and which rights they waive for the benefit of recipients or other creators. They are created and offered free to the public by non-profit organization Creative Commons. *See* CREATIVE COMMONS, <http://creativecommons.org/> (last visited July 24, 2013).

Another example of a policy that could have been articulated in a Creative Commons license is Paramount's policy as the official rights holder of *Star Trek*. Largely ignoring fan fiction publications unless they are commercial products, Paramount's policy is to take aggressive action against fan copying of official images or scripts.<sup>26</sup> Strict copying is one activity that the studio will not abide, but it has largely given tacit tolerance of other activities.

This policy could have been incorporated in a Creative Commons license, and it is also interesting with regards to a fair use defense, which courts have largely boiled down to a question of whether the fan works create a substitute for the original market.<sup>27</sup> Compared to a franchise such as *Star Wars*, with merchandise ubiquitous in retail stores like Walmart, official *Star Trek* images (on clothing, lunch boxes, bedspreads, posters, etc.) are surprisingly difficult to come across.<sup>28</sup> This suggests that while fan copying of images could intrude on a market in which Paramount might *someday* like to increase activity, in the meantime such copying does not appear to harm a current market. Although courts are indeed concerned with hypothetical future markets in which right holders might become active, a policy concern arises in terms of societal benefit. Should Paramount be permitted to forbid fans from creating *Star Trek* merchandise, even if Paramount itself slows in creating such merchandise?<sup>29</sup> Such protection of potential markets could leave society in a dearth of creativity if fans declined to infringe rights by creating fan art, posters, t-shirts, etc. Indeed, relatively few images are being made, making it difficult for *Star Trek* fans to purchase merchandise with the images of their favorite characters, unless they are at fan conventions, where the artwork, clothing, and posters largely utilize unauthorized copies of images. The societal benefit argument is that copyright regimes should promote creativity, not allow one entity to stamp out creation and close a lock on a vault of popular characters and images.

Japanese industry reactions were remarkably different from American counterparts, with good reason. In Japan, unlike in the U.S., fan works – including commercial fan works – make up an enormous and visible industry that has matured alongside the industry of original content production. The most visible example of this is a phenomenon called *dōjinshi*, which translates to “self-published manga,” and refers to the industry of mostly amateur, fan-made manga, much of it based on copyrighted works.<sup>30</sup> The *dōjinshi* conventions, where fans buy and sell their works, present an enormous, large-scale tolerance of copyright infringement.<sup>31</sup>

Copyright scholar Sean Kirkpatrick notes that some legitimate owners of anime are pleased when their work takes on a life of its own, generating *dōjinshi* fan works, even

26. *Id.*

27. See *infra* Part II.A.

28. Illustrating the contrast, a search of “Star Trek” on Walmart.com results in 453 products, while a search of “Star Wars” results in 1188 products. See WALMART.COM, <http://www.walmart.com/> (last visited July 25, 2013).

29. For example, the Star Trek franchise experienced what some people thought might be the death of the franchise when the most recent television series, *Star Trek: Enterprise*, ended in 2005. See *An End to the Enterprise*, N.Y. Times (Apr. 26, 2005), <http://www.nytimes.com/2005/04/26/opinion/26tue4.html?ref=startrek>.

30. Sean Kirkpatrick, *Like Holding a Bird: What the Prevalence of Fansubbing Can Teach Us about the Use of Strategic Selective Copyright Enforcement*, 21 TEMP. ENVTL. L. & TECH. J. 131, 147 (2003).

31. See generally *What is the Comic Market*, COMIKET (2008), <http://www.comiket.co.jp/info-a/WhatsEng080528.pdf> (explaining about Comiket, otherwise known as the Comic Market, the world's largest *dōjinshi* fair, held twice a year in Tokyo, Japan).

though such fan works are for-profit.<sup>32</sup> Because *dōjinshi* is such an accepted market in Japan, popularity of content among *dōjinshi* artists can be seen as a legitimate measure of success. Professor Matt Thorn from the Manga Department of Kyoto Seika University opined that if a particularly racy fanzine caused a stir, it would help the mainstream manga.<sup>33</sup>

Another reason that copyright owners in Japan did not pursue legal battles is that most Japanese animation studios are small, are constrained by tight budgets, and survive on small television contracts or straight to video deals.<sup>34</sup> Engaging in legal disputes that might alienate fans would constitute a grave risk and almost certainly would not increase their revenue.

In addition, Japanese society does not resort to lawsuits as quickly as in America.<sup>35</sup> Parties will first attempt a process of conciliation and apology; lawsuits are considered the worst possible outcome since they largely ruin relationships in a public way, reflecting poorly on all parties involved.<sup>36</sup> Even in the case of internet music piracy, rather than bring lawsuits as record companies in the U.S. did, the Japanese industry reacted by drastically cutting CD prices; they gave the fans what they wanted.<sup>37</sup> Kirkpatrick cites the value of harmony within the community and the fact that Japan has very few lawyers as reasons for this reaction.<sup>38</sup>

Although non-aggressive reactions to amateur manga and even illegal downloads of anime are understandable, Japan's reaction to peer-to-peer file sharing was not a foregone conclusion. While the lawsuits against consumers in the U.S. brought rancor towards the studios, the Japanese recording industry seems to have avoided such a reaction, by attempting to maintain harmony with consumers.<sup>39</sup> Professor Ian Condry notes that the decline in the Japanese music market has an even longer history than in the U.S.,<sup>40</sup> but by March 2004, recording executives in Japan had initiated only three legal actions, while hundreds of lawsuits had already commenced in Europe.<sup>41</sup> While Japanese society is generally not litigious, and there are far too few prosecutors in Japan to pursue many crimes, Japanese rights holders also did not necessarily assume that fans were behaving improperly and should be deterred from continuing their actions.<sup>42</sup> Instead, quickly accepting that a shift in consumer culture had occurred, Japanese content providers sought to make up losses in profits by pursuing other markets, such as song ringtones for cell phones, with much more alacrity than their American counterparts.<sup>43</sup>

Although the media industries of America and Japan reacted to most types of infringing fan works differently, rights holders in both locations will rarely interfere with

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32. Kirkpatrick, *supra* note 30 at 137.

33. Ian Condry, *Cultures of Music Piracy: An Ethnographical Comparison of the US and Japan*, 7 INT'L J. CULTURAL STUD. 343, 354 (2004).

34. Kirkpatrick, *supra* note 30, at 143.

35. *Id.* at 148.

36. *Id.* at 149.

37. *Id.* at 148.

38. *Id.* at 149.

39. *Id.* at 148-49.

40. Condry, *supra* note 33, at 347.

41. *Id.* at 345-46.

42. Kirkpatrick, *supra* note 30, at 149.

43. See Condry, *supra* note 33, at 351-52, 355.



fan fiction because the majority of those stories do not intrude on the original market.<sup>44</sup> By placing characters in situations that the original work would not allow – such as in a homosexual context, or where a main character dies – the majority of fan fiction often incorporates huge changes that would signal the end of the show if incorporated in official products.<sup>45</sup> Thus, even in commercial contexts, fan fiction is largely the least harmful type of fan work to the original market, and probably the most entitled to protection.

### C. FAN WORKS' IMPACT ON THE ORIGINAL MARKET

Case law provides support for a conclusion that fan works (especially, fan fiction) enhance the market for official content. The Ninth Circuit, in *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, held that a computer program allowing Nintendo players to change character attributes improved the market for the original and thus was fair use.<sup>46</sup> Admittedly, fan fiction is not the same as a device that adds variety to the appearance of game characters, but the premises and potential objections are similar; both the computer program in *Lewis Galoob Toys* and fan fiction allow non-rights holders to change the image and characterization of characters that are part of an official text. The main objection is likely the same in both cases: only the rights holder should have the right to control the characters, because non-rights holders changing the attributes of characters may tarnish the characters or confuse the public, creating the impression that the rights holders have authorized or created fan-made results.<sup>47</sup> The Ninth Circuit was more concerned with the market of the original material and the fact that it was not harmed, but ameliorated.<sup>48</sup> If fan fiction is similarly beneficial to the market of the original works, then courts should uphold fan fiction authors' penning of stories using copyrighted works under a fair use defense.

Other evidence suggests that fan fiction does not harm the original market. Tushnet notes that although *Star Trek* fan fiction has been thriving since the 1980s, as of 1996, an official *Star Trek* novel was sold every thirteen seconds.<sup>49</sup> Since July 1986, thirty consecutive *Star Trek* novels were *New York Times* best sellers, which was the longest consecutive streak of any series at the time Tushnet's article was published.<sup>50</sup> This co-existence of thriving official texts with flourishing fan fiction seems to suggest that, in the light most unfavorable to fans, fan works do not appear to harm the original market. Interpreted in the light most favorable to fans, this evidence may suggest that fan fiction helps official texts to thrive by generating overall interest in *Star Trek*.

However, in contrast to the argument that fan fiction may support official markets, anime producer Arthur Smith, speaking on behalf of many Japanese companies, has written on the detrimental effect that another type of fan work, fansubs, has had on the market of anime DVD sales.<sup>51</sup> Smith largely views fansubs the same as peer-to-peer file sharing, and

44. An exception would be a commercial novelization that attempted to pass itself off as an official, authorized book, but most fan fiction authors include clear disclaimers indicating the fan work is their own and identifying the rights holder. See *supra* note 20.

45. Tushnet, *supra* note 13, at 670-71.

46. *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965, 967 (9th Cir. 1992).

47. Likelihood of confusion and dilution are often primary concerns in trademark cases as well. See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 759-60 (9th Cir. Cal. 1978).

48. *Lewis Galoob*, 964 F.2d at 971-72.

49. Tushnet, *supra* note 13, at 672.

50. *Id.*

51. See Arthur Smith, *Open Letter from GDH International's Arthur Smith*, ANIME NEWS NETWORK,

he does not agree with the public benefit argument of creating translations.<sup>52</sup> While he admits that there is some value to the concept of generating hype for unknown titles through fansubs or file sharing, he notes that interest in anime in the U.S. (as evinced by anime convention activities, television ratings, etc.) was at a high in 2005, but anime DVD sales dropped by 50% from 2005 to 2007.<sup>53</sup> To account for this inconsistency, Smith deduces that fansubs and illegal video downloading sites have had a deleterious effect on the anime industry, despite fans' attempts to suggest fansubs promote the industry.<sup>54</sup> While aware that most fansubbing groups and anime sharing websites are well-meaning and encourage fans to purchase the DVDs, Smith presents convincing evidence that fans' attempts to promote anime through illegal activities is misguided and harms the original market.<sup>55</sup> If this evidence were conclusive, courts should not uphold an ability to create fansubs under fair use because it is deleterious to the original market. This contrast to fan fiction reinforces the notion that not all fan works are created equal; even if non-commercial, some fan works perhaps should be illegal.

But some arguments can be made that fan works are too beneficial to be illegal.<sup>56</sup> A similar argument is that illegal sharing of works allows a previously undiscovered market to emerge and grow. The dubbing and trading of anime among fan clubs in the U.S. decades ago likely contributed significantly to the growth of American interest in anime films.<sup>57</sup> Moreover, major media in the U.S. such as film, radio, cable television, and recorded music depended on "piracy" for their initial success.<sup>58</sup> Thus, for new markets that have not yet gained recognition, illegal uses may be beneficial.

Assuming illegal file sharing does harm DVD sales, should fansubs be suppressed when the international community is otherwise prevented from seeing anime in particular languages, especially, in countries where anime is never licensed in the local language? English language fansubs often provide such countries with a version of the anime that they can watch, since English is more well-known than Japanese.<sup>59</sup> Moreover, anime producers likely do not have sufficient resources to establish official channels to distribute anime in many more countries than they already do.<sup>60</sup> Courts and legislators should consider these policy implications.

Moreover, are falling anime DVD sales dissuading anime artists from creating more anime, or dissuading young people from becoming anime artists? The *dōjinshi* market (where many anime and manga artists start out) is still quite large and vibrant, suggesting that many do not pursue anime and manga because they hope to maintain absolute control over their characters. However, it is possible they do not continue making anime

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<http://www.animenewsnetwork.com/industry-comments/arthur-smith-open-letter-on-fansubbing> (2007).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. For example, a Japanese research institute has found that clips of anime on YouTube may have boosted domestic anime DVD sales, once the TV broadcasts in Japan concluded. Tatsuo Tanaka, *Do Illegal Copies of Movies Reduce the Revenue of Legal Products? The Case of TV Animation in Japan*, RESEARCH INSTITUTE OF ECONOMY, TRADE & INDUSTRY (2011), <http://www.rieti.go.jp/en/publications/summary/11010021.html>.

57. Condry, *supra* 33, at 354-55.

58. *Id.* at 355.

59. English is generally recognized as the most widely used language in the world. Seth Mydans, *Across cultures, English is the word*, N.Y. TIMES (May 14, 2007), [http://www.nytimes.com/2007/05/14/world/asia/14iht-14englede.5705671.html?\\_r=0](http://www.nytimes.com/2007/05/14/world/asia/14iht-14englede.5705671.html?_r=0).

60. See generally *Anime Industry in Japan*, JETRO (2008), [www.jetro.org/trends/market\\_info\\_anime.pdf](http://www.jetro.org/trends/market_info_anime.pdf) (providing general information about the Japan anime industry, both domestic and overseas).

professionally because they cannot make a living on it. The objective of copyright law (to promote creation)<sup>61</sup> applies not just to amateurs and fans but also to people who would become authors for their livelihood.

## II. FAN WORKS AND FAIR USE DEFENSES

Because they do not infringe on an original market, require creative effort, and are often transformative parodies, many fan works are entitled to protection under a fair use defense.<sup>62</sup> But should all such works be protected? It is difficult to evaluate the current state of copyright law and fair use without considering why fans act as they do. Some policy concerns may justify unauthorized uses of copyrighted works, while other uses are not supportable. Below is a brief overview of the relevant case law and an exploration of policy concerns and one major influence on fan expectations: the mixing of professional and fan activities.

### A. *CAMPBELL V. ACUFF-ROSE*

The formative case on copyright law and the fair use defense for derivative works that may be infringing is *Campbell v. Acuff-Rose Music*.<sup>63</sup> The case arose after rap group 2 Live Crew composed a parodic song, "Pretty Woman," based on Roy Orbison's original "Oh, Pretty Woman."<sup>64</sup> While the original glamorized the woman who was the subject of the song, the parody depicted a far from glamorous image of a prostitute.<sup>65</sup> Although 2 Live Crew had attempted to secure a license from Acuff-Rose Music and their request was denied, they produced the song anyway.<sup>66</sup>

*Campbell* established that a parody could be fair use even if it was for profit.<sup>67</sup> More important than its economic value was its creative value, as the Supreme Court put strong emphasis on the transformative element of the derivative work, suggesting that creativity – not maximizing profits for rights holders – is what copyright law should protect.<sup>68</sup>

The fair use analysis considered by the Court included four factors: (1) the purpose and character of the use, especially whether the use is commercial, or not for profit; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used compared to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work.<sup>69</sup> In practice, the transformative element of the derivative work has become the touchstone for the fair use test, especially when exact copying occurs.<sup>70</sup>

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61. The U.S. Constitution empowers Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

62. See 17 U.S.C. § 107.

63. 510 U.S. 569 (1994).

64. *Id.* at 572.

65. See *id.* at 582.

66. *Id.* at 572.

67. *Id.* at 591.

68. *Id.* at 579; see also *supra* note 61.

69. 17 U.S.C. § 107.

70. See *Campbell*, 510 U.S. at 591.

While case law does not address the question of fair use in the context of many fan works, such as fan fiction, *Campbell* can be applied to individual works on a case by case basis, from fan-made videos and mash-ups to fansubs, scanlations, and fan fiction. Peer-to-peer file sharing fails the fair use test because it involves exact copying for a commercial purpose, violating the fourth factor, and since the illegal download becomes an economic substitute for the original, it cannot be upheld under a fair use defense.

## B. POLICY CONCERNS

A number of policy issues should be considered concerning protection of fan works. For example, as discussed earlier, fansubs and scanlations may be justified for use in countries where anime and manga are not licensed or translated via official channels.<sup>71</sup> If certain anime and manga are never translated to Norwegian, for example, then Norwegians who do not know Japanese will be denied exposure to the media, unless they are able to access it through translations in English or other languages. Not only could denial of such exposure be harmful to a potential anime or manga market in Norway, but also creativity in Norway is in no way served by suppressing exposure to foreign art forms.

Further, fans' illegal activities do not appear to dissuade people from creating. People are surely not of the mind that if they create a work, they will not get credit for it, or that fan works based on the work will detract from their authorship or profits. Thus for many fan works, which require creativity and rearranging, not just copying, creativity does not appear to be diminished.

This should be contrasted with peer-to-peer file sharing. Many continue to create music for the enjoyment of the activity, but it is perfectly reasonable to assume that, based on falling revenues in the music industry, many are dissuaded from pursuing a career in music, as they feel they cannot make a stable living as professional musicians. This may dissuade many people from creating music they would have created if music creation were more profitable. Thus, from a policy standpoint, peer-to-peer file sharing, which allows free copies to replace originals, harms the goal of copyright, to promote creativity, without offering any offsetting societal benefits.

Additionally, professors Anupam Chander and Madhavi Sunder have written about the uses of one particular type of fan fiction, which empowers minorities who may not be given their own presence in official products, thus presenting another societal benefit argument.<sup>72</sup> *Mary Sue fan fiction*, often decried by fan communities, occurs when a fan fiction writer inserts herself into an original character within the world of an established text, such as becoming a Captain of a starship or Queen on an alien planet, meeting with Kirk and Spock and potentially forming a romantic relationship.<sup>73</sup> The possibilities are endless for plots allowing the insertion of a person typically denied a presence or voice in canonical texts.

An original (commercial) fan fiction that became well-known in the legal community, and was upheld by courts, is *The Wind Done Gone*, which presents a version of *Gone with the Wind* told by a black female character.<sup>74</sup> In *Gone with the Wind*, such characters were mere servants and caricatures with no meaningful voice portrayed fanning and serving

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71. See *infra* Part I.C.

72. See Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of Mary Sue Fan Fiction as Fair Use*, 95 CAL. L. REV. 597 (2007).

73. Chander & Sunder, *supra* note 72, at 597-98.

74. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

white characters; the black members of society were simplified embodiments of servitude and certainly not role models for any black youth watching the film or reading the book.<sup>75</sup> With the emergence of *The Wind Done Gone*, however, blacks were able to view a beloved American classic with a meaningful perspective from a black character. This is the value that all fan fiction can provide, even now that racial representation in film and literature is relatively improved.

Indeed, to this day, certain groups are not well-represented in film and television, in contrast to their strong presence in American society.<sup>76</sup> These include ethnic and religious minorities, but also LGBT individuals. They have few opportunities to see themselves in meaningful roles within American classics, and they are typically only sidekicks or minor characters within the main group of characters in mainstream shows and movies, if they appear at all.

Thus, “slash” fan fiction authors have, perhaps unwittingly, taken a step toward presenting images where gay men (and occasionally lesbians and transvestites) are empowered and given the spotlight in fictional worlds and stories that were originally created for the masses.<sup>77</sup> These authors are also giving themselves, in a way, more of a presence in roles historically – and still often – denied.

### C. BLURRING PROFESSIONAL AND FAN ACTIVITIES

Having identified several policy concerns advocating the fair use defense of fan fiction and suggesting that fansubs (and scanlations) have use in some instances as a benefit to society, another phenomenon has often caused fans confusion and influenced their expectations. Amateur works and official works have been intertwined for decades, and the blurring of the two persists in the entertainment industry today, especially as official channels utilize amateur and fan work.

Concerning the types of blurring that persist, major businesses such as Yahoo! and VH1 offer rewards for user generated content.<sup>78</sup> In addition to providing rewards, VH1’s contest selected a submission on their television show “WebJunk20” to become a part of the authorized television program.<sup>79</sup> Another example was a contest on YouTube soliciting music videos for the band Pretty Girls Make Graves.<sup>80</sup>

Pilots of major networks are also featuring more online material from amateurs. Journalist Richard Siklos cited pilots from Bravo and NBC (presumably from the year of the article, 2006), and noted that the USA Network was developing a pilot for a user-generated show on a popular website, eBaum’s World.<sup>81</sup>

With the increase of people uploading content online, a trend has developed where soliciting and using the best from amateurs and aspiring auteurs is in some ways preferable

75. See Chander & Sunder, *supra* note 72, at 614.

76. See *Room for Debate*, N.Y. TIMES (April 25, 2012), <http://www.nytimes.com/roomfordebate/2012/04/25/minorities-in-movies-and-television>.

77. “Slash” fan fiction involves same-sex romantic pairings. Chander & Sunder, *supra* note 72, at 609.

78. Richard Siklos, *Online Auteurs Hardly Need to be Famous*, N.Y. TIMES (Mar. 13, 2006), [http://www.nytimes.com/2006/03/13/business/media/13user.html?\\_r=1&oref=slogin&pagewanted=all](http://www.nytimes.com/2006/03/13/business/media/13user.html?_r=1&oref=slogin&pagewanted=all).

79. *Id.*

80. *Id.*

81. *Id.*

to using professionals. This is not just because amateurs are less expensive, but because the participation of fans gets more eyeballs on the company holding the contest. People are interested in the work of their peers, especially when they are the ones judging the contests, as is often the case.<sup>82</sup>

Similarly, commercials and movie trailers often have authorized remixes.<sup>83</sup> New Line Cinema solicited computer users to create for one of its films unofficial mashups of music from the movie, using material available on the film's official website.<sup>84</sup> Interestingly, this is similar to allowing fans to create music videos on YouTube with the official material, which is likely an infringing activity.<sup>85</sup> Here, New Line encouraged the public to violate its copyright in a particular way, much like having a Creative Commons license allowing for certain uses that would otherwise be infringing.

Rebecca Tushnet also notes the rise of video game companies selling amateur-created works and hiring programmers based on their unauthorized creations of levels for games.<sup>86</sup> Similarly, fan fiction writers turn professional using their fan writings as evidence of commercial potential.<sup>87</sup> The following are a few examples:

There's a librarian in Rathdrum, Idaho, who spent 10 years posting her writings about a character from Jane Austen's "Pride and Prejudice" online; Simon & Schuster paid her a \$150,000 advance to publish the works as a three-novel trilogy. In Brooklyn, N.Y., a free-lance copy editor has become one of the Web's best-known "Lord of the Rings" and "Harry Potter" fan-fiction writers, and has landed a three-book publishing deal for a young-adult fantasy series. When a comic-book store manager in New Jersey decided to take his first stab at fan fiction this year, entering a contest sponsored by Showtime's "The L Word," he got the attention of a literary agent, who signed him last month.<sup>88</sup>

A more recent example is Canon Film's Projection Imagination, which solicits submissions of imaginative photos related to specific storytelling themes.<sup>89</sup> Once submissions are collected, director Ron Howard and a public vote determine ninety-one winners, and then celebrity directors will choose one photo per theme (ten in total) to set the stage for upcoming films. Themes are rather abstract, such as "character," "mood," "the unknown," and "discovery."<sup>90</sup> Even though the actual photo may not appear in the film, this contest asks for brain power, creativity, and communication of concepts, not just the photographic work. Directors are looking for particular expressions of vague themes through photography. This suggests the industry values ideas and creativity from the public, which surely encourages fans to blur the boundaries between fandom and official productions. If the public's expressions of ideas are valued and used in productions by a reputable industry, then fans may feel that fan works can be not just a legitimate enterprise, but also a way to enter and influence the industry.

82. For example, cable TV channel Current solicited short videos for broadcast, with winners to be selected by voters online. *Id.*

83. Stuart Elliot, *Going Unconventional to Market Movies*, N.Y. TIMES (Apr. 6, 2006), <http://www.nytimes.com/2006/04/06/business/media/06adco.html>.

84. *Id.*

85. See *YouTube Community Guidelines*, YouTube, [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited July 25, 2013).

86. Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 169 (2007).

87. *Id.*

88. *Id.* (citing John Jurgensen, *Rewriting the Rules of Fiction*, WALL ST. J. (Sept. 16, 2006), at P1).

89. *Project Imagination*, CANON FILMS (2012), <https://www.longliveimagination.com/how-it-works>.

90. *Id.*

From the industry perspective, incorporating user-generated submissions that are selected based on high ratings and votes is logical. To the extent that one of a network's goals is getting hits on its website or views on its television show, higher involvement of viewers makes perfect sense, especially if it helps bring viewers to its website or channel instead of their competitor's.<sup>91</sup>

Thus, official channels often view illegal fan activity as evidence of talent and commercial potential. How then should the public view copyright law, which forbids such activity as fansubs, fan fiction, and fan-made music videos? The industry's ambivalent response, ranging from condemning to encouraging, does nothing to further notions that copyright law in its current form makes sense. Instead, because the goal of copyright is to promote creativity,<sup>92</sup> the law should protect and value both amateur and official work equally.

### III. EXAMINING INFRINGERS' MOTIVATIONS

In order to come up with industry solutions regarding infringing works, from the more innocuous non-profit fan fiction to the more insidious illegal file sharing, the motivations of fans must be understood, as well as the industry factors that influence these motivations.

One of the largest motivations for illegally sharing music may be the rise of CD prices to a level that consumers find unreasonable. From 1999 to 2001, CD prices (in the U.S.) rose 7.2%, likely contributing to why CD sales dropped during that time period.<sup>93</sup> Coupled with the estimation that 2.1 billion CDs were downloaded for free during that period, it may also demonstrate that fans felt the rise in CD prices was unfair.<sup>94</sup>

Music fans in both America and Japan have had similar reactions to increased CD prices.<sup>95</sup> In addition, both countries' fans complain that albums may have only one or two good songs.<sup>96</sup> Fans may see the sale of albums with remixed old songs whose original versions they already purchased as a ploy for recording labels to make more money without giving fans anything in return.

In both America and Japan, the music industry is often perceived as a monolithic, faceless entity whose only purpose is to make money, but fans are more likely to buy music when they feel a more direct connection to the artist.<sup>97</sup> This can take the form of an indie band without major label promotion gaining popularity primarily through word of mouth.<sup>98</sup> Popular Canadian solo artist Justin Bieber was discovered through fans on YouTube and promoted by them because they felt they were participating in his career, and that they mattered.<sup>99</sup> People feel more responsible for and protective of artists they discover and

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91. For example, Microsoft began offering cash and prizes in a contest to encourage people to use its MSN search service over those of Google and Yahoo. Siklos, *supra* note 78.

92. See *supra* note 61.

93. Condry, *supra* note 33, at 352.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 353.

98. *Id.*

99. See *Justin Bieber*, BIOGRAPHY.COM, <http://www.biography.com/people/justin-bieber-522504> (last visited Jul 25, 2013).

artists who depend on their recommendations for promotion. When fan participation (such as purchasing CDs) is viewed as needed by the artist, people step up to help the artists.

People also will purchase music if they feel the artist is sincerely looking out for the fans' best interests and making attempts to be fair. The most well-known example is The Grateful Dead, who allow fans to record and share their live concerts.<sup>100</sup>

Contrasting with the music industry, motivations for sharing anime illegally among non-Japanese are quite different. While the popular perception of the American film industry by the general public may be that studios make plenty of revenue, and thus the public does not feel protective of that industry, anime presents a different story. Americans and other non-Japanese anime fans evince little, if any, disdain toward the producers of anime; perhaps thinking that, excepting famous production studios, anime is cheaply made on tight budgets.<sup>101</sup> Overseas anime fans want other fans to purchase anime DVDs and promote what is a niche market in their countries. Thus, their motivations for sharing files illegally are not in reaction to unfair prices set by the industry, but are instead a perhaps misguided attempt to promote the anime industry.<sup>102</sup>

#### IV. SOLUTIONS AND RECOMMENDATIONS FOR ADDRESSING INFRINGING ACTIVITIES

There are several potential solutions to problems of infringing fan works. Ideal solutions should address both the fan motivations listed in Part III and rights holders' concerns.

Rights holders' objections to fan works can probably fall into two categories. First, fans are putting their characters into situations and contexts that do not meet with rights holders' approval, which is tantamount to a moral rights objection.<sup>103</sup> Second, fans may be intruding on a market into which rights holders may eventually venture, detracting potential profits.<sup>104</sup> Both interests are legitimate, as both may incentivize creation.<sup>105</sup>

Possible solutions include attribution, alternative marketing methods, increased transparency, and increasing the availability and legal uses.

##### A. ATTRIBUTION

One solution to the problems presented by fan works may be attribution. If studios and rights holders are concerned about their characters and stories being used in an unauthorized way, then attribution may largely resolve the problem. When executed properly, attribution is clear and evident to any casual observer, notifies the public of who the rights holder is,

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100. Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us about Persuading People to Obey Copyright Law*, 21 BERK. TECH. L. J. 651, 669 (2006).

101. See generally Justin Sevakis, *The Anime Economy – Part 1: Let's Make An Anime!*, ANIME NEWS NETWORK (Mar. 5, 2012), <http://www.animenewsnetwork.com/feature/2012-03-05> (explaining the typical anime production process).

102. Japanese fans may not be as protective of anime as a medium and industry, since it is pervasive in Japan. See Justin Sevakis, *The Anime Economy – Part 2: Shiny Discs*, ANIME NEWS NETWORK (Mar. 7, 2012), <http://www.animenewsnetwork.com/feature/2012-03-05> (explaining the pervasiveness of anime DVD sales in Japan, as well as increasing pervasiveness abroad).

103. See *supra* Part I.B.

104. See *supra* Part II.A.

105. See *supra* note 61.



and notes that the rights holder's work is being used for the fan author's own purposes. This may take care of moral rights objections in both copyright and trademark contexts.

With respect to monetary concerns, it is possible that attribution will dissuade some people from purchasing a product because they only want authorized versions of the work. However, fan artists often sell merchandise at conventions and online, and the products often involve illegal uses of images. Rights holders may not have allowed much merchandise to be produced officially, but merchandise is still a market they may want to pursue in the future. The current protection of potential markets suggests that such fan activity should not be protected by a fair use defense.<sup>106</sup> But the policy concern is that if rights holders never do engage in that market, then the public is deprived of the merchandise they could otherwise procure through fan artists.<sup>107</sup> While attribution may be a solution to the moral rights concern, it is not likely to solve problems with respect to potential profits studios might make but-for fan works.

Nowhere in the Copyright Act is attribution suggested as a solution. By contrast, the structure of U.S. copyright law gives certain rights and uses to copyright owners, without making room for others to use works under certain circumstances, such as attribution.<sup>108</sup>

However, Creative Commons licenses embrace attribution requirements.<sup>109</sup> In addition, the Copyright Office's orphan works report refers to licenses which usually allow reproduction of works as long as credit is attached to reuse.<sup>110</sup> The legislative proposal made by the Copyright Office includes an attribution requirement; to claim protection, users of orphan works would be required to search for and offer attribution to both the copyright owner and the author whenever reasonable.<sup>111</sup> These appear to be evidence of an attribution norm shared by both creators and secondary users. As evinced by fan authors, who tend to include disclaimers on their works, attribution requirements make sense to the public.<sup>112</sup> Moreover, the fact that Creative Commons licenses are already in use seems to suggest that such requirements make sense to many rights holders. If credit and profits are the main concerns and incentives for authors, attribution requirements provide sufficient satisfaction.

Although the U.S. Copyright Act does not include attribution requirements, such requirements are incorporated in the Copyright Acts in other countries. For example, attribution requirements are found in areas such as the United Kingdom and Australia as a form of fair dealing.<sup>113</sup> So long as attribution is made, the work will not be considered to be infringing.<sup>114</sup>

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106. See *supra* Part II.A.

107. See *supra* Part I.B.

108. See Copyright Act of 1976, 17 U.S.C. §§ 101-810 (2012).

109. Lydia Pallas Loren, *Building a Reliable Semicommons of Creative Works: Enforcement of Creative Commons Licenses and Limited Abandonment of Copyright*, 14 GEORGE MASON L. REV. 271, 291 (2007) (discussing attribution as the most common requirement among authors using Creative Commons licenses).

110. See U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 86-87 (January 2006) available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

111. *Id.*

112. See *supra* note 20.

113. Tushnet, *supra* note 86, at 152 (citing Copyright Amendment (Moral Rights) Act 2000 § 42 (Australia) (amending Copyright Act 1968) and Copyright, Designs and Patents Act, 1988, ch. 48, § 30(1)-(2) (U.K.)).

114. *Id.*

## B. ALTERNATIVE MARKETING METHODS

Other solutions can be found in alternative marketing methods. In Japan, for example, CD rental shops, karaoke machines, and ringtones (high-quality versions of songs on cell phones) present various alternatives for commercialization, aside from CD sales.<sup>115</sup> Additionally, record companies can package albums in more fair ways, such as including only new songs on an album, so that fans do not feel they are paying for the same songs twice. Companies might make more revenue by releasing mini-albums with only a few songs (all of them new) for a few dollars.

## C. INCREASED TRANSPARENCY

Another recommendation is greater transparency. For the entertainment media industries in the U.S., marketing is a huge problem that can be improved through transparency. Issues such as the high percentage of CD revenue taken by record labels while leaving the artist with a small percentage, give the public the impression that these industries are heartless, greedy, and do not rely on fan participation, including purchases.<sup>116</sup> Better communication to the public about financing of films, uses of resources, and *why* DVD prices are what they are could perhaps help change public perception of the industry. In the music industry, a similar accounting of how money is raised, how it is spent, and why, as well as why CD prices are what they are, may help the public to feel they are being treated fairly.

Both industries can also be more transparent about the need for individual participation on a project by project basis. How does each project connect to fans? What does the studio need our money for? Consumers are more likely to participate if they know that they are needed and why. Transparency and accountability could go a long way in currying fans' favor.

## D. INCREASING AVAILABLE LEGAL USES

Studios could also gain favor with the public by allowing more uses of products in what would otherwise likely be infringing ways. They could encourage derivative works and even file sharing of certain projects, with proper attribution and even mention of sponsors and advertisers. In the case of The Grateful Dead, the band chose its battles.<sup>117</sup> Instead of attempting to hold on to every right, it negotiated with the public, giving away certain rights so that fans would feel they were treated fairly and even getting something special.<sup>118</sup> Being permitted and even encouraged to make live recordings of the band allowed fans to feel the band cared about what they wanted.<sup>119</sup> Giving away more rights in other industries could create a similar result.

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115. Condry, *supra* note 33, at 351-52.

116. See Condry, *supra* note 33, at 356.

117. See *supra* Part III.

118. See Schultz, *supra* note 100 at 676-77.

119. See *id.* at 723.

## CONCLUSION

Copyright owners face a plethora of challenges due to the many ways fans employ the Internet. Peter Menell notes that the extent of illegal uses is relatively new and is facilitated by the Internet.<sup>120</sup> Before the rise of the Internet, content industry producers and intermediaries acted as gatekeepers controlling distribution and limiting access to large audiences.<sup>121</sup> Distribution channels were limited to entities such as theatres, licensed broadcasters, bookstores and record stores, and because content was not yet digital, actual copying was more labor intensive.<sup>122</sup> The Internet changed everything, making it much more difficult for copyright owners to enjoy an exclusive right to reproduce their works and produce derivative works.

This article has asserted that varying degrees of harm result from infringing fan activities and must be balanced with substantial policy concerns. A number of lessons should be considered by courts, legislators, policymakers, and the content industry.

First, it is important to recognize the different motivations and codes of ethics of fans. Peer-to-peer file sharing categorically does not reflect the ethics of most groups and individuals involved in fan works, such as fansubs, scanlations, fan fiction, fan videos, and fan art. People who illegally download music, films, television shows, etc. are likely not concerned with the well-being of the original creators; they often feel the creators either make enough money already or are attempting to treat consumers unfairly. Moreover, file sharers are not contributing to the original work or participating in any type of original creation. By contrast, many creators of fan works seek to contribute to the original work and participate in a specific way, and they tend to care about the original creators and rights holders as an extension of their devotion to the original work.

Second, copyright law should promote creativity equally among fans and official players, rather than maximizing the profits of the rights holder. With respect to fan works that are creative and transformative, there will still be incentives for authors to create. Relatedly, remixes and reimaginings should be valued as much as original works, and they should be promoted as a necessity for a vibrant, evolving, and participatory consumer culture.

Third, the current protection of activity in potential markets should be reevaluated. Perhaps this protection should be considered on a case-by-case basis, involving review of evidence as to whether a rights holder may be interested in entering a potential market. If no such evidence is present, courts might consider the length of time that the rights holder has had to demonstrate interest in pursuing a particular market, and question whether society is being deprived of that market by protecting the rights holder's exclusive claim on it.

Fourth, copyright law should make sense to the general public, and in its current state, it may not. The blurring of professional and fan activities coupled with schizophrenic studio reactions have left fans to devise their own moral code of disclaimers and attribution. However, the instincts of creators of fan works, who tend to care about the original work, its authors, and its rights holders, often take into consideration many of the policy concerns that arise, while attempting to protect rights holders' interests through attribution.

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120. Peter Menell, *Infringement Conflation*, 64 STANFORD L. REV. 1551, 1554 (2012)

121. *Id.* at 1570.

122. *Id.* at 1552; *see also id.* at 1575.

Finally, there still persists a divisive gap between media content industries and consumers. The industries appear to fare better when they invite participation from fans (which they have been doing increasingly), and when they convince fans that the industries' actions make sense and are fair to consumers. The industries should continue their efforts to understand and communicate with fans, so that fans ultimately feel they are being offered a good and sensible deal. The perceptions and motivations of creative and well-meaning fans are important, and perhaps it should largely be their ethics that influence the law and society going forward.



