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### Are Commissioner Suspensions Really Any Different From Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade

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## ARTICLES

# ARE COMMISSIONER SUSPENSIONS REALLY ANY DIFFERENT FROM ILLEGAL GROUP BOYCOTTS? ANALYZING WHETHER THE NFL PERSONAL CONDUCT POLICY ILLEGALLY RESTRAINS TRADE

Marc Edelman<sup>+</sup>

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On April 10, 2007, National Football League Commissioner Roger Goodell unveiled a new, league-wide personal conduct policy (NFL Personal Conduct Policy), which vests in the league commissioner the power to suspend indefinitely any player who engages in violent or criminal behavior.<sup>1</sup> The NFL Personal Conduct Policy is not written into the NFL Collective Bargaining Agreement.<sup>2</sup> However, the late executive director of the National Football League Players Association (NFLPA), Gene Upshaw, had publicly voiced his support for the policy.<sup>3</sup> In addition, a panel of six to ten NFL players had also informally approved the policy.<sup>4</sup>

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1. See NAT'L FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY 1-3 (2008) [hereinafter NFL PERSONAL CONDUCT POLICY], available at <http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=336&pid=0&type=n>; see also Adam B. Marks, Note, *Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members By Not Fighting the Enactment of the Personal Conduct Policy*, 40 CONN. L. REV. 1581, 1591-93 (2008); Judy Battista, *N.F.L. Assesses Lengthy Bans for Misconduct*, N.Y. TIMES, Apr. 11, 2007, at D1 [hereinafter Battista, *N.F.L. Assesses Lengthy Bans*].

2. The current NFL Collective Bargaining Agreement does not contain a single reference to the NFL Personal Conduct Policy in either the agreement itself or its appendices. See NFL PLAYERS ASS'N, NFL COLLECTIVE BARGAINING AGREEMENT 2006-2012 (2006).

3. See Kevin Goheen, *New Policy Goes Beyond Discipline*, CIN. POST, Apr. 11, 2007, at B1; see also Assoc. Press, *Goodell Unveils New Conduct Policy*, ESPN.COM, Apr. 11, 2007, <http://sports.espn.go.com/nfl/news/story?id=2832098>.

4. See Jim Ducibella, *Local Football Player Could Face Difficult Return to NFL*, VIRGINIAN-PILOT (Norfolk, Va.), Mar. 27, 2007, at A1 ("The Commissioner met . . . with . . . Upshaw and about 10 players. All agreed that stronger discipline is necessary."); Dave George, Column, *Goodell Fosters Spirit of Needed Cooperation*, PALM BEACH POST (Fla.), Apr. 13, 2007, at 1C (suggesting that a six-player panel may have supported the NFL Personal Conduct Policy); Posting of Rick Karcher to Sports Law Blog, *Spies are Among Us*,

In recent months, many coaches, commentators, and even law-review authors have praised the new NFL Personal Conduct Policy.<sup>5</sup> In their view, the policy benefits society by keeping violent and criminal offenders away from the media spotlight.<sup>6</sup> Thus, the policy decreases the risk that children will be influenced by the negative actions of professional football players.<sup>7</sup>

However, there is also a darker side to the NFL Personal Conduct Policy. Despite promoting positive role models, the NFL Personal Conduct Policy also prevents certain members of the football workforce from practicing their trade.<sup>8</sup> In addition, the policy prevents football fans from expressing their preference for games that would otherwise feature these suspended players.<sup>9</sup> For these reasons, the NFL Personal Conduct Policy might violate § 1 of the Sherman Act.<sup>10</sup>

This Article explains why some courts would likely find the NFL Personal Conduct Policy to violate § 1 of the Sherman Act, and explores ways in which the NFL clubs could promote off-the-field decorum without risking antitrust liability. Part I of this Article discusses the underlying business structure of the NFL. Part II provides a brief overview of § 1 of the Sherman Act. Part III analyzes the legality of the NFL Personal Conduct Policy under § 1 of the Sherman Act. Part IV proposes four ways in which NFL clubs could promote positive off-the-field decorum without incurring antitrust risk.

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law.blogspot.com/2008/11/spies-are-among-us.html (Nov. 8, 2008, 06:55 EST) (mentioning that “(according to previous press reports) the new policy was assented to by a 6-player committee”).

5. See, e.g., Greg Cote, Column, *NFL's Tougher Conduct Policy Long Overdue*, MIAMI HERALD, Apr. 18, 2007, at D1; Editorial, *In Our View: Good for Goodell*, COLUMBIAN (Vancouver, Wash.), Apr. 15, 2007, at C, available at 2007 WLNR 9546368; Bill Rabinowitz, *NFL Lays Down Law with Henry*, COLUMBUS DISPATCH, Apr. 11, 2007, at B5 (noting Bengals coach Marvin Lewis's support for the NFL Personal Conduct Policy); Stephen A. Smith, Column, *Good Riddance to Two Bad NFL Apples*, PHILA. INQUIRER, Apr. 11, 2007, at E1; see also Robert Ambrose, Note, *The NFL Makes it Rain: Through Strict Enforcement of its Conduct Policy, the NFL Protects its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL L. REV. 1069, 1072 (2008) (endorsing the NFL Personal Conduct Policy).

6. See, e.g., *In Our View: Good for Goodell*, *supra* note 5.

7. See Ambrose, *supra* note 5, at 1108–09.

8. See *infra* note 101 and accompanying text; see also John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 706 (1977) (“[L]eague suspensions [are] a form of discipline which may have severe economic consequences for the athlete involved.”); Jerry Bembry, *NBA Suspends Sprewell a Year*, BALT. SUN, Dec. 5, 1997, at 1A (quoting NBA union leader Billy Hunter on the restriction of trade issue).

9. See *infra* note 102 and accompanying text.

10. See *Radovich v. Nat'l Football League*, 352 U.S. 445, 447–49 (1957) (finding that the NFL teams' decision to blacklist a particular player states a claim under § 1 of the Sherman Act); Weistart, *supra* note 8, at 705 (“It should quickly become apparent that the rules governing player discipline also have an effect upon the demand for players' services. Thus, it is appropriate to examine the application of these rules [under antitrust law] . . .”). For a discussion of the Sherman Act see *infra* Part II.

## I. THE PROFESSIONAL FOOTBALL MARKETPLACE

### A. NFL History and Core Operating Principles

Established in 1920, the NFL “is an unincorporated association comprised of [thirty-two independently owned] member clubs which own and operate professional football teams.”<sup>11</sup> The NFL is structured almost identically to America’s three other major professional sports leagues—Major League Baseball, the National Basketball Association, and the National Hockey League.<sup>12</sup> The NFL clubs serve as the only employers of premier professional football labor in the United States.<sup>13</sup>

Every day the NFL performs various administrative functions on behalf of its member clubs. These functions include organizing and scheduling games and promulgating league rules.<sup>14</sup> For the most part, these activities are governed by the NFL Constitution and Bylaws, which are the primary documents that set forth the relationship between the NFL and its member clubs.<sup>15</sup> However, in 1968, the National Labor Relations Board recognized the NFLPA as a labor organization within the meaning of the National Labor Relations Act, and as “the exclusive bargaining representative of all NFL players.”<sup>16</sup> As a result, the NFL member clubs, as a matter of law, are required to bargain with the NFLPA over mandatory terms and conditions of employment.<sup>17</sup> Any agreement reached between the NFL clubs and the NFLPA through collective bargaining naturally trumps any conflicting terms stated in the NFL Constitution and Bylaws.

### B. Commissioner Suspensions

Since the early days of professional sports, club owners have vested power in a league commissioner to serve as the chief executive officer of their joint venture league. In this capacity, league commissioners have sought to suspend players for a wide range of misconduct.<sup>18</sup>

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11. *Mackey v. Nat’l Football League*, 543 F.2d 606, 610 (8th Cir. 1976); see also NFL History by Decade, <http://www.nfl.com/history> (last visited Jan. 10, 2009).

12. See Marc Edelman, *Why the “Single Entity” Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 903–04 (2008) [hereinafter Edelman, *Why the “Single Entity” Defense Can Never Apply to NFL Clubs*].

13. See *Mackey*, 543 F.2d at 610.

14. *Id.*

15. See Edelman, *Why the “Single Entity” Defense Can Never Apply to NFL Clubs*, *supra* note 12, at 905–06.

16. *Mackey*, 543 F.2d at 610.

17. *Id.*

18. For one of the earliest cases on record of a league commissioner attempting to suspend a player, see *American League Baseball Club of New York v. Johnson*, 179 N.Y.S. 498, 499–500 (Sup. Ct. 1919), *aff’d sub nom.* *Am. League Baseball Club, Inc. v. Johnson*, 179 N.Y.S. 898

Historically, most commissioner suspensions have involved either on-the-field misconduct or off-the-field misconduct with some reasonable nexus to the player's on-the-field activities.<sup>19</sup> The earliest instances of off-the-field player suspensions typically involved gambling.<sup>20</sup> For example, during the 1920–21 offseason, MLB Commissioner Kenesaw Mountain Landis banned eight members of the Chicago White Sox for purportedly betting against their team in the 1919 World Series.<sup>21</sup> Thereafter, in 1948, NHL President Clarence Campbell suspended two NHL hockey players for gambling.<sup>22</sup> Then, in 1954, NBA President Maurice Podoloff indefinitely suspended rookie basketball player Jack Molinas for gambling on basketball games in which his team had played.<sup>23</sup>

Beginning in the early 1980s, some league commissioners also began to suspend players for other forms of wrongdoing, such as taking illegal drugs—presumably based on the link between drug use and a player's athletic performance.<sup>24</sup> Initially, commissioners attempted to unilaterally suspend players for drug use.<sup>25</sup> However, after several labor arbitrators overturned early drug suspensions,<sup>26</sup> sports leagues and their players associations began to

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(App. Div. 1920). At the time, Byron Johnson went by the title of American League President rather than commissioner. *Id.* at 502.

19. See *infra* notes 20–27 and accompanying text.

20. See Weistart, *supra* note 8, at 703 n.2, 706–07 & nn.13, 16.

21. See *No Precedent for Reinstatement*, MIAMI HERALD, Aug. 25, 1989, at 4D (noting that the Black Sox Scandal players banned from MLB included Shoeless Joe Jackson, Buck Weaver, Ed Cicotte, Fred McMullen, Happy Felsch, Lefty Williams, Chick Gandel, and Swede Risberg). These players were banned even though no court ever found them guilty of any wrongdoing. See Shayna M. Sigman, *The Jurisprudence of Kenesaw Mountain Landis*, 15 MARQ. SPORTS L. REV. 284, 305 (2005); see also Hal Bock, *If Suspended for Gambling, Rose Might Find Fame Fleeting*, ST. LOUIS-POST DISPATCH, Mar. 26, 1989, at 1F (noting that one of the players suspended for life, Shoeless Joe Jackson, seemed to be exonerated by a number of investigations).

22. See Bock, *supra* note 21; *Notable Sports Suspensions*, S.F. CHRON., Dec. 5, 1997, at C5.

23. See Dave Anderson, Sports of the Times, *The N.B.A. Holds its Breath*, N.Y. TIMES, Apr. 21, 1987, at B7; see also Bock, *supra* note 21 (noting that Molinas was the only player ever suspended from the NBA for life for gambling).

24. See Jason M. Pollack, Note, *Take My Arbitrator, Please: Commissioner "Best Interests" Disciplinary Authority in Professional Sports*, 67 FORDHAM L. REV. 1645, 1667–68 & n.213 (1999) (noting the movement to suspend players for using drugs began in August 1980, after Ontario police arrested Texas Rangers pitcher Ferguson Jenkins for possessing "two ounces of marijuana, two grams of hashish, and four grams of cocaine"); cf. Anderson, *supra* note 23 (reporting link between cocaine addiction and point-fixing in basketball).

25. See Pollack, *supra* note 24, at 1668–69.

26. See, e.g., *id.* at 1668–70 (noting that in 1980, Arbitrator Raymond Goetz overruled Baseball Commissioner Bowie Kuhn's attempted suspension of pitcher Ferguson Jenkins for drug possession, and in 1984 Arbitrator Richard Bloch terminated Kuhn's drug-related suspension of pitcher Pascual Perez).

bargain over drug policy, thus leading to collectively bargained drug policies that rarely allowed for lifetime suspensions.<sup>27</sup>

### C. NFL Personal Conduct Policy

Historically, there have even been a few isolated instances in which commissioners have attempted to suspend players for off-the-field conduct that has involved absolutely no nexus to on-the-field performance.<sup>28</sup> Yet, the NFL Personal Conduct Policy marks the only policy in American professional sports history whereby a league commissioner has sought to systematically rid the league of players based entirely on their off-the-field conduct.<sup>29</sup> Hence, the policy has been controversial.

#### 1. The NFL Personal Conduct Policy

Most football fans incorrectly presume that the NFL Personal Conduct Policy was first introduced at Commissioner Goodell's now-famous April 10, 2007 media conference during which he announced the suspensions of players Adam "Pac Man" Jones and Chris Henry.<sup>30</sup> However, in reality, the original NFL Personal Conduct Policy dates back at least as far as May 23, 2000, when the NFL club owners, in response to negative publicity that the NFL received during linebacker Ray Lewis's then-ongoing murder trial, unilaterally empowered the league's then-Commissioner Paul Tagliabue to suspend players for a wide range of off-the-field misconduct.<sup>31</sup>

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27. See *Notable Sports Suspensions*, *supra* note 22 (noting the following instances: Michael Ray Richardson was suspended by the NBA for substance abuse in 1986 but reinstated July 21, 1988; Roy Tarpley was suspended by the NBA for substance abuse in 1991 but reinstated September 30, 1994; Mitchell Wiggins and Lewis Lloyd of the Houston Rockets were suspended for substance abuse in 1987, but reinstated in 1989); *The Reaction*, L.A. TIMES, July 10, 1997, at C6 (noting that, pursuant to the league collective bargaining agreement, NFL Commissioner Paul Tagliabue gave Washington, D.C., football player Dexter Manley an automatic lifetime ban in 1989 after his third positive drug test; however, the commissioner then reinstated Manley in November 1990); Greg Stoda, Column, *Dolphins Must Quit Habit of Forgiving and Just Forget*, PALM BEACH POST (Fla.), Apr. 26, 2006, at 1C ("[Dolphins running back Ricky] Williams has been suspended by the NFL—this time for the 2006 season—for a fourth violation of its substance-abuse policy. The announcement came Tuesday night that Williams' appeal of his most recent positive drug test was denied.").

28. See, e.g., Bock, *supra* note 21 (noting MLB Commissioner Bowie Kuhn's suspension of Detroit Tigers pitcher Denny McLain in 1970 for illegally carrying a gun).

29. See Sean Bukowski, Note, *Flag on the Play: 25 to Life for the Offense of Murder*, 3 VAND. J. ENT. L. & PRAC. 106, 110 (2001).

30. For example, the Wikipedia page entitled "National Football League player conduct controversy" makes no textual reference to the predecessor NFL Personal Conduct Policy. See Wikipedia, National Football League Player Conduct Controversy, [http://en.wikipedia.org/wiki/National\\_Football\\_League\\_player\\_conduct\\_controversy](http://en.wikipedia.org/wiki/National_Football_League_player_conduct_controversy) (last visited Jan. 12, 2009).

31. See David Elfin, *NFL Owners Expand Rules on Player Crime*, WASH. TIMES, May 24, 2000, at B1; see also Bukowski, *supra* note 29, at 110–11 (discussing the NFL's Violent Crime Policy that was instituted in 1998); Memorandum from Legal Department to Pro Star Sports Agency on NFL's "Personal Conduct Policy" (June 22, 2000) [hereinafter Pro Star Sports

Under the June 2000 NFL Personal Conduct Policy, the NFL clubs vested power in the league commissioner to fine, suspend, or banish any player who was convicted of criminal activity or admitted to engaging in wrongdoing.<sup>32</sup> As a practical matter, however, former NFL Commissioner Paul Tagliabue never suspended any player under the old NFL policy for more than a de minimis number of games.<sup>33</sup> Hence, the policy never became the focus of much attention.

Less than one year after the NFL clubs appointed Goodell as their new commissioner, the thirty-two clubs, at his request, decided to strengthen the NFL Personal Conduct Policy by adding longer suspensions, indefinite suspensions, and even the commissioner's right to suspend players for non-criminal behavior.<sup>34</sup> Paragraph 1 of the April 10, 2007 version of the NFL Personal Conduct Policy states as follows:

Engaging in violent and/or criminal activity is unacceptable and constitutes conduct detrimental to the integrity of and public confidence in the National Football League. Such conduct alienates the fans on whom the success of the League depends and has negative and sometimes tragic consequences for both the victim and the perpetrator.<sup>35</sup>

The following paragraphs of the NFL Personal Conduct Policy then list a series of punishments that the NFL clubs empower their commissioner to impose on any player that the commissioner believes to have committed a

Agency Memorandum], available at [http://www.prostaronline.com/nfl\\_conduct\\_policy.html](http://www.prostaronline.com/nfl_conduct_policy.html) (stating that the 2000 Personal Conduct Policy supercedes the NFL's earlier Violent Crime Policy). Some even trace the NFL Personal Conduct Policy back to when the NFL clubs maintained something they referred to as a Violent Crime Policy. See Bukowski, *supra* note 29, at 110; Pro Star Sports Agency Memorandum, *supra*.

32. Pro Star Sports Agency Memorandum, *supra* note 31.

33. See, e.g., Around the League, *Packers, Titans Fuming*, CHI. TRIB., Aug. 30, 2003, at 6 (noting that New Orleans Saints linebacker Derrick Rodgers was suspended for one game under the NFL Personal Conduct Policy after Rodgers pleaded no contest to charges he attacked his wife and a man at a restaurant in Miami); Assoc. Press, *Conduct Policy Prompts Suspension*, MILWAUKEE J. SENTINEL, Mar. 20, 2002, at 9C (noting that former NFL Commissioner Paul Tagliabue suspended free agent tackle Victor Riley for one game after Riley was accused of ramming his vehicle several times into a vehicle occupied by his wife and infant daughter); Rich Cimini, *L.I. Grand Jury Quizzes Jets*, N.Y. DAILY NEWS, Feb. 11, 2003, at 63 (noting that former NFL Commissioner Paul Tagliabue suspended New York Jets offensive lineman John "Jumbo" Elliot for one game in 2000 for violating the NFL's Personal Conduct Policy); *NFL Players Arrested in 2000*, SAN DIEGO UNION TRIB., Jan. 22, 2001, at D4 (reporting that eight NFL players were suspended under the NFL Personal Conduct Policy in 2000, none for longer than two games).

34. See *Changes Approved on Player Conduct*, N.Y. TIMES, May 24, 2007, at D7; *NFL Adopts New Conduct Policy*, BALTIMORERAVENS.COM, Apr. 10, 2007, [http://www.baltimore Ravens.com/News/Articles/2007/04/NFL\\_Adopts\\_New\\_Conduct\\_Policy.aspx](http://www.baltimore Ravens.com/News/Articles/2007/04/NFL_Adopts_New_Conduct_Policy.aspx).

35. NAT'L FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY (2007), available at <http://sports.espn.go.com/nfl/news/story?id=2798214>. This Policy was replaced by a new version in 2008.



violent or criminal act.<sup>36</sup> These punishments include not only temporary suspensions but also, far more significantly, permanent suspensions or “banishment from the League.”<sup>37</sup>

## 2. *The Relationship (or Lack Thereof) Between the NFL Personal Conduct Policy and the NFL Collective Bargaining Agreement*

Any relationship between the NFL Personal Conduct Policy and the NFL Collective Bargaining Agreement is extremely remote. Although Paragraph 15 of the NFL Player Contract—also included as Appendix C to the NFL Collective Bargaining Agreement—empowers the league commissioner to suspend players for gambling, performance enhancing drug use, and other conduct that the Commissioner deems to be “detrimental to the League or professional football,”<sup>38</sup> there is no compelling argument that Paragraph 15 of the NFL Player Contract is intended to address off-the-field conduct that lacks any nexus to the game of football.<sup>39</sup> In addition, neither the NFL Collective Bargaining Agreement nor the NFL Player Contract makes a direct reference to a commissioner’s right to suspend a player for off-the-field violent or criminal conduct.<sup>40</sup> Indeed, the NFL Personal Conduct Policy is not mentioned anywhere in the NFL Collective Bargaining Agreement.<sup>41</sup>

Furthermore, the new NFL Personal Conduct Policy is not a legally binding amendment or rider to the NFL Collective Bargaining Agreement. This is because the NFL Collective Bargaining Agreement explicitly states that “[n]one of the Articles of this Agreement may be changed, altered or amended other than by a written agreement.”<sup>42</sup> The NFL Personal Conduct Policy is not a signed, written agreement between the NFL clubs and the NFLPA; rather, it is a regulation the NFL clubs unilaterally impose on all individuals publicly associated with it.<sup>43</sup>

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36. *See id.* at 2–3.

37. *Id.* at 2.

38. NFL PLAYERS ASS’N, NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012 app.C, para. 15, at 253 (2006) [hereinafter NFL PLAYER CONTRACT].

39. To illustrate this point, compare the language in Paragraph Fifteen of the NFL Player Contract, describing specific conduct prohibited by the NFL, *id.*, with the far broader language in Paragraph Eleven, which states that a team may release a player when he has “engaged in personal conduct reasonably judged by [the club] to adversely affect or reflect on [the] Club,” *id.* para. 11, at 252.

40. *See* NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012, *supra* note 2.

41. *See id.*

42. *Id.* art. LV § 19, at 235 (Parol Evidence).

43. *See* NFL PERSONAL CONDUCT POLICY, *supra* note 1, at 1, 3.

## II. AN INTRODUCTION TO ANTITRUST LAW

### A. *Antitrust Basics*

Section 1 of the Sherman Act, in pertinent part, states that “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”<sup>44</sup> Although most claims under § 1 of the Sherman Act involve the restraint of trade in product markets, § 1 of the Sherman Act also prohibits restraints of trade in labor markets.<sup>45</sup>

Antitrust law forbids employers from engaging in group boycotts for two reasons. First, group boycotts harm consumers.<sup>46</sup> In the seminal case *Eastern State Retail Lumber Dealers’ Ass’n v. United States*,<sup>47</sup> the Supreme Court explained:

An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.<sup>48</sup>

In addition, group boycotts by employers deny workers the ability to “secur[e] employment in [their] chosen avocation, trade and calling.”<sup>49</sup> This is a right strongly entrenched in American common law, and one that has implicitly

44. Sherman Antitrust Act, 15 U.S.C. § 1 (2000). The Sherman Antitrust Act of 1890 was “intended to serve both political and economic purposes and to prevent any one business from becoming more powerful than the government.” Marc Edelman, *Can Antitrust Law Save the Minnesota Twins? Why Commissioner Selig’s Contraction Plan Was Never a Sure Deal*, 10 SPORTS LAW. J. 45, 56–57 (2003).

45. See Marc Edelman & Brian Doyle, *Antitrust and “Free Movements” Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT’L L. & BUS. 405, 414–15 (2009); see also Nichols v. Spencer Int’l Press, Inc., 371 F.2d 332, 334, 337 (7th Cir. 1967); McNeil v. Nat’l Football League, 790 F. Supp. 871, 881 (D. Minn. 1992) (citing FTC v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411 (1990)); Marc Edelman & C. Keith Harrison, *Analyzing the WNBA’s Mandatory Age and Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW. J.L. AND SOC. POL’Y 1, 12 (2008); Michael A. McCann & Joseph S. Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731, 734 (2006).

46. See E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS § 4.13, at 161–64 (4th ed. 2003); see also *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) (“Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . .” (footnote omitted)).

47. 234 U.S. 600 (1914).

48. *Id.* at 614 (quoting *Grenada Lumber Co. v. Mississippi*, 217 U.S. 433, 440–41 (1910)).

49. *Mattison v. Lake Shore & M.S. Ry. Co.*, 3 Ohio Dec. 526, 527 (1895) (internal quotation marks omitted); see also Petitioner’s Opening Brief at 33, *Radovich v. Nat’l Football League*, 352 U.S. 445 (1957) (No. 94) (citing various cases “[f]or additional common law treatment of boycotting and blacklisting as restraints of trade”).

become a part of federal antitrust policy.<sup>50</sup> As one court explained, “[e]very man has the liberty of employing and being employed, and every man must respect the like liberty in others.”<sup>51</sup> For that reason, the Honorable Learned Hand explained in his famous opinion, *Gardella v. Chandler*, that § 1 of the Sherman Act “certainly forbid[s] all restraints . . . which unreasonably forbid[] anyone to practice his calling.”<sup>52</sup>

### B. Applying § 1 of the Sherman Act

Courts determine whether a particular restraint violates § 1 of the Sherman Act by applying a three-step test. First, a court will consider two threshold issues: (1) whether there is an effect on trade or commerce among more than one state, and (2) whether there is a sufficient agreement among two or more parties to constitute a “contract, combination . . . or conspiracy.”<sup>53</sup>

If both of these preliminary issues are satisfied, a court will then perform one of three sanctioned tests to determine whether the agreement produces a prima facie antitrust violation.<sup>54</sup> On one end of the spectrum, if the agreement seems so nefarious that it is unlikely to have any redeeming value, a court will apply the per se test, under which it simply presumes a prima facie violation.<sup>55</sup> On the other end of the spectrum, if an agreement seems to yield potential economic benefits, a court will apply the Rule of Reason test, under which it would fully investigate the agreement’s net economic impact.<sup>56</sup> Meanwhile, in

50. See *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1061 (C.D. Cal. 1971) (finding that one of the antitrust harms of the group boycott was that “the victim of the boycott is injured by being excluded from the market he seeks to enter”).

51. *Mattison*, 3 Ohio Dec. at 530 (internal quotation marks omitted). It is irrelevant whether the victim of the boycott is able to find employment in a different vocation, so long as the boycott victim finds the alternative employment inferior. See *id.*

52. *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (Hand, J., concurring).

53. *Denver Rockets*, 325 F. Supp. at 1062 (citing 15 U.S.C. § 1); see also *Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469 (6th Cir. 2005); *McCreery Angus Farms v. Am. Angus Ass’n*, 379 F. Supp. 1008, 1016–17 (S.D. Ill. 1974), *aff’d*, 506 F.2d 1404 (7th Cir. 1974); *Blalock v. Ladies Prof’l Golf Ass’n*, 359 F. Supp. 1260, 1263 (N.D. Ga. 1973); John R. Gerba, Comment, *Instant Replay: A Review of the Case of Maurice Clarett, The Application of the Non-Statutory Labor Exemption, and Its Protection of the NFL Draft Eligibility Rule*, 73 *FORDHAM L. REV.* 2383, 2388 (2005).

54. *Edelman & Harrison*, *supra* note 45, at 13; see also *Edelman & Doyle*, *supra* note 45, at 415.

55. *Edelman & Harrison*, *supra* note 45, at 13; see also *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). The per se test is intended to be a bright-line test that “facilitates legal certainty and promotes judicial economy.” *Edelman & Harrison*, *supra* note 45, at 13. The purpose of the test is to avoid “subjective policy judgments” that most courts recognize “are more appropriate for legislative, rather than judicial, determination.” *Linseman v. World Hockey Ass’n*, 439 F. Supp. 1315, 1320 (D. Conn. 1977).

56. *Edelman & Harrison*, *supra* note 45, at 13 (citing *Nat’l Soc’y of Prof’l Engineers v. United States*, 435 U.S. 679, 689 (1978)). To establish the prima facie case of an antitrust violation under the Rule of Reason, a plaintiff must prove three elements: (1) market power; (2)

between those two scenarios, a court might also apply a so-called “quick look,” “truncated” or “abbreviated” Rule of Reason test,<sup>57</sup> under which it would consider the economic effects of a particular agreement based on only a “rudimentary understanding of economics.”<sup>58</sup>

Presuming that a court finds a prima facie antitrust violation, a court would next determine whether any antitrust exemption or affirmative defense would negate the finding of liability.<sup>59</sup> The most frequently cited exemption or affirmative defense, in the context of an agreement among members of a professional sports league, is the non-statutory labor exemption, which precludes antitrust liability for any conduct that emerges through the proper workings of the collective bargaining process.<sup>60</sup> As a matter of public policy, the non-statutory labor exemption reflects the view that employees are better off negotiating together rather than individually, and that labor law, rather than antitrust law, should apply to situations where employers and employees have engaged in good faith collective bargaining.<sup>61</sup> Not all courts, however, have agreed on where, exactly, to draw the line on this defense.

### III. WHY THE NFL PERSONAL CONDUCT POLICY MAY VIOLATE ANTITRUST LAW

Based on various splits in the circuits, it is impossible to predict with certainty whether a reviewing court would find the NFL Personal Conduct Policy to violate § 1 of the Sherman Act.<sup>62</sup> However, if a plaintiff were to challenge the NFL Personal Conduct Policy in either the Third, Sixth, Eighth,

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net anticompetitive effects; and (3) harm. *Id.* (citing 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 49 (2007)).

57. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 763–64, 770 (1999); see also Mark W. Pletcher & Ludovic C. Ghesquiere, *In Restraint of Trade: The Judicial Law Clerk Hiring Plan*, 78 U. COLO. L. REV. 147, 175–76 (2007); Ryan T. Jardine, Note, *ECONOMIC LAW—Vertical Minimum Pricing in Leegin—Adrift with the Rule of Reason; Sinking with Stare Decisis*; *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007), 8 WYO. L. REV. 683, 697 (2008).

58. *Cal. Dental Ass'n*, 526 U.S. at 770; *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (“The abbreviated rule of reason is an intermediate standard. It applies to cases where *per se* condemnation is inappropriate, but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an inherently suspect restraint.” (internal quotation marks omitted)).

59. Edelman & Harrison, *supra* note 45, at 14 (citing PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 106–22 (5th ed. 1997)).

60. *Id.*; see also Edelman & Doyle, *supra* note 45, at 417–18; see also *Nat'l Basketball Ass'n v. Williams*, 45 F.3d 684, 688 (2d Cir. 1995) (“[A]ntitrust laws do not prohibit employers from acting jointly in bargaining with a common union.”).

61. See Edelman & Harrison, *supra* note 45, at 14; see also Weistart, *supra* note 8, at 705 n.10 (stating that courts require arm’s length collective bargaining in order for the agreement to fall under the non-statutory labor exemption).

62. These splits primarily revolve around two issues: whether the NFL clubs constitute two or more parties, and whether the non-statutory labor exemption could apply to conduct not directly written into a collective bargaining agreement. See discussion *infra* Parts III.A.2, III.C.

or D.C. circuits, it is more likely than not that the reviewing court would find an antitrust violation.<sup>63</sup>

### A. *Threshold Issues*

If an NFL player were to challenge his suspension under the NFL Personal Conduct Policy, the reviewing court would begin its analysis by considering whether two threshold issues are met: (1) whether there is some effect on trade or commerce among more than one state, and (2) whether there is a sufficient agreement among two or more parties to constitute a “contract, combination . . . or conspiracy.”<sup>64</sup>

#### 1. *Interstate Commerce*

There is no real dispute about whether the NFL Personal Conduct Policy has an effect on trade or commerce among more than one state.<sup>65</sup> The Supreme Court addressed this issue affirmatively in the case *Radovich v. National Football League*, in which it found that the NFL clubs indeed engage in interstate commerce.<sup>66</sup>

#### 2. *Is there a Contract, Combination, or Conspiracy Among Two or More Parties?*

Whether the NFL Personal Conduct Policy involves a “contract, combination or conspiracy” among two or more parties, however, is somewhat less certain.<sup>67</sup> Most courts have held that an agreement among NFL clubs always constitutes a contract, combination, or conspiracy among two or more parties.<sup>68</sup> The United States Court of Appeals for the Second Circuit, for example, was among the first to reach this conclusion in the 1982 case *North*

63. See *infra* notes 153–55 and accompanying text.

64. *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1062 (C.D. Cal. 1971) (citing 15 U.S.C. § 1); see also *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 468–69 (6th Cir. 2005); *McCreery Angus Farms v. Am. Angus Ass'n*, 379 F. Supp. 1008, 1016–17 (S.D. Ill. 1974), *aff'd*, 506 F.2d 1404 (7th Cir. 1974); *Blalock v. Ladies Prof'l Golf Ass'n*, 359 F. Supp. 1260, 1263 (N.D. Ga. 1973); *Gerba*, *supra* note 53, at 2388–89.

65. See, e.g., *Radovich v. Nat'l Football League*, 352 U.S. 445, 453 (1957) (finding that the National Football League clubs engage in interstate commerce); see also *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (“Professional baseball is a business and it is engaged in interstate commerce.”); *Denver Rockets*, 325 F. Supp. at 1055 (“The business of professional basketball as conducted by the NBA and the NBA teams on a multi-state basis, coupled with the sale of rights to televise and broadcast the games for interstate transmission, is trade or commerce among the several States within the meaning of the Sherman Act.”).

66. See *Radovich*, 352 U.S. at 453.

67. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984) (the seminal case for deciding whether two or more parties exist for purposes of liability under § 1 of the Sherman Act).

68. See Edelman, *Why the “Single Entity” Defense Can Never Apply to NFL Clubs*, *supra* note 12, at 893 n.11; Marc Edelman, *Single-Entity Sports Ruling: ‘Needle’ in a Haystack*, N.Y.L.J. Jan. 2, 2008, at 4, 12.

*American Soccer League v. National Football League*.<sup>69</sup> In that case, the Second Circuit held that the NFL is best defined as a collection of “individually owned separate professional football teams,” which derive separate revenues from sources including “local TV and radio, parking and concessions.”<sup>70</sup> The court went on to explain:

To tolerate [treating the NFL as a single entity] would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects . . . . *The sound and more just procedure is to judge the legality of such restraints according to well-recognized standards of our antitrust laws rather than permit their exemption*  
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. . . .

Shortly thereafter, the Third Circuit, in *Mid-South Grizzlies v. National Football League*, similarly refused to find that the NFL was a single entity.<sup>72</sup> In that case, the court held that, although NFL teams shared substantial revenues with one another, “within certain geographic submarkets two league members [nevertheless] compete with one another for ticket buyers, for local broadcast revenue, and for sale of concession items like food and beverages and team paraphernalia.”<sup>73</sup>

Likewise, the Eighth Circuit in *McNeil v. National Football League*<sup>74</sup> found the NFL to consist of a joint venture of separate member clubs, pointing out that courts on numerous occasions had already “expressly rejected” the single-entity defense.<sup>75</sup> The First and Ninth Circuits have also reached this

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69. 670 F.2d 1249 (2d Cir. 1982).

70. *Id.* at 1251–52.

71. *Id.* at 1257 (emphasis added).

72. 720 F.3d 772, 786–87 (3d Cir. 1983).

73. *Id.* at 787.

74. 790 F. Supp. 871 (D. Minn. 1992).

75. *Id.* at 879.

conclusion directly,<sup>76</sup> as well as the Sixth Circuit in dicta,<sup>77</sup> and the D.C. Circuit by inference.<sup>78</sup>

Nevertheless, two circuits—the Fourth and the Seventh—have issued opinions that create some ambiguity. The Seventh Circuit, in the case *American Needle Inc. v. National Football League*, recently held that the question of whether any professional sports league is truly a single entity should be addressed “‘one league at a time,’ . . . ‘one facet of a league at a time.’”<sup>79</sup> Meanwhile, the Fourth Circuit in *Seabury Management, Inc. v. Professional Golfers’ Ass’n of America* held that a trade association and its separately incorporated division should be treated as a single entity for antitrust purposes because the two entities functioned as a single economic unit.<sup>80</sup> Nevertheless, *Seabury* might not present a true conflict with the majority view because it involved a trade association and not an association of separately owned sports teams.<sup>81</sup>

### B. *Prima Facie Test*

Presuming a plaintiff can meet both threshold issues, the next issue for the court to consider is whether the plaintiff can make a prima facie showing that the NFL Personal Conduct Policy violates antitrust law.<sup>82</sup> The Supreme

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76. See *Sullivan v. Nat’l Football League*, 34 F.3d 1091, 1099 (1st Cir. 1994); *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1389 (9th Cir. 1984). Specifically, the First Circuit in *Sullivan* rejected finding the NFL to be a single entity, because sports teams “compete in several ways off the field.” Thus, these teams “pursue diverse interests and are not a single enterprise.” *Sullivan*, 34 F.3d at 1099. Meanwhile, the Ninth Circuit in *Los Angeles Memorial Coliseum Commission* rejected applying the single-entity defense to the NFL because “[e]ven though the individual clubs often act for the common good of the [league, a court] must not lose sight of the purpose of the [league] . . . , which is to promote and foster the primary business of [l]eague members.” *L.A. Mem’l Coliseum Comm’n*, 726 F.2d at 1389 (internal quotation marks omitted).

77. See *Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 470 (6th Cir. 2005) (stating that “[j]ust as the National Football League could not accurately be characterized as a ‘single economic entity,’ neither could the [Ontario Hockey League]” (citation omitted)).

78. See *Madison Square Garden, L.P. v. Nat’l Hockey League*, No. 07 CV 8455(LAP), 2008 WL 4547518, at \*12 (S.D.N.Y. Oct. 10, 2008) (citing *Smith v. Pro Football Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) and other circuits for the proposition that the NFL is a combination of independent teams and not a single entity).

79. *Am. Needle, Inc. v. Nat’l Football League*, 538 F.3d 736, 742 (9th Cir. 2008) (quoting *Chi. Prof’l Sports Ltd. v. Nat’l Basketball Ass’n*, 95 F.3d 593, 600 (7th Cir. 1996)), *petition for cert. filed*, 77 U.S.L.W. 3326 (U.S. Nov. 17, 2008) (No. 08-661).

80. *Seabury Mgmt., Inc. v. Prof’l Golfers’ Ass’n of Am., Inc.*, Nos. 94-1814, 94-1688, 1995 WL 241379, at \*2-3 (4th Cir. Apr. 26, 1995).

81. See Posting of Gabe Feldman to Sports Law Blog, <http://sports-law.blogspot.com/2008/10/msg-new-media-antitrust-claim-survives.html> (Oct. 13, 2008, 23:42 EST).

82. See Edelman & Harrison, *supra* note 45, at 20; see also *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 769 (1999); *Linseman v. World Hockey Ass’n*, 439 F. Supp. 1315, 1320 (D. Conn. 1977).

Court's recent decision in the case *Texaco Inc. v. Dagher*<sup>83</sup> seems to indicate that, because the NFL is a joint venture, the NFL Personal Conduct Policy is subject to review only under a full Rule of Reason analysis.<sup>84</sup> Applying the Rule of Reason test, a player seeking to challenge the NFL Personal Conduct Policy must show the following three elements: (1) market power; (2) net anti-competitive effects; and (3) harm.<sup>85</sup>

### 1. Market Power

Market power is defined as "the power to control prices or exclude competition."<sup>86</sup> Courts generally determine the presence (or absence) of market power based on economist testimony.<sup>87</sup> However, if such testimony is unavailable or inconclusive, the court will consider simple market share estimates as the best proxy.<sup>88</sup>

When analyzing market share data, a court determines the scope of the relevant market based on both product and geographic considerations.<sup>89</sup> The relevant product market in a labor-side sports dispute has always been found to be the market for labor in the same ability-level of that respective sport.<sup>90</sup> Meanwhile, the relevant geographic market is "the market in which the seller

83. 547 U.S. 1 (2006).

84. *See id.* at 3 ("We granted certiorari to determine whether it is *per se* illegal under § 1 of the Sherman Act, 15 U.S.C. § 1, for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products. We conclude that it is not, and accordingly we reverse the contrary judgment of the Court of Appeals."); *see also id.* at 7. For support of this position specifically in the context of sports, albeit predating *Dagher*, see *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1181–82 (D.C. Cir. 1978) (applying the Rule of Reason to an alleged group boycott in the joint venture NFL), and *Weistart*, *supra* note 8, at 723 ("In determining whether particular disciplinary action bears the necessary relationship to the concerns which support self-regulation, the rule of reason will be applied, except, of course, where the action so clearly reflects an anti-competitive motive as to call for treatment under the *per se* doctrine.").

85. *Edelman & Harrison*, *supra* note 45, at 20. However, "proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986) (internal quotation marks omitted).

86. *SULLIVAN & HARRISON*, *supra* note 46, at 26 (quoting *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)). Others have defined market power as "the ability to raise prices above those that would prevail in a competitive market." *E.g.*, *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993).

87. *Edelman & Harrison*, *supra* note 45, at 20.

88. *Id.* (citing *SULLIVAN & HARRISON*, *supra* note 46, at 28).

89. *Id.* (citing *SULLIVAN & HARRISON*, *supra* note 46, at 33).

90. *See, e.g.*, *Nat'l Hockey League Players Ass'n v. Plymouth Whalers*, 419 F.3d 462, 472 (6th Cir. 2005) (finding there to be a relevant product market for sixteen- to twenty-year-old hockey players); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59–60 (1st Cir. 2002) (upholding jury finding that the relevant product market was broader than just soccer labor from Division-I United States college teams); *Smith v. Pro Football Inc.*, 593 F.2d 1173, 1186 (D.C. Cir. 1978) (upholding a district court opinion describing the relevant product market for the labor of football players seeking to enter professional football from college).



operates and to which the purchaser can turn for supplies.”<sup>91</sup> This is “the geographic area to which players can turn, as a practical matter, for alternate opportunities for employment.”<sup>92</sup> Notably, “[t]his factor is important because if there is a limited opportunity for practical employment [in a given industry], a market restriction is more likely to [produce] an antitrust violation.”<sup>93</sup>

In the context of an antitrust claim brought by a suspended NFL player, the NFL clubs exert market power in the market for premier professional football labor within the United States because the NFL is the only elite-level employer of professional football players in the United States.<sup>94</sup> In addition, even if a court were to define the relevant market for professional labor as extending throughout either all of North America or the world, the NFL would still exert market power given that the world’s second most prominent professional football league—the Canadian Football League—imposes a rule that forbids teams from signing any player who is currently serving an NFL suspension.<sup>95</sup>

## 2. Net Anticompetitive Effects

A net anticompetitive effect, meanwhile, is one where the anticompetitive effects of a particular agreement are greater than their pro-competitive benefits.<sup>96</sup> Although courts until the late 1970s had considered this prong of the Rule of Reason to allow intermingling social policy with economic analysis, the Supreme Court explained in the seminal case *National Society of Professional Engineers v. United States* that pro-competitive effects relate only to an agreement’s economic effects, and not to social ones.<sup>97</sup> In other words,

91. SULLIVAN & HARRISON, *supra* note 46, at 33 (quoted in Edelman & Harrison, *supra* note 45, at 20); *see also Plymouth Whalers*, 419 F.3d at 471 (“Generally, a relevant market is one which includes products or services that are reasonably interchangeable with, as well as identical to, defendant’s product affected by the rule or regulation being challenged.” (internal quotation marks omitted)).

92. *Fraser*, 284 F.3d at 63 (internal quotation marks omitted).

93. Edelman & Harrison, *supra* note 45, at 20.

94. *Cf.* Jeffrey A. Durney, Comment, *Fair or Foul? The Commissioner and Major League Baseball’s Disciplinary Process*, 41 EMORY L.J. 581, 617 (1992) (explaining that Major League Baseball clubs collectively exert market power for this same reason). *See also Marks*, *supra* note 1, at 1598 (“With the exception of the Arena Football League, which is barely comparable to the NFL, there are currently no other professional football leagues in the United States.”).

95. *See Marks*, *supra* note 1, at 1598; *see also* Marc Edelman, *Time for CFL to Rethink Suspension Rule*, STREET & SMITH’S SPORTS B. J. 32 (2007) (“By enforcing the Ricky Williams Rule, the CFL has [similarly] exposed itself to U.S. antitrust liability, even though the CFL only has Canadian-based teams.”).

96. *See Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 681, 688–89 (1978); *see also* Edelman & Harrison, *supra* note 45, at 21.

97. *See Prof’l Eng’rs*, 435 U.S. at 695–96 (safety concerns are not pro-competitive benefits); *see also* FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 462–63 (1986) (improved “quality of care” is not in itself a pro-competitive benefit under antitrust law); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (“A restraint on competition cannot be justified solely on the basis of social welfare concerns.”); *id.* at 675 (finding the increased competition in curriculum, campus activities, and student-faculty ratio is not a pro-competitive benefit); *Union*

the Rule of Reason should not turn “on a court’s intuitive judgment of whether a particular practice seems sensible and equitable, but rather on economic analysis.”<sup>98</sup>

Under this prong of the Rule of Reason, a plaintiff has the initial burden of demonstrating the presence of anti-competitive effects within some relevant market.<sup>99</sup> Should the plaintiff meet this burden, the burden then shifts to the defendant to provide evidence of pro-competitive effects to justify any anticompetitive injuries.<sup>100</sup>

#### *a. Aggregate Anticompetitive Effects*

The NFL Personal Conduct Policy produces strong anticompetitive effects in national, North American, and worldwide markets for professional football labor. This is because the NFL Personal Conduct Policy prevents prospective NFL players from practicing their profession<sup>101</sup> and denies consumers the opportunity to express their preference for watching games featuring the boycotted players.<sup>102</sup>

As a matter of antitrust law, it is generally illegal for members of any industry to collectively boycott a worker.<sup>103</sup> For example, in the case *Anderson v. Shipowners Ass’n of Pacific Coast*, the Supreme Court held that it was illegal for an association of ship owners to collectively boycott a

Circulation Co. v. FTC, 241 F.2d 652, 656 (2d Cir. 1957) (“Under the Sherman Act the test of validity for any restraint of trade is not the motive of the parties who act in concert. Restraints of trade must be examined not merely for the intent of their creators but for their reasonableness . . . .”); Edelman & Harrison, *supra* note 45, at 21–22.

98. PAUL C. WEILER & GARY R. ROBERTS, *SPORTS & THE LAW: TEXT, CASES, AND PROBLEMS* 42 (3d ed. 2004); *see also Prof’l Eng’rs*, 435 U.S. at 688 (“Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint’s impact on competitive conditions.”); Pletcher & Ghesquiere, *supra* note 57, at 175 (“[G]ood motives alone will not validate an otherwise objectionable anti-competitive practice. Likewise, a group’s proffered justification of promoting the social good is not enough to save anti-competitive conduct . . . .” (footnote omitted)); Note, “Political” Blacklisting in the Motion Picture Industry: A Sherman Act Violation, 74 YALE L.J. 567, 575 (1965) (“[T]he Sherman Act could not be evaded by good motives . . . .”).

99. Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club, 413 F.3d 462, 469 (6th Cir. 2005).

100. *Id.* Assuming the defendant succeeds in this regard, the burden then shifts back to the plaintiff to “show that any legitimate objectives can be achieved in a substantially less restrictive manner.” *Id.* (internal quotation marks omitted).

101. *See Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1066–67 (C.D. Cal. 1971); *see also Weistart, supra* note 8, at 706.

102. *See Nichols v. Spencer Int’l Press, Inc.*, 371 F.2d 332, 336 (7th Cir. 1967) (citing *Radovich v. Nat’l Football League*, 352 U.S. 445 (1957)).

103. *See Anderson v. Shipowners Ass’n of Pac. Coast*, 272 U.S. 359, 360–63 (1926); *see also Radovich*, 352 U.S. at 453–54; *Quinonez v. Nat’l Ass’n of Sec. Dealers, Inc.*, 540 F.2d 824, 828–29 (5th Cir. 1976); *Denver Rockets*, 325 F. Supp. at 1067.

prospective worker who had not been granted his certification card from the defendant ship-owners' association.<sup>104</sup>

Further, four separate cases in the context of professional sports have found it illegal for club owners outside the scope of a collective bargaining agreement to impose league-wide rules that restrict player eligibility.<sup>105</sup> In the first of these cases, *Denver Rockets v. All-Pro Management, Inc.*, the United States District Court for the Central District of California overturned an NBA rule that required all prospective men's professional basketball players to wait at least four years after completing high school before applying for the NBA draft.<sup>106</sup> Although the *Denver Rockets* court acknowledged that the NBA education policy might have been socially "commendable," it explained that the goals of promoting education may not "override the objective of fostering economic competition which is embodied in the antitrust laws."<sup>107</sup> In other words, "antitrust law is not a forum for social policy"; it is exclusively about balancing pro-competitive and anticompetitive effects.<sup>108</sup>

Six years later in *Linseman v. World Hockey Ass'n*, the United States District Court for the District of Connecticut found the group boycott of young athletes to be illegal.<sup>109</sup> In *Linseman*, an amateur hockey player brought suit against the World Hockey Association (WHA), contending that the league's prohibition against players under the age of twenty violated § 1 of the Sherman Act.<sup>110</sup> Consistent with the *Denver Rockets* holding, the District of Connecticut ultimately concluded that the WHA's age/education policy was a "per se illegal refusal to deal, and that there was not any valid purpose to the WHA rule."<sup>111</sup>

104. See *Anderson*, 272 U.S. at 361–62, 365.

105. See *Boris v. U.S. Football League*, No. CV 83-4980 LEW (Kx), 1984 WL 894, at \*1 (C.D. Cal. Feb. 28, 1984); *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1325 (D. Conn. 1977); *Denver Rockets*, 325 F. Supp. at 1064–66. The following portion of this Article is adapted from my article with C. Keith Harrison in the *Northwestern Journal of Law & Social Policy*, see Edelman & Harrison, *supra* note 45, at 15–17, and my article with Brian Doyle in the *Northwestern Journal of International Law and Business*, see Edelman & Doyle, *supra* note 45, at 426–28.

106. *Denver Rockets*, 325 F. Supp. at 1055, 1067. The NBA clubs thereafter moved for a stay of this ruling, which was granted by the Ninth Circuit Court of Appeals but was then overturned by the Supreme Court. See *Denver Rockets v. All-Pro Mgmt., Inc.*, No. 71-1089, 1971 WL 3015, at \*1 (9th Cir. Feb. 16, 1971) (per curiam), *rev'd sub nom.* *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1204, 1206–07 (1971) (Douglas, Circuit Justice).

107. *Denver Rockets*, 325 F. Supp. at 1066.

108. Edelman & Harrison, *supra* note 45, at 16; see also Edelman & Doyle, *supra* note 45, 426–27.

109. *Linseman*, 439 F. Supp. at 1317, 1325.

110. Edelman & Harrison, *supra* note 45, at 16 (citing *Linseman*, 439 F. Supp. at 1317); see also Edelman & Doyle, *supra* note 45, at 427.

111. Edelman & Harrison, *supra* note 45, at 16 (citing *Linseman*, 439 F. Supp. at 1321–22). "The *Linseman* court also found that antitrust law did not allow for exceptions to the Sherman Act based on a sports league's purported economic necessity." *Id.* (citing *Linseman*, 439 F. Supp.

Then, in *Boris v. United States Football League*, the Central District of California struck down another unilateral age/education policy.<sup>112</sup> The plaintiff in that case, Robert Boris, a former University of Arizona football player, “challenged an age/education policy of the United States Football League (USFL), which mandated that all prospective players exhaust their college eligibility before entering the draft.”<sup>113</sup> Ultimately, the parties reached a settlement and dismissed the case with prejudice.<sup>114</sup>

Most recently, in *Clarett v. National Football League*,<sup>115</sup> the United States District Court for the Southern District of New York, applying the Rule of Reason, found that the NFL’s age/education requirement that prevented players less than three years removed from high school from entering the league was prima facie evidence of an antitrust violation.<sup>116</sup> Ultimately, however, the Second Circuit Court of Appeals reversed and upheld the age/education requirement because it found that the requirement was a product of collective bargaining and was thus insulated from liability by the non-statutory labor exemption.<sup>117</sup>

Unlike each of these four age/education requirements, the NFL Personal Conduct Policy only affects players who have engaged in purported wrongdoing.<sup>118</sup> However, under antitrust law this distinction is entirely irrelevant.<sup>119</sup> Section 1 of the Sherman Act does not discriminate on social policy grounds.<sup>120</sup> Not only does it prohibit agreements that exclude scrupulous employees, but it also prohibits agreements that exclude bona fide wrongdoers.<sup>121</sup>

at 1322). The court wrote that the “[e]xclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators’ profit margins.” *Linseman*, 439 F. Supp. at 1322 (quoting *United States v. Gen. Motors Corp.*, 384 U.S. 127, 146 (1966)).

112. *Boris v. U.S. Football League*, No. Cv. 83-4980 LEW (Kx), 1984 WL 894, at \*1 (C.D. Cal. Feb. 28, 1984).

113. *Edelman & Harrison*, *supra* note 45, at 17 (citing *Boris*, 1984 WL 894, at \*2).

114. *Boris*, 1984 WL 894, at \*1.

115. 306 F. Supp. 2d 379 (S.D.N.Y. 2004), *rev’d on other grounds*, 369 F.3d 124 (2d Cir. 2004).

116. *See id.* at 408 (“The [NFL age–education requirement] is the perfect example of a policy that is appropriately analyzed under the ‘quick look’ standard because its anticompetitive effects are so obvious.”); *see also id.* at 405 (“[T]he parties agree that the rule of reason applies because the challenged restraint arises in the context of a sports league.”).

117. *See Clarett v. Nat’l Football League*, 369 F.3d 124, 125 (2d Cir. 2004).

118. *See NFL PERSONAL CONDUCT POLICY*, *supra* note 1, ¶ 3 (stating that an NFL employee “[is] held to a higher standard and expected to conduct [himself] in a way that is responsible, promotes the values upon which the League is based, and is lawful”).

119. *See infra* notes 122–27 and accompanying text.

120. *See supra* notes 53–58 and accompanying text.

121. *See Union Circulation Co. v. FTC*, 241 F.2d 652, 656–58 (2d Cir. 1957) (finding that the magazine sales industry cannot avoid antitrust liability by arguing it was necessary to boycott

Many lower courts—both before and after *Professional Engineers*—have found group boycotts to be illegal even where the boycotted employees have engaged in *actual* wrongdoing.<sup>122</sup> For instance, in the case *Quinonez v. National Ass'n of Securities Dealers, Inc.*, the Fifth Circuit found that even though a plaintiff was fired by two previous employers for admitting “prior involvements with criminal charges,”<sup>123</sup> the defendant employers still were not allowed to agree with one another to keep that plaintiff out of the securities industry.<sup>124</sup> Similarly, in *Union Circulation Co. v. FTC*, the Second Circuit found that a no-switching agreement between employers in the magazine industry was “an unreasonable restraint of trade” even where the agreement purportedly existed as a way to prevent deceptive selling practices.<sup>125</sup> According to the court in *Union Circulation*, even if attempts to remove wrongdoers from an industry were laudable, “[t]he petitioners can not be left to police the . . . industry by a method as ripe for abuse as that offered by such agreements.”<sup>126</sup>

Recognizing that antitrust law does not allow for employers in an industry to boycott workers, even those who have admitted to *actual* wrongdoing, it seems extraordinarily unlikely that any court would allow the NFL club owners to enact a policy that enables a group boycott of certain NFL players, some of whom have neither admitted nor been found guilty of any wrongdoing.<sup>127</sup>

#### b. Aggregate Pro-Competitive Benefits

By contrast, the economic benefits of the NFL Personal Conduct Policy are extremely limited. The two strongest economic arguments in favor of upholding the NFL Personal Conduct Policy are (1) that the policy is needed to

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a class of employees who had engaged in deceptive practices); *see also* *Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824, 827–29 (5th Cir. 1976) (finding that even though a plaintiff was fired from two previous employers for admitting “prior involvements with criminal charges,” the defendants were not allowed to agree to keep that plaintiff out of their industry); *McCreery Angus Farms v. Am. Angus Ass'n*, 379 F. Supp. 1008, 1010, 1019 (S.D. Ill. 1974), *aff'd*, 506 F.2d 1404 (7th Cir. 1974) (holding that the American Angus Association’s indefinite suspension of a plaintiff angus farmer constituted an illegal group boycott, even though the plaintiff might have violated the association’s blood-typing rules).

122. *See infra* notes 123–26 and accompanying text.

123. *Quinonez*, 540 F.2d at 827.

124. *Id.* at 828–29.

125. *Union Circulation*, 241 F.2d at 658.

126. *Id.*

127. *See Changes Approved on Player Conduct*, *supra* note 34; *see also NFL Adopts New Conduct Policy*, *supra* note 34 (discussing a plan to begin suspending players under the NFL Personal Conduct Policy even if not convicted of any wrongdoing); *League Suspends Chiefs Running Back Johnson for a Game*, N.Y. TIMES, Nov. 1, 2008, at B14 (noting NFL Commissioner Roger Goodell suspended Kansas City Chiefs running back Larry Johnson for one game for spitting his drink in a woman’s face, even though he had not been convicted of any wrongdoing).

make competition for football labor available in the first place,<sup>128</sup> and (2) that the policy is needed to prevent individual club owners from incurring bona fide industry-wide liability.<sup>129</sup> Neither of these arguments, however, is particularly compelling.

*i. The “Necessary to Make Any Competition Available” Argument*

Courts, applying the “necessary to make any competition available” argument, have long upheld otherwise anticompetitive agreements that were necessary to allow any degree of competition to exist in a particular marketplace.<sup>130</sup> This is based on the belief that it is more competitive for an industry to operate under limited restraints than to not operate at all.<sup>131</sup> As explained in a 1977 article by Duke Law Professor John C. Weistart, “[i]t would be a rather startling notion if the antitrust laws meant that a business operation such as a league could not protect itself against actions of participants which might seriously injure, if not destroy, the enterprise.”<sup>132</sup>

The case *Molinas v. National Basketball Ass’n* is the best known example of a court accepting the “necessary to make any competition available” argument for upholding a group boycott of a professional athlete.<sup>133</sup> In that case, former professional basketball player Jack Molinas (mentioned above in Part I.B.) brought suit against the NBA and its member clubs after the NBA president

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128. See *infra* notes 131–40 and accompanying text.

129. See *infra* notes 141–43 and accompanying text. The NFL would also likely seek to argue that its Personal Conduct Policy is pro-competitive based on social policy grounds; however, as explained above, as well as in *Professional Engineers*, social policy arguments unrelated to actual economic effects are entirely irrelevant to any Rule of Reason analysis. See *supra* notes 97–98 and accompanying text; see also Nat’l Soc’y of Prof’l Eng’rs, 435 U.S. 679, 694 (1978). In addition, the NFL might seek to compare its Personal Conduct Policy with a rule that would ban an individual from maintaining membership in a private organization such as a country club or a knitting club. However, that analogy misses the mark legally, given that courts have long held there is an important legal difference between suspension from a private, industry-wide business association and suspension from a social club. See *McCreery Angus Farms v. Am. Angus Ass’n*, 379 F. Supp. 1008, 1010, 1019 (S.D. Ill. 1974) (noting this distinction), *aff’d*, 506 F.2d 1404 (7th Cir. 1974); see also *Blalock v. Ladies Prof’l Golf Ass’n*, 359 F. Supp. 1260, 1265–66 (N.D. Ga. 1973) (stating that suspending Blalock for one year constituted an illegal group boycott because it is “tantamount to total exclusion from the market of professional golf”).

130. See *Broad. Music, Inc. v. CBS*, 441 U.S. 1, 20 (1979) (explaining that a blanket license among competitors “was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided” (emphasis added)); see also Weistart, *supra* note 8, at 707; FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, HORIZONTAL MERGER GUIDELINES § 5.1 (1992), available at <http://www.ftc.gov/bc/docs/hmg080617.pdf> (explaining a very similar “Failing Firm” defense to otherwise anticompetitive mergers). For application of this same principle in European Union antitrust law, see *Union Royale Belge des Sociétés de Football Ass’n ASBL v. Bosman*, Case C-415/93, 1995 E.C.R. I-4921, ¶ 265, and Edelman & Doyle, *supra* note 45, at 430–33.

131. See *Broad. Music*, 441 U.S. at 20.

132. Weistart, *supra* note 8, at 707.

133. *Molinas v. Nat’l Basketball Ass’n*, 190 F. Supp. 241, 243–44 (S.D.N.Y. 1961).

indefinitely suspended him from the league for betting on his team's games.<sup>134</sup> In his pleadings, Molinas argued that the NBA "ha[d] entered into a conspiracy with its member teams and others in restraint of trade,"<sup>135</sup> and that his suspension was "the result of a conspiracy in violation of these laws."<sup>136</sup> Nevertheless, the United States District Court for the Southern District of New York rejected Molinas's claim, holding that "a disciplinary rule invoked against gambling seems about as reasonable a rule as could be imagined" because "the confidence of the public in basketball has been shattered, due to a series of gambling incidents."<sup>137</sup>

As further explained by Professor Weistart:

The success of most professional sports activities depends upon the fans' belief that games and matches represent honest competition . . . . It is unlikely that the interest of fans would continue at present levels if they had reason to believe that the outcome of the competition was controlled by factors other than the personal efforts of those participating and the pre-established rules of the game.<sup>138</sup>

From a post-*Professional Engineers* economic standpoint, the "necessary to make any competition available" argument still seems to apply well to *Molinas*, where a single gambling scandal could drive an entire league into bankruptcy.<sup>139</sup> However, this argument does not seem to carry much weight when applied to the NFL Personal Conduct Policy. This is because, unlike the NBA's anti-gambling policy, the NFL Personal Conduct Policy does not protect "honest [on-the-field] competition," and the absence of such a policy would not likely drive the NFL into imminent bankruptcy.<sup>140</sup>

#### ii. *The "Necessary to Avoid Industry-Wide Liability" Argument*

Additionally, some courts have upheld agreements that contain some anticompetitive effects if those agreements are deemed necessary to prevent liability from flowing to other members of that industry.<sup>141</sup> This sort of pro-

134. *Id.* at 242-43; see also Bob Oates, *A Long Line of Bettors*, L.A. TIMES, Aug. 16, 1989, at Pt. III.1.

135. *Molinas*, 190 F. Supp. at 242.

136. *Id.* at 243.

137. *Id.* at 243-44. Other language in *Molinas* seems to imply a broader reasoning for the court's ruling—for example the court's statement that "[e]very league or association must have some reasonable governing rules." *Id.* This broader line of reasoning would be inapplicable today in light of the Supreme Court's holding in *Professional Engineers*. See *supra* notes 97-98 and accompanying text.

138. Weistart, *supra* note 8, at 707.

139. *Molinas*, 190 F. Supp. at 243-44.

140. See generally Weistart, *supra* note 8, at 708-09 (differentiating a commissioner's attempt to suspend a player from a sports league for cheating from other types of group boycotts).

141. See *Neeld v. Nat'l Hockey League*, 594 F.2d 1297, 1300 (9th Cir. 1979) (arguing that a restraint against one-eyed hockey players is reasonable based on the risk to other teams and their players of being sued should that player lose his other eye); *Tripoli Co. v. Wella Corp.*, 425 F.2d

competitive effect is discussed briefly by the Supreme Court in a peculiar and often overlooked footnote to *Professional Engineers*.<sup>142</sup>

In the context of labor restraints involving professional sports, the only time that a court has applied this argument was in the Ninth Circuit case *Neeld v. National Hockey League*.<sup>143</sup> In that case, the court found an NHL bylaw that precluded any player with just one eye from competing in NHL games was reasonable because the “primary purpose and direct effect of the [NHL] by-law was not anticompetitive but rather safety,” as well as avoiding lawsuits against the league and its members.<sup>144</sup>

Nevertheless, much like the aforementioned “necessary to make any competition available” argument, the “necessary to avoid industry-wide liability” argument does not provide much support for upholding the NFL Personal Conduct Policy. Once again, there is simply no compelling evidence that all thirty-two NFL clubs would become exposed to substantial liability if a single club chooses to hire a player with a violent or criminal past.

### 3. Harm

The final prong of the Rule of Reason requires a plaintiff to show that the allegedly anticompetitive agreement caused harm.<sup>145</sup> In the context of a labor-market antitrust claim, most courts have recognized that this prong is met merely by showing harm to a prospective employee.<sup>146</sup> However, some courts may require direct proof of harm to consumers.<sup>147</sup>

Here, choosing the appropriate test does not seem to affect this prong’s outcome at all. The joint action by NFL clubs clearly produces harm to suspended football players by denying them the opportunity to sell their services.<sup>148</sup> However, it also hurts football game consumers by taking away

932, 938–39 (3d Cir. 1970) (en banc) (protecting oneself from potential products liability is a lawful reason to restrict the resale of a product in a manner that might otherwise violate antitrust laws); see also *Nat’l Soc’y of Prof’l Eng’rs v. U.S.*, 435 U.S. 679, 696 n.22 (1978) (citing *Tripoli*, 425 F.2d 932).

142. *Prof’l Eng’rs*, 435 U.S. at 696 n.22.

143. *Neeld*, 594 F.2d at 1300.

144. *Id.*; see also *id.* at 1298 n.1 (explaining that the NHL bylaw specifically states that “[a] player with only one eye, or one of whose eyes has a vision of only three-sixtieths (3-60ths) or under, shall not be eligible to play for [an NHL] Member Club”).

145. Edelman & Harrison, *supra* note 45, at 22; see also Edelman & Doyle, *supra* note 45, at 416.

146. Edelman & Harrison, *supra* note 45, at 22; see also *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 742–43 (9th Cir. 1984).

147. See, e.g., *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 961 F.3d 667, 670 (7th Cir. 1992) (Easterbrook, J.).

148. Weistart, *supra* note 8, at 706; see *Nichols v. Spencer Int’l Press, Inc.*, 371 F.2d 332, 336 (7th Cir. 1967) (a covenant not to compete for workers violates § 1 as long as it “impair[s] full and free competition in the supply of a service or commodity to the public”); Pletcher & Ghesquiere, *supra* note 57, at 179 (defining harm to an athlete denied eligibility as loss of salary).



their opportunity to express a preference for football games featuring the suspended players.

### C. Non-Statutory Labor Exemption

Presuming that a suspended player is able to make a prima facie showing of an antitrust violation, a court finally turns to whether any exemption or affirmative defense would negate the finding of antitrust liability.<sup>149</sup> Here, the only potentially relevant exemption or affirmative defense is the non-statutory labor exemption.<sup>150</sup>

“[T]he interaction of the [antitrust laws] and federal labor legislation is an area of law marked more by controversy than by clarity.”<sup>151</sup> Currently, there is a split among the circuits about how broadly the non-statutory labor exemption should be applied.<sup>152</sup> In the 1976 case *Mackey v. National Football League*, the Eighth Circuit “held that the non-statutory labor exemption applies only where an alleged restraint of trade: (1) involves mandatory subjects of bargaining, (2) primarily affects the parties involved, and (3) is reached through bona fide, arm’s-length bargaining (the *Mackey* Test).”<sup>153</sup> Both the Sixth Circuit and the United States District Court for the District of Columbia have since applied this test in the context of professional sports disputes.<sup>154</sup> Meanwhile, in the Third Circuit, the United States District Court for the Eastern District of Pennsylvania applied a very similar test in the context of a professional sports dispute that occurred four years before *Mackey*.<sup>155</sup>

In 2004, the Second Circuit, however, held in the case *Clarett v. National Football League* that the non-statutory labor exemption applies more broadly, and might extend to any situation where the exemption’s application would “ensure the successful operation of the collective bargaining process” (the *Clarett* Test).<sup>156</sup> No other court has directly applied the *Clarett* Test in the

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149. See *supra* note 59 and accompanying text.

150. Edelman & Harrison, *supra* note 45, at 22; see also Edelman & Doyle, *supra* note 45, at 417–19.

151. Wood v. Nat’l Basketball Ass’n, 809 F.2d 954, 959 (2d Cir. 1987).

152. Edelman & Harrison, *supra* note 45, at 15; see also Edelman & Doyle, *supra* note 45, at 418–19.

153. Edelman & Harrison, *supra* note 45, at 15 (citing *Mackey v. Nat’l Football League*, 543 F.2d 606, 614 (8th Cir. 1976)).

154. See *McCourt v. Cal. Sports, Inc.*, 600 F.2d 1193, 1197–98 (6th Cir. 1979); *Zimmerman v. Nat’l Football League*, 632 F. Supp. 398, 403–04 (D.D.C. 1986).

155. See *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 499 (E.D. Pa. 1972) (“[A] multi-employer organization will be insulated from unfair labor practice prosecutions only if it acts in good faith and takes only the limited steps necessary to protect itself . . .”).

156. *Clarett v. Nat’l Football League*, 369 F.3d 124, 142–43 (2d Cir. 2004) (emphasis omitted).

context of professional sports; however, many courts have never addressed this issue.<sup>157</sup>

### *1. Is the NFL's Personal Conduct Policy a Mandatory Subject of Bargaining?*

In beginning the analysis, “[t]he first prong of both the *Mackey* and *Clarett* tests addresses whether the NFL Personal Conduct Policy is a mandatory subject of bargaining.”<sup>158</sup> The mandatory subjects of bargaining include hours, wages, and working conditions.<sup>159</sup>

Courts have traditionally held that “[a] grievance-arbitration procedure is a term or condition of employment and a mandatory subject of bargaining within the meaning of [the National Labor Relations Act].”<sup>160</sup> However, even if the NFL Personal Conduct Policy were not found to be sufficiently related to grievance arbitration for a court to conclude that it is a “mandatory subject of bargaining,” both the courts in *Mackey* and *Clarett* have separately held that any conduct affecting wages, even indirectly, is a mandatory subject.<sup>161</sup> NFL player suspensions affect wages of suspended players, because whenever a player is suspended, that player is docked pay.<sup>162</sup> In addition, player expulsions more broadly affect wages because they implicate the amount of salary cap room that is available to all non-expelled players.

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157. The Sixth Circuit cited to *Clarett* in *National Hockey League Players Ass'n v. Plymouth Whalers*, 419 F.3d 462 (6th Cir. 2005), for the general proposition that “[a]ny anti-competitive effect of a properly bargained collective bargaining agreement is excluded from antitrust scrutiny by a non-statutory antitrust exemption.” *Id.* at 474. However, that reference is entirely divorced from the circuit split between *Mackey* and *Clarett*.

158. Edelman & Harrison, *supra* note 45, at 22.

159. See National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (2000); *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW § 7.4[B], at 210 (1999).

160. *NLRB v. Indep. Stave Co.*, 591 F.2d 443, 446 (8th Cir. 1979); see also *Chi. Magnesium Castings Co. v. NLRB*, 612 F.2d 1028, 1034 (7th Cir. 1980) (“It is moreover well settled that grievance machinery is a mandatory subject of collective bargaining.”); Pollack, *supra* note 24, at 1648.

161. See *Clarett*, 369 F.3d at 140 (asserting that conduct that has “tangible effects on the wages and working conditions of current NFL players” is a mandatory subject of bargaining); see also *Mackey v. Nat'l Football League*, 543 F.2d 606, 615 (8th Cir. 1976) (stating that conduct that “operates to restrict a player’s ability to move from one team to another and depresses player salaries” constitutes a mandatory subject of bargaining).

162. See *League Suspends Chiefs Running Back Johnson for a Game*, *supra* note 127 (noting that Commissioner Roger Goodell’s one-game suspension of Kansas City Chiefs’ running back Larry Johnson cost Johnson his weekly paycheck of \$147,000).

## 2. Does the NFL Personal Conduct Policy Primarily Affect the Parties Involved?

The second prong of the *Mackey* Test addresses whether the NFL Personal Conduct Policy primarily affects the parties involved in the collective bargaining process.<sup>163</sup> However, “[i]t is unclear whether this prong also applies under the *Clarett* Test.”<sup>164</sup>

Applying the *Mackey* Test, there is no doubt that the NFL Personal Conduct Policy primarily affects the parties involved in collective bargaining. This is because the parties most affected by the NFL Personal Conduct Policy—the NFL clubs and the suspended players—are both represented by collective bargaining.<sup>165</sup> Under the *Clarett* Test, to the extent that a plaintiff even needs to meet this prong, the same logic would apply.<sup>166</sup>

## 3. Is the NFL Personal Conduct Policy Reached Through Bona Fide Arm’s-Length Bargaining?

Completing the analysis, “[t]he final prong of the *Mackey* Test addresses whether the alleged agreement was reached through bona fide arm’s-length bargaining.”<sup>167</sup> According to *Mackey*, this prong of the Rule of Reason is met if a particular term appears in the parties’ collective bargaining agreement.<sup>168</sup> By contrast, this requirement is not met where one party unilaterally imposes a provision.<sup>169</sup>

The NFL Personal Conduct Policy does not appear anywhere in the collective bargaining agreement.<sup>170</sup> Although some evidence indicates that the NFLPA was aware of the NFL clubs’ desire to implement a league-wide personal conduct policy (and may have even voiced some support for the

163. See *supra* note 153 and accompanying text.

164. Edelman & Harrison, *supra* note 45, at 23.

165. See *id.* at 69; cf. *Mackey*, 543 F.2d at 614–15. This is distinctly different from a league-entry policy such as an age–education requirement, where the parties primarily affected are those that are unable to vote on league matters and are therefore, in the view of some, “economic actors completely removed from the bargaining relationship.” *Zimmerman v. Nat’l Football League*, 632 F. Supp. 398, 405 (D.D.C. 1986).

166. See Edelman & Harrison, *supra* note 45, at 23; see also Edelman & Doyle, *supra* note 45, at 418–19.

167. Edelman & Harrison, *supra* note 45, at 23.

168. See *Mackey*, 543 F.2d at 615–16 (finding no bona fide arm’s-length bargaining); see also *Phoenix Elec. Co. v. Nat’l Elec. Contractors Ass’n*, 867 F. Supp. 925, 938 (D. Or. 1994) (examining whether the agreement was negotiated), *aff’d*, 81 F.3d 858 (9th Cir. 1996).

169. See *In re Detroit Auto Dealers Ass’n*, 955 F.2d 457, 473–74 (6th Cir. 1992) (Ryan, J., concurring in part and dissenting in part); see also *Zimmerman*, 632 F. Supp. at 406 (“This analysis denies the labor exemption to anti-competitive agreements imposed unilaterally by one party, usually management, without regard to the interests of the other.”). Cf. *Chi. Magnesium Castings Co. v. NLRB*, 612 F.2d 1028, 1034–35 (7th Cir. 1980) (explaining that unilateral changes to a collective bargaining agreement during the period of agreement is an unfair labor practice); *NLRB v. Indep. Stave Co.*, 591 F.2d 443, 446–47 (8th Cir. 1979) (same).

170. See *supra* note 40 and accompanying text.

policy),<sup>171</sup> the NFLPA never agreed to insert the policy as a rider into the collective bargaining agreement, which clearly would have indicated the intent of both parties to make the policy binding.

This last point is critical from both an evidentiary and a practical perspective. From an evidentiary perspective, the Parol Evidence clause in the NFL Collective Bargaining Agreement states that any proposed changes, alterations, or amendments to the collective bargaining agreement may only take place through “written agreement.”<sup>172</sup> Therefore, any evidence of purported verbal changes to the Collective Bargaining Agreement is simply irrelevant.

Additionally, from a more practical perspective, if the NFLPA were found to have agreed to the NFL Personal Conduct Policy, any potential liability for the policy would shift from the NFL teams (under antitrust law) to the NFLPA under the union’s duty of fair representation.<sup>173</sup> Given that the duty of fair representation requires a union to act in a non-discriminatory manner,<sup>174</sup> by agreeing to the NFL Personal Conduct Policy, the NFLPA would incur the risk of being sued by an NFL player with a criminal record—a protected class, at least in the state of New York.<sup>175</sup> Therefore, it would be tremendously unfair, as a matter of law, to bind the NFLPA to the terms of the NFL Personal Conduct Policy based merely on a few passing statements.

#### IV. FOUR LEGAL WAYS FOR NFL CLUBS TO KEEP VIOLENT OFFENDERS OUT OF THE NFL

Based on the analysis above, it is clear that the NFL Personal Conduct Policy has the potential to violate antitrust law.<sup>176</sup> While it is not clear that every federal court would find the NFL Personal Conduct Policy illegal (in fact, a court in the Second Circuit most probably would not),<sup>177</sup> there are many

171. See *supra* notes 3–4 and accompanying text.

172. NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012, *supra* note 2, art. LV, § 19, at 235 (Parol Evidence).

173. See *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 962 (2d Cir. 1987) (“Even if some such arrangements might be illegal because of discrimination against new employees (players), the proper action would be one for breach of the duty of fair representation.”).

174. See *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (“A breach of the statutory duty of fair representation occurs only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.”); *Peterson v. Kennedy*, 771 F.2d 1244, 1253 (9th Cir. 1985) (explaining the duty of fair representation).

175. See N.Y. CORRECTIONS LAW § 752 (McKinney Supp. 2009) (stating that “no employment or license held by an individual . . . shall be denied or acted upon adversely by reason of the individual’s having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of good ‘moral character’” unless one of two exceptions apply).

176. See discussion *supra* Part III.

177. See *Clarett v. Nat’l Football League*, 369 F.3d 124, 142–43 & n.19 (2d Cir. 2004) (finding that to determine whether the non-statutory labor exemption applied to the NFL age-education rules, the court “need not determine whether as a matter of law the Constitution and

other ways that the NFL clubs could encourage player decorum without risking antitrust liability.<sup>178</sup>

### A. Independent Team Enforcement of Moral Clauses

One alternative way for NFL clubs to encourage player decorum would be for NFL clubs to exercise the morals clauses that are included in all NFL player contracts more vigorously. Specifically, Paragraph 11 of the NFL Player Contract allows individual club owners to terminate any player's contract if that player is "engaged in personal conduct reasonably judged by [the club] to adversely affect or reflect on [the club]."<sup>179</sup> This language is far broader in scope than Paragraph 15 of the NFL Player Contract, which only allows a commissioner to suspend a player for conduct that is deemed "detrimental to the League or professional football."<sup>180</sup>

In determining whether to terminate a player's contract for breach of his morals clause, a club owner must balance his perceptions of that player's positive contributions to his team with that player's negative conduct. Ultimately, a club owner's decision about whether to retain a particular player would often turn on how a club owner believes that his fan base would react to that player's continued presence. However, if a particular club owner feels strongly about the gravity of a particular player's wrongdoing, he may choose to release that player even where the player continues to provide a strong return on investment.

From an antitrust perspective, it is perfectly valid for an individual club owner to release a player pursuant to the morals clause in his contract, so long as he is doing so independently (rather than in concert with other club owners).<sup>181</sup> Furthermore, if a club owner chooses to release a player for breach of his morals clause, the thirty-one other NFL club owners would then gain the opportunity to sign that player, thus allowing consumer preferences to play a dominant role in dictating whether that player ultimately finds new employment.

### B. Petitioning Congress to Regulate Eligibility Standards for Professional Athletes

A second way that NFL clubs may attempt to regulate player conduct would be for the clubs to petition Congress to pass a statute that restricts one's right to work as a professional football player if one has engaged in past misconduct.

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Bylaws that contained the eligibility rules were incorporated by reference into the current collective bargaining agreement").

178. See discussion *infra* Part IV.A–D.

179. NFL PLAYER CONTRACT, *supra* note 38, para. 11, at 252.

180. See *id.* para. 15, at 253 (noting the difference in meaning between "detrimental" and simply "adverse").

181. See discussion *supra* Part III.A.2 (noting that independent conduct does not meet one of the threshold issues for a violation under § 1 of the Sherman Act).

If a petition of this nature were successful, Congress might ultimately pass a statute similar to the NFL Personal Conduct Policy, thus keeping perceived wrongdoers statutorily out of the NFL. However, Congress also might tweak aspects of the current policy to make it more consistent with other societal goals. For example, Congress might remove any language from the NFL Personal Conduct Policy pertaining to lifetime banishment, because rehabilitative aspects of our criminal justice system seem to point away from that particular remedy.<sup>182</sup>

From an antitrust perspective, petitioning Congress to regulate player conduct does not present any concern under § 1 of the Sherman Act. Even if the NFL clubs concertedly petition Congress, their conduct remains entirely exempt based on the *Noerr-Pennington* doctrine, which allows competing businesses to join in combination for the purpose of influencing government action.<sup>183</sup> This is true even if the underlying goal is to restrain competition.<sup>184</sup>

In addition, § 1 of the Sherman Act does not prevent Congress from regulating one's eligibility to participate in a given industry.<sup>185</sup> Rather, the Sherman Act only prevents private citizens, outside of the scope of a collective bargaining agreement, from collectively implementing their own form of self-governance.<sup>186</sup>

### C. *Petitioning Congress for Limited Antitrust Exemption to Regulate Player Eligibility*

A third legal way for club owners to keep undesirable players out of the NFL would be to petition Congress for a limited antitrust exemption to self-regulate player eligibility. Again, this kind of collective petitioning is fully protected from antitrust scrutiny under the *Noerr-Pennington* doctrine.<sup>187</sup> In

182. See Joel Michael Ugolini, *Even a Violent Game Has Its Limits: A Look at the NFL's Responsibility for the Behavior of Its Players*, 39 U. TOL. L. REV. 41, 45 & n.28 (2007); Monica Scales, Note, *Employer Catch-22: The Paradox Between Employer Liability for Employee Criminal Acts and the Prohibition Against Ex-Convict Discrimination*, 11 GEO. MASON L. REV. 419, 421 (2002) (“[T]he federal government and some state governments have passed legislation that prohibits employers from discriminating against individuals with conviction records unless the crime is substantially related to the occupation.”); see also James R. Todd, Comment, “*It’s Not My Problem*”: *How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725, 736 (2004) (discussing employment discrimination statutes in New York and Wisconsin).

183. SULLIVAN & HARRISON, *supra* note 46, § 3.04[A], at 71; see also *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (“Joint efforts to influence public officials do not violate antitrust laws even though intended to eliminate competition.”); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135–38 (1961).

184. SULLIVAN & HARRISON, *supra* note 46, § 3.04[A], at 71.

185. See “*Political*” *Blacklisting in the Motion Picture Industry*, *supra* note 98, at 579–80.

186. See *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1061 (C.D. Cal. 1971); “*Political*” *Blacklisting in the Motion Picture Industry*, *supra* note 98, at 579–80.

187. See *supra* note 183 and accompanying text.

addition, there is some precedent for Congress granting limited antitrust exemptions to the NFL where it deems appropriate.<sup>188</sup>

From both a right-to-work perspective and a consumer-welfare perspective, even if Congress were to grant a limited antitrust exemption to the NFL clubs for the purposes of enforcing their Personal Conduct Policy, such an outcome would be preferable to allowing the NFL clubs to engage in unbridled self-regulation. This is because, if Congress grants the NFL a statutory right to self-regulate, Congress can impose safeguards to ensure the NFL does so justly.<sup>189</sup>

*D. Collectively Bargain the Terms of the NFL Personal Conduct Policy with the NFLPA*

Finally, and perhaps most easily, the NFL clubs could enforce a personal conduct policy by simply agreeing with the NFLPA to add it in writing to the collective bargaining agreement, thus insulating the policy from antitrust liability under the non-statutory labor exemption.<sup>190</sup> As a matter of labor law, courts have found that negotiating over personal conduct policies is an appropriate part of the collective bargaining process.<sup>191</sup> For example, the Second Circuit noted that “[f]ederal labor policy . . . allows [unions] to seek the best deal for the greatest number [of employees] by the exercise of collective rather than individual bargaining power.”<sup>192</sup> Yet for the NFL clubs

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188. See, e.g., Sports Broadcasting Act of 1961, Pub. L. No. 87-331, 75 Stat. 732 (codified as amended at 15 U.S.C. § 1291 (2000)) (granting the NFL teams a special antitrust exemption to pool and jointly sell their television broadcast rights); see also Football Merger Act of 1966, Pub. L. No. 89-800, § 6, 80 Stat. 1508, 1515–16 (amending 15 U.S.C. § 1291) (adding language to the Sports Broadcasting Act that “[antitrust] laws [further] shall not apply to a joint agreement by which the member clubs of two or more professional football leagues . . . combine their operations in expanded single league . . . if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto”).

189. It is not unusual for Congress to use the threat of removing a sports league’s special antitrust exemption to compel related conduct. See, e.g., Marc Edelman, *Sports and the City: How to Curb Professional Sports Teams’ Demands for Free Public Stadiums*, 6 RUTGERS J.L. & PUB. POL’Y 35, 71–72 (2008) (explaining that Pennsylvania Senator Arlen Specter’s proposed Stadium Financing and Franchise Relocation Act of 1999, § 952, 106th Cong., intended to repeal the antitrust exemption granted to NFL teams by the Sports Broadcasting Act of 1961 if NFL teams did not devote some broadcasting revenue toward the cost of building their own stadiums).

190. See discussion *supra* Part III.C; see also *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 959 (2d Cir. 1987) (“Among the fundamental principles of federal labor policy is the legal rule that employees may eliminate competition among themselves through a governmentally supervised majority vote selecting an exclusive bargaining representative.”).

191. *Wood*, 809 F.2d at 959 (citing 29 U.S.C. § 159(a)) (noting that, indeed, “section 9(a) of the National Labor Relations Act provides that ‘[r]epresentatives . . . selected . . . by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining.’” (alteration and omissions in original) (quoting 29 U.S.C. § 159(a))).

192. *Id.*

to enjoy this liability shield, the clubs must engage in bona fide arm's-length bargaining rather than merely engaging in an ad hoc process. If real bargaining were to occur, however, the challenge for NFL clubs would involve convincing the NFLPA to accept a potential shift in liability to them for any player grievances arising out of the NFL Personal Conduct Policy.<sup>193</sup> To convince the NFLPA to incur this liability, the NFL clubs would likely have to offer something of substance in exchange to the NFLPA.

## V. CONCLUSION

Since April 10, 2007, NFL Commissioner Roger Goodell has suspended several players under the NFL Personal Conduct Policy. Most notably, Commissioner Goodell disciplined cornerback Adam "Pacman" Jones for his five separate arrests by suspending him for the entire 2007 football season,<sup>194</sup> wide receiver Chris Henry for his four separate arrests by suspending him for the first half of the 2007 NFL season,<sup>195</sup> and quarterback Michael Vick for his role in organizing an illegal dog fighting ring by suspending him indefinitely.<sup>196</sup>

The NFL's goal of promoting positive football role models is undeniably important. Many American children idolize professional football players.<sup>197</sup> In addition, sports figures serve an "especially [important] role within low-income and African-American communities."<sup>198</sup>

Nevertheless, the method by which NFL club owners have sought to banish players from their league is improper. The NFL Personal Conduct Policy harms the players who Commissioner Goodell suspends by concertedly taking away their right to practice their profession—a right that, according to the Honorable Learned Hand, is deeply entrenched in modern antitrust law.<sup>199</sup> In addition, the policy harms football consumers by stripping them of their ability to signal a preference for watching NFL games that feature particular players.<sup>200</sup>

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193. See *supra* note 173 and accompanying text.

194. See Battista, *N.F.L. Assesses Lengthy Bans*, *supra* note 1; Judy Battista, *Two Players Meet with Commissioner*, N.Y. TIMES, Apr. 4, 2007, at D6 [hereinafter Battista, *Two Players Meet with Commissioner*].

195. See Battista, *N.F.L. Assesses Lengthy Bans*, *supra* note 1; Battista, *Two Players Meet with Commissioner*, *supra* note 194.

196. See John Branch, *Another Win, But No Suspense*, N.Y. TIMES, Oct. 16, 2007, at D1.

197. See Marc Edelman, Note, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 MICHIGAN J. L. REFORM 861, 878 (2002).

198. See *id.* (citing George O. Assibey-Mensah, *Role Models and Youth Development: Evidence and Lessons from the Perception of African-American Youth*, 21 W.J. OF BLACK STUD. 242, 244 (1997)) (discussing a 1997 study of African American children that found 85% of ten-year olds and 98% of eighteen-year olds considered their primary role model to be an athlete).

199. *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949) (Hand, J., concurring); see also *supra* note 101 and accompanying text.

200. See *supra* note 102 and accompanying text.



As discussed above, there are four legitimate ways in which the NFL clubs could approach the goal of improving football player conduct, and avoid antitrust liability. First, individual NFL club owners may vigorously enforce the morals clauses included in the standard NFL player contract. Second, the clubs may collectively petition Congress to regulate eligibility standards for professional football players. Third, the clubs may petition Congress to grant the NFL clubs a limited antitrust exemption to self-regulate player eligibility legally. Finally, the clubs could reach a collectively bargained agreement with the NFLPA over the terms of eligibility to play in the NFL.

What the NFL clubs may not do, however, is use the egregious personal wrongdoings committed by a few NFL players as a *carte blanche* license to engage in a group boycott. Indeed, two wrongs simply do not make a right. If the NFL club owners truly want to encourage NFL players to act with greater decorum, they too must tread carefully to follow the strictest letter of the law.