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PROFILE OF THE GUEST EDITOR-IN-CHIEF

Anastasios Kaburakis holds Ph.D. and M.S. degrees from Indiana University in Bloomington, IN and a Law degree from Aristotle University of Thessaloniki, Greece. He held Faculty appointments at Southern Illinois University Edwardsville, Indiana University Bloomington, and Washington University Law School in St. Louis. He is currently an Asst. Professor of Management and Sports Business in the John Cook School of Business, Saint Louis University. Prior to academia, he practiced law and is licensed through the Thessaloniki Bar Association. While in Greece, he coached basketball at the junior and professional club levels, the national teams of Greece, and served the Greek Basketball Federation, FIBA, and several European educational institutions on legal and policy matters.

He has published articles and presented research on International Comparative Sport Law, NCAA Compliance, particularly pertaining to International Student-Athletes, recruiting, amateurism, gambling, coaches' contracts, institutional liability, and intellectual property applications in sport. He regularly consults international sport governing bodies, NCAA Division I governance committees, policy-drafting actors in member conferences and coaches' associations, member institutions' compliance and coaching staff members on international recruiting, amateurism policy, and legal issues in intercollegiate athletics settings. He serves as an advisor for various international sport consulting firms.

GUEST EDITOR-IN-CHIEF'S INTRODUCTION TO THE ISSUE

The Journal you have before you is the culmination of hundreds of work hours invested by several Saint Louis University students, advisors, contributors from many University units, and kind reviewers in law practice and academe. Timely, this publication comes as the University is rapidly becoming a key player in international education, with increasing enrollment, new academic programs, interdisciplinary partnerships among University departments and industry stakeholders, and coveted research output by university faculty and students. In the areas of sport and entertainment in particular, student interest, faculty research and expertise, and support by institutional administrators led to key highlights including the advent of what currently has become one of the most popular undergraduate concentrations, in the area of sports business. Further joint efforts to nurture related student interest from business, law, communications, and other departments, showcase the collective intellectual capacity and talent this University features via initiatives such as the ones led by the Sport and Entertainment Law Association (law students group) and the Sports Business Association (business students group). Continuing Legal Education sessions, symposia and colloquia featuring renowned authors and practitioners, and publications (by both faculty and law students) cited by federal courts and receiving media attention demonstrate that there are quite a few good things happening around Saint Louis University. Naturally, none is more fulfilling than the pride and satisfaction faculty and advisors feel when students thrive and succeed in their endeavors, and this Journal is a fine example of such student productivity and good work.

In its second edition, the Saint Louis University Legal Studies Journal undertakes the valiant task of tackling several important legal issues in the never-boring and always attractive for litigation and scholarship areas of sport and entertainment. Immense gratitude is owed to Janet O'Hallaron, J.D., our inspiring Director of the highly successful Pre-Law program, and graduate assistants Jessica Cervenka and Joyce LaFontain, the heart and soul of this issue spending countless hours (and indeed as a 2L and 1L, respectively, at SLU Law) on communications with students, editing, research, and ensuring everything progressed smoothly, as well as all the members of the Pre-Law advisory committee and our ad-hoc review team. We all wish we could have accepted every submission and fielded pertinent inquiries beyond the course of an academic semester, however practical considerations lead to the competitive articles the reader will enjoy in this issue.

Petina Benigno's paper on collective bargaining kicks off our special issue with an analysis of past collective bargaining agreements' (CBAs) inefficiencies and particularly focuses on the most recent impasse and eventual lockout at the National Hockey League. Using legal theory and reasoning that goes beyond what an average undergraduate student would undertake (indeed the author will be pursuing law studies at the highest level, thus law school admissions officers take note), Benigno contrasts ex-post subjectivist approaches with her analysis utilizing the tool of ex-ante perspective, whilst forecasting and conducting fundamental cost-benefit exploration of collective bargaining problems. Two of the main problems under discussion, as with most contemporary CBAs, are revenue-sharing between the league/franchise owners and the main actors contributing to the spectacle, the players, as well as the always hard-fought matter of salary caps. Using publicly available data (such as NHL's hockey-related –

net – revenue, total revenue annually increasing and reaching the region of $3billion, compared to loss suffered by certain franchises and communities such as Phoenix and St. Louis) as well as her original research, Benigno posits that there are great inefficiencies in the way owners and players negotiate. She posits that both sides need to assume an ex-ante approach, keeping the larger picture in mind, while trying to reach a mutually beneficial CBA that will uphold benefits and the entire sport's interests in future years. Interviewing law practitioners and citing related research, Benigno remains balanced and concludes that, although somewhat understandable economically, the costs and risks outweigh the potential benefits for both parties when impasse and lockouts/strikes ensue. Ultimately in her ex-ante analysis, a key reference point is the impact on the fans and potential pitfalls of hard-nosed bargaining, as both hockey and baseball fans can confirm from past experiences and canceled seasons.

Joe Benoist and Alexandra Rahimi provide analysis on one of the most alarming issues in sports, the currently litigated field of concussions. Benoist is focusing on prevention rather than treatment of concussions which league policies and state regulations address. Treatment rules are fine, but Benoist attempts to foresee avenues toward preemptively treating the problems that led to high-stakes concussions' litigation. He provides the examples of Kentucky, Ohio, and Texas, which mandate medical training and more rigorous education for coaches, trainers, and people involved in athletics. Benoist advocated further education for parents and athletes, and embraces recommendations espoused by the Sports Legacy Institute and affiliated physicians, who argue there should be "hit counts" introduced and other policy restraints in the way the games are played. Analyzing such measures, the author acknowledges they frequently conflict with engrained American love and passion for the extreme in competition, effort, and gamesmanship. However, he argues they are now necessary to avoid further deaths and ultimately protecting the games themselves.

Closely, Rahimi analyzes the issue of concussions specifically investigating the National Football League (NFL) practices and related policies. Through a combination of labor and tort law analysis, Rahimi showcases high-level inquiry and application of collective bargaining and negligence principles in respect to the NFL. She assumes a critical stance toward retired players' suits and argues it would be difficult to maintain a feasible NFL season if retirees were to collect for every conceivable injury they sustained. Rahimi uses precedent to demonstrate that there is ample blame to be shared, and players, coaches, physicians, as well as officials may all be found negligent in such concussion-related suits. Finally, Rahimi provides suggestions to the league in regard to inclusion of certain injuries in the retirement and benefits plans, and advocates education and proactive planning from all involved.

Alexis Blood is offering a contribution on the always-appealing for lawyers and scholars and interesting for league governance matter of performance enhancing drugs (PEDs). The author conducts a historical review of PEDs handling by international sport federations from the first instances of doping in sport to the modern era of the World Anti-Doping Agency (WADA) and the perpetual battle between officials/enforcement/regulators and laboratories/cheats. Given the recent (summer 2013) cases of baseball players' PEDs rules infractions and heavy sanctions by Major League Baseball (MLB), there is a lot of timely and quality information on both the background of testing programs and a view for the future in Blood's paper. It is evident that such analyses will continue to be necessary and applicable as continuous cases of PEDs-related violations occur in most sports, each year.

Thomas Hanlon invites the reader on a journey down memory lane, and the history of baseball (and sport labor law) in the U.S. He reflects on the infamous reserve clause, Curt Flood and his pursuit of free agency, the U.S. Supreme Court's trilogy commencing with the *Federal Baseball* case of 1922 granting baseball a long-standing exemption from antitrust laws, and overall highlights baseball history and the advent of free agency. It is a significant undertaking by an undergraduate student, displaying the ardent desire for learning and yearning for answers to difficult questions, frequently encountered when looking at one's past, as Hanlon accomplishes by reminiscing on baseball's past.

Closing, an important contribution to entertainment and intellectual property law scholarship is William McWay's work on "work for hire" doctrine and copyright grants. After a review of copyright law underpinnings, the author presents application of the Sonny Bono Copyright Extension Act, 17 U.S.C. § 302(a), with 2013 being the first year that artists may terminate a copyright license previously granted to a publishing/record company. In a recent case in federal district court in California, it was decided that a musician who had previously transferred copyright interest may unilaterally terminate the grant. Impressively, McWay unearths what was not pursued in the sequence of litigation by the record companies, and that was the argument that the work was made "for hire" (exemption from copyright law and property interest favoring the employer, e.g. universities and faculty research/publications in most cases). Logically, McWay argues that in cases where it is clear that the work was made "for hire", the employer owns the property right, thus artists will not have a valid claim and be able to terminate a copyright license under the Sonny Bono Extension Act provision, since they would have never had ownership of a right to license, rather the employer would be the sole owner of that property interest. Closely, McWay provides recent case law favoring a recording company over the heirs of Bob Marley, finding that the musician's works were made for hire, fully owned by the company.

Summarizing, this has been an outstanding collection of student works, epitomizing Saint Louis University students' work ethic, service to society, and the pursuit of truth in a balanced, inquisitive, and meaningful way. It is my hope that future students will follow the lead of the authors of the works in these first two volumes. Indeed, there is much work and intellectual inquiry to be invested in ensuing issues, and forthcoming publications will reiterate the quality of research and sense of service Saint Louis University students proudly display in all aspects of their lives.

Dr. Anastasios Kaburakis
Guest Editor-In-Chief
Saint Louis University Legal Studies Journal
Sports & Entertainment Law Edition

THE COLLECTIVE BARGAINING AGREEMENT: A SHOOT-OUT DISASTER OR A GAME-WINNING-GOAL?

Petina Benigno

The crowd is roaring at the packed United Center to watch a Chicago Blackhawks game; the infamous theme music, "Chelsea Dagger," is blaring throughout, and the starting six players are on the ice waiting for the puck drop. The loud buzzer clock sounds, but this time it is not signaling the start of a season opening game; instead, on September 16, 2012, the buzzer clock signaled the beginning of the latest labor dispute between the National Hockey League Players' Association (NHLPA), led by Donald Fehr, and the commissioner and owners of the NHL. The collective bargaining agreement between the team owners, led by commissioner Gary Bettman, and the NHLPA expired, initiating this contract arbitration. In studying the legal premises of the past and most recent NHL lockouts, it can be determined that these lockouts do not create efficiency in the markets or for the teams, and therefore, in looking at these legal sports contracts from the ex-ante perspective, these contracts should be negotiated before a deteriorating arbitration.

The intentions and reasoning behind a change in the contract between the NHLPA and the NHL owners and commissioner are valid and understandable, especially with fluctuating changes in the economy. However, the way in which the latest revised contract was settled, or lack thereof, resulted in inefficiencies. Aware of the impending contract deadline, in the most recent case of the 2012-2013 lockout, the two parties would have minimized the negative impacts of cancelling half of a season of hockey play if they were to have conceded to a contract before the deadline. Yet, since they did not, the NHL cancelled 510 regular season games, including the popular Winter Classic and the All-Star Game. The lock out cancelled 41.5 percent of the season, which essentially translates into 41.5 percent of lost revenue. According to the finalized collective bargaining agreement as of 10 January, 2013, the categories of terms on which the NHLPA and the NHL disagreed on are, but not exclusive to, "economic and system issues", "revenue sharing", and "supplemental and commissioner disciplines." Collective bargaining, by definition, is the "process by which a group of workers negotiates as a collective unit with management to

establish the working conditions, salaries, and benefits for all employees," and courts recognize the agreement as an enforceable contract.[1] The most notable parts of the revised collective bargaining agreement fall under the "economic and system issues" and include minimum player salaries, the fifty-fifty split share of the related revenues.[2] After the approximately four-month lock out, the two teams, the NHL and the NHLPA finally consummated the new collective bargaining agreement and play began once again for the shortened forty-eight-game season.

Sport is not just a series of games; it is a business, and a big business at that. It involves legalized standards and regulations, which form the foundation for the business, but once settled allow for maximizing gains. Patrick Thorton, JD, LLM, author of the book *Sports Law,* states, "Professional sports leagues dominate the landscape in the United States…".[3] Professional sports are governed by the National Labor Relations Act (NLRA), and in excerpts from the act outlining its policies, it states that "employees shall have the right to self-organization… to bargain collectively through representatives … and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[4] The professional athletes contract with the team owner to establish the relationship contingent upon the created contract. The liaison collectivizing the players and protecting their contracts is the National Hockey League Players' Association. A basic contract between the player and team ties the player to the team and organization of the team; it outlines an annual salary rate and outlines conduct and scheduling requirements. For so many rookies and drafted players, that signature on the contractual document is the beginning of a dream; that signature should open opportunities. Yet, when it is forfeited and exploited, various forms of law can be indicted, ranging from contract law to antitrust law, and an unlimited range of context. Herein lie the fundamentals of the latest contract, most specifically earnings of players and their share of revenues. After all, hockey is still a business.

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[1] PATRICK K. THORNTON, SPORTS LAW 209 (2011).
[2] *Collective Bargaining Agreement*, NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION, http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf (last visited Aug. 15, 2013).
[3] THORNTON, *supra* note 1, at 21.
[4] 29 U.S.C. § 157 (2012).

In recent hockey history, from the early 1990s on, there have been three lockouts and one strike in total. The slight animosity between the players (NHLPA) and the owners of the teams began with the 1992 strike, which was initiated by the players' association; it called for increases in playoff bonuses and revisions to the free agency agreements. The 1994-1995 lockout was primarily a disagreement over the salary cap, which resulted in the initiation of a cap for entering rookies' salaries. The 2004-2005 lockout cancelled the entire season; its central argument concerned the salary cap and the correlation between the revenue and salaries of players, similar to the most recent lockout's premises. Based on similar disagreements, why wouldn't the commissioner, owners, and players create a solid contract that would withstand potential and, in this case, impending lockouts? The expiration date on this most recent collective bargaining contract is set for 15 September 2022; one can only hope that this next contract will be flexible enough to avoid contract arbitration and further lockouts in the upcoming years.

Discovering the sporting law standards and looking at how there have been three lockouts in the last twenty years, one must see a problem with this procedure of waiting until the final minute to settle fundamental contracts. There simply can be no marginal benefit of locking out players. Players need to learn how to block a 90mph shot from the opposition to defend their goal; leaders of the league, then, need to lean how to block the shot of a due contract, which they know is impending, to defend their "goal" of maximizing profit and returns and maintaining the legacy of the sport. This avoidance of lockouts and resolution of dispute will only maximize efficiency. It simply cannot be inefficient to decide on a contract on time and avoid a lockout. This "ex post" standpoint on coming to terms on a collective bargaining agreement creates inefficiencies in solidifying future business practices in the NHL.

In Ward Farnsworth's *The Legal Analyst*, he writes a substantial amount regarding the "ex post" versus the "ex ante" perspective.[5] As Farnsworth describes, ex post reasoning looks backwards and maintains a subjectivist approach that concerns itself only with the outcome of one certain incident[6], much like the transgression of past collective bargaining agreement terms. In contrast, the ex ante

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[5] *See* WARD FARNSWORTH, THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW (2007).
[6] *Id.* at 5.

perspective is a form of analysis that forecasts future results that not only pertain to one incident, but that will create a benefit for all pertinent incidents of the like; it looks towards the future and tries to create positive implications that will create lasting benefits.[7] Create lasting benefits, looking towards the future – do not these phrases exemplify any manager, owner, or commissioner's goal for their business? It would be in the best interest for Gary Bettman and the owners and the NHLPA to take the ex ante line of thinking when creating the contracts that so exponentially impact every aspect of the National Hockey League. If they were to do so, it would create the most efficiencies for not only the present contract, but also for future collective bargaining agreements, and therefore, for the future of the NHL.

The two main components, as mentioned above, that repeatedly are contested upon are profit sharing of revenues between teams and players and the amount of player salaries, which are categorized under "economic and system issues."[8] These disagreements greatly affect the efficiency of the game itself. Efficiency in this context can be defined as maximizing the greatest benefits and gains while minimizing unproductivity and losses. There are major potential losses that result in a lockout, which therefore defines lockouts as inefficient. The losses that are not being minimized include: the potential profits for teams and the cities in which they play are significantly decreased, especially for already struggling teams that are put in this compromising predicament; the player trust of the league is compromised and the league itself loses money from the intellectual property value of key players; and fan trust is mitigated, therefore increasing the potential that certain fans will not return. Based on the apparent inefficiencies they create, lockouts are not solutions to debated collective bargaining agreements in the NHL.

The revenue of the NHL is constituted of monopoly-money-like revenues. The "HRR", or hockey related revenues, are defined in the 2013 collective bargaining agreement as "net of direct costs", which can include building expenses and corporate overhead costs, for example.[9] In an article published by

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[7] *Id.*
[8] *Collective Bargaining Agreement*, NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION, http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf (last visited Aug. 15, 2013).
[9] *Id.* at 223.

the NHL on their website entitled *Best-ever business year highlighted by record revenue*, it stated that the NHL is "on pace for its fifth consecutive year of record total revenue and is projected to bring in more that $2.9 billion by the end of the Stanley Cup Playoffs."[10] Revenues are set to increase by 14.8 percent, which sets record bests; these increases come from increases in sponsorships, increases in the caliber of corporate partners, and an overall increase in ticket sales due to the Winter Classic and the All-Star Game.[11] In spite of the significant revenues and the projected increases, what would incentivize the NHL to not expedite the finalization of their impending collective bargaining contract? The Chicago Blackhawks, for example, according to Forbes Magazine, have a current estimated value of $350 million dollars; their estimated revenue culminates to $125 million dollars.[12] Before the lockout, the average ticket price was $56; after the lockout, to compensate for losses, the average ticket price was $86, a 65% increase.[13] Furthermore, in an article from Fox Business, *Local Businesses Pay for the NHL Lockout*, they concluded that The Saint Louis Budget Director's office "estimates the city of Saint Louis lost more than $1.3 million in revenue due to the shortened season."[14] It continues in saying that the office estimates $65,000 in revenue per game.[15] Over a loss of around 500 games across the cities in the league, calculations based on that evidence, total losses for the cities of the league could constitute $32,500,000.[16] In teams that already struggle, most exemplary the Phoenix Coyotes, which has negative operating income and is in contention of being sold, cannot afford lost games. Even though the concept of potential can lean to either side, the risks are greater than potential benefit, maximizing probability for inefficiency.

Player trust and loyalty is another aspect that the NHL should evaluate before engaging in a negotiation of their loyalty. Hockey players are essentially part of the HRR, hockey related revenues as mentioned in the 2013 collective bargaining agreement. Hockey related revenues encompass other

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[10] *Best-ever Business Year Highlighted by Record Revenue*, NHL (Apr. 13, 2011), http://www.nhl.com/ice/news.htm?id=559630.
[11] *Id.*
[12] *NHL Team Values: The Business of Hockey*, FORBES http://www.forbes.com/nhl-valuations/list/ (Last visited Aug. 15, 2013).
[13] *Id.*
[14] Seana Smith, *Local Businesses Pay for NHL Lockout*, FOX BUSINESS (Jan. 14, 2013) http://www.foxbusiness.com/economy/2013/01/14/local-businesses-pay-for-nhl-lockout/.
[15] *Id.*
[16] *Id.*

revenues, most notably the players and their reputations, etc. In *Sports Law,* Thorton rightfully states that "teams, leagues, and players possess logos, names, memorabilia, designs, characters, and other forms of intellectual property that they must protect."[17] Without the players, these revenues are null. Jonathan Toews, captain for the Chicago Blackhawks, has a contract worth six million dollars, but this six million is not comparable to the value of him in actuality. Named captain at just twenty years old, league leader in several categorical statistics, and one of the faces for the original six team, the fan base that he acquired is priceless for the NHL. On the NHL website, number nineteen's game worn jersey with the C (captain) is bidding for $5,570, and that is relatively inexpensive when compared to even bigger stars' jerseys.[18] He and his name is a brand, an intellectual property possession, for the NHL and basically a revenue stream. This is continuous among countless players across the league, and if they do not pledge loyalty, do not return to play, or feel compromised, the NHL will lose revenue from the players themselves.

Flowing from that same thought process, fan trust is essential for the National Hockey League to succeed. Fans are the main revenue source; ticket sales, social media participation, and merchandise purchases on copyright substantiate a great majority of the revenue and profit for the NHL. In a question posed on the topic to attorney Ryan Davis, partner at Bryan Cave, a firm specializing in corporate counseling and sports, he stated that he two sides "need to settle earlier", especially knowing that the contract is coming due; when asked how the contracts could create more efficiencies, he stated that it needs to be recognized and underlined that the fans are central to the agreement; it is important to recognize the best interest of all participating parties, most notably the fans, and create an agreement sooner rather than later that will benefit as many as possible.[19] As Mr. Davis mentioned, without the fans, the collective bargaining would be a countercyclical entity. It is therefore inefficient to bargain for a

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[17] PATRICK K. THORNTON, SPORTS LAW 476 (2011).
[18] *Chicago Blackhawks - #19 Jonathan Toews - Black 2009 Winter Classic Game-Worn Jersey*, NHL http://auction.nhl.com/cgi-bin/ncommerce3/ProductDisplay?aunbr=101532255&prrfnbr=101185545&prmenbr=12717464 (last visited Aug. 15, 2013).

[19] Interview with Ryan Davis, Partner, Bryan Cave (2013).

lockout when the potential for losing fans is greater than the potential to maintain them. The trust and loyalty between fans and the NHL in entirety will falter, which returns less marginal benefits. It is in everyone's best interest to avoid the lockouts as to not lose revenues.

In recognition of the opposite viewpoint, other educated people deem lockouts potentially viable and beneficial for the market league of a whole. There are sources stating that there has been an increase in ticket sales, in particular for the Chicago Blackhawks, even after the lockout, which would stem on the thought that there has not been a decrease in the crucial fan base. However, the Blackhawks went on a historical opening season, with a record 24 consecutive wins in a shoot-out or regulation. This could have increased ticket sales; the fan base willing to pay the high ticket prices wanted to be a part of this historical record, and also the fact that fans are simply excited for hockey to return.

Notably, in a video entitled *NHL's Lawyer: Lockouts are 'Necessary' Weapons* from Bloomberg Law, Robert Batterman was interviewed in February 2013. Mr. Batterman is the labor counselor and a senior member of the Sports Law Group at Proskauer Rose, LLP, the firm that represented the National Hockey League in the latest collective bargaining agreement. In this video, he states when there is a labor dispute, and especially when there is a unionized institution [NHLPA] involved, the union has the right to strike, "that is its economic weapon and the employer [NHL], has the right to lockout – that is its economic weapon."[20] He continues, "The [NHL] leagues determined they were paying too much" but the union was not prepared to agree.[21] The lockout was then initiated because of the "economically justifiable need to reduce the amount of money given to players in order to increase the amount available to pay expenses of running those clubs and to grow."[22] He concludes with saying that the lockout was necessary as "the tactic, as the weapon, the weapon to force the compromise."[23] It was a means to an end. Even though this is logically plausible, Batterman even recognizes the fact that the "fans are what the

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[20] *NHL's Lawyer: Lockouts are 'Necessary' Weapons*, BLOOMBERG LAW (Feb. 12, 2013) http://www.youtube.com/watch?v=DFq2LFuBWIM.
[21] *Id.*
[22] *Id.*
[23] *Id.*

business is all about."[24] The cost is essentially antagonizing the main revenue source, the fans, and antagonizing the product, which are the players. The risks of "antagonizing" the revenue and products are frankly too great. Even if it is economically justifiable to have a lockout, a lockout seems counter-intuitive and unproductive, which only instigate root causes of inefficiency; and in order to increase economic efficiency, as Batterman says, it should be in the best interest to finalize the collective bargaining agreements before a lockout ensues, which parallels an ex ante perspective.

Even though Mr. Batterman and other esteemed persons state otherwise, the costs outweigh benefits of sustaining a lockout; to maximize efficiency, deciding on the contract before the due date will maximize efficiency. Furthermore, taking an ex ante viewpoint will secure the contract for years to come and enable security and stability for the future of the National Hockey League and all its affiliates. The logical fallacy of their distorted progression of contract resolvability causes inefficiencies for teams and cities, especially sinking teams, players, and fans.

One viable solution to the problem of settlement deferment and potentially hasty decisions is to initiate "baseball arbitration," a type of final-offer dispute resolution. Carrell and Bales give an example of the collective bargaining agreement between the Major League Baseball Players' Association and the MLB owners and state that in the CBA between the two parties, the discussion of salary provides that the two sides "can present their respective cases to a three-person arbitration panel, and then the panel is limited to awarding only one or the other of the two figures submitted."[25] This method of baseball arbitration in dispute resolution holds advantages in that it puts pressure on both sides to settle with an agreement they would willingly concede to, if the three arbiters choose it to settle upon. In terms of the National Hockey League's CBA agreements, this baseball arbitration has its advantages. In the succession of the 2013 lockout, the two sides submitted offers that were rejected by the opposing parties, and it went on back and forth for some time. In this case, a one-submission factor could have left one party unable to maximize their gains. Therefore, to epitomize efficiency in the market for both the players and their

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[24] *Id.*

[25] Michael Carrell & Richard Bales, *Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining*, 28 OHIO ST. J ON DISP. RESOL 1 (2013).

salaries and the owners and their revenues, the fifty-fifty split is set, and it is crucial that it is a lasting settlement. The ideal scenario for the end of this contract in 2022 and those contracts to come is to study economic trends to prepare for booms and busts, analyze financial statements to streamline expenditures, capitalize on revenue streams to maximize profits, and split the "hockey related revenues" equally between the collective bargaining employers, the NHL, and employees, the players. This analysis and preparation for the future will only create a business that will block any shots to its main goal.

In principle, the solution to the economic changes that insinuate changes to collective bargaining agreements leaning towards a financial perspective would be to recognize the problem quickly and take action on that problem as soon as viable in order to avoid a lockout. The agreements towards solving the contracts should be solved with ample time to dispute and times that are in the means to sustaining an entire season of play, which will only maximize the profits and revenues being disputed upon. The upcoming contract is set to expire in 2022, which is in around nine years. Studying economic trends, the league and commissioner should be able to budget once time approaches for the contract expiration and to be able to predict a potential alteration of the contract. There have been three previous examples for the two sides on how not to do things and there are ten years to plan ahead. The face-offs between the NHLPA and players versus the commissioner and owners are not statistically in either teams' favor. This time, when the buzzer sounds, it should signal the beginning of the game, solidified by a favorable contract for both sides that compliments the game and its overall goals of displaying the talents of exceptional athletes that create the most enjoyable game for the fans of the game. The mission statement of, "We don't own the game of hockey – we serve it. This is a league with a respect for the past that propels us into a great future." Paralleling this mission statement, creating a most efficient collective bargaining agreement should be a winning goal for the National Hockey League in its entirety.

SAVING THE GAME, AND OUR YOUTH

Joe Benoist

Although many Americans claim baseball to be “America’s Pastime”, there are just as many Americans who would argue that football is truly America’s core. Whether it is high school football games on Friday nights or gathering around the TV on Super Bowl Sunday, football plays an intricate role in American society. Along with the glory and pride that comes with football, the physical stress has begun to show on the players themselves. In the past decade, football players from junior high leagues to the NFL have experienced physical and mental instability due to the sport. The most prevalent injury in football has been the concussion. A concussion is a type of traumatic brain injury, or TBI, caused by a bump, blow, or jolt to the head that can change the way your brain normally functions. Most concussions are considered to be mild brain injuries, but their effects can still be severe. The symptoms of concussions can vary, especially due to differences in ages. The symptoms usually appear in physical ability, thinking/remembering, emotions, and sleep schedules. Due to the high capacity of concussions and other head injuries in youth football, many states have enacted laws and policies with the intention of preventing or correctly treating these injuries. Some critics have even gone so far as to suggest eliminating physically intense sports such as football from high school leagues and youth leagues all together. Here in Missouri, the Youth Sports Brain Injury Prevention Act attempts to tackle the ongoing problem of head injuries in youth sports, especially football. A law that effectively prevents severe head injuries and concussions in sport would be more successful than the current laws, such as Missouri’s Youth Sports Brain Injury Prevention Act, which places a large focus on treatment rather than prevention.

Annually 1.7 million people sustain a traumatic brain injury, with about 75% of them being concussions or other forms of mild injuries.[26] Also, within the last decade, emergency department visits for sports- and recreation-related traumatic brain injuries, including concussions, among children and young adults has increased by 60%.[27] Therefore, it is fair to conclude that these traumatic brain injuries and concussions have gained prevalence within the last decade, especially within youth sports. Traumatic brain injuries and concussions in youth sports first gained public attention when a family of a traumatic brain injury victim fought for legal action to take place in order to protect from future incidents. After the state of Washington took action and enacted a law regarding youth athletes and head injuries, many legislatures in other states began to consider their youth in athletics.

In 2011, Missouri legislatures began their work on constructing a new law that would address head injuries in youth sports. On July 13, 2011, Missouri's Youth Sport Brain Injury Prevention Act was signed into Missouri state law.[28] This law attempts to tackle the issue of head injuries in youth sports through a broad spectrum of regulations. "On a yearly basis, each school district shall distribute a concussion and brain injury information sheet to each youth athlete participating in the district's athletics program."[29] The distributed information sheet must be signed by the student's parent or guardian before the student can engage in the sport.[30] This aspect of the law focuses on educating both the athlete and their guardians on the types of head injuries, accurate treatment procedures, and other information regarding the severity of these injuries.

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[26] *Injury Prevention and Control: Traumatic Brain Injury*, CENTERS FOR DISEASE CONTROL AND PREVENTION http://www.cdc.gov/concussion/sports/ (last updated July 22, 2013).
[27] *Id.*
[28] MO. REV. STAT. § 167.765 (2011).
[29] *Id.*
[30] *Id.*

The second part of the law, which is the majority of the law, focuses on the student athlete after the concussion or head injury has already taken place. The law states that any "youth athlete who is suspected of sustaining a concussion or brain injury in a practice or game shall be removed from competition at that time and for no less that twenty-four hours."[31] In addition, "a youth athlete who has been removed from play shall not return to competition until the athlete is evaluated by a licensed health care provider trained in the evaluation and management of concussions as defined in the guidelines developed under subsection 1 of this section and receives written clearance to return to competition from that health care provider."[32] Finally, the law requires any statewide athletic organization with a public school district to publish an annual report discussing the impact of concussions and head injuries on student athletes to multiple educational committees throughout the state government.[33] Overall, the Youth Sports Brain Injury Prevention Act attempts to prevent concussions and other head injuries in youth sports by solely educating both the athletes and parents of the injuries. The other regulations within the law focus largely on the treatment of a student athlete after the injury has already taken place.

Other states have adopted concussion laws that go slightly farther in the protection of their youth in sports. The Ohio state legislature passed a concussion law in December of 2012, which mandates that all coaches must undergo an initial concussion training program, and must repeat the training program every three years.[34] Ohio is not the only state legislature that has included this type of provision in their concussion law. Texas's concussion law, passed in June of 2011, not only requires all coaches to attend a concussion training program, but also any athletic trainers or anyone involved in the athletic program must attend training programs

[31] MO. REV. STAT. § 167.765 (2011).
[32] *Id.*
[33] MO. REV. STAT. § 167.775 (2011).
[34] OHIO REV. CODE ANN. § 3313.539 (West 2012).

biennially.[35] Kentucky's legislation passed in April of 2012, requires coaches to attend medical training programs but also requires schools to develop "venue-specific emergency action plans."[36] Also, Kentucky's law "aims to expand the law's coverage to non-school sports teams."[37] While these types of additional provisions are step in the right direction towards protecting youth athletes, none of them seem to work towards prevention. Missouri's current law lacks the requirement of coaches to acquire medical training, an immediate plan for emergency situations, and the extension of coverage in non-school related sports organizations. These are all reputable attempts to treat an injured youth athlete but seem to still fall short of preventing an actual head injury or concussion from taking place.

With the immensely large numbers of youth head injuries in sports, adopting the Youth Sports Brain Injury Prevention Act was a wise and rational decision by Missouri legislatures along with other state legislatures who have adopted similar laws in their states. While these laws are a huge step forward in the campaign against head injuries in youth sports, many skeptics may ask, if these laws, such as Missouri's Youth Sports Brain Injury Prevention Act, are really enough to keep the youth safe in sports.

The intentions of concussion laws like Missouri's Youth Sports Brain Injury Prevention Act are to reduce the amount of concussions and head injuries in youth athletics in order to protect the youth athletes from both short-term and long-term consequences of such injuries. By mandating that a student and their guardian read, or potentially only sign a form, essentially does not to prevent a concussion or head injury from occurring. Yes, this educational step towards a more informed citizenry may explain the symptoms of concussions or how to appropriately treat them, but it fails to physically prevent the head injury from taking place. Educating the athletes

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[35] TEX. EDUC. CODE § 38.158 (2011).
[36] KY. REV. STAT. ANN. § 160.445 (West 2012).
[37] *Id.*

and their parents on traumatic brain injuries is extremely important. However, this aspect of the law seems to be the only attempt to prevent the injury from happening in the first place and does it really work? We may never know how effective these laws are in preventing head injuries, especially in the long-term.

When considering the long-term consequences of head injuries in youth sports, the regulations focusing on treatment within Missouri's Youth Sports Brain Injury Prevention Act may even fall short of preventing physical and mental instability later in life. Missouri's law requires that any youth athlete suspected of a head injury must be taken out of the game or practice and may not rejoin the activities until at least twenty four-hours along with authorization of a medical provider. If a youth athlete receives a head injury while playing a sport and follows the regulations within Missouri's law, they could enter back into the athletic activities that caused the initial head injury, two days after the injury took place. According to Boston's Children's Hospital, teens and children who have sustained a head injury may feel better within a few days, but the full recovery of the brain injury may take up to a month, sometimes even longer.

Although each case must be treated on an individual basis, twenty-four hours may not provide enough time for each youth athlete to completely heal from their injury. One must also consider that feeling better than one did immediately after the injury had taken place does not necessarily mean the injury has healed.

A large fear of sports physicians is second impact syndrome, which occurs when an athlete returns to sport too early after suffering from an initial concussion.[38] Second impact syndrome can occur from the slightest contact with another player or even equipment. A hit to

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[38] Terry Ziegler, *Second Impact Syndrome*, SPORTSMD http://www.sportsmd.com/articles/id/38.aspx#sthash.IScDDfsA.dpbs (last visited Aug. 16, 2013).

the chest or back that snaps the head enough can even cause second impact syndrome.[39] After an initial injury to the head, the brain is extremely more susceptible to any type of injury thereafter.[40] An increase in pressure to the brain happens rapidly, which can cause brain death in about three to five minutes.[41] Therefore, second impact syndrome has a high fatality rate in young athletes.[42] When taking this type of information into consideration, waiting only twenty four hours before rejoining the athletic activity seems to be an extremely minimal amount of caution. In order to focus on prevention of head injuries, especially fatal head injuries such as second impact syndrome, a more preventative law would possibly require the injured player to refrain from athletics for a longer period of time than twenty-four hours, regardless of what the medical professional suggests. While the treatment of initial head injuries and second impact injuries are essential to a successful recovery, the prevention of second impact syndrome is the most efficient solution. Especially since second impact syndrome is completely preventable.

Chris Nowinksi, a researcher, advocate of concussion awareness, co-director of The Boston University Center for the Study of Traumatic Encephalopathy, and cofounder of the Sports Legacy Institute, discussed the current concussion laws with American Academy of Orthopaedic Surgeons' Editorial Board Member, Howard R. Epps, MD. In the discussion, Nowinksi confirms that his organization of Sports Legacy Institute supports the implementation of a Hit Count or something similar in youth football.[43] Also, Nowinksi theoretically asks, "If we count pitches in baseball to protect the elbow, why aren't we counting hits to protect the brain?"[44] The Sports Legacy Institute claims that the fastest and most effective way to protect

[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *The Impact of Concussion Legislation*, AMERICAN ACADEMY OF ORTHOPEDIC SURGEONS, http://aaos.org/news/aaosnow/dec12/clinical4.asp (last visited Aug. 16, 2013).
[44] *Id.*

our youth from head injuries is to "regulate the amount of brain trauma that a child is allowed to incur in a season and a year."[45]

The Sport Legacy Institute provides an in depth description of their work towards implementing a Hit Count in youth football. The institute suggests that a Hit Count should consider the following regulations: maximum threshold to be considered a "Hit", maximum Hits per day (dependent upon age), maximum Hits per week, maximum Hits per season, maximum Hits per year, minimum required days of rest after a minimum brain trauma exposure, and when the technological advancement calls for it, a "Total Force" threshold formulated from the number of Hits times the mean force per hit.[46] The proposition of a Hit Count can even be used in other sports such as soccer, where counting the amount of headers would be an effective way of preventing traumatic brain injuries.[47] Although the Sports Legacy Institute hopes to see an implemented Hit Count in youth sports this year, they advise that even without an mandated Hit Count "no athlete under 18 years-old be exposed to more than 1,000 hits to the head exceeding 10 g's of force in a season, and no more than 2,000 times a year."[48] Essentially, Nowinksi and the studies done by his organization suggest that the current concussion laws do largely focus on treatment rather than prevention, which is the most effective part.

So what does all of this mean for the future of football? Many advocates of concussion awareness and critics of the current concussion laws have even gone far enough to suggest eliminating football in youth athletics or changing to solely flag football. For most Americans, these kinds of suggestions are like telling us we can't eat apple pie or celebrate Fourth of July—

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[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *The Impact of Concussion Legislation*, AMERICAN ACADEMY OF ORTHOPEDIC SURGEONS, http://aaos.org/news/aaosnow/dec12/clinical4.asp (last visited Aug. 16, 2013).

it just can’t happen. Hit Counts may even be considered an attack on the game by many football enthusiasts. Some companies along with advocates for concussion awareness have suggested wearing more protective helmets in youth football. Although this suggestion seems like a viable solution, medical scholars have discredited its effectiveness aside from the immensely large monetary requirements in order to purchase the helmets. There have been no clear solutions to the problem of traumatic head injuries in youth sports, especially football. Therefore, it is not fair to conclude either that the current concussion laws are ineffective or that they’re a great success, especially due to the small amount of time since they have been implemented. In order to protect our young athletes from physical and mental ailments while also saving the American tradition of football, something new must be done.

THE PERFORMANCE ENHANCING DRUG REVOLUTION

Alexis Blood

Barry Lamar Bonds was born July 24, 1964 in Riverside, California, graduated from Arizona State and began his Major League career in 1986.[49] The San Francisco Giants player started breaking records just three years after Saint Louis Cardinals' Mark McGwire hit a record seventy home runs breaking the Major League Baseball home run record. Bonds broke that record with a seventy-three-homerun season in 2001.[50] McGwire has consistently denied taking steroids at any point throughout the season. He finished fourth in RBIs and seventh in batting average among National Leaguers, but led all players in slugging percentage and runs scored. Bonds hit his 500th career home run in the beginning of the 2001 season.[51] In 2003, Bonds won the National League's Most Valuable Player Award.[52] Regrettably, his accomplishments as a player were overshadowed by allegations of steroid use. At about this time, Major League Baseball drafted stricter rules and regulations regarding the use of performance enhancing drugs. Yes, these long-overdue efforts are a step in the right direction, but much more still needs to be done. This needs to occur due to two reasons. First, Major League Baseball's Joint Drug Prevention and Blunt Treatment Program does not cover emerging methods of performance enhancing drug intake. Second, it lacks severe enough consequences for those who are found to be associated with these drugs.

The use of performance enhancers can be traced all the way back to the Ancient Greeks preparing for the Olympic games.[53] The word 'doping' comes from the Dutch term 'doop' referring to an opium juice that was the Ancient Greeks' drug-of-choice.[54] Drug use was not regulated until 1928 when The

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[49] *Barry Bonds*, THE BIOGRAPHY CHANNEL http://www.biography.com/people/barry-bonds-9542459 (last visited Aug. 15, 2013).
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *History of Performance Enhancing Drugs in Sports*, PROCON.ORG http://sportsanddrugs.procon.org/view.timeline.php?timelineID=000017 (last visited Aug. 15, 2013).
[54] *Id.*

International Association of Athletics Federation made a ruling against doping in sports.[55] It was the first sporting federation ever to acknowledge and prohibit doping by registered athletes. In the 1950's during World War II, soldiers discovered the so-called benefits of amphetamines.[56] These drugs were found to reduce the feelings of exhaustion and weariness during exercise; naturally, the sporting world joined in on the trend to eliminate weakness, and give them a competitive edge.[57]

In 1968, the International Olympic Committee (IOC) instituted its first "compulsory doping controls" at the Winter Olympics.[58] This was the first major performance enhancing drug testing seen in sports history. At this point, the list of banned substances included narcotics and stimulants, things that would alter the central nervous system.[59] It was suspected that athletes were using anabolic steroids, but no accurate testing methods existed at this time that would encourage adding anabolic steroids to the list of banned substances. It wasn't until 1975, that anabolic steroids were finally added to the banned substances list when the ability to test for steroids became available.[60]

Jumping to the Reagan era, the Anti-Drug Abuse Act of 1988 was signed outlawing the sale of steroids for non-medical purposes.[61] Although this act focused on preventing high school students from using steroids, it had an overwhelming effect on the entire sporting community. Just three years later in 1991, Major League Baseball itself outlawed the possession, sale or use of any illegal drug or controlled substance, including steroids.[62] At this time, there was a lack of actual testing, enforcement of the policy. Moreover, little was done to sufficiently publicize the rule. Many team managers and players later claimed to have been completely ignorant of the policy's existence.

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *History of Performance Enhancing Drugs in Sports*, PROCON.ORG http://sportsanddrugs.procon.org/view.timeline.php?timelineID=000017 (last visited Aug. 15, 2013).
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*

By 1999, The World Anti-Doping Agency (WADA) was established to try to eliminate doping in all sports.[63] It was designed to be an independent international agency working to regulate drug use for the Olympic games in Sydney, Australia that following year.[64] WADA was to consist of representatives from the Olympic Movement and public authorities.[65] With steroid and drug use among athletes becoming common knowledge, these policies and regulations became more influential in curbing the use of PEDs in the athletic community.

The governing rules over performance enhancing drugs developed during the latter half of the 20th century definitely made a dent in the fight against drug and steroid use, but did not bring the level of purity in competition in the sporting world to the point it needed to be. Major League Baseball made an impressive move in 2002 with the establishment of the Joint Drug Prevention and Blunt Treatment Program. This new policy called for "Survey Testing" in 2003 to measure steroid use among every baseball team.[66] These tests were intended to be anonymous and without punishment for the purpose of gaining insight into the extent of performance enhancing drug use. The Joint Drug Prevention and Treatment Program "(i) educates Players on the risks associated with the use of Prohibited Substances; (ii) deters and ends the use of Prohibited Substances by Players; and (iii) provides for, in keeping with the overall purposes of the Program, an orderly, systematic, and cooperative resolution of any disputes that may arise concerning the existence, interpretation or application of the Program."[67] In plain English this means the policy explains the administration of the program, lists prohibited substances, testing methods, treatments for the drugs abused and details for what disciplinary action would be taken if a violation were to occur. There are seventy performance enhancing substances listed in the document. Any anabolic

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[63] *History of Performance Enhancing Drugs in Sports*, PROCON.ORG http://sportsanddrugs.procon.org/view.timeline.php?timelineID=000017 (last visited Aug. 15, 2013).
[64] *Id.*
[65] *Id.*
[66] David Epstein, *The Rules, The Law, The Reality,* SPORTS ILLUSTRATED VAULT (Feb. 16, 2009) http://sportsillustrated.cnn.com/vault/article/magazine/MAG1151761/index.htm.
[67] *Major League Baseball's Joint Drug Prevention and Treatment Program,* MLB 1, *available at* http://mlb.mlb.com/pa/pdf/jda.pdf (last visited Aug. 15, 2013).

steroids that may not be lawfully obtained or used in the United States are also under the category of performance enhancing substances.

There are multiple testing methods for performance enhancing substances that the Program outlines. The first is for in-season testing; all players must be tested before spring training and could be selected for additional unannounced urine tests on a randomly selected date. The second method is for additional random testing. The Program outlines 1,400 additional tests to be conducted of randomly selected players at unannounced times including the possibility of off-season random tests.[68] Each player would also be required to cooperate in an unannounced blood collection pre-season and or randomly during the off-season to test for the presence of hGH, which is also known as Human Growth Hormone.[69] Along with these regulated tests, the IPA (Independent Program Administrator) has the capability to test based on reasonable cause.[70] They must have sufficient evidence to indicate that the player has engaged in the use, possession, sale or distribution of a performance enhancing substance within the last twelve months.

The Program's treatments of and disciplinary actions for players found using, possessing, selling or distributing performance enhancing drugs go hand in hand. Treatments primarily focus on those players found using controlled substances. Those players are first referred to the Treatment Board for an evaluation to determine whether they should be placed in the Treatment Program and to determine what type of program is most appropriate. Medical Representatives would then clarify whether counseling, inpatient treatment, outpatient treatment and or follow-up testing is needed. The player must consent to be admitted to the Program, but do not have control over the duration or content of the Treatment Program. A player admitted to the Treatment Program is entitled to salary retention, which would result in full salary retention for the first 30 days in the Program and one-half salary retention for the second 30 days in the Program. The disciplinary action taken for a player who tests positive for performance enhancing drug

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[68] *Id.* at 11.
[69] *Id.*
[70] *Id.* at 12.

use is suspension of games. The first violation is a 50-game suspension, the second is a 100-game and the third is permanent suspension from Major League Baseball.

Although the Joint Drug Prevention and Treatment Program outlines all of these rules and regulations, Major League Baseball players are finding ways to get around the existing performance enhancing drug policies, even though they have become stricter over time. One major scandal in 2003 involved an issue with the Bay Area Laboratory Co-Operative, also known as BALCO. Federal investigators searched the laboratory, which was assumed to be distributing steroids to professional athletes. The investigators detained financial and medical records. A schedule of Barry Bonds' steroid purchases and records of payments from Bonds' were found. Another case of alleged drug distribution is the Miami clinic, Biogenesis, run by Anthony Bosch. The clinic was purportedly supplying prohibited performance enhancers to several Major League players. Bosch was considered a "PED pipeline" for the players such as Alex Rodriguez.[71] At least seven Major Leaguers were linked to performance-enhancing substances allegedly provided by the Miami anti-aging clinic.[72] Testosterone, human growth hormone and human chorionic gonadotropin are among the banned drugs that were allegedly supplied to the players despite obvious violation to their contracts. Players have been beating the antiquated testing system by using substances like hGH and synthetic testosterone that baseball could not test for.[73] Finally, an emerging method for obtaining performance enhancing substances is through injury rehab steroids. The term has been coined "surgical doping" to describe this manner of acquiring the drugs through post-surgical treatment. A growing number of athletes are submitting themselves to mainly elective surgeries in order to obtain non-essential performance enhancing drugs.[74] An example of nonessential performance enhancing drugs would be those used to increase muscle mass or allow faster oxygen delivery to the

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[71] Dayn Perry, *MLB Files Suit Against Miami Clinic, Operator in PED Case*, CBS SPORTS (Mar. 22, 2013) http://www.cbssports.com/mlb/eye-on-baseball/21932135/21932135.
[72] *Id.*
[73] Jayson Stark, *Cheaters Must Feel the Pain*, ESPN, (Feb. 2, 2013) http://espn.go.com/mlb/story/_/id/8893372/baseball-stiffen-ped-penalties.
[74] R. M. Rodenberg & H. L. Hampton, *Surgical Doping: A Policy Loophole?*, INT'L J. SPORTS POL'Y & POL. 145 (2013).

muscles. It is difficult to pinpoint where the difference lies between drugs necessary for surgical recovery therapy and those that provide performance enhancement, but it is a problem that needs to be set straight.

The Joint Drug Prevention and Blunt Treatment Program, along with the World Anti-Doping Agency, should enact further regulations addressing additional prohibited methods of performance enhancing substance intake and obtainment. Stricter sanctions for those disregarding the policies should be ratified as well. Senator G. Mitchell outlines ways to improve testing in his widely known *Mitchell Report*, and each of these should be given greater consideration. The report's first recommendation is that Major League Baseball should test for performance enhancing drugs using methods other than urine testing.[75] It also suggests improving efforts to educate the players on the health dangers that could stem from using the drugs.[76] Proactive investigative services should be put in place to prevent performance enhancing substance use in the first place.[77] The penalties including both suspensions and monetary must grow longer and stiffer if players are still found to be using performance enhancers after this.[78] The commissioner holds the power to "suspend players without a positive test if there is firm evidence that they used, or even possessed, a banned substance."[79] So why isn't he? Despite the addition of in-season and out-of-season drug testing and the improvements that have been made in actual testing of players, Major League management are not putting an end to the players efforts to cheat. The consequences these players pay for this drug abuse must become so significant that they suffer enough of a sting that no player would take the risk of using PEDs. Public humiliation and a two-month suspension just isn't enough; these punishments will not be enough until penalties become more rigid suspensions increase. Major League Baseball now has the opportunity to make serious revisions to its act.

[75] *Mitchell Report*, MLB (Dec. 13, 2007) http://mlb.mlb.com/mlb/news/mitchell/.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Jayson Stark, *Cheaters Must Feel the Pain*, ESPN, (Feb. 2, 2013) http://espn.go.com/mlb/story/_/id/8893372/baseball-stiffen-ped-penalties.

THE FLOOD GATES OPEN: CURT FLOOD'S INFLUENCE ON FREE AGENCY

Thomas Hanlon

Baseball is oftentimes seen as America's National Pastime. Ken Burns, director of the award winning documentary series, *Baseball,* eloquently writes "Nothing in our daily life offers more the comfort of continuity, the powerful sense of belonging, and the freedom from time's constraints than does our National Pastime."[80] Baseball has often been the steady drumbeat to which our country marches. The omnipresence of baseball in America has been consistent through times of war, times of prosperity, and times of strife. It has allowed us to remain true to our roots while simultaneously providing the power to transform our society. From the smallest, most inconspicuous event, such as the ritualistic singing of our National Anthem, to the most progressive and socially transforming event, like the breaking of the color barrier, baseball has led the way, deftly navigating the line between nostalgia and progress.

That being said, baseball reflects society in the sense that it is constantly evolving and changing. This evolution has brought about changes that have both benefited the game of baseball and hindered it. These evolutions were often the product of some sacrifice. It is very clear that baseball, a sport that relies so heavily on its past, is oftentimes characterized by the athletes that graced the field. The legacies of these players will be etched into American lore, connected with future generations because of the heroics performed on the field. The evolutions that occurred in baseball often came from the names of individuals that are seldom remembered. It is their sacrifices that have been the most lasting impact on baseball.

One of the most impactful, but seldom remembered names in baseball, is Curt Flood. Flood, a star centerfielder for the St. Louis Cardinals, was a three-time All Star, two-time World

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[80] Ken Burns, "*Home" By Ken Burns*, FACEBOOK (Oct. 28, 2010, 7:45 AM), https://www.facebook.com/notes/ken-burns-pbs/home-by-ken-burns/136858629699555.

Series winner, and seven-time Gold Glove recipient. However, his outstanding play on the field is secondary to his overall impact on baseball. Curt Flood, responding to the injustice of the reserve clause, sacrificed his career and good standing within baseball, in order to fight for a player's right to choose the team for whom he wished to play. We now know this right to be called Free Agency, but at the time no such process existed. It is because of the sacrifices that Curt Flood made to his career that Free Agency came about. Furthermore, despite few negative aspects, Free Agency was the best solution for correcting the unjust nature of the reserve clause. As such, Curt Flood's impact on baseball was immense. His fight against the reserve system is a prime example of the transformative nature of baseball; it shows how baseball truly is a model of fairness for all society to live by.

It is important to make clear what the reserve system without Free Agency meant for the players. Under the reserve clause, Major League Teams had complete control over the careers of their players. Instituting the reserve clause left players unable to test the open market, forcing them to either comply with the dictates of the team that owned them or suffering release, never again allowed to play the game that they loved. This reserve clause is found in Paragraph 10 (a) of the Uniform Player Contract which states "The club shall have the right…to renew this contract for a period of one year." Read in modern day legal terms, the player is signed to a one year contract with a one year option on the player's services, which equates to a binding contract that virtually would last forever, dependent solely upon the discretion of team management. This became an undue burden to players seeing that "For 90 years, baseball players had been bought, sold, and traded like property."[81] In order to remedy some of these issues, baseball, which had been previously exempted from the Sherman Antitrust Act, would need to be viewed as interstate commerce. Only then could federal antitrust laws be applied. Once that could be established,

[81] BRAD SNYDER, A WELL PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS 3 (2007).

abolishment of the reserve clause would seem to be the next logical step, thus freeing players to test an open market without fear of retribution.

The road to Free Agency was a painstaking process, one that had been attempted in the years before Curt Flood. Legal precedent and controversial Supreme Court decisions made any change to the way that Baseball handled their business seem almost impossible. The case that has defined that precedent the most is *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs.*[82] Seen as the grandfather of all cases regarding baseball's Antitrust Exemption, it has been used as a benchmark in keeping many of baseball's injustices intact. In that case, baseball's antitrust exemption was challenged under the Sherman Antitrust Act.[83]

The Federal Baseball Club of Baltimore claimed that the defendant had conspired to monopolize the baseball business by purchasing or otherwise inducing all other clubs in the club's former league to leave that league.[84] While the plaintiff originally succeeded and obtained a verdict for $80,000 in damages, the success was short lived, as an appellate court held that baseball didn't actually fall under the Sherman Antitrust act.[85] The case was then brought to the Supreme Court which affirmed the appellate court's decision, and in so doing stated that the conduct charged against the defendants was not an interference with interstate commerce, as prohibited by the Sherman Act.[86] The Supreme Court also held that, although competitions between teams required extensive interstate travel, the travel was "merely incidental" to the competition taking place.[87] They reasoned that baseball was purely a state affair, which

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[82] *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs.* 259 U.S. 200 (1922).
[83] *Id*. at 207.
[84] *Id*.
[85] *Id*. at 208.
[86] *Id*. at 209.
[87] *Id*.

precluded it from federal antitrust law.[88] This ruling formed the foundation to which all future cases would be compared.

The landmark ruling derived from *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, et al.* would go virtually unchallenged for thirty-one years. It wasn't until a talented minor leaguer by the name of George Toolson brought suit against the New York Yankees that the issue of the reserve clause would be brought once again to the forefront of legal discourse. Toolson, a position player for the New York Yankees farm system, was talented enough to play on any major league team. Unfortunately for him, the Yankees at that time were full of future Hall of Famers and thus no room existed on the Major League roster. Toolson requested to sign with a team that would actually utilize his services. The Yankees, not wishing to release such a talented player, rejected his request on the basis of the reserve clause and designated him for assignment to another minor league affiliate. Toolson, incensed, refused his assignment and was released from the organization. He brought the issue to the courts where the defendants filed a successful motion for dismissal.[89] The court granted the motion claiming that "baseball was not commerce or trade, but sport."[90] The Supreme Court granted Certiorari to Toolson but affirmed the judgment stating "…the judgments below are affirmed on the federal authority of *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, et al*…".[91] In other words, the Supreme Court used the prior case to justify the decision. This became the second time such a decision was rendered thus strengthening both the reserve clause and baseball's antitrust exemption.

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[88] *Id*.
[89] *Toolson v. New York Yankees, Inc.*, 101 F. Supp. 93 (S.D. Cal. 1951)
[90] *Id*. at 94.
[91] *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 356 (1953).

Nearly twenty years would pass before baseball's antitrust exemption and reserve clause was challenged once more. Curt Flood, an extremely talented and prodigious centerfielder for the St. Louis Cardinals, was traded at the prime of his career to the Philadelphia Phillies. The Phillies, at the time, were one of baseball's worst teams and were infamous for having both racist fans and racist management. Flood, offended by the trade, refused to play for the Phillies and petitioned the commissioner, Bowie Kuhn, to become the first free agent and test his worth on the open market. Kuhn denied his request and Flood sued.

Flood argued that "professional baseball's reserve system violated the federal antitrust laws and civil rights statutes, as well as state statutes and the common law, and imposed a form of peonage and involuntary servitude contrary to the Thirteenth Amendment…".[92] Flood's arguments built upon the ill feelings derived from *Toolson v. New York Yankees.* Flood argued the unfair nature of the reserve system treated players like property.[93] After being denied by the lower courts, the Supreme Court examined Flood's claim. Given the historical precedent, the Supreme Court affirmed the decision of the lower courts and ruled in favor of the defendants.[94] In so ruling the Court held "As the burden on interstate commerce outweighed the states' interests in regulating professional baseball's reserve system, the Commerce Clause precluded the application of state antitrust law."[95]

For the third time, baseball's antitrust exemption and reserve clause were upheld despite valid arguments made by Flood. The court also ruled that "In light of its ultimate conclusion, the Supreme Court found it unnecessary to consider respondents' additional argument that federal

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[92] *Flood v. Kuhn*, 407 U.S. 258, 265 (1972).
[93] *Id*. at 289 (Marshall, J., dissenting).
[94] *Id*. at 285.
[95] *Id*. at 284.

labor policy exempted the reserve system from the operation of federal antitrust laws."[96] It seemed as though baseball's antitrust exemption was here to stay. However, Curt Flood's fight was not fought in vain. His argument was persuasive enough to catch the attention of Justice Thurgood Marshall who believed that the Supreme Court should admit the error in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, *et al.*, and correct it by making baseball prospectively subject to the antitrust laws unless Congress decided otherwise.[97] Thus, although the Supreme Court felt obligated to uphold the prior rulings as precedence, they left enough of an opening by contesting that "The remedy, if any was indicated, was for congressional and not judicial action".[98] While Flood may have not directly succeeded in bringing an end to the reserve system, his fight sparked a movement within baseball.

Curt Flood's actions inspired Marvin Miller, the representative of the Major League Players Association . Miller, along with arbitrator, Peter Seitz, made dismantling the reserve clause a top priority. In 1975, five years after the Supreme Court decision in *Flood v. Kuhn,* the reserve clause was dismantled during the Collective Bargaining Agreement. This allowed for players to test their worth in Free Agency.

From the time of the first collective bargaining agreement in 1975, the average salary of a baseball player was roughly $19,000. Many players needed to find a second job just to earn a living. The reserve clause kept players from gaining competitive offers from other teams, thus keeping wages low. In 1982, the average salary had increased to $241,000 and the average salary has increased dramatically since then, topping out most recently at an average salary of $3.1 million.

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[96] *Id*. at 285.
[97] *Id*. at 293.
[98] *Id*. at 285.

While salaries have skyrocketed under the free agency system, not all have benefitted from such a wage increase. Oftentimes, during the offseason, many players abuse their privileges of free agency by holding teams for ransom which leads to the market price being driven up. This led to a noticeable unfair advantage that has only just recently been addressed. Within the free market, only the wealthiest of teams can afford to pay top dollar for free agents. This leads to a form of monopoly on talent. Large market teams like the New York Yankees can consistently outbid smaller market teams like the Oakland A's.

In an effort to curb this unfair advantage, recent collective bargaining agreements have implemented a process where teams, who lose top tier free agents, are rewarded with compensatory draft picks during that year's upcoming Amateur Draft. While this implementation has partially closed the gap between team disparities, it only holds so much weight. Additionally, in an effort to promote the fair treatment of young players, the league has mandated minimum salary requirements as well as arbitration eligibility years. During arbitration a player is compared with prior arbitration cases. The arbitrator is able to take into account the numerous influences that have an impact on what value can be placed on a player. By comparing the arbitration eligible player to other players with comparable skills, and by using a third party arbitrator, it ensures that the player is given a fair salary increase. Players can also stipulate a "no trade clause" once they hit free agency. All of these changes have given players more control over their careers.

As baseball has continued to evolve, it is important to realize that much of what is seen in the business of baseball today wouldn't have been realized had it not been for key individuals calling to attention the injustices of old ways. By challenging the status quo, Curt Flood sacrificed his career in order to right a wrong. His impact on baseball cannot be understated. Curt

Flood's selfless actions have indirectly changed the fabric of the sport. While no system is perfect, Free Agency was the correct response to changing the reserve system. In a sport that parallels life, fairness is the name of the game.

WILL CONCUSSIONS BE THE END OF THE NFL?

Alexandra Rahimi

Introduction:

Concussions are expected in any contact sport, especially in football. That is what makes the National Football League concussion lawsuit disturbing. With technological advances, we are able to find out more about concussions; thus able to find better ways to protect players and prevent injuries. The NFL has known that concussions are a major problem of the sport and took the issue into their own hands and started to place restrictions on the game. In 2007, the NFL started to enforce hard, dangerous hits and also started to regulate the treatment of players with concussions. In 2009 the league designed new rules to help regulate and monitor players with concussions. The current guidelines provide that, when a player suffers a concussion, he should not be allowed to return to the game or practice on the same day if he shows the following signs or symptoms: loss of consciousness, confusion, amnesia/memory lapses, abnormal neurological examination, new/persistent headaches, or any other persistent signs/symptoms of concussions.[99] Also per these new guidelines, players cannot return to the field until they are asymptomatic.[100]

The main long-term issue of numerous concussions is the risk of Chronic Traumatic Encephalopathy, which is better known as CTE. Boston University is currently in the process of studying athletes' brains who have had multiple concussions. They are still in the process of finalizing this study, yet there are many hard facts that are known. "Chronic Traumatic Encephalopathy is a progressive degenerative disease of the brain found in athletes with a history of repetitive brain trauma, including symptomatic concussions as well as asymptomatic sub-concussive hits to the head."[101] Symptoms of brain degeneration include: memory loss, confusion, impaired judgment, impulse control issues, aggression,

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[99] Press Release, NFL, *NFL Adopts Stricter Return-to-Play Policy Following Concussions* (Dec. 2, 2009), *available at* http://www.nflevolution.com/wordpress/wp-content/uploads/2013/03/nfl_adopts_stricter_statement_on_return-to-play_following_concussions-508.pdf.
[100] *Id.*
[101] *What is CTE?* BOSTON UNIVERSITY CENTER FOR THE STUDY OF TRAUMATIC ENCEPHOLAPATHY, http://www.bu.edu/cste/about/what-is-cte/ (last visited Aug. 15, 2013).

depression, and progressive dementia.[102] CTE is also linked to the development of dementia, amyotrophic lateral sclerosis (better known as ALS), and Parkinson's disease.[103]

Since these findings have been released there has been an onslaught of players filing suit against the NFL for damages from multiple concussions. What is unclear is how and why these retired players find that the league should be held responsible for their long-term injuries. Should these players not take responsibility for what has happened to them; especially since no one forced these men to play this sport for a living? Who is to say that the issues they are having today is from playing in the NFL and not in High School or Intercollegiate football? These retired players do not have legal standing to sue the NFL over the issue of concussions and it's side effects because they already have a retirement health plan, which I will detail below.

Collective Bargaining Agreement Background

In order for there to be a NFL season there has to be a Collective Bargaining Agreement, which is essentially a contract by both parties to play the sport for a given period of time. The current CBA was ratified in 2011 and has many articles that mandate what is allowed when it comes to injuries. Article 58 of the current CBA discusses the health plan that is put in place for the retired NFL players. This article details what is known as the 88 Plan. Article 58 specifically states that the NFL is to "provide medical benefits to former Players who are 1) vested due to their credited seasons or their total and permanent disability under the Bert Belle/Pete Rozelle National Football League Players Retirement Plan and 2) determined by the governing board of the 88 Plan to have 'dementia', amyotrophic lateral sclerosis (better known as ALS), and/or Parkinson's disease as defined by the parties."[104] This is extremely important due to the fact that it expressly states what the retired players are allowed medical benefits for. This then, limits what the players are able to sue for, which will be expressly important when trying to prove that the retired players do not have legal standing to sue.

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[102] *Id.*
[103] *Id.*
[104] NAT'L FOOTBALL LEAGUE MGMT. COUNCIL & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N NFL COLLECTIVE BARGAINING AGREEMENT 2011 art. LVIII (2011) *available at* https://images.nflplayers.com/mediaResources/files/2011CBA.pdf.

As noted above, Article 58 makes it very clear that these retired players are only entitled to medical benefits if they have at least one of the three conditions that are listed above. If these players do not have at least one of the three listed conditions documented by a physician, they cannot recover any damages. It unfortunately is not that easy due to the way that the retired players have structured their lawsuit. The retired players are alleging that the National Football League was negligent in the care and handling of these players.

Negligence and the players' assumption of risk:

Negligence is a keystone when it comes to tort law; it is very common for the plaintiff to allege that the defendant was negligent in sports law cases. Negligence is defined as, "failure to act as an ordinary, reasonably prudent person."[105] There are three types of negligence: ordinary, contributory, and comparative, sometimes known as comparative fault. Comparative negligence means that the plaintiff and defendant are responsible for the harm that was done. "Under the doctrine of comparative fault, plaintiffs may be partially to blame for their own injuries, but as long as they are not more at fault than the defendant, they can still recover damages, minus their percentage of fault."[106] There are three ways used in determining the amount of fault: the pure rule, the 49 percent rule and the 50 percent rule. The pure rule states that, "the Plaintiff can recover his or her damages from Defendant's negligence minus a percentage attributable to his or her own negligence."[107] The 49 percent rule states "the Plaintiff can only recover damages if his or her own negligence accounts for less than 49 percent of his or her own damages."[108] The 50 percent rule states, "Plaintiff can only recover damages if his or her own negligence accounts for less than 50 percent of his or her own damages."[109] The individual states get to decide on which rule they use to go about determining which party is more at fault.

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[105] ADAM EPSTEIN, SPORTS LAW 64 (2002).
[106] *Id.* at 65.
[107] Amy L. Bernstein, *Into the Red Zone: How the National Football League's Quest to Curb Concussions and Concussion-Related Injuries Could Affect Players' Legal Recovery*, 22 Seton Hall J. Sports & Ent. L. 271, 299 (2012).
[108] *Id.*
[109] *Id.*

The best way for the NFL to combat the comparative negligence allegation is to prove that the retired players assumed the risk while playing the sport. There is express and implied assumption of risk. Express assumption of risk is legally defined as, "agreeing, normally in writing, that one understands that certain risks of participation may result in an injury."[110] Implied assumption of risk is legally defined as, "voluntarily assuming the risk of being injured in an activity likely to cause an injury but without formally agreeing orally or in writing."[111]

The big question is what do all of these legal terms coupled with the 88 Plan mean for the league. The league expressly states that there are only these three conditions that the players are able to recover for. The 88 Plan states that if a retired player has dementia, ALS, or Parkinson's disease they are entitled to collect for damages. If the player receives care outside of their residence they receive $88,000 per year; yet if the player receives care inside of their residence they are able to collect $50,000 per year.

While the Boston University CTE study has linked excessive concussions to brain degeneration and ultimately dementia; they have not linked any other brain conditions such as ALS, Parkinson's disease, or Alzheimer's. The NFL is very progressive considering that they have included ALS and Parkinson's conditions into the collection of diseases that are covered in the 88 Plan. Why would a retired player feel that they are entitled to damages when they do not have one of the three "allowable" conditions? Why, when the player knew the risk of the game, would they continue to play? Why would a player go back into the game before they felt that they were ready to return, whether they had medical clearance or not?

The 88 Plan does a sufficient job of helping to provide for the medical treatment of these retired players. The NFL has to limit the types of injuries that these players can sue and/or recover for due to many reasons. The most important of which is the NFL cannot afford to pay for every injury such as multiple back surgeries or knee problems that result in lengthy procedures and stints in physical therapy.

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[110] ADAM EPSTEIN, SPORTS LAW 148 (2002).
[111] *Id.*

If the league were to allow every retired player to collect for any injury the league would not have the finances to run the typical season.

These retired players do not have legal standing to sue the NFL because their injuries are not covered by the current CBA in regards to the 88 Plan, nor are they able to prove that these injuries came from playing in the NFL, nor that their long term injuries have come from concussions.

Secondly, these players knew the risk that came with playing and continued to play. No one forced these players to play this game. These players worked up to and trained for the better part of their lives to get to the NFL. The players need to take accountability for the fact that they put themselves in that position. When it comes down to the bottom line the players are more accountable than the league for their injuries. The league has rules in place to mandate the type of rules that can be made. The league suspends and/or fines players who break the rules. The league does everything in their power to make sure the players are kept safe while on the field. The retired players knew the risk that came with playing this very physical, rough sport. Many times players get back on the field with an undiagnosed concussion because they do not want to miss the game; that is something that should fall on the players not the league.

There have been many lawsuits brought against the National Football League by injured players; specifically relating to the Bert Bell/Pete Rozelle National Football League Players Retirement Plan. These court cases deal with numerous types of injuries that ended of these players' careers. It would be much more apt to have these players file suit against the team doctor who cleared the player medically or the player who hit them and knocked them out of the game and potentially ended their career. Merril Hoge filed one of the most notable concussion lawsuits. Mr. Hoge was a running back for the Chicago Bears during the 1994-1995 season.[112] Hoge received a hit that led to a concussion in a game against the Kansas City Chiefs that put him out of the game and on the injured reserved list.[113] The Bears team doctor

[112] Alexander N. Hecht, *Legal and Ethical Aspects of Sports-Related Concussions: The Merril Hoge Story*, 12 Seton Hall. J. Sports L. 17, 26 (2002).
[113] *Id.*

then cleared him to return to playing; without physically examining him.[114] Hoge returned and received another concussion a few weeks later.[115] This time the concussion led to Hoge having to be resuscitated and he then spent two days in the intensive care unit.

This led to Hoge filing a lawsuit against the team doctor, John Munsell.[116] Hoge alleged that Munsell cleared him to return to the field before he stopped experiencing post-concussion syndrome.[117] Hoge sued for damages from having to end his football career well before his prime playing days.[118] Munsell, in defense, retorted that Hoge hid his true symptoms so he would be able to return to the field well before sufficient time had passed.[119] In the end of this trial Hoge was awarded a total of 1.55 million dollars that accounted for both the remainder of his contract and damages from the traumatic hit.[120]

From the court's ruling, it is evident that the doctor and player are liable for negligence. The court only allowed Hoge to collect on his last two years of his contract speak to the fact that these players are as liable as the team or the doctor; if they felt otherwise Hoge would have been able to collect up to the statutory maximum. It would make much more sense for the retired players who are currently suing the NFL to sue the team doctors. If these retired players truly feel as if they have been wronged, they should be suing the people who cleared them to play, the player who distributed the hit, or the coaching staff that put them back in.

How Can the League Fix This Problem?

There are many ways that the league can handle this problem moving forward. The first way that the league can solve this problem is to expressly state what injuries will be covered in the 88 Plan. If the league does not state that they will cover only certain injuries and nothing else, they leave themselves open to lawsuits. As mentioned above, players need to realize that the team doctor, coaching staff, or

[114] *Id.* at 27.
[115] *Id.* at 26.
[116] *Id.* at 27.
[117] Alexander N. Hecht, *Legal and Ethical Aspects of Sports-Related Concussions: The Merril Hoge Story*, 12 Seton Hall. J. Sports L. 17, 27 (2002).
[118] *Id.*
[119] *Id.* at 28.
[120] *Id.* at 29.

opposing player that delivered the hit is more liable than the league is when it comes to these issues. The league is doing everything that they can to make sure that these players are protected on the field; so much so that they even have the Bert Bell/Pete Rozelle National Football League Players Retirement Plan, which includes a health plan. The league does not owe anything to these men other than the compensation for the time that they played in the league.

Secondly, the league needs to take the results of the CTE study into account. The NFL needs to help the players realize that this sport carries serious health risks. This is a good way to help cover their bases as well as start to make rules changes that are in accordance with injury prevention. The NFL also needs to monitor the players who are diagnosed with concussions as well as dementia. The most important reason is that the league knows what can happen down the line as well as how serious brain injuries are. If the NFL heeds the recommendations they will find themselves in a place that is better than what it currently is.

Conclusion

These retired players do not have legal standing to sue the NFL over the issue of concussions and concussion side effects due to the fact that the league has allowable conditions that a player can receive health benefits for listed in the 88 Plan.

When will players start to take the accountability for what has happened to them? The league should not and cannot be responsible for any long-term health issue a player has when the player cannot prove that the problem came from playing in the NFL. The NFL has done everything in their power to make sure the player is safe while on the field. While Boston University's study has linked repeated concussions to future brain degeneration, it is important to remember that not every player is going to have brain degeneration from multiple concussions.

It is time these players take accountability for the situation that they are in. No one forced these athletes to play the sport. No one forced these players to get back onto the field after a concussion, and if someone did the lawsuit should be directed against those who had sent them back onto the field.

THE ROLE OF THE TERM "WORK FOR HIRE" IN THE TERMINATION OF COPYRIGHT GRANTS

William McWay

"Lay Down Sally" by Eric Clapton, "Running on Empty" by Jackson Browne, "Staying Alive" by the Bee Gees, "Come Sail Away" by Styx, "Miss You" by the Rolling Stones, "Hot Blooded" by Foreigner, and "What's Your Name" by Lynryd Skynryd. What do these songs and musicians have in common? All were among the most popular songs and musicians of 1978, with each song riding to the top of the Billboard charts.[121] With every hit, profits for music companies soared. Fast-forward thirty-five years to 2013 and the question arises: Who will control the copyright for these songs and resulting profits from this music? As a result of Congress' amendment to U.S. copyright law in 1976, the question of who controls music previously recorded thirty-five years ago becomes more uncertain.

This article examines the amendment to copyright law in the context of how musicians and record companies may deal with the change over control of previously copyrighted works. An overview of copyright law provides an understanding of the significance of the amendment to today's world. A discussion of a recent case where the musician wrested control of his music output from the record company follows. A prediction of the trend of the future completes the paper.

The law of copyright is as old as this country, in fact it derives from a much older English statute. The U.S. Constitution recognizes Congress' power to address this issue through the Copyright Clause: "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and

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[121] *Top 100 Hits of 1978/Top 100 Songs of 1978*, MUSIC OUTFITTERS http:www.musicoutfitters.com/topsongs/1978/htm (last visited May 4, 2013).

Discoveries."[122] Copyrights apply to a wide range of works, including musical compositions and sound recordings.

The purpose of copyright law is to give the author of a work the exclusive rights to that work for a limited time period and the authority to protect that work from others who may want to adapt the work, perform it, and benefit from it financially.[123] Accordingly, the significance of an "exclusive right" to a work means that the copyright holder can take any action he or she wants with regard to the work. It also means that anyone other than the copyright holder must seek permission from the copyright holder before taking any action related to the copyrighted work. If action is taken with regard to the work, e.g., copies produced or adaptations created, and permission has not been granted, a copyright is considered "infringed". Such infringement provides the copyright holder with remedies under the law.

While the holder of a copyright is oftentimes the creator of the work, this is not always the case. A "work made for hire" refers to a work created "by an employee in the course of his or her employment" or the work was "specially ordered or commissioned for use as a contribution to a collective work . . ."[124] Such a situation provides that the employer, not the employee, owns rights to the work. Because the copyright is completely owned by the employer, there is no hint that the melody and/or lyrics were created by someone else. This means that the song's author is the musical company and the musical artist has no rights to the work at all.

Congress has amended the copyright law over time in response to perceived injustices and changes in technology. One such change occurred in 1976 when Congress sought to extend the time window for copyright protection for works created on or after January 1, 1978, creating

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[122] U.S. CONST. art. I, § 8.
[123] MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 2-4 (1986).
[124] Copyright Act, 17 U.S.C. § 101 (2013).

a fifty year window after the death of the author for the copyright to remain valid.[125] With the addition of the Sonny Bono Copyright Extension Act, the term was extended to seventy years after the author's death. [126] Recognizing that some musical artists may have created works in the early stages of their career and handed over the copyright because they felt they had limited bargaining power, Congress created an opportunity for those musicians to regain copyright. Congress created a termination clause, permitting musical artists to terminate a copyright grant thirty-five years after the first publishing of the work if they comply with a strict process for notifying the record company.[127] Because this clause became effective in 1978, the year 2013 is the first year that musical artists would benefit from a termination.

One of the first musicians to take advantage of the termination clause is Victor Willis, the original lead singer of the Village People. In the late 1970s, the French corporation Scorpio Music hired Willis, among several other artists, to write lyrics for already owned and published works. The thirty-three works, including "YMCA", "In the Navy", and "Go West" were published by Scorpio's American sub-publisher Can't Stop Music Productions; the copyrights to these compositions were signed over by Willis to this company upon the music's publishing. Thirty-five years later, Willis initiated the ending of these grants through a Notice of Termination. In response, Scorpio and Can't Stop Productions sued Willis, challenging the validity of this termination.

The music companies argued that Willis could not regain control over the songs because he was one of many musicians who created the songs, not just Willis. Under Section 203a of

[125] Copyright Act, 17 U.S.C. § 302(a) (2013).
[126] Sonny Bono Copyright Extension Act, 17 U.S.C. § 302(a) (2013).
[127] Copyright Act, 17 U.S.C. § 203(a) (2013).

Copyright Law, the music companies argued the majority of all co-authors must seek to terminate the copyrights together and that one co-author could not pursue doing so separately.[128]

These arguments were rejected by the court, who read the copyright statute as not requiring joint action by co-authors. Judge Barry Moskowitz of the U S District Court for the Southern District of California stated "the Court concludes that a joint author who separately transfers his copyright interest may unilaterally terminate the grant."[129] Because Willis was the only author to have transferred his copyright interest, he was the only author that could have the opportunity of terminating the grant with Scorpio Music.

The music companies offered an alternative challenge to the validity of his termination by claiming that Willis was limited to the percent ownership he received as compensation. The court rejected this claim as well, citing that Willis receives "his undivided interest in the whole."[130] They further found that "the percentage of copyright interest recoverable by Willis is capped by the royalty percentage has no legal basis."[131]

Scorpio Music and Can't Stop Productions also filed a claim that Willis was not entitled to the copyrights, and therefore could not terminate the grants, because he was an employee of the music publishers. Because of this, the claim the companies made was that the music composed by Willis and his fellow song writers fell under the category "work made for hire." The music companies later decided not to pursue this claim and instead withdrew it.

Although the term "work for hire" did not play a pivotal role in this case, I believe that the term will ultimately decide the future of similar cases involving termination of copyright grants. The determination of an artist's position, as either a work for hire employee or a true

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[128] Copyright Act, 17 U.S.C. §203(a) (2013).
[129] Scorpio Music S.A. v. Willis, No. 11CV1557 BTM(RBB), 2012WL 1598043, at *1, *5 (S.D. Cal. May 7, 2012).
[130] *Id.*
[131] *Id.* at 6.

author, will be decisive in the future of terminations because it determines the validity of termination. Publishers will be forced to prove whether or not artists have been employed under contract of work for hire and, furthermore, that the opportunity for the success of works, created by the artists under contract, could not have been successful or created without the publisher having given that opportunity to them as hired employees. The publishers will contend they are entitled to full ownership of the copyright in this instance because they provided the medium through which the successful works were possible. Publishers are held more responsible for a song's success or failure and therefore benefit or suffer in accordance with the achievement of those works.

In my opinion, Scorpio and Can't Stop Productions retracted their claim of Willis as a "work for hire" because they knew they could not prove contracted employment with specific consideration to that term. There was never any contract determining compositions during employment as "works made for hire." As stated earlier, Willis had to transfer his copyright interests prior to notice of termination in order to have ever filed for the termination. In fact, Willis could never have transferred his copyright interests at all if he had been employed under the guise "work for hire." In that employment scenario, artists would never have been offered that opportunity to transfer, for they had forfeited their right to copyright when contracting themselves to the publishing company. The ability for a publisher to prove that an artist created works under this guise will allow them justification to end grant terminations.

Relying on the work for hire approach has been successful for music companies in other battles over control of the creations of musical artists. The determination of "work made for hire" was relevant in a case involving the compositions of Bob Marley in 2010.[132] The heirs of Bob

[132] Fifty-Six Hope Road Music Ltd. et al. v. UMG Recordings, Inc., No. 08CIV.6143(DLC), 2010 WL 3564258, at *1, *1 (S.D.N.Y. Sept. 10, 2010).

Marley and their estate claimed that they, rather than his publishing company, had the right to copyright renewal terms, which were enacted after the event of Bob Marley's death, as well as further royalties unpaid to the Marley heirs.[133] Within the Marley Recording Agreements, however, it is clear that Marley was employed by the publishing company UGM Recordings and his work was to be considered "works made for hire".[134] Marley signed over his right to copyright in exchange for the exploitation of his music and the financial royalties associated with their success.

In the end, the court sided with the UGM Recordings and dismissed the claims of the Marley heirs on account of the contents of the recording agreements.[135] UGM was fully entitled to the copyrights of Marley's music. Even in this example that bars Bob Marley's family from the copyright of his music, the term "works for hire" played a pivotal role. The term is the deciding instrument that gives certainty over who has control of copyright within the artist/publisher forum.

The road ahead is uncertain for artists who wish to regain copyrights to their works, but not insurmountable. Many musical artists will see this action as not only beneficial to themselves, but something that Congress recognized as favorable to them. As the Willis case demonstrates, a termination of a copyright grant can succeed. But powerful interests in the music industry stand to lose considerable profits if grant terminations succeed. Accordingly, these interests will be motivated to work hard to retain the copyright. Because the concept of work for hire was not decided upon in the Willis case, due to lack of validity, and was used successfully in the Marley case, this concept may be the best weapon the music interests have to retain their copyright.

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[133] *Id.*
[134] *Id.* at 8.
[135] *Id.* at 12.