

SANTA CLARA UNIVERSITY



**INSTITUTE OF  
SPORTS LAW  
AND ETHICS**

SPORTS LAW SYMPOSIUM  
SELECTED PROCEEDINGS 2014



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# FIFTH ANNUAL SPORTS LAW SYMPOSIUM AGENDA: INTEGRITY IN SPORTS

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**8:00-9:00 a.m.**

**Registration and Breakfast**

**9:00-9:15 a.m.**

**Welcome**

Ron Katz, *Chairman of the Institute of Sports Law and Ethics (ISLE)*;  
Lisa Kloppenberg, *Dean of Santa Clara School of Law.*

**9:15-10:00 a.m.**

**Keynote Address**

Paraag Marathe, *President, San Francisco 49ers.*

**10:00-11:00 a.m.**

**Trending Topics**

Moderator:

Hannah Gordon, *Director of Legal Affairs, San Francisco 49ers.*

Panelists:

Rich Brand, *Chair Sports Practice Group, Arent Fox*;

Patrick Dunkley, *Senior University Counsel; Deputy Director of Athletics, HR, and Legal Affairs, Stanford University*;

William Gould IV, *Professor Emeritus, Stanford Law School and former NLRB Chairman*;

Ryan Nece, *Former NFL player, entrepreneur, football analyst and philanthropist.*

**11:00-11:20 a.m.**

**Break**

**11:20 a.m.-12:45 p.m.**

**Bullying and a Culture of Performance**

Moderator:

Jim Thompson, *CEO & Founder, Positive Coaching Alliance.*

Panelists:

Brandi Chastain, *Retired US World Champion Soccer Team player*;

Dr. Gary Namie, *Founder, Workplace Bullying Institute*;

Dr. William Pollock, *Founder, National Violence Prevention & Study Center; Professor, Harvard Medical School.*

**12:45-2:00 p.m.**

**Special Lunchtime Presentation**

Travis Tygart, *President, CEO, United States Anti-Doping Agency (USADA)*.

Introduced by: Dan Coonan, *Santa Clara University Athletic Director*.

Interviewed by: Kirk Hanson, *Executive Director of the Markkula Center for Applied Ethics at Santa Clara University*.

**2:00-3:25 p.m.**

**The Brave New World of College Athletics**

Moderator:

Tom Farrey, *Director, Aspen Institute Sports & Society; ESPN Correspondent*.

Panelists:

Marisa Brutoco, *Corporate Counsel, Google/You Tube*;

Ilan Ben-Hanan, *VP Programming and Acquisitions, ESPN*;

Missy Conboy, *Sr. Deputy Athletic Director, University of Notre Dame*;

Bernard Muir, *Stanford University Athletic Director*;

Jamie Zaninovich, *Deputy Commissioner and COO, Pac-12 Conference*.

**3:25-3:45 p.m.**

**Break**

**3:45-4:45 p.m.**

**Match-Fixing – The New Danger to U.S. Sports**

Dr. Declan Hill, *Investigative journalist, author, academic*;

Moderated by: Patricia Ernstrom, *Executive Director, San Jose Sports Authority*.

**4:45-5:20 p.m.**

**A Big Picture View of Ethics in Sport, interactive session**

Jack Bowen, *Philosopher, ethicist, author, coach*.

**5:20-5:30 p.m.**

**Closing**

Issac Vaughn, *Deputy Chairman of ISLE*.

**5:30-6:30 p.m.**

**Cocktail reception**

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## **FROM THE EDITOR**

ON BEHALF OF the Board of Editors it is my pleasure to welcome you to this Fifth Annual Santa Clara Sports Law Symposium brought to you by the Institute of Sports Law and Ethics. Each year the Symposium has focused on various topics involving sports and ethical issues. This year, the Symposium will focus on integrity in sports touching on current topics such as bullying, college athletics and match-fixing.

We are proud to present to you this fourth edition of the Selected Proceedings of the Santa Clara Sports Law Symposium. It is our intention that these Proceedings help enhance the Symposium experience by expanding on the topics discussed by this year's speakers. For those unable to attend, we hope these Proceedings provide insight into the discussions that took place during the Symposium.

We would like to thank the authors and previous publishers for their generosity in sharing these articles with our attendees and those interested in our publication. It is because of their contribution and commitment to sports ethics that we are able to provide a Proceedings with such great articles.

We would also like to recognize our team of editors who have performed admirable work in complying this publication.

This publication would not exist but for the support of the Institute of Sports Law and Ethics Board Chair, Professor Ron Katz. We have appreciated his thoughtful advice throughout the compilation and editing of the Selected Proceedings. While we could expound pages on how Professor Katz has tirelessly and selflessly contributed to our work and to SCU Law in general, I will simply say that we could not have asked for a better mentor with whom to work.

Finally, we thank you for attending this year's Symposium at Santa Clara. Please enjoy today's informative sessions, which are supplemented by the content in these Selected Proceedings.

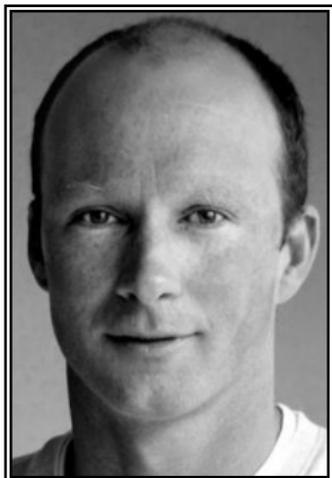
Respectfully,

Xhavin Sinha

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## **SPORTS LAW SYMPOSIUM SPEAKER BIOGRAPHIES**



### **JACK BOWEN**

*Philosopher, ethicist, author, coach*

Jack graduated from Stanford with honors in Human Biology and went on to earn a Master's degree in philosophy with an emphasis in sport ethics graduating summa cum laude from California State University, Long Beach.

He has published three books, his most recent being "*If You Can Read This: The Philosophy of Bumper Stickers*" (Random House, 2010) as well as a philosophical novel, "*The Dream Weaver*" (Penguin, 2008) and a college-level philosophy textbook.

While at Stanford, Jack was a 2-time All-American and NCAA MVP water polo player and was the alternate goalie on the 2006 Olympic Team. He has coached water polo at Menlo School for the past 13 years, winning the league championship 12 years and the section championship 5 times. In 2011 he was named by the Positive Coaching Alliance as a National Award Winner and now serves as the chair of the National Coaches Council for PCA. He teaches philosophy at Menlo School and serves as their College Athletics Councilor.



### **RICHARD L. BRAND**

*Partner, Arent Fox, Washington D.C.*

Rich Brand, a partner in the Business Department and the chair of the firm's Sports Practice Group, focuses on sports law, real estate and corporate transactions, e-commerce, hospitality and leisure, and partnership and corporate law.

Rich is recognized as a leading sports attorney by Chambers USA and as a leading real estate attorney by Legal 500 and Best Lawyers. As noted by Chambers USA, "he is highly regarded for his expertise in representing both sellers and purchasers of sports teams" and "he brings tons of experience, and good business sense to the deal table."

Rich speaks extensively on many aspects of sports, real estate and hospitality law at major industry conferences. He is frequently featured on the Yes Network's Forbes SportsMoney sports talk show and has been seen on CNN and other national video/television programs. Rich is also an adjunct professor at Georgetown University Law Center teaching "Drafting, Negotiating and Understanding Sports Law Transactions" and regularly guest lectures at prominent undergraduate and graduate Sports Administration programs.



**MARISA BRUTO CO**

*Corporate Counsel, Google/You Tube*

Marisa is an attorney at YouTube/Google, who focuses on digital media deals and technology advising and transactions. She is YouTube’s lead attorney for sports and live streaming and negotiates deals with the professional sports leagues, college conference and other partners, such as Red Bull, UFC and the US Olympic Committee. Marisa also works on government, news, and entertainment partnerships for YouTube/Google Play. She previously was an attorney for Apple/iTunes and was an associate in Wilson Sonsini Goodrich & Rosati’s technology transactions group. Marisa is on the Executive Committee and is a member of the Board for Santa Clara University’s Institute of Sports Law &

Ethics. Marisa is a graduate of Stanford University and Stanford Law School, serving on Stanford Law School’s Board of Visitors and the Board of Directors for Stanford Athletics.



**BRANDI CHASTAIN**

*Retired US World Champion Soccer Team player*

A two-time All-American, Brandi gained international fame by helping the U.S. National Team win the inaugural Women’s World Cup, by bringing home the first-ever Olympic women’s soccer gold medal and making that famous penalty kick to secure a second World Cup.

Brandi, a former Bronco All-American and assistant coach, returned to the Broncos full-time for the 2010 season as a volunteer assistant coach and is set to begin her third season on the sidelines. Brandi also serves as an expert commentator on Olympic and World Cup Soccer broadcasts.



**MISSY CONBOY**

*Sr. Deputy Athletic Director, University of Notre Dame*

Missy Conboy, a 27-year veteran of the Notre Dame Athletic Department staff, serves as the senior deputy director of athletics, having also served as the interim director of athletics in the summer of 2008. She oversees the Center of Excellence for Operational Innovation and Community Commitment, which includes the Campus Crossroads Project, facility development, management, and marketing, event management and game day operations, RecSports, community outreach, sports camps, equipment, special events, and the Monogram Club. She serves as the primary university contact for all Atlantic Coast Conference

(ACC) matters, and is departmental liaison to the Athletic Affairs Committee of the Board of Trustees and the Faculty Board on Athletics.

She is currently a member of the NCAA Division I Committee on Infractions. Missy, a 1982 Notre Dame graduate, received her J.D. from the University of Kansas in 1985 and worked with the enforcement staff of the NCAA before joining the Notre Dame community in 1987. She is on the Board for Santa Clara University's Institute of Sports Law & Ethics.



**DAN COONAN**

*Director of Athletics and Recreation, Santa Clara University*

Since taking over as the Director of Athletics and Recreation in August 2004, Dan Coonan has helped take the Broncos to new heights on the field, in the classroom and in the community.

Since 2005 the Broncos have won two WCC Commissioner's Cups, and finished as the runner-up twice. They have won nine WCC Championships and teams or athletes from 11 different sports have advanced to post-season play. Twenty-one Bronco teams have advanced to NCAA tournaments, with two reaching the Final Four. The Broncos can boast one National Player of the Year, 21 All-Americans, a Rhodes Scholar, and eight Conference

Players of the Year. A 1984 graduate of the University of Notre Dame, Dan received his law degree from Loyola Law School, Los Angeles in 1987, where he earned a spot on the Law Review.



**PATRICK DUNKLEY**

*Deputy Director, HR and Legal Affairs at Stanford University*

Patrick Dunkley joined the Stanford Department of Athletics and Recreation (DAPER) in the spring of 2011 as one of the two Deputy Directors of Athletics. Patrick is responsibility for human resources, DAPER legal affairs and leadership initiatives. Patrick also is the sport administrator for indoor and outdoor track and field, cross-country, baseball, men's rowing, women's rowing, and lightweight rowing.

Patrick joined DAPER after nearly a decade of serving Stanford as a member of the Office of the General Counsel. During his time in the legal office Patrick became intimately involved in the activities of DAPER serving as its legal counsel. Patrick was selected by Provost John Etchemendy to serve as interim athletic director in 2012 after the departure of Bob Bowlsby to become the Commissioner of the Big 12 Conference and before the hiring of current Athletic Director, Bernard Muir. Prior to his arrival at Stanford, Patrick was a vice president in the legal department at Charles Schwab and Company in San Francisco. He spent the first 10 years of his legal career as an associate and partner at Pillsbury, Winthrop, Shaw, Pittman. Before he began his legal career Patrick was a certified public accountant for eight years including several years at a national accounting firm.



## **PATRICIA ERNSTROM**

*Executive Director of San Jose Sports Authority*

Patricia Ernstrom, Executive Director of San Jose Sports Authority has a wealth of experience in sports management. During her tenure at the Sports Authority, Patricia has helped bring a diverse set of events to San Jose, including the NHL All-Star Game, Women's Final Four, Women's World Cup, USA Volleyball Open Championship, USA Water Polo Junior Olympic Championships, Dew Action Sports Tour, NCAA Basketball Championships and USA vs. Ireland Boxing.

A graduate of Santa Clara University, Patricia also serves on the Bronco Bench Foundation Board of Directors, which raises funds for student-athlete scholarships.



## **TOM FARREY**

*Director, Aspen Institute Sports & Society; ESPN Correspondent.*

The Sports and Society program is led by director Tom Farrey, an Emmy Award-winning journalist for ESPN and author of the book, "***Game On: The All-American Race to Make Champions of Our Children.***" Tom's work over the years has explored the connections between sport and the largest themes in society – education, globalization, technology, race and ethics, among others.

As a journalist, his reports have appeared on ESPN's Outside the Lines, SportsCenter and E:60, ABC's World News Tonight and Good Morning America, and in the Seattle Times, Business Week and Washington Post. He is a contributing writer at ESPN The Magazine and ESPN.com, where in 1996 he was one of the website's first editors. Two of his stories have won television Emmy awards, and his written work has earned top national honors from organizations including the Women's Sports Foundation and the Society of Professional Journalists.

His 2008 book, "***Game On***", a deep exploration of the culture of modern youth sports, is a required text in courses at universities from Florida to Oregon. He was invited by the Aspen Institute to speak about the book at the 2010 Aspen Ideas Festival, and oversaw the launch of the Sports & Society Program in May 2011. He can be followed on Twitter at @TomFarrey.

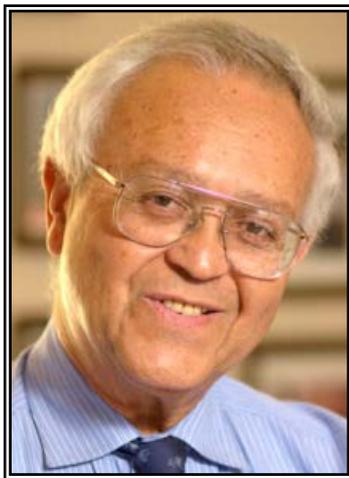


**HANNAH GORDON**

*Director of Legal Affairs, San Francisco 49ers*

Hannah Gordon is the Director of Legal Affairs at the San Francisco Forty Niners. Hannah works on the Levi's Stadium project and other business, football and government relations issues. Her duties include negotiating sponsorship and broadcasting contracts and managing litigation and compliance with League rules. She was integrally involved in the Levi's® Stadium naming rights deal, and served as the chief legal negotiator on hundreds of millions of dollars worth of sponsorship agreements with Anheuser Busch, Pepsi, Sony and SAP, among others. Hannah hears appeals as a panelist on the committee that administers the NFL Player Tuition Assistance Plan and the NFL Severance Pay Plan.

Hannah also serves on the Advisory Board of the Santa Clara University Institute for Sports Law and Ethics. In 2012, the San Francisco Business Times and Silicon Valley Business Journal named her a finalist for its Best Bay Area Corporate Counsel Rising Star award. Hannah joined the team from the NFL Management Council where she worked on the latest Collective Bargaining Agreement and reviewed NFL player contracts for salary cap compliance. Hannah holds a J.D. from Stanford and a B.A. from UCLA.

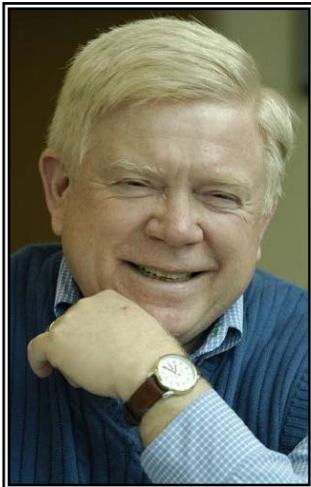


**WILLIAM B. GOULD IV**

*Professor of Law, Emeritus at Stanford Law School*

A prolific scholar of labor and discrimination law, Bill has been an influential voice on worker-management relations for more than forty years. He has served as chairman of the National Labor Relations Board. Professor Gould has been a member of the National Academy of Arbitrators since 1970 and has arbitrated and mediated more than 200 labor disputes, including the 1992 and 1993 salary disputes between the Major League Baseball Players Association and the Major League Baseball Player Relations Committee.

He currently serves as Independent Monitor for FirstGroup America, addressing freedom of association complaints, and is the Charles A. Beardsley Professor of Law, Emeritus at Stanford Law School.



**KIRK O. HANSON**

*Director, Markkula Center for Applied Ethics*

Kirk O. Hanson is Executive Director of the Markkula Center for Applied Ethics at Santa Clara University and John Courtney Murray, S.J. University Professor of Social Ethics. He has held these positions since 2001 when he took early retirement from Stanford University where he taught in the Graduate School of Business for 23 years and holds the rank of faculty emeritus. The Markkula Center for Applied Ethics is one of the most active ethics centers in the U.S., working in business, government, health care and K-12 character education. Mr. Hanson is a graduate of Stanford University and the Stanford Graduate School of Business. He has held graduate fellowships and research appointments at the Yale Divinity School and Harvard Business School.



**ILAN BEN-HANAN**

*Vice President, Programming and Acquisitions, ESPN MediaZone*

Ilan Ben-Hanan was promoted to vice president, programming & acquisitions in June 2011 from senior director, west coast programming. In his daily role, he oversees all college football programming for the ESPN networks including post-season bowl games and the Bowl Championship Series. His responsibilities include managing the complete college football budget and identifying college football properties for acquisition that will maximize ratings performance, increase profitability and are strategically important in the competitive landscape. He is the day-to-day point on college football for all major areas and businesses

within ESPN, for ESPN externally, and with all leagues, conferences, schools, bowls, and TV rights holders including the BCS and the Rose Bowl.

Ilan played an integral role in the network's recent SEC, ACC and PAC-12 negotiations, helping to secure long-term agreements with full cross-platform rights. He reports to Burke Magnus, senior vice president, college sports programming.

A two-time cancer survivor, Ilan has been instrumental in the creation and promotion of one of ESPN's and The V Foundation for Cancer Research's biggest fundraising events, Jimmy V Week, an event he conceptualized in 2007. Ilan graduated from the University of Southern California, with a bachelor's of arts a degree in broadcast journalism.



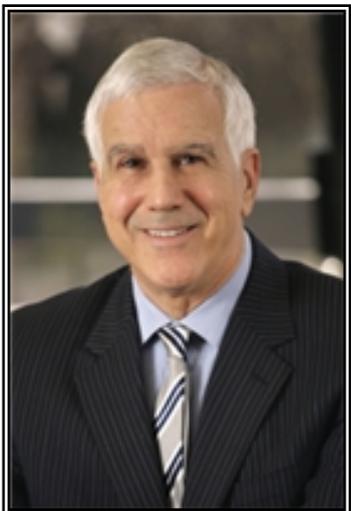
## **DECLAN HILL**

*Investigative journalist, author, academic*

Dr. Declan Hill is an investigative journalist, documentary maker and academic. He specializes in the study of organized crime and international issues. He broke the story of match-fixing gangs destroying international football in his book *“The Fix: Soccer & Organized Crime.”* It has now become a best-seller in 20 languages.

Before publishing *“The Fix”* Declan completed documentaries on the killing of the head of the Canadian mafia, blood feuds in Kosovo and ethnic cleansing in Iraq. He has also made documentaries in Kurdistan, Bolivia, India, Mexico, and Turkey.

Declan has won a number of national and international awards from organizations such as Amnesty International, the Canadian Association of Journalists and Play the Game. He worked for CBC Radio (“Ideas”, “Tapestry”, “Dispatches”, “The Current”, “Iraq Unit”) CBC Television (“the fifth estate”, “Disclosure”, “Newsworld” and “Newsworld International”) and “PBS Frontline”. His programs and articles have appeared on BBC Radio World Service and BBC Radio 4: the Guardian and the Sunday Telegraph (London), as well as various new media outlets. Declan was a Chevening Scholar at Green College, University of Oxford where he obtained his doctorate on the study of match-fixing in professional football. He has also testified before the Council of Europe, the International Olympic Committee and other sports agencies.



## **RONALD KATZ**

*Board Chair, Institute of Sports Law and Ethics*

Mr. Katz, who heads the litigation group in the Palo Alto office of Manatt, Phelps & Phillips and is a sports law lecturer at Santa Clara Law, specializes in complex commercial dispute resolution with an emphasis on intellectual property, antitrust and technology matters. He represented a class of 2062 retired National Football League players against their union resulting in a \$28,100,000 jury verdict.

Mr. Katz also teaches a course in trial advocacy at Stanford University Law School.



**LISA KLOPPENBERG**

*Dean, Santa Clara Law*

Dean Lisa Kloppenberg is a well-known expert in constitutional law and Appropriate Dispute Resolution. She is the co-author of a popular text teaching law students to be effective advocates in negotiation and mediation. Previous to being appointed Dean in 2013, Dean Kloppenberg served as Dean and Professor of Law at the University of Dayton (2001-2011) where she received national recognition for championing curricular reform and creating the first accelerated five-semester law degree in the nation. She also diversified the faculty, emphasized student services and fostered a renewed student commitment to service.

A West Coast native, Dean Kloppenberg received her law degree from the University of Southern California Law Center where she was editor-in-chief of the law review. After graduation, Dean Kloppenberg clerked for Judge Dorothy Wright Nelson of the 9th U.S. Circuit Court of Appeals. She then became an attorney with Kaye, Scholer, Fierman, Hays & Handler in Washington, D.C. where she was involved with litigation, arbitration, and mediation of a variety of domestic and international disputes.



**PARAAG MARATHE**

*President, San Francisco 49ers*

Paraag Marathe enters his 14th year with the 49ers, and first as team President. As team President, Paraag is responsible for all of the club's business operations. Paraag spent the three previous seasons as the team's chief operating officer. Under his direction, the 49ers have experienced tremendous progress off the field, with the construction of Levi's® Stadium being the focal point of the club's efforts. His leadership has proven integral to the club's short-term and long-term business strategy, as the team recorded consecutive years of Candlestick Park sellouts, and simultaneously launched a successful sales campaign for Levi's® Stadium. Paraag is charged with helping bring to life the vision of an unparalleled fan experience at Levi's® Stadium. Levi's Stadium features several innovative elements, including the new 49ers Museum presented by Sony, Michael Mina's world-class restaurant – Bourbon Steak and Pub, a television and radio production studio, a 27,000 square foot green roof, and a mobile app allowing fans to personalize their visit to the venue. The stadium is home to a premium 49ers store, adding to the team's budding retail sales initiative that already boasts three store locations throughout the Bay Area.

On the football side, Paraag is the club's chief contract negotiator and salary cap architect, and also runs the team's football analytics efforts. He is responsible for the 49ers compliance with the NFL's collective bargaining agreement and works closely with general manager Trent Baalke

within football operations. Paraag has played an integral role in helping the 49ers maintain a solid veteran nucleus, negotiating contract extensions in recent years with a number of key players, including QB Colin Kaepernick, All-Pros LB Patrick Willis, DT Justin Smith, LB NaVorro Bowman, TE Vernon Davis, P Andy Lee, LB Ahmad Brooks and OT Joe Staley, Pro Bowler RB Frank Gore and Pro Bowl alternates DT Ray McDonald, OT Anthony Davis and G Alex Boone. Additionally, Paraag's work during free agency has helped to land accomplished veteran players, such as S Antoine Bethea and K Phil Dawson.

Prior to joining the 49ers, Paraag worked at management consulting firm Bain & Company, as a Senior Associate Consultant, where he advised clients in a variety of industries including private equity, venture capital, computer software, retail, sports footwear, consumer products, and health clubs. Before that, Paraag worked in the sports consulting group at the International Management Group (IMG), where he concentrated primarily on stadium naming rights deals, corporate sponsorships, and athlete endorsements.

Paraag received his bachelor's degree with high honors from the Haas School of Business at the University of California-Berkeley and his MBA from Stanford University's Graduate School of Business.



## **BERNARD MUIR**

*Stanford University Athletic Director*

Bernard Muir was named Stanford's Jaquish & Kenninger Director of Athletics on July 27, 2012. He was appointed to his position by Provost John Etchemendy. Under Bernard's guidance in 2012-13, Stanford kept alive two of the most significant streaks in college athletics. Stanford won its 19th consecutive Directors' Cup trophy as the top overall athletic program in the country and extended its streak of having won at least one NCAA national championship annually for the past 37 years, the longest such streak in the nation.

In addition to its 36 varsity sports, the Stanford Department of Athletics, Physical Education and Recreation supports campus-wide recreation, fitness and wellness programs. The university employs over 100 coaches and assistants. Eleven current coaches have led their teams to one or more NCAA titles. Bernard brought nearly 25 years of athletic administrative experience to The Farm from stops at Delaware, Georgetown, Notre Dame, Butler, Auburn and the National Collegiate Athletics Association (NCAA). He directed Delaware's athletic program from 2009 to 2012 and, before that, was director of athletics at Georgetown from 2005 to 2009. As an undergraduate at Brown University, Bernard was a four-year letter winner in basketball.



## **GARY NAMIE**

*Founder, Workplace Bullying Institute*

Dr. Gary Namie is a social psychologist (PhD, University of California, Santa Barbara) and widely regarded as North America's foremost authority on Workplace Bullying. He is the founder of the Workplace Bullying Institute and President of Work Doctor®, Inc., the premier consulting firm that focuses on employer solutions to correct and prevent Workplace Bullying. He co-authored "*The Bully-Free Workplace*" and "*The Bully At Work*" and serves as an expert witness in bullying-related litigation. He testified in the nation's first "bullying" trial and was the retained expert in the Jonathan Martin / Miami Dolphins case.

He also directs a national network of volunteer Coordinators working to enact the anti-bullying Healthy Workplace Bill in states. To date, 26 states have introduced this landmark legislation. In 2014, 2010 & 2007, Dr. Namie wrote, and Zogby conducted, the scientific U.S. Workplace Bullying Surveys which provide the most frequently cited statistics in the world on the topic.



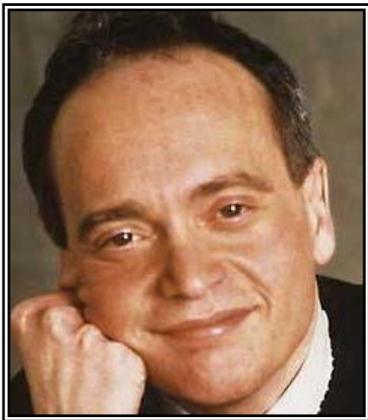
## **RYAN NECE**

*Retired NFL Player, Entrepreneur, Football Analyst and Philanthropist*

Ryan received his Bachelor's Degree in business economics from UCLA, where he starred on the football field as a linebacker for the Bruins in the late 1990s, when they were nationally ranked and Pac-10 Champions. After graduation, Ryan signed with the Tampa Bay Buccaneers as an undrafted free agent on April 22, 2002. During his rookie season, Ryan was awarded Rookie of the Year honors with Tampa Bay the same year they won the World Championship at Super Bowl XXXVII in San Diego.

Ryan has stayed active in business and charity life in parallel with his NFL football career. He sits on the board of the Tampa Bay Sports Authority and Tampa's Lowry Park Zoo. He has also completed NFL Business Management and Entrepreneurial Programs at the Stanford Graduate School of Business and Harvard Business School.

In 2006, he created The Ryan Nece Foundation in an effort to better the communities where he lives and works. His foundation strives to provide physical, financial, and spiritual assistance to those in need through various foundation programs for youth and families. Also, Ryan launched the Power of Giving campaign in June 2009 to encourage individuals to become involved in the needs of their community.



**WILLIAM S. POLLACK, Ph. D.**

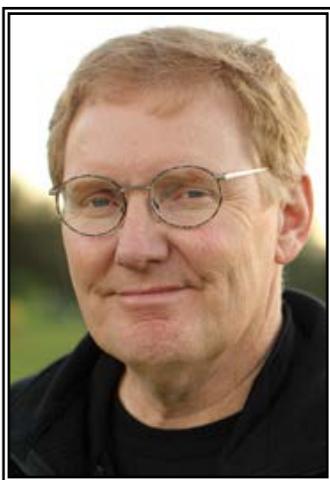
*Founder, National Violence Prevention & Study Center;  
Professor, Harvard Medical School*

William S. Pollack, Ph.D., FAACP is the Founding Principal of the National Violence Prevention and Study Center & The Centers for Men, Young Men & Boys, an Independent Consultant on Bullying, Behavioral Threat Assessment and the creation of “Safe Climates.”

He presently is Associate Clinical Professor (Psychology) in the Department of Psychiatry at Harvard Medical School and Faculty member & Senior Consultant at the Departments of Psychiatry at McLean Hospital and the Cambridge Health Alliance.

Dr. Pollack has served on the U.S. Presidential Initiative, The National Campaign Against Youth Violence and was a consultant to The United States Secret Service, including its collaborative Safe Schools Initiative with the U.S. Department of Education, a co-author of its Handbook on Threat Assessment/Creating Safe School Climates, the Principal Investigator of The US Bystander & Schools Anti-Violence Project and primary author of its “Bystander Study.” He serves on the National Advisory Boards of Positive Coaching Alliance, Men’s Health Magazine, the Adolescent Male Health Initiative, and the Centers for the Study of Men & Masculinity.

Dr. Pollack is also the author of numerous scholarly journal articles and book chapters, several books including *Real Boys: Rescuing Our Sons from the Myths of Masculinity* where he articulated the idea of “the boy code” and the pressures toward bullying and violence. He may be reached at: [info@williampollack.com](mailto:info@williampollack.com) or via his website: [www.williampollack.com](http://www.williampollack.com).



**JIM THOMPSON**

*CEO & Founder, Positive Coaching Alliance*

Jim Thompson is founder and Chief Executive Officer of Positive Coaching Alliance, a non-profit formed at Stanford University with the mission to create a movement to transform the culture of youth sports so that all youth athletes have a positive, character-building experience. For more than 10 years, Jim was director of the Public and Global Management Programs at the Stanford Graduate School of Business, where he also taught courses in leadership and non-profit issues. US News named Stanford’s Public Management Program the top nonprofit business management program in the nation in 1992.

Jim has a degree in elementary education from the University of North Dakota, a Masters in Public Affairs from the University of Oregon, and an MBA from Stanford.



## **TRAVIS T. TYGART**

*President, CEO, United States Anti-Doping Agency*

Travis T. Tygart has served as the Chief Executive Officer (CEO) of the U.S. Anti-Doping Agency (USADA) since 2007. In his nearly twelve years at USADA, he has also served as the Director of Legal Affairs and as Senior Managing Director & General Counsel; prosecuting cases on behalf of clean athletes before the American Arbitration Association and the Court of Arbitration for Sport.

Under Travis's leadership, USADA's efforts to protect the rights of clean athletes and the integrity of sport have included cooperating with Federal authorities on numerous investigations, including the international steroid bust, Operation Raw Deal, and the international doping conspiracy involving the BALCO laboratory in San Francisco. Travis led the investigation into the team-wide U.S. Postal Service Pro- Cycling team doping conspiracy and the Lance Armstrong case, which uncovered the most sophisticated and professionalized doping scheme that sport had ever seen.

Travis has been recognized by Sports Illustrated as one of the 50 Most Powerful People in sports and was named to the TIME 100 list of most influential people in the world for 2013. A lawyer by training, Travis has also published numerous papers and law review articles on topics including Title IX, antitrust, and doping in sport.



## **ISSAC VAUGHN**

*Vice-chair, Institute of Sports Law and Ethics*

Issac Vaughn is Senior Vice President and Legal Counsel at Ooyala where he oversees all legal functions. Isaac has more than 20 years of experience representing and working with high-growth technology companies. Before joining Ooyala, Issac was the Managing Director of SC Investments Consulting, a boutique angel investment and consulting company where he helped manage several sports media companies among other ventures. He is a founding partner of Bennu Venture Group, a stage-agnostic venture capital firm.

Previously, Issac was partner at Wilson Sonsini Goodrich & Rosati, where he practiced for 14 years and co-led a group that worked with both public and private technology companies. Issac received a degree in Economics from Santa Clara University and his law degree from the University of Michigan.



**JAMIE ZANINOVICH**

*Deputy Commissioner and COO, Pac-12 Conference*

Jamie was recently named Pac-12 Deputy Commissioner and COO. In his new role with the Pac-12, Jamie will have the oversight responsibility for all aspects of the Conference's operations, including governance, enforcement, compliance, sports management, championships, football bowl relationships, officiating, and television administration.

Jamie, who was selected to lead the conference by the league's school presidents, previously served as the Senior Associate Athletic Director for External Relations at Princeton University. Prior to Princeton, Jamie spent two years as Senior Assistant Athletic Director for Strategic Planning and Men's Basketball Operations at Stanford after earning his MBA from the Stanford University Graduate School of Business in 2001.

Jamie was appointed to the advisory committee for the Positive Coaching Alliance (PCA) in January of 2014.

*Speeches*  
**Bargaining, Race, and Globalization: How  
Baseball and Other Sports Mirror Collective  
Bargaining, Law, and Life\*†**

By William B. Gould IV\*\*

IT IS AN HONOR and pleasure to speak here and to give the Ninth Annual Pemberton Lecture on the centennial of the University of San Francisco School of Law.<sup>1</sup> I have enjoyed my association with this law school for many years and am particularly proud of Professor Maria Ontiveros whom Stanford Law School counts as its own for her distinguished graduate degree at Stanford.

The honor is particularly important to me given my close friendship and professional working relationship with Jack Pemberton in the 1970s and early 1980s. He was my valued co-counsel in employment discrimination class

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\* This article was originally published by the University of San Francisco (USF) Law Review in 48 U.S.F. L. REV. 1 (2013). Permission to republish was granted by USF Law Review.

† This article is based on the Ninth Annual Pemberton Lecture, held on April 4, 2013.

\*\* Charles A. Beardsley Professor of Law, Emeritus, Stanford Law School; Chairman of the National Labor Relations Board, 1994–98; member of the National Academy of Arbitrators since 1970; expert witness for the National Hockey League in 2005–07 in *Orca Bay Limited Partnership*, [2007] B.C.L.R.B. No. B172/2007, ¶¶ 67–68 (July 31, 2007), *available at* [http://www.lrb.bc.ca/decisions/B172\\$2007.pdf](http://www.lrb.bc.ca/decisions/B172$2007.pdf) -and- expert witness for the National Hockey League in *Colby Armstrong et al. & National Hockey League Players Ass'n v. Club de Hockey Canadien, Inc. & NHL*, No. CM-2012-4431 (2012) -and- expert witness for retirees in *Eller v. Nat'l Football League Players Ass'n*, 872 F. Supp. 2d 823 (D. Minn. 2012); occasional Stanford baseball broadcaster since 1988; freelance baseball newspaper journalist since 1986; and Boston Red Sox fan since 1946. As Board Chairman, the author cast the deciding vote in the 1994–95 baseball strike in favor of authorizing the Board to pursue the injunction granted in *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2d Cir. 1995). This brought to conclusion the last in a series of baseball strikes and lockouts covering three decades. The parties then negotiated a collective bargaining agreement in November 1996.

The author is grateful to Eric Weitz, Stanford Law School 2014, and Veronica Francis, University of San Francisco 2015, for their valuable research assistance. Of course, I take full responsibility for any errors or deficiencies in this article.

1. The University of San Francisco created the annual Jack Pemberton Lecture on Workplace Justice in 2005. See William B. Gould IV, *A Tribute to Professor John De. J. Pemberton, Jr. at the Commencement of the Jack Pemberton Lecture on Workplace Justice*, 29 U.S.F. L. REV. 693 (2005). The lecture features nationally recognized labor and employment law scholars and focuses on emerging workplace issues with students, alumni, and practitioners. *Annual Jack Pemberton Lecture on Workplace Justice*, U.S.F. SCHOOL OF LAW, <http://www.usfca.edu/law/pembertonlectures/> (last visited Oct. 23, 2013).

actions<sup>2</sup> as well as co-teacher for our employment discrimination seminar alternating between Stanford and USF week by week. Beginning with Equal Employment Opportunity Commission hearings in 1971, we became close personal friends interested in collective bargaining as well as racial issues and discrimination cases (two of today's subjects), though I daresay Professor Pemberton had little interest in sports—but he kept up, I am told, a very good tennis game.

Though today's subject is sports generally, as well as labor and race, my focus is disproportionately weighted toward baseball and issues relating to it, particularly given the timing of the lecture with this new season. For April 2013 marks the celebration of two out of three world championships (perhaps properly characterized as *national*, given the fact they involve only the United States and Canada) for the San Francisco Giants, a team which along with my own Boston Red Sox, are two clubs that have won twice in this still relatively new century.<sup>3</sup> The Oakland Athletics, still winners of what has been characterized as their game of "moneyball,"<sup>4</sup> defend a Western Division championship and, in keeping with the idea of spring and new beginnings, there will be an ever so brief exposure to exciting new twenty-two-year-old rookie Jackie Bradley, Jr. who may yet return to patrol the left or centerfield territory of Fenway Park.<sup>5</sup> Nearly thirty years ago the ex-Boston Red Sox second-string catcher Roy Partee gave me a photo of the infamous dash to home plate by Enos Slaughter in the seventh game of the 1946 World Series, which allowed the St. Louis Cardinals to prevail four games to three, allowing for the Cardinals to win the World Series in the final game.<sup>6</sup>

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2. See, e.g., *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973), *rev'd in part*, *Equal Emp't Opportunity Comm'n v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), *vacated*, *Stamps v. Detroit Edison Co.*, 431 U.S. 951 (1977), *remanded to the Sixth Circuit in light of Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Jones v. Pac. Intermountain Express*, 536 F.2d 817 (9th Cir. 1976); *United States v. Trucking Emp'rs, Inc.*, 561 F.2d 313 (D.C. Cir. 1977); *Black Musicians of Pittsburgh v. Local 60-471, Am. Fed'n of Musicians*, 375 F. Supp. 902 (W.D. Pa. 1974).

3. Since this lecture was delivered in April, the Red Sox have won their third world championship in the past decade. David Waldstein, *Monster Achievement: Red Sox Clinch First Title at Fenway Since 1918*, N.Y. TIMES, Oct. 31, 2013, at B13; Dan Shaughnessy, *Tested and Triumphant*, BOSTON GLOBE, Oct. 31, 2013, at Y1; David Waldstein, *In Baseball's Time Machine, 21st Century Belongs to the Red Sox*, N.Y. TIMES, Nov. 3, 2013, at Y1.

4. MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (2003) (portraying a limited and somewhat misleading examination of the Oakland Athletics' approach to being a competitive baseball team despite a lack of financial revenue).

5. Zach Schonbrun, *Boston's Center Fielder of the Future Gets a Second Chance at Now*, N.Y. TIMES, June 2, 2013, at SP3, available at <http://www.nytimes.com/2013/06/02/sports/baseball/bostons-center-fielder-of-future-gets-a-second-chance-at-now.html>.

6. George Vecsey, *John Pesky: The Man Who Held the Ball*, N.Y. TIMES (Oct. 23, 2004), <http://www.nytimes.com/2004/10/23/sports/baseball/23vecsey.html>. As second baseman Bobby Doerr told me, Slaughter scored because Leon Culberson, subbing for Dominic DiMaggio, was tardy in retrieving Harry Walker's hit. Telephone interview with Bobby Doerr, former Major League Baseball second baseman and coach (Oct. 14, 2009).

The photo is signed by all in it, and for years I was intrigued by the identity of one individual excluded from it just a few feet away down the third base line, e.g., the Cardinals's hot corner coach, Mike Gonzalez, a man with a Latin name at the time of the last game of the twentieth century's color bar.<sup>7</sup>

The following spring Jackie Robinson broke that century's color bar,<sup>8</sup> though contrary to much public belief, he was not the first black player in organized baseball. Approximately thirty-three black players were part of "white baseball" between 1878 and the close of that century, three standouts being Frank Grant, John "Bud" Fowler, and Moses Fleetwood Walker, who were three of the more well-known players<sup>9</sup> before Jim Crow and "separate but equal"<sup>10</sup> sealed the door to black players in the 1890s.

But in the twentieth century with the advent of some Latin players, particularly from baseball-dominant and baseball-crazy Cuba (where the game has been played nearly as long as in the United States<sup>11</sup>) the situation took on added complexity. Cuba, from whence Mike Gonzalez hailed, produced

at least one unheralded ebony-skinned Cincinnati pitcher of Cuban birth (Tommy de la Cruz) [who preceded] Robinson in crossing baseball's twentieth-century racial barriers during the 1944 National League season. Even before [Branch] Rickey's plan had materialized in 1945 and 1946, other Cubans (Jack Calvo and Jose' Acosta with the 1920s Senators) and Puerto Ricans (Hi Bithorn with the 1942–1944 Cubs and perhaps Lu'is Olmo with the Dodgers from 1943 to 1945) had also slipped behind the racial barriers quietly and almost unnoticed.<sup>12</sup>

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7. The 1946 season was extraordinarily memorable and is chronicled in FREDERICK TURNER, *WHEN THE BOYS CAME BACK: BASEBALL AND 1946* (1996). See also ROBERT WEINTRAUB, *THE VICTORY SEASON: THE END OF WORLD WAR II AND THE BIRTH OF BASEBALL'S GOLDEN AGE* (2013). Likewise, the author has discussed the 1946 season in WILLIAM B. GOULD IV, *BARGAINING WITH BASEBALL: LABOR RELATIONS IN AN AGE OF PROSPEROUS TURMOIL* 25–37 (2011) [hereinafter GOULD, *BARGAINING WITH BASEBALL*].

8. JULES TYGIEL, *JACKIE ROBINSON AND HIS LEGACY* (1984); ARNOLD RAMPERSAD, *JACKIE ROBINSON: A BIOGRAPHY* 158–67 (1998); William B. Gould IV, *Black Player Jackie Robinson's Influence Still Noticeable Today*, *SAN JOSE MERCURY NEWS*, Apr. 15, 2007, at 5P.

9. RICK SWAINE, *THE INTEGRATION OF MAJOR LEAGUE BASEBALL: A TEAM BY TEAM HISTORY* 12 (McFarland 2009).

10. See *Plessy v. Ferguson*, 163 U.S. 537 (1896). Separate but equal was undercut in *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954), and was later overruled in *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala. 1956), *aff'd*, *Gayle v. Browder*, 352 U.S. 903 (1956).

11. For in-depth examinations of the history of baseball in Cuba, see ROBERTO GONZALEZ ECHEVARRIA, *THE PRIDE OF HAVANA: A HISTORY OF CUBAN BASEBALL* (1999), and PETER C. BJARKMAN, *HISTORY OF CUBAN BASEBALL, 1864–2006* (2007).

Cuban, Adolfo “Dolf” Luque, was sufficiently light-skinned to pass the color barrier,<sup>13</sup> as others presumably did by characterizing themselves as American Indians, in my judgment—and Luque “stood supreme as one of the most feared hurlers in baseball.”<sup>14</sup> Present for the 1919 Black Sox World Series scandal, and a survivor of both the Ty Cobb dead-ball era as well as the beginnings of Babe Ruth’s supremacy in the long-ball era, Luque won nearly 200 games over a two-decade major league career, going 27–8 with a 1.93 ERA in 1923.<sup>15</sup> His alleged aggressiveness on the field seemed to be mirrored by pitcher Samuel Deduno of the Dominican Republic in the 2013 World Baseball Classic as he taunted San Francisco centerfielder Ángel Pagán subsequent to fanning him with two on and two out in the critical fifth inning of the championship game between the Dominican Republic and Puerto Rico here in San Francisco.<sup>16</sup> And before Robinson, Branch Rickey apparently considered signing dark-skinned Cuban, Silvio García<sup>17</sup>—the pre-1947 twentieth century test for Latin Americans being skin complexion rather than racial identity. Thus did the often-nuanced interplay between race and globalization emerge long before the past quarter-century of globalization.

And what followed Robinson, of course, was the advent of a number of black superstars like Larry Doby (who was the first in the American League, following Robinson by just a few weeks), Roy Campanella, Don Newcombe, Monte Irvin, Satchel Paige (then somewhere beyond forty years old and essentially limited to his effective “hesitation pitch”),<sup>18</sup> the great Willie Mays, as well as black Latinos like Orestes “Minnie” Miñoso. In those years, the few black players in the majors out-hit whites by more than twenty points.<sup>19</sup> This became the era which the Court

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12. PETER C. BJARKMAN, *BASEBALL WITH A LATIN BEAT: A HISTORY OF THE LATIN AMERICAN GAME* 13–14 (1994).

13. The all-black Cuban Giants spoke an infield chatter gibberish they hoped would avoid their identification as black Americans. See Alvin Harlow, *Unrecognized Stars*, *ESQUIRE*, Sept. 1938, at 75 (quoting former Cuban Giants player Sol White).

14. BJARKMAN, *supra* note 12, at 14.

15. MLB Player Stats of Dolf Luque, MLB.COM, [http://reds.mlb.com/team/player.jsp?player\\_id=118012&c\\_id=cin#gameType='R'&sectionType=career&statType=2&season=2013&level='ALL'](http://reds.mlb.com/team/player.jsp?player_id=118012&c_id=cin#gameType='R'&sectionType=career&statType=2&season=2013&level='ALL') (last visited Nov. 25, 2013).

16. Tom Goldman, *Dominican Republic Wins World Baseball Classic* (NPR News radio broadcast Mar. 20, 2013), available at <http://www.npr.org/2013/03/20/174812890/dominican-republic-wins-world-baseball-classic>.

17. ECHEVARRIA, *supra* note 11, at 262.

18. See LARRY TYE, *SACHEL: THE LIFE AND TIMES OF AN AMERICAN LEGEND* 147, 213, 271 (2009).

19. See Gerald W. Scully, *Economic Discrimination in Professional Sports*, 38 *LAW & CONTEMP. PROBS.* 67, 71 (1973).

of Appeals for the Ninth Circuit here in San Francisco, speaking through Judge Stephen Reinhardt, characterized as “the racist culture that permeated baseball from the 1940’s through [the] early 1970’s [which] led to an unwritten quota of two black players per [MLB] team after the color barrier was broken, and those two players were usually . . . of outstanding talent.”<sup>20</sup> Soon thereafter, in the 1970s, blacks went to 30% of the player universe<sup>21</sup>—though black Americans constituted only approximately 17–18% of the total complement—and then, after much controversy, rounding out with Los Angeles Dodger Al Campanis’s controversial comments about blacks not possessing the necessities to be a manager,<sup>22</sup> Frank Robinson broke that barrier with the Cleveland Indians in 1975.<sup>23</sup>

Then began the great decline of African-American baseball players,<sup>24</sup> professionally as well as in the so-called amateur ranks—a phenomenon in sharp contrast to the rise of blacks in football and basketball. Indeed, it has been noted that the San Francisco Giants, once an employer of Willie Mays and Monte Irvin,<sup>25</sup> in 2013 do not have one black American player on the roster or in camp.<sup>26</sup>

Baseball, the last of the major sports to have a black manager (Bill Russell was the first in any of the major sports, becoming Boston Celtics head coach in 1966) and one which continues to lag in the employment of minorities at the so-called

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20. Moran v. Selig, 447 F.3d 748, 756 n.12 (9th Cir. 2006) (internal quotations omitted); see also N. Jeremi Duru, *Exploring Jethroe’s Injustice: The Impact of an Ex-Ballplayer’s Legal Quest for a Pension on the Movement for Restorative Racial Justice*, 76 U. CIN. L. REV. 793, 799 (2008).

21. Ann Killion, *Baseball Struggles to Reach Black America*, S.F. CHRON. (Mar. 17, 2013), <http://www.sfgate.com/sports/article/Baseball-struggles-to-reach-black-America-4360778.php>.

22. Richard L. Harris, *For Campanis, a Night that Lived in Infamy*, L.A. TIMES (Aug. 5, 2008), <http://articles.latimes.com/2008/aug/05/sports/sp-campanis5>; see also William B. Gould IV, *Time for Affirmative Action: Baseball Urged to Seek Out, Train Blacks as Managers and Executives*, S.F. CHRON., July 6, 1986, at C8 [hereinafter Gould, *Time for Affirmative Action*] (quoting Campanis, to the same effect, prior to his well-publicized April 1987 interview with Ted Koppel).

23. Gould, *Time for Affirmative Action*, *supra* note 22; cf. N. JEREMI DURU, *ADVANCING THE BALL: RACE, REFORMATION, AND THE QUEST FOR EQUAL COACHING OPPORTUNITY IN THE NFL* 176 n.2 (2011).

24. Steve Treder, *The Persistent Color Line: Specific Instances of Racial Preference in Major League Player Evaluation Decisions After 1947*, 10 NINE 1, 3, 6, 27 (2001).

25. Andrew Baggarly, *Extra Baggs: Giants Only Club with No African-Americans, etc.*, CSN BAY AREA (Feb. 26, 2013, 6:00 PM), <http://www.csnbayarea.com/blog/andrew-baggarly/extra-baggs-giants-only-club-no-african-americans-etc>; see also John Shea, *Why Robinson Turned Down the Giants*, S.F. CHRON. (Apr. 16, 2013), <http://www.sfgate.com/giants/she/article/Why-Robinson-turned-down-Giants-4440239.php>. The Giants purchased Robinson from the Dodgers in 1958, when he was near the end—he immediately retired. Shea, *supra*.

26. Baggarly, *supra* note 25.

stepping stone positions of bench and third base coach,<sup>27</sup> has seen a dwindling number of players on the field. Indeed, in the 2013 World Series only one (Quentin Berry of the Red Sox) of the fifty roster players was black.<sup>28</sup> The alleged reasons for this are numerous and frequently debated.<sup>29</sup>

A leading baseball executive has said that the “decline of black children playing baseball [is] the inability to get instant gratification in baseball; these kids think they can come out of high school and go right to the pros in basketball and football.”<sup>30</sup> But this seems both stereotypical and to ignore the fact that, in football anyway, one can- not go directly to the pros from high school, as is possible in baseball under the Second Circuit’s ruling in *Clarett v. National Football League*.<sup>31</sup> Indeed, the instant gratification argument relies upon the idea that in baseball, except for players like first baseman John Olerud of Washington State or twirler Mike Leake of Arizona State, an apprenticeship in the minor leagues of some duration must be served prior to promotion to the majors even after college. In basketball, where at one time the jump could be made from high school to the National Basketball Association immediately,<sup>32</sup> one year in college or the equivalent time period must precede advancement,<sup>33</sup> though the recent emergence of the developmental league, as well as European and Chinese basketball, creates a minor league apprenticeship which has no analogue in football.

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27. As of 2010, 67% of first-base coaches were minorities compared to just 23% of third-base coaches. Michael S. Schmidt & Andrew Keh, *Baseball’s Praised Diversity Is Stranded at First Base*, N.Y. TIMES, Aug. 12, 2010, at B13, available at [http://www.nytimes.com/2010/08/12/sports/baseball/12baseball.html?\\_r=0](http://www.nytimes.com/2010/08/12/sports/baseball/12baseball.html?_r=0).

28. Bill Shaikin, *In the Year of ‘42,’ a World Series with One African-American Player*, L.A. TIMES, Oct. 26, 2013, available at <http://www.latimes.com/sports/sportsnow/la-sp-sn-world-series-bud-selig-african-american-player-20131026,0,117671.story#axzz2jWpdrj00>; William C. Rhoden, *Jackie Robinson’s Legacy Recedes on Baseball Rosters*, N.Y. TIMES, Oct. 30, 2013, at B12.

29. William B. Gould IV, *On Blacks and Baseball*, BOSTON GLOBE, Apr. 12, 2006, at A13; William B. Gould IV, *A Fan’s Complaint: Red Sox Shortchange Blacks*, BOSTON GLOBE, Apr. 14, 1986, at 19.

30. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 249 (internal quotations omitted).

31. 369 F.3d 124, 139–41 (2d Cir. 2004) (upholding NFL’s draft eligibility rules requiring players to be three full college football seasons removed from high school).

32. *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204, 1206 (1971) (reinstating preliminary injunction preventing league from taking sanctions against team for signing a player less than four years after graduating from high school).

33. NAT’L BASKETBALL ASS’N, CBA 101: HIGHLIGHTS OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BASKETBALL ASSOCIATION AND THE NATIONAL BASKETBALL PLAYERS ASSOCIATION 13 (2010), available at <http://www.nba.com/element/mp3/2.0/sect/podcastmp3/PDF/CBA101.pdf>. Under the current NBA-NBPA collective bargaining agreement, “U.S. players must . . . be at least one year removed from high school” to be eligible for the NBA draft. *Id.*

Second, in my view there are a number of reasons for the substantial decline of black players in baseball. It is noticeable that, not only are facilities and equipment expensive and more easily available in the suburbs, but also even the existence of a batting cage is entirely unavailable in some of the major cities where blacks are more likely to reside.<sup>34</sup> Travel teams have become the training ground for young baseball players as early as eight, nine, or ten years old who aspire to play high school, college, and professional ball down the road.<sup>35</sup> Third, and arguably the second cousin of the instant gratification argument, there is the oft-cited reason of the disproportionate absence of fathers in black households.<sup>36</sup> But that hardly seems to have affected football and basketball.

The role of colleges, previously unimportant in baseball where, in contrast to football and basketball, the professional game antedates and dwarfs the rise of college play,<sup>37</sup> is surely a factor. In the past thirty years more than 50% of the players filling the professional ranks have attended college.<sup>38</sup> Of course, it will be said that football and basketball receive more attention in the black community than does baseball. But the college statistics demonstrate that this reasoning is superficial and circular:

The standard argument is that diversity in the college game suffers because of baseball's dwindling popularity among young African Americans. But this gives an incomplete picture. A lower percent- age of African Americans participate in college baseball than cross- country, fencing, soccer, volleyball and wrestling. These sports don't exactly compete with basketball or football for dominance in black neighborhoods. They don't exactly match baseball's level of black participation on the professional stage, either.<sup>39</sup>

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34. GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 252.

35. Tim Keown, *Why African Americans Don't Play Pro Baseball*, ESPN, [http://espn.go.com/mlb/story/\\_id/9186117/why-african-americans-play-pro-baseball](http://espn.go.com/mlb/story/_id/9186117/why-african-americans-play-pro-baseball) (last updated Apr. 19, 2013).

36. Dexter Rogers, *Bob Costas on Being Commissioner, Changes Major League Baseball Needs and Race*, HUFFINGTON POST (May 26, 2013), [http://www.huffingtonpost.com/dexter-rogers/bob-costas-on-being-commi\\_b\\_3303551.html](http://www.huffingtonpost.com/dexter-rogers/bob-costas-on-being-commi_b_3303551.html). In addition to discussing the expense of baseball and the lack of scholarships available, Costas mentions, “[b]aseball tends to be a father son game—at least when a kid is first introduced to it. As we know, in certain portions of the black community, fatherlessness is a problem that goes well beyond baseball but probably is a factor when it comes to declining baseball participation among black youth.” *Id.*

37. GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 12–13.

38. However, few probably graduate, in substantial part, because players become eligible to contract with professional teams after their junior year.

39. Gregory Ruehlmann, *The Incredibly White College World Series*, THE ROOT (June 20, 2008), <http://www.theroot.com/views/incredibly-white-college-world-series>.

King football, the great revenue-producer, in Division I possesses eighty-five full-time scholarships—in contrast to baseball, where the number is 11.7 and rarely is a full-scholarship given to any player.<sup>40</sup> In contrast, baseball scholarships “must be divided up like morsels among the entire roster. Players are expected to cover the rest.”<sup>41</sup> This is a problem exacerbated by the recruitment of out-of-state students by public universities and the college baseball dominance of some private universities like Rice, Miami, and Stanford, which now has two black players on its roster (but in some years past has had none). All of “this translates to a huge tuition bill that’s hard for anybody but the most well-heeled to pay, whatever color they are.”<sup>42</sup>

The average black youngster may be drawn away, blacks constitute 4.1% of all college baseball players, a number which has actually declined in the past decade.<sup>43</sup> The comparable figure in football is 34.5% and in basketball, where thirteen scholarships are available, the comparable number is 45.6%.<sup>44</sup> Moreover, only 0.5% of college base- ball coaches are black, Tony Gwynn at San Diego State standing as a lonely exception that proves the rule. True, black players in football and basketball are more likely to play for white coaches in that sport as well, but the presence of a critical mass of players may diminish any reticence attached with the coaching racial composition.<sup>45</sup>

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40. See Bob Nightengale, *MLB Hopes to Invigorate African-American Participation*, USA TODAY SPORTS (Apr. 10, 2013), <http://www.usatoday.com/story/sports/mlb/2013/04/10/mlb-bud-selig-creates-diversity-task-force/2071305/>. Compare *Football Recruiting*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/Test/Issues/Recruiting/Football+Recruiting> (last updated Mar. 9, 2012), with Dave Pickle, *In the News: March 24*, NCAA INSIDER BLOG (Mar. 25, 2011), <http://www.ncaa.org/blog/2011/03/in-the-news-march-24/>.

41. Ruehlmann, *supra* note 39; see also Telephone interview with Mark Marquess, Stanford baseball, (Dec. 7, 2004).

42. Ruehlmann, *supra* note 39.

43. NAT’L COLLEGIATE ATHLETIC ASS’N, 1999–2000 — 2009–10 NCAA STUDENT ATHLETE RACE/ETHNICITY REPORT 111 (2010).

44. *Id.* at 112, 115.

45. Cf. *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977) (finding lower court erred in comparing racial composition of teacher workforce with that of the student population); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (rejecting the so-called role model theory by stating “[t]here are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups”). I am of the view that the best position in this area has been set forth by Justice Ginsburg in her dissenting opinion in *Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2432–34 (2013) (Ginsburg, J., dissenting) (“[T]hose that candidly disclose their consideration of race [are] preferable to those that conceal it.”) (internal quotations omitted). See also *Ricci v. DeStafano*, 557 U.S. 557, 608, 644 (2009) (Ginsburg, J., dissenting) (disagreeing with the majority’s finding that “a city in which African-Americans and Hispanics account for nearly 60 percent of the population, must today be served—as it was in the days of undisguised discrimination—by a fire department in which members of racial and ethnic minorities are rarely seen in command positions”).

There is a particular irony in the statistical data relating to the Southeastern Conference, where baseball-dominant Louisiana State University and the University of Florida (in a conference which barred black players altogether until the 1970s) reside in states where the black population is at its highest and where the percentage of blacks in basketball and football is more than 70% at the University of Alabama, University of Georgia, University of South Carolina, University of Mississippi, Mississippi State University, and the University of Tennessee.<sup>46</sup> The percentage difference between blacks in the undergraduate student body and on these revenue-generating sports teams is dramatic, going from a 63% difference at the University of Florida all the way up to 73% at the University of Mississippi.<sup>47</sup> Baseball statistics are not remotely comparable.

And the figures relating to the absence of blacks are even more dramatic at the elite level where teams in the College World Series (“CWS”) often do not have any black players at all.<sup>48</sup> Thus, “NCAA baseball has a race problem that dwarfs anything in the major leagues.”<sup>49</sup> All of this means that one of the main avenues<sup>50</sup> to professional baseball is shut down for black players through raw economics.<sup>51</sup>

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46. SHAUN R. HARPER, COLLIN D. WILLIAMS, JR. & HORATIO W. BLACKMAN, CTR. FOR THE STUDY OF RACE AND EQUITY IN EDUC., UNIV. OF PENN. GRADUATE SCH. OF EDUC., *BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUALITIES IN NCAA DIVISION I COLLEGE SPORTS* 14 (2013).

47. *Id.*

48. *E.g.*, Ruehlmann, *supra* note 39 (noting that three of eight teams in the 2008 CWS had no black players); Pat Borzi, *Black Players Often Stand Alone in College Baseball*, N.Y. TIMES, June 25, 2005, at D5 (noting that the four finalists in the 2005 CWS had a total of four black players and one team had none); *Three CWS Teams Have No Black Players*, ESPN (June 25, 2005), <http://sports.espn.go.com/ncaa/news/story?id=2094459> (noting that three teams in the 2005 CWS had no black players).

49. Ruehlmann, *supra* note 39.

50. In 2012, Baseball America found that 54% of drafted players on major league forty-man rosters came from four-year colleges. See Conor Glassey, *MLB 40-Man Roster Analysis*, BASEBALL AMERICA (Mar. 30, 2012), <http://www.baseballamerica.com/today/majors/season-preview/2012/2613177.html>; GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 257.

51. Bob Cook, *Baseball’s Lack of Black Players Reflects Flawed U.S. Development System*, FORBES (Apr. 10, 2013), <http://www.forbes.com/sites/bobcook/2013/04/10/baseballs-lack-of-black-players-reflects-flawed-u-s-youth-development-system/> (“[Sports like baseball] generally require their participants to have families with the luxury of money to spend thousands of dollars on equipment each year and the luxury of time to be able to tag along during the extensive travel schedule those teams require, a process that begins when players still haven’t reached double digits in age. They also require those families to live in communities where there is access to such programs.”); see also *id.* (“Major League Baseball, if it’s serious about wanting to increase African-American player development, will have to do more than a few promotional programs here and there. It will have to engage in some level of what it’s doing in Latin America for urban America. In other words, spend a ton of money to even the playing field, no pun intended, between black kids and their richer, whiter counterparts.”); Tim Keown, *What the MLB Committee Will Find*, ESPN (Apr. 19, 2013), [http://espn.go.com/mlb/story/\\_/id/9186117/why-african-americans-play-pro-baseball](http://espn.go.com/mlb/story/_/id/9186117/why-african-americans-play-pro-baseball) (“The committee members need to see the industry of youth baseball for what it has become: A business enterprise designed to exclude those without the means and mobility to

Major League Baseball has appropriately engaged in discussions in recent years about providing financial aid to the NCAA to remedy this,<sup>52</sup> but to date nothing has happened and at present I fear nothing will happen. Of course, there remains the elephant in the room in this entire discussion, i.e., the professionalization of so-called amateur athletics and the question of whether college athletes ought to be considered employees within the meaning of the National Labor Relations Act.<sup>53</sup> But in the confines of the system as it currently is, baseball, along with the NCAA, needs to step up to the plate so that poor or less-affluent kids of all races have an opportunity to benefit from available scholarships, something that the NCAA appears unwilling to do because of the privileged position of the revenue-producing sports in its hierarchy.<sup>54</sup>

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participate. Over the past 15 to 20 years, the proliferation of pay-for-play teams in youth baseball—and the parallel proliferation of parents willing to pay for them and coaches willing to cash their checks—has had more of an impact on African-American participation than anything another sport has to offer.”).

52. See Andy Gardiner, *NCAA, MLB Ponder Partnership on Additional Scholarships*, USA TODAY (May 15, 2012), <http://usatoday30.usatoday.com/sports/college/baseball/story/2012-05-15/ncaa-mlb-ponder-partnership-on-scholarships/54977248/1>.

53. 9U.S.C. §§ 151–169(2006); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006); Taylor Branch, *The Shame of College Sports*, ATLANTIC (Sept. 7, 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>; Joe Nocera, *Let’s Start Paying College Athletes*, N.Y. TIMES (Dec. 30, 2011), available at [http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all&_r=0); see also *Boston Medical Ctr. Corp.*, 330 N.L.R.B. 152 (1999) (determining that interns and residents are employees); William B. Gould IV, *Globalization in Collective Bargaining, Baseball, and Matsuzaka: Labor and Antitrust Law on the Diamond*, 28 COMP. LAB. L. & POL’Y J. 283 (2007) [hereinafter Gould, *Globalization in Collective Bargaining*].

54. Mike Axisa, *MLB Creating Committee to Study Decline in African-American Players*, CBS SPORTS (Apr. 10, 2013), <http://www.cbssports.com/mlb/blog/eye-on-baseball/22045063/mlb-creating-committee-to-study-decline-of-africanamerican-player> (“I think at least part of the reason the number of African-Americans in baseball has declined has to do with the lack of baseball scholarships colleges can offer. NCAA Division I schools are allowed only 11.7 baseball scholarships, and may fund fewer. Other sports like football (85 scholarships in the FBS) and basketball (13 in Division I) can offer more, which may be luring young athletes—of all races, not just African-Americans—away from the diamond.”).

Baseball has taken a number of steps to address this issue through the establishment of a so-called RBI (Reviving Baseball in Inner Cities) program, of which Carl Crawford, Coco Crisp, Jimmy Rollins, CC Sabathia, and Dontrelle Willis are some of the most prominent alumni.<sup>55</sup> A similar program, aimed at the community, has been instituted in the form of the Major League Baseball Urban Youth Academy in Compton, California. An additional facility has been opened in Houston, Texas. It may be that these programs will bear fruit and reverse the decline at some point in the future. At present there is no sign of this.<sup>56</sup>

And there is another factor that must be taken into account. This is the development of globalization, which, similar to its advent in the general economy,<sup>57</sup> contains both its positive and negative aspects.

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55. *But see* Phil Taylor, *In Oakland and Cities Across the Country, Baseball a Forgotten Game*, SPORTS ILLUSTRATED (Apr. 17, 2013), <http://sportsillustrated.cnn.com/mlb/news/20130417/baseball-diversity/>.

56. Nick Cafardo, *MLB Still Lacks Interest from African-Americans*, BOSTON GLOBE, Apr. 14, 2013, at C9 (“The RBI program has been a noble undertaking. RBI has seen more than 200 of its kids drafted to major league teams. But it hasn’t created that interest of a kid gathering up his pals and heading over the park for a pickup game, like Willie Mays, Hank Aaron, and Ernie Banks etc. used to do. Nowadays, if it’s not organized or structured, it usually doesn’t happen.”).

57. *Cf.* ROBERT J. FLANAGAN, GLOBALIZATION AND LABOR CONDITIONS: WORKING CONDITIONS AND WORKERS RIGHTS IN A GLOBAL ECONOMY 7 (2006) (examining how mechanisms of globalization alter working conditions and labor rights). *See generally* INTERNATIONAL LABOR STANDARDS: GLOBALIZATION, TRADE, AND PUBLIC POLICY (Robert J. Flanagan, William B. Gould IV eds., Stanford Univ. Press 2003) (examining current regulations and standards, along with recent proposals and mechanisms to compel developing countries to adopt labor standards).

## I. The Jurisprudence of Title IX and Its Potential Applicability to Blacks in College Baseball

Here, Title IX, with regard to the NCAA, is instructive. The statute was designed to combat sex-based discrimination in education admissions but, notwithstanding the fact that there appeared to be little discussion of intercollegiate athletics in the legislative history,<sup>58</sup> Senator Birch Bayh stated that the exceptions to discriminatory prohibitions were narrow, i.e., “[Title IX is not designed to] mandate the desegregation of football fields.”<sup>59</sup> The proposed Tower Amendment provided for a revenue-based exemption to the sex discrimination prohibition and was subsequently rejected,<sup>60</sup> but Congress replaced it with another amendment in late 1974, the Javits Amendment, which directed the Secretary of the Department of Health, Education, and Welfare (“HEW”) to prepare regulations regarding “intercollegiate athletic [activities providing for] reasonable provisions considering the nature of particular sports.”<sup>61</sup> Subsequent attempts to exempt revenue-producing sports were introduced between 1974 and 1976, but they all failed.<sup>62</sup> The Secretary of HEW noted that, while “revenue production could not justify disparity in average per capita expenditure between men and women,” there were nonetheless differences that could be tolerated because of the high expenditures required, for instance, for “expensive protective equipment.”<sup>63</sup>

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58. See, e.g., Charles Spitz, Note, *Gender Equity in Intercollegiate Athletics as Mandated by Title IX of the Education Amendments Act of 1972: Fair or Foul?*, 21 SETON HALL LEGIS. J. 621, 625–26 (1997).

59. *Id.* at 626 n.22 (quoting 117 CONG. REC. S5807 (1972)).

60. See *id.* at 627, 627 n.26; *Cohen v. Brown Univ.*, 991 F.2d 888, 894 n.6 (1st Cir. 1993).

61. Spitz, *supra* note 58, at 627 n.30 (quoting The Education Amendments of 1974, Pub. L. 93-380, § 844, 88 Stat. 612 (1974)).

62. See Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 11 n.36 (1992); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 532 n.22, 533 n.24 (1982) (noting amendments aimed at limiting Title IX’s applicability to athletics).

63. Office of Civil Rights, Office of the Secretary, HEW, *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71421 (1979). *But see Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994) (upholding pay disparities between coaches of men’s and women’s basketball teams in part based on the claim that the men’s team generated much more revenue and thus warranted a higher-paid coach); *Bartges v. Univ. of N.C.* at Charlotte, 908 F. Supp. 1312 (W.D.N.C. 1995), *aff’d*, 94 F.3d 641 (4th Cir. 1996) (unpublished table decision).

As a matter of Title IX law, it seems that equality is not required in each sport but rather in treatment overall,<sup>64</sup> and thus, even assuming the law applied to race as well as sex, a violation could not be made out because of the unfair treatment of blacks and other poor players, so long as the programs such as football and basketball produce large numbers of black athletes. It seems to me nonetheless that given the relevance of lack of interest on the part of students to sports opportunities, the fact that black, minority, and poor baseball players may be diverted from that sport by superior benefits in others, is a matter to which policymakers ought to attend as part of an attempt to remedy the absence of blacks in college baseball—and thus the relative absence of blacks in professional baseball.

## II. Globalization

The backdrop for these developments is globalization, which, as we have seen, had already been developing prior to Robinson in 1947. At the time of the embargo of Cuba in 1961, ninety-six Cubans and twelve Dominicans had played in Major League Baseball.<sup>65</sup> After more than a half-century the Cubans keep coming— notwithstanding the legal prohibitions — at least sixty defectors have played in the majors.<sup>66</sup> But since the Cuban embargo the numbers have shifted dramatically

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64. See, e.g., *Kelley v. Bd. of Trustees*, 35 F.3d 265, 271 (7th Cir. 1994) (rejecting discrimination allegation brought by members of men's swimming program that was cut by the University of Illinois when the women's swimming program and other men's sports were not).

Requiring parallel teams would certainly have been the simplest method of ensuring equality of opportunity—and plaintiffs would doubtless have preferred this approach since, had it been adopted, the men's swimming program would likely have been saved. It was not unreasonable, however, for the agency to reject this course of action. Requiring parallel teams is a rigid approach that denies schools the flexibility to respond to the differing athletic interests of men and women. It was perfectly acceptable, therefore, for the agency to chart a different course and adopt an enforcement scheme that measures compliance by analyzing how a school has allocated its various athletic resources.

*Id.*

65. Mark Kurlansky, *Cuba's Major-League Cachet*, WALL ST. J. (Apr. 10, 2010), <http://online.wsj.com/article/SB10001424052702303720604575170171909416204.html>

66. *Id.*; see also Rachel D. Solomon, Note, *Cuban Baseball Players, the Unlucky Ones: United States-Cuban Professional Baseball Relations Should Be an Integral Part of the United States- Cuba Relationship*, 101 J. INT'L BUS. & L. 153, 157 (2011) (noting impact of legislation on Cuban defectors); Walter T. Champion & Danyahel Norris, *Why Not Row to the Bahamas Instead of Miami?: The Conundrum That Awaits Cuban Elite Baseball Players Who Seek Asylum and the Economic Nirvana of Free Agency*, 9 VA. SPORTS & ENT. L.J. 219, 231–32 (2009) (explaining incentive to defect in light of MLB "loophole" rules); Matthew J. Frankel, Note, *Major League Problems: Baseball's Broken System of Cuban Defection*, 25 B.C. THIRD WORLD L.J. 383, 408 n.218 (2005); Andrea Kupfer Schneider, *Baseball Diplomacy*, 12 MARQ.SPORTS L.REV. 473, 479–85 (2002) (explaining the hiring of Cuban defectors and focusing on the MLB rules for hiring individual players from Cuba once they arrive in the United States); Scott M. Cwierny, Note, *The Need for a Worldwide Draft: Major League Baseball and Its Relationship with toward the Dominican Republic*.<sup>67</sup>

In the wake of free agency, baseball decided to fight so as to limit or reverse Peter Seitz's 1975 award providing that players were free to sign with another club subsequent to the expiration of the option year at the end of their individual contract<sup>68</sup> and the 1976 collective bargaining agreement which followed it.<sup>69</sup> But a near thirty years' war,<sup>70</sup> culminating in the mother of all strikes in 1994–95, which produced the elimination of the World Series and ultimately brought the intervention of the National Labor Relations Board prior to Opening Day 1995 to rescind the owners' unilateral changes on free agency and salary arbitration, brought the players back to the field and produced peaceable relationships for two decades and counting.<sup>71</sup> Though the 1996 collective bargaining agreement following the end of the 1994–95 strike brought peace, salary escalation continued, and the search was on for both new revenues and new talent.<sup>72</sup> It is not entirely coincidental that Hideo Nomo was able

*the Cuban Embargo and United States Foreign Policy*, 20 LOY. L.A. ENT. L. REV. 391, 411–21 (2000) (examining the evolution of MLB rules, including the MLB "loophole," regarding the recruiting and signing of Cuban baseball players). More recently, the MLB has made it increasingly difficult to sign Cuban defectors. Ben Badler, *MLB Delays Cuban Signings*, BASEBALL AMERICA, Sept. 17–Oct. 1, 2013, at 3 (on file with author); cf. Ben Badler, *Slugging First Baseman Abreu Leaves Cuba*, BASEBALL AMERICA, Sept. 3–17, 2013, at 19 (on file with author) (acknowledging that despite increasing difficulty of signing, Jose Abreu, a premiere offensive Cuban player, has left Cuba to try to sign with a major league team). However, Cuba has begun to lift restrictions on Cuban players who seek to play abroad. See Randal C. Archibold, *Cuba to Let Its Athletes Play Abroad*, N.Y. TIMES, Sept. 28, 2013, at A2.

67. See discussion *infra* Part III.

68. Professional Baseball Clubs, 66 Lab. Arb. Rep. (BNA) 101 (1975) (Seitz, Arb.).

69. See GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 115 (noting the suggestion that Miller, long-time executive director of the MLB Players Association, initially feared that free agency might lead to an oversupply of players); CHARLES KORR, THE END OF BASEBALL AS WE KNOW IT: THE PLAYERS UNION, 1960–81 (2002) (discussing background dynamics), see also MARVIN MILLER, A WHOLE DIFFERENT BALLGAME: THE INSIDE STOCK OF THE BASEBALL REVOLUTION (2004).

70. ROBERT C. BERRY, WILLIAM B. GOULD IV ET. AL., LABOR RELATIONS IN PROFESSIONAL SPORTS 60–73 (1986); William B. Gould IV, *The 1994- '95 Strike and National Labor Relations Board, in REVERSING FIELD EXAMINING COMMERCIALIZATION, LABOR GENDER AND RACE IN 21<sup>ST</sup> CENTURY SPORTS LAW* 92–105 (André Douglas Pond Cummings & Anne Marie Lofaso eds., 2010); Robert C. Berry & William B. Gould IV, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes*, 31 CASE W. RES. L. REV. 685, 748–53 (1981) (discussing Seitz's 1975 award); William B. Gould IV & Robert C. Berry, *Views of Sport: Labor Trouble Is Brewing*, N.Y. TIMES, Aug. 10, 1986, at L\_I\_S2; see generally William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV. 61 (2004) (discussing thirty years of war with particular focus on the 1994–95 strike).

71. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 97–112.

72. *Baseball's Revenue Gap: Pennant for Sale? Hearing Before the Subcomm. on Antitrust Business Rights, and Competition of the S. Comm. on the Judiciary*, 106th Cong. 5 (2000) (statement of Sen. Herbert Kohl), available at <http://www.gpo.gov/fdsys/pkg/CHRG-106shrg74416/pdf/CHRG-106shrg74416.pdf>.

to exploit contractual loopholes and to become the first Japanese player in the United States since the 1960s in the immediate wake of the 1994–95 bitterly fought strike.<sup>73</sup> Today the average annual salary for major league players is \$3.2 million.<sup>74</sup>

The roots of globalization, however, go far beyond the search for more inexpensive labor from both the Far East and Latin America, but also it has involved baseball in a search for new revenues to compensate for ever-increasing labor costs. At its most fundamental level the sale of hats, shirts, and other paraphernalia in countries such as Indonesia and Turkey, where baseball is little known, was part of the MLB strategy. Moreover, the Boston Globe noted that buying an advertisement behind home plate in Rangers Ballpark in Arlington, Texas, costs between \$120,000 and \$160,000 per half inning, if the advertiser buys an entire season's worth of ads.<sup>75</sup> Buying for just a few games cost more per half inning, and the same is true in Kansas City, Seattle, and elsewhere.<sup>76</sup> "With the advent of Japanese players of superstar quality, many Japanese companies began to express interest in this advertising, aimed as it was at Japanese audiences watching Major League Baseball."<sup>77</sup>

But much more was involved. Though the Commonwealth of Puerto Rico had been a source in the 1950s and 1960s, it is generally thought that baseball's institution of the draft applicable to Puerto Rico and Canada in 1990 dried up the flow of talent from the Commonwealth. As *The Economist* has noted:

In theory, this should not have affected the number of Puerto Ricans signed, since undrafted players become free agents, who can sign with any team they wish. But in practice, MLB clubs rarely sign them; they tell them to go to university and try their luck in the draft later on. The draft thus forced Puerto Ricans to compete with Americans for a fixed number of places. Moreover, whereas Puerto Ricans could previously be signed at age 16, a high-school degree (usually given at 18) is required for the draft.

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73. Claire Smith, *Dodgers Look East*, N.Y. TIMES (Feb. 13, 1995), available at [http://www.nytimes.com/packages/html/sports/year\\_in\\_sports/02.13.html](http://www.nytimes.com/packages/html/sports/year_in_sports/02.13.html).

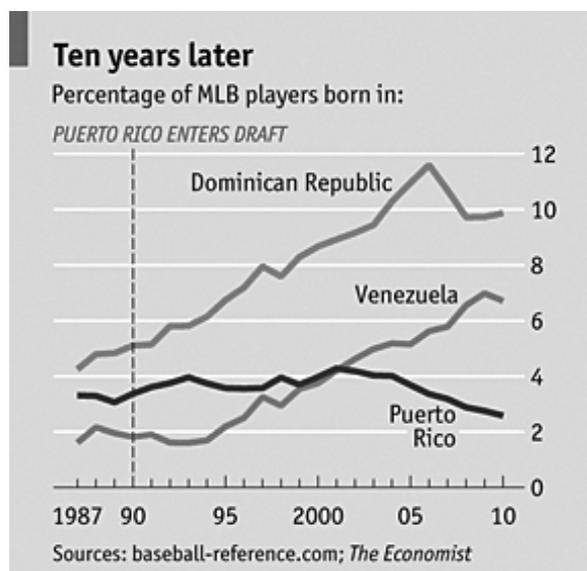
74. *Average Major League Baseball Salary Climbs to \$3.2 Million*, L.A. TIMES (Dec. 7, 2012), available at <http://articles.latimes.com/2012/dec/07/sports/la-sp-newswire-20121208>; cf. WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 61–63 (5th ed. 2013) (noting luxury tax and revenue sharing impacts on players' salaries).

75. Keith Reid, *Sox Have Dice-K but Rivals Reaping Ad Dollars*, BOSTON GLOBE, Apr. 25, 2007, [http://www.boston.com/sports/baseball/redsox/articles/2007/04/25/sox\\_have\\_dice\\_k\\_but\\_rivals\\_reaping\\_ad\\_dollars/](http://www.boston.com/sports/baseball/redsox/articles/2007/04/25/sox_have_dice_k_but_rivals_reaping_ad_dollars/).

76. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 259; see also David Jacobson, *The Revenue Model: Why Baseball Is Booming*, CBS MONEYWATCH (July 11, 2008), [http://www.cbsnews.com/8301-505125\\_162-51210671/the-revenue-model-why-baseball-is-booming/](http://www.cbsnews.com/8301-505125_162-51210671/the-revenue-model-why-baseball-is-booming/).

77. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 259.

Since the island's schools do not have baseball teams, its 16- and 17-year-olds had nowhere to train. As a result, the number of Puerto Rican MLB signings fell by 13% in 1991–92.<sup>78</sup>



**Figure 1 - Reproduced from *The Economist***

Substituted for Puerto Rico and Cuba was the Dominican Republic and, secondarily, Venezuela. Separate protocols or agreements were negotiated with Japan, Korea, and, less noticed (because it is football, or soccer, crazy), Mexico. The new recruiting grounds were initially a real cost-saver. For instance, Pedro Martínez received a \$6,500 bonus compared to the incredible but hardly comparable Mike Mussina's \$225,000.<sup>79</sup> Shortstop Troy Tulowitzki of Colorado got \$2.3 million as opposed to the mere \$23,000 that the Boston Red Sox paid for Hanley Ramírez.<sup>80</sup> And so it goes: “The average signing bonus for American players drafted in 2011 was \$232,000; for international players, it was approximately half that.<sup>81</sup> The philosophy, furthered by the COMPETE Act of 2006, which made it easier to obtain visas for minor league players from abroad during the Bush administration,<sup>82</sup> meant that as of 2012 42% of minor leaguers were from Latin American countries and almost 29% of major leaguers were born there as well, the highest percentage ever except for 2005.<sup>83</sup>

78. *Baseball in Latin America: Draft Dodgers No More*, ECONOMIST, Feb. 4, 2012, at 40, available at <http://www.economist.com/node/21546064>.

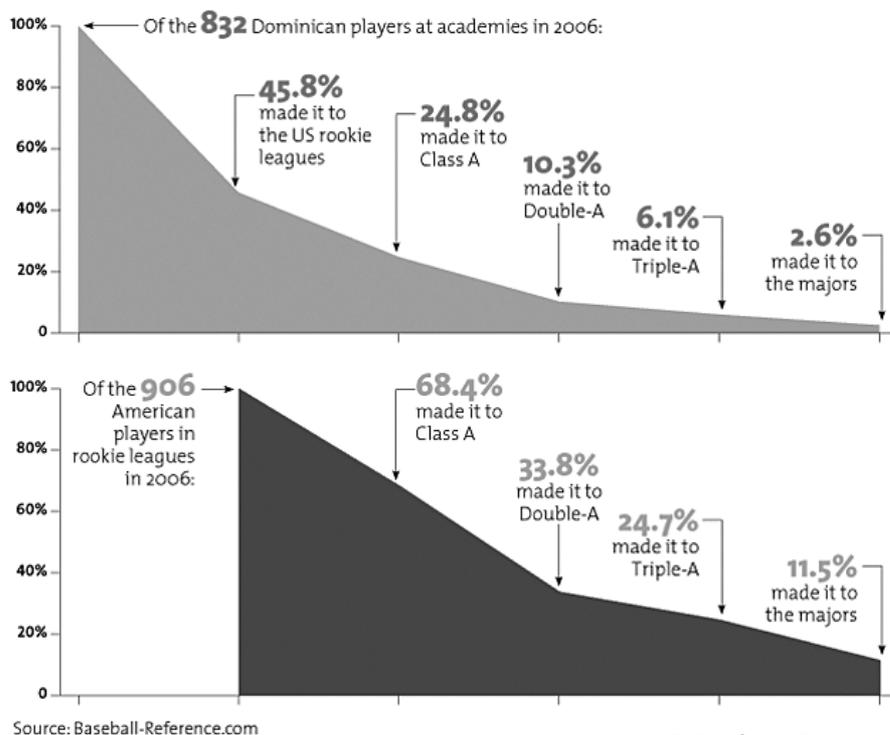
79. Ian Gordon, *Played*, MOTHER JONES, March/April 2013, at 44.

80. *Id.*

81. *Id.*

The Dominican Republic, to which baseball came in the late-1800s presumably through Cuban immigrants, became the primary ground of recruitment, with clubs utilizing so-called “academies” and training camps where players could be signed at the age of sixteen rather than the age of eighteen as is the case in the United States.<sup>84</sup> Clubs were “parachuting in to look for big-time talent at bargain basement prices. As former Colorado Rockies executive Dick Balderson once explained, ‘Instead of signing four American guys at \$25,000 each, you sign 20 Dominican guys for \$5,000 each.’”<sup>85</sup>

This meant that players had less of a chance to advance to professional baseball than their American counterparts and approximately 20% the chance of getting to the majors.



Mother Jones

**Figure 2 - Reproduced from *Mother Jones***

82. Pub. L. No. 109-463, 120 Stat. 3477 (2006) (codified at 8 U.S.C. § 1184 (2006)); *see also* Joel Millman, *Foreign Talent Loads the Bases in Minor Leagues*, WALL ST. J., (Aug. 15, 2009), <http://online.wsj.com/news/articles/SB124966930911615069>.

83. Gordon, *supra* note 79; GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 248.

84. Michael S. Schmidt, *Baseball Considers Plan to Curtail Age Fraud*, N.Y. TIMES (Feb. 9, 2010), [http://www.nytimes.com/2010/02/10/sports/baseball/10baseball.html?\\_r=0](http://www.nytimes.com/2010/02/10/sports/baseball/10baseball.html?_r=0); GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 257.

85. Gordon, *supra* note 79.

As time went on, however, bonuses began to increase, rising from \$29,000 for the Dominican Republic to \$108,000.<sup>86</sup> Meanwhile, secondarily, organized baseball began to lose out in the court of public opinion when abuses emerged. Not all of the academies had certified trainers.<sup>87</sup> A 2009 Sandy Alderson report advocated changes aimed at diminishing the steroid problem in the Dominican Republic<sup>88</sup>—as well as age and identity fraud<sup>89</sup>—providing for three-year contracts so that teams could recoup their losses if they had been misled in signing what they perceived to be a younger player.<sup>90</sup> The regulation of the so-called “buscones,” the recruiters who feed these players to the clubs and their academies, was sought as well. The biggest development is the 2011 collective bargaining agreement, which limits the salaries of both draftees as well as international players and provides for substantial tax and draft disallowance sanctions for violations. The collective bargaining agreement provides that these sanctions grow more severe in both the fines and the draft losses and thus a kind of poison pill in the event that the negotiation of an international draft is not—and it was not—achieved by June 1, 2013.

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86. *Baseball in Latin America: Draft Dodgers No More*, *supra* note 78.

87. Gordon, *supra* note 79, at 43.

88. Memorandum from Sandy Alderson for Bud Selig, Commissioner of Major League Baseball 9–10 (Sept. 23, 2009) (on file with University of San Francisco Law Review) [hereinafter Alderson Report]; *see also* ARTURO J. MARCANO & DAVID P. FIDLER, *STEALING LIVES: THE GLOBALIZATION OF BASEBALL AND THE TRAGIC STORY OF ALEXIS QUIROZ* 51 (2002); Arturo J. Marcano Guevara & David P. Fidler, *Fighting Baseball Doping in Latin America: A Critical Analysis of Major League Baseball’s Drug Prevention and Treatment Program in the Dominican Republic and Venezuela*, 15 U. MIAMI INT’L & COMP. L. REV. 107, 120–26 (2007); Arturo J. Marcano & David P. Fidler, *The Globalization of Baseball: Major League Baseball and the Mistreatment of Latin American Baseball Talent*, 6 IND. J. GLOBAL LEG. STUD. 511, 542–47 (1999) (examining the less than favorable treatment of players at baseball academies); Arturo J. Marcano & David P. Fidler, *Global Baseball: Latin America*, in *THE CAMBRIDGE COMPANION TO BASEBALL* (Leonard Cassuto ed., 2011).

89. For instance, Fausto Carmona of the Cleveland Indians was revealed to be playing under a false identity, having been born Roberto Hernández. Subsequently, he assumed his real identity with the Tampa Bay Rays. Joe Smith, *Hernandez Evoking the Carmona of Old*, TAMPA BAY TIMES, March 11, 2013, at 1C, available at <http://www.tampabay.com/sports/baseball/rays/rays-roberto-hernandez-looking-like-same-old-pitcher-under-new-name/2108356>.

90. Alderson Report, *supra* note 88, at 6–7.

It remains to be seen, but these changes may diminish academy abuses and perhaps, as in Puerto Rico, the recruitment of Latin American players as well. The question of whether American players, black or white, will obtain more job opportunities remains a matter of conjecture. The principle thrust of the 2011 agreement was to fashion a quid pro quo for expanding free agency for major league players<sup>91</sup> in exchange for wage constraints for those entering the market. Like draftees who are the subject of rookie wage scales in basketball and football, they are, of course, unrepresented.<sup>92</sup> Undoubtedly these provisions are an attempt to not only move away from both academy abuses and escalating Latin American draft bonuses but also are devised in anticipation of the inevitable diminution of extant Cold War barriers vis-à-vis Cuba. MLB knows that a gold rush could be on once Helms-Burton is modified and the potential for a draft system may well head off what would otherwise be a relatively expensive free agency scramble.

The first and most prominent of the country-specific arrangements involves Japan.<sup>93</sup> The Japanese protocol arrangement grew out of the Los Angeles Dodgers's signing of Nomo in the 1990s as well as a dispute relating to Japanese pitcher Hideki Irabu, who was the subject of an attempted exclusive working agreement between the San Diego Padres and Chiba Lotte Mariners.<sup>94</sup> After it was clear that he wanted to play in the United States, Irabu was assigned to the Padres but he resisted this transaction.

The MLBPA threatened legal and arbitral action if the Padres did not trade Irabu's negotiating rights to the team of his choice. The MLB Players Relation Committee questioned the authority of the MLBPA to file a grievance on Irabu's behalf. The Committee maintained that the MLBPA could not properly represent a Japanese player who was not already part of the bargaining unit composed of major league players.<sup>95</sup>

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91. The 2011 collective bargaining agreement substantially modified the rules for free agent compensation by eliminating the Type A and Type B free agent designations (former Type C designations were eliminated in an earlier collective bargaining agreement) for determining compensation and replacing them with a uniform system based on qualifying offers. *See* MLB-MLBPA 2012–2016 BASIC AGREEMENT 87–88 (2011) [hereinafter BASIC AGREEMENT]; Matthew Leach, *As Expected, New Rules Impact Free-Agent Market*, MLB (Feb. 12, 2013), [http://mlb.mlb.com/news/article.jsp?ymd=20130212&content\\_id=41560238&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20130212&content_id=41560238&c_id=mlb). If a team makes one of its players who is becoming a free agent a qualifying offer (equal to the average salary of the 125 highest paid players), the free agent declines the offer, and the free agent is signed by another team, then the team losing the free agent is entitled to a compensatory draft pick. Leach, *supra*.

92. *See generally* Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) (involving antitrust action brought by college basketball players challenging certain provisions of collective bargaining agreement with the NBA).

93. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 268–72; *see also* Gould, *Globalization in Collective Bargaining*, *supra* note 53.

94. *See* GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 262–63.

95. *Id.* at 263.

But the fact is that not only is the Rule 4 amateur draft system part of the collective bargaining agreement, but also the draft has served as compensation for major league free agents, a compensation, as noted above, considerably diminished by the 2011 agreement.<sup>96</sup> Earlier rulings by both the courts and arbitrators supported the idea that MLBPA could act on behalf of applicant players as well as incumbents inasmuch as unilateral changes could undermine or affect the incumbent player's benefit protected by the collective bargaining agreement.<sup>97</sup> Noting that bargaining historically sometimes involved amateur matters and sometimes did not, the arbitrator was of the view that the parties had routinely recognized the promotion of players to the majors and the demotion of players to the minors.<sup>98</sup> Moreover, the arbitrator concluded that the right to challenge changes in the amateur draft had not been waived by the MLBPA in collective bargaining.<sup>99</sup> Further, the arbitrator believed that the changes in the case before him were significant because they assigned a college-bound player to a club for five years and eliminated the pressure to sign a player upon pain of losing him during the following year.<sup>100</sup> As a practical matter, the opportunity to improve his position in succeeding drafts was foreclosed. Subsequent arbitral decisions confirmed this reasoning.<sup>101</sup>

Although these baseball arbitration cases avoided the question of whether the duty to bargain about hiring decisions was a mandatory subject of bargaining within the meaning of the National Labor Relations Act,<sup>102</sup> the Court of Appeals for the Second Circuit has held that the basketball draft and salary cap were not “the product solely of an agreement among horizontal competitors but [rather was] embodied in a collective agreement between an employer or employers and a labor organization reached through procedures mandated by federal labor legislation.”<sup>103</sup>

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96. See Alderson Report, *supra* note 88, at 8–9.

97. See Major League Baseball Players' Association and the Twenty-eight Major League Clubs (Amateur draft) (Aug. 19, 1992) (on file with author); BASIC AGREEMENT, *supra* note 91, at 1–2.

98. William B. Gould IV, *Baseball and Globalization: The Game Played and Heard and Watched 'Round the World (With Apologies to Soccer and Bobby Thomson)*, 8 IND. J. GLOBAL & L. STUD. 85, 111 (2000) [hereinafter Gould, *Baseball and Globalization*].

99. *Id.*

100. *Id.*

101. See Major League Baseball Players' Association and the Twenty-eight Major League Clubs (Amateur draft) (June 10, 1993) (on file with author); Major League Baseball Players' Association and the Thirty Major League Clubs (May 18, 1998) (on file with author).

102. 29 U.S.C. § 151 (2006); *cf.* NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958) (holding that bargaining may be divided into mandatory and non-mandatory or permissive subjects and establishing different rules for each).

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

Accordingly, the court reasoned that federal labor policy precluded a player from obtaining his true market value through antitrust litigation simply because he was dissatisfied with his salary.<sup>104</sup> Analogizing to collective negotiations between labor and management in construction, maritime, and other industries,<sup>105</sup> the court stated:

The choice of employer is governed by the rules of the hiring hall, not the preference of the individual worker. There is nothing that prevents such agreements from providing that the employee either work for the designated employer at the stipulated wage or not be referred at that time. Otherwise, a union might find it difficult to provide the requisite number of workers to employers. Such an agreement is functionally indistinguishable from the college draft.<sup>106</sup>

“The court noted that ‘newcomers’ like Wood, who sought to bargain as a rookie free of both cap and draft status which limited him to one team, are frequently disadvantaged in collective bargaining relationships primarily because they lack seniority.”<sup>107</sup> Judge Winter’s opinion for the Second Circuit rejected the argument that individuals who were not current members of the bargaining unit could not be regulated by collective bargaining agreements and noted that the NLRA “explicitly defines ‘employee’ in a way that includes workers outside the bargaining unit.”<sup>108</sup> “Accordingly, the court brought ‘potential employees’ and current employees within the purview of the labor exemption immunity to antitrust liability established [in this case].”<sup>109</sup>

Moreover, the NLRB, during my chairmanship in the 1990s, held that an employer is obliged to provide the union with information about applicants where there was possible discrimination in the work- place as evidenced by the parties’ inclusion of a no-discrimination clause in the collective bargaining agreement, so that it may discharge its duty as collective bargaining representative under some circumstances.<sup>110</sup> Subsequently, in the 1994 baseball strike, the Second Circuit again reasoned:

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104. *Id.* at 960–61.

105. Houston Chapter, Associated Gen. Contractors (Houston AGC), 143 N.L.R.B. 409 (1963), *enf’d*, 349 F.2d 449 (5th Cir. 1965) (deciding the question of whether the hiring hall is a mandatory subject of bargaining within the meaning of the National Labor Relations Act).

106. *Wood*, 809 F.2d at 960.

107. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 263.

108. *Wood*, 809 F.2d at 960.

109. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 263.

110. Hertz Corp., 319 N.L.R.B. 180 (1995), *enf. denied*, Hertz Corp. v. NLRB, 105 F.3d 868 (3d Cir. 1997); *cf.* NLRB v. U.S. Postal Serv., 18 F.3d 1089 (3d Cir. 1994).

A mix of free agency and reserve clauses combined with other provisions is the universal method by which leagues and player unions set individual salaries in professional sports. Free agency for veteran players may thus be combined with a reserve system, as in baseball, or a rookie draft, as in basketball, for newer players. . . . To hold that any of these items, or others that make up the mix in a particular sport, is merely a permissive subject of bargaining would ignore the reality of collective bargaining in sports.<sup>111</sup>

These authorities, along with potential antitrust liability, undoubtedly convinced MLB to support the proposition that a trade could and should send Iribu to the team of his choosing, the New York Yankees, where to the regret of both Iribu and the Yankees, he did not flourish.

“In the wake of the *Iribu* matter, baseball has negotiated agreements with commissioners’ offices of baseball in Japan and Korea. These agreements do not include the MLBPA or the Japanese players’ union as a party to them.”<sup>112</sup> One potential consequence of this is to presumably make unavailable the so-called non-statutory labor exemption to antitrust law, which has played such a major role in sports generally.<sup>113</sup>

Though baseball historically—beginning with the landmark decision in *Federal Baseball Club v. National League*,<sup>114</sup> authored by Justice Oliver Wendell Holmes—was deemed to have an antitrust exemption, the Curt Flood Act of 1998 has partially reversed that authority insofar as major league employment relations are concerned. Given the previously noted treatment of applicants in the form of draftees as well as international signings, the subject matter would seem to involve major league relations and thus fall within the Curt Flood Act’s reversal of the seventy-six years of baseball antitrust jurisprudence.<sup>115</sup> But the 1998 statute also states that the labor exemption shields baseball owners, as it does the owners of football, basketball, and hockey, unless the union has disappeared or is moribund—this is what has prompted a number of the sports unions to threaten decertification and

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111. *Silverman v. Major League Baseball Player Relations Comm.* (*Silverman I*), 67 F.3d 1054, 1061–62 (2d Cir. 1995) (citation omitted).

112. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 268.

113. See *Mackey v. Nat’l Football League*, 543 F.2d 606, 611–13 (8th Cir. 1976); *Robertson v. Nat’l Basketball Ass’n*, 556 F.2d 682, 686 (2d Cir. 1977); *Powell v. Nat’l Football League*, 930 F.2d 1293, 1308 (8th Cir. 1989); *McNeil v. Nat’l Football League*, 790 F. Supp. 871, 882–83 (D. Minn. 1992).

114. 259 U.S. 200 (1922); see also *Flood v. Kuhn*, 407 U.S. 258, 285 (1972); STUART BANNER, *THE BASEBALL TRUST: A HISTORY OF BASEBALL’S ANTITRUST EXEMPTION* 91 (2013).

115. The Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824 (1998); BANNER, *supra* note 114, at 246–47; GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 265.

disaffiliation<sup>116</sup>—and the Major League Baseball Players Association is certainly alive and well! Does the Supreme Court precedent of *Brown v. Pro Football, Inc.*,<sup>117</sup> now made applicable to baseball by virtue of the Curt Flood Act, allow for the elimination of the non-statutory labor exemption where the subject matter in question has not been bargained by the union, the union is not a signatory to the agreement in question, and yet the subject would be, if the union raised it, a mandatory subject of bargaining within the meaning of the Act?<sup>118</sup>

The protocol between the Japanese and American baseball systems applies to major league players within the Japanese reserve system, although a dispute has already emerged in connection with the Boston Red Sox signing of Junichi Tazawa from the Industrial League in Japan as to whether such players are governed by the system. The Japanese claimed that such players (Tazawa played for Nippon Oil) are really off-limits to the Americans as a result of a “gentlemen’s agreement.”<sup>119</sup> (The San Diego Padres created controversy by signing an eighteen-year-old Japanese pitcher prior to his graduation from high school!)

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116. See, e.g., *McNeil*, 790 F. Supp. at 886; *Jackson v. Nat’l Football League*, 802 F. Supp. 226, 235 (D. Minn. 1992); *White v. Nat’l Football League*, 822 F. Supp. 1389, 1408 (D. Minn. 1993); cf. *Brady v. Nat’l Football League*, 640 F.3d 785 (8th Cir. 2011) (avoiding the issue, given the Eighth Circuit’s conclusion that the Norris-LaGuardia Act of 1932 precluded the issue of an injunction against the NFL’s lockout regardless of the disaffiliation or decertification issue).

117. 518 U.S. 231 (1996).

118. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (holding that applicants are employees within the meaning of the Act); *Hertz Corp.*, 319 N.L.R.B. 180 (1995), *enf. denied*, *Hertz Corp. v. NLRB*, 105 F.3d 868 (3d Cir. 1997); cf. *Bd. of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); see generally *Gould, Baseball and Globalization*, *supra* note 98 (discussing how labor-management relations in the MLB has created controversies in U.S. antitrust and labor law that are inseparable from the global and domestic growth of the MLB). The issue of retirees is also relevant. See *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (holding that retirees are not employees within the meaning of the Act; therefore, employers are not obliged to bargain about their conditions); *Nedd v. United Mine Workers*, 556 F.2d 190, 200 (3d Cir. 1977) (“When a Union elects to undertak[e] bargaining over retiree benefits, the union’s duty of fair representation must apply.”); *Toensing v. Brown*, 528 F.2d 69, 72 (9th Cir. 1975) (similar holding). *But see* *United Auto Workers v. Yard-Man*, 716 F.2d 1476, 1486 n.16 (1983) (suggesting that the duty of fair representation should not extend to retirees, even when the union acts in ways that affect retiree interests); *Anderson v. Alpha Portland Indus., Inc.*, 727 F.2d 177, 183 (8th Cir. 1984) (holding that the duty of fair representation does not apply to contract *administration* on behalf of retirees); *Eller v. Nat’l Football League Players Ass’n*, 872 F. Supp. 2d 823, 833–34 (D. Minn. 2012) (dismissing retirees’ claims against NFLPA because of the lack of a fiduciary duty). Conditions involving retirees as they relate to active incumbent employees are a mandatory subject of bargaining. See *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1356 (D.C. Cir. 2008); *Inland Steel Co. v. NLRB*, 170 F.2d 247, 250–51 (7th Cir. 1948).

119. See Alan Schwarz & Brad Lefton, *Japanese Are Irked by U.S. Interest in Pitcher*, N.Y. TIMES, Nov. 19, 2008, at B12.

In Japan, only a player who has played for nine years is a free agent and can be recruited and signed by Major League Baseball at that time,<sup>120</sup> just as players in the United States, ever since the 1976 collective bargaining agreement, are free agents at the end of six years of major league service.<sup>121</sup> The protocol applies to Japanese players *prior* to their nine-year period.

If an MLB club wishes to engage a Japanese player who has “played baseball in Japan and/or is under contract with a Japanese club,” the club must request that the MLB Commissioner determine the status and availability of the Japanese player in the same manner that the status and availability of the MLB player is determined. If no approval is needed, the club immediately contacts the Japanese player. If approval is needed, that contact can be initiated only when the club has provided approval. Similar provisions are provided in the Korean agreement, which was entered into in 1996.<sup>122</sup>

All of these procedures were brought into play by the *Irabu* matter and the fear on the part of American baseball that litigation—perhaps raising antitrust issues protecting a boycott of Japanese players under the Curt Flood Act—would ensue in the absence of new mechanisms. The attempt is to address those Japanese players who have reached an advanced stage in moving toward free agency and thus provide an early exit for them with compensation for the Japanese team. In a way, this is a rough analogue to the way in which American clubs may treat American players who are about to obtain free agency and are traded away by their clubs so that the latter can obtain some compensation for them beyond what they would be entitled to under the collective bargaining agreement when the player has obtained free agent status.

With regard to those players for whom approval is required, e.g., those who have not reached the end of their nine-year service period, the MLB Commissioner posts the Japanese player’s availability by notifying

all U.S. Major League Clubs of the Japanese clubs to make the player available. Requests for Japanese club postings are made from November 1 to March 1. Within four business days of the posting all interested MLB clubs are required to submit a bid to the MLB Commissioner composed of monetary consideration only, to be paid to the Japanese Club as consideration for the Japanese Club relinquishing its rights to the player in the event that the U.S. Club reaches an agreement with the Japanese

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120. *Japan Tries to Discourage Amateurs from Playing in MLB with Ban*, ESPN (Oct. 8, 2008), <http://sports.espn.go.com/mlb/news/story?id=3632083>; GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 268.

121. BASIC AGREEMENT, *supra* note 91, at 86.

122. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 268.

player. The MLB Commissioner determines the highest bidder and that determination is 'conclusive and binding on all parties. The Japanese commissioner must then determine whether the bid is acceptable to the Japanese club. If it is not acceptable, then no contract may be had with the player until the next window period. If the highest bid is acceptable, the MLB Commissioner is to award the sole, exclusive and non-assignable right to negotiate with and sign the Japanese player. If the MLB team cannot come to terms with the player within thirty days from the date that the MLB Commissioner indicates that the bid is acceptable to the Japanese club, the obligation to compensate lapses, as do the negotiation rights of the club, and no contract may be had with the player until the following window period.<sup>123</sup>

Both the original Japanese and Korean agreements have since expired, but by their terms are automatically renewed each year unless either league objects in advance.<sup>124</sup> Why were they entered into in the first instance and why might their renewal potentially come under de- bate? In the first place, the idea was to avoid future litigation of the kind described previously. In the second place, as more Japanese players are recruited, there will always be eighteen MLB clubs which are displeased by virtue of any exclusive or preferential working agreements. This is because there are thirty MLB teams and only twelve Japanese teams. Thus, access for all MLB clubs to Japanese players became an important principle.

Third, the approval mechanisms were included so that Japanese sensibilities about MLB baseball imperialism would not be ignored.<sup>125</sup> The Japanese do not want to see their own professional league become a farm system for MLB and to see their best teams raided for top talent, a concern shared by the Koreans and one that is sure to be manifested by the Cubans who have a well-established league of their own. "As noted above, this problem has become more considerable as attendance and TV ratings in Japan have dropped. The problem of American baseball imperialism remains an important one."<sup>126</sup> And since 1999, when the Japanese system went into effect, twenty-two Japanese

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123. *Id.* at 269 (internal citations omitted).

124. . E-mail from Joe Garagiola, Jr. to the author (Apr. 3, 2013, 18:00:52 PST) (on file with author); *cf.* Ben Badler, *Teams Keeping Close Watch on Japan's Tanaka*, BASEBALL AMERICA, Sep. 17–Oct.1, 2013, at 18 (on file with author) (detailing that Japan's Tanaka is being closely watched even though there may be changes to MLB's posting system that could affect his future).

125. American baseball has not always been concerned with this problem. *See generally* ROBERT ELIAS, THE EMPIRE STRIKES OUT: HOW BASEBALL SOLD U.S. FOREIGN POLICY AND PROMOTED THE AMERICAN WAY ABROAD (2010) (providing an examination of baseball's historic relationship with American's foreign policy).

126. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 269.

players<sup>127</sup> have been posted through the system and only one Korean, the Dodger lefty Ryu Hyun-jin.

The same holds true for other nations that may fear talent depletion because of an MLB international draft. Thus, Japan and other countries have an interest in restraining and regulating the future *Irabu* disputes. But there are many problems with this arrangement. The nonassignability of the rights obtained by the highest bidder is presumably designed to avoid another *Irabu* situation in which the Yankees were waiting in the wings to receive *Irabu*'s assigned negotiating rights. But teams like the Yankees, Red Sox (it was the Red Sox, after all, which provided the record-breaking \$51 million purchase price for Seibu's Daisuke Matsuzaka)<sup>128</sup> and other high rollers will still benefit from the post-*Irabu* mechanism because they are most likely to be the highest bidder for the players that are perceived to be of premium quality. This is particularly true given the fact that only monetary compensation may be provided.<sup>129</sup>

After the highest bidder wins, the negotiating rights lapse if no arrangement is reached with the player within thirty days. Some teams may want to keep the player off the market and to provide the highest bid, knowing that their bargaining stance makes a contract with the player impossible since no dispute resolution mechanism such as arbitration is contained in the agreement. It is unclear how this and other potential abuses by teams can be adjudicated.

Another problem with the current system is that bidding and potential bargaining are not transparent. Teams are bidding in the dark, i.e., they do not know what the other teams are offering. In the case of the Red Sox bid of \$51 million for Matsuzaka, the next-highest bid, put forward by the New York Mets, was almost \$20 million less.<sup>130</sup> The Red Sox undoubtedly thought the New York Yankees would

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127. There have been thirteen successful postings from Japan through which players from the Japanese league were acquired by American teams. Brad Lefton, *Focus on a Star and a System*, N.Y. TIMES, Nov. 10, 2011, at B14, available at [http://www.nytimes.com/2011/11/10/sports/baseball/yu-darvish-situation-puts-spotlight-on-japanese-player-posting-system.html?\\_r=0#](http://www.nytimes.com/2011/11/10/sports/baseball/yu-darvish-situation-puts-spotlight-on-japanese-player-posting-system.html?_r=0#). The players with the four highest winning bids have been Yu Darvish in 2011 (\$51.7 million from the Texas Rangers), Daisuke Matsuzaka in 2006 (\$51.1 million from the Boston Red Sox), Kei Igawa in 2006 (\$26.0 million from the New York Yankees), and Ichiro Suzuki in 2000 (\$13.1 million from the Seattle Mariners). *Id.* There have been nine unsuccessful postings from Japan, including seven players who did not draw any bids from American teams. *Id.* The Athletics won exclusive negotiating rights to pitcher Hisashi Iwakuma in 2010 and the Yankees to infielder Hiroyuki Nakajima in 2011, but in both cases the team and player failed to reach an agreement in the allotted time. *Id.*

128. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 269.

129. In my view, the transaction arrangements, other than those providing for monetary compensation exclusively, should be part of the system. It is unclear why a trade between the two countries cannot be arranged unless the Commissioners thought that an agreement could not be negotiated with the players. The promotion of trades across national boundaries will lend more credibility to foreign leagues, such as those in Japan, and promote and enhance foreign baseball, which will lead to a genuine World Series between clubs, as well as national teams, at some point in the future.

130. ROGER D. BLAIR, SPORTS ECONOMICS 399 (2012).

come much closer (the Yankees were reputed to have offered \$33 million). The Americans want the system to be one of open-bidding so that the Japanese teams do not get a windfall, and obviously the Japanese resist this for the very same reasons that the Americans want it. Another related point is the view of the Americans that it is difficult to sign such players because of the high bid which goes to the Japanese team. MLB has proposed that the players get more, perhaps assuming that the teams are an obstacle to both negotiations and thus make the system more inflexible—but, of course, the Japanese teams obviously are of a different view.

The Japanese players' union—while the players' value is diminished by the bidding process that gives everything to the clubs and therefore inhibits the amount of future bargaining that will go to the player—has thus far said little to express dissatisfaction. As a result, as the *Japan Times* noted, “[p]layers currently have little leverage and are essentially held hostage by the process.”<sup>131</sup> said the *Times*:

Japanese teams have to not only first agree to post a player, but then also deem the posting fee acceptable. The Yomiuri Giants' Koji Uehara [now with the Boston Red Sox], the Hanshin Tigers' Kyuji Fujikawa and the Seibu Lions' Hiroyuki Nakajima all hit the wall in this regard in past seasons. That trio was eventually forced to wait out the nine-year service time requirement needed to reach international free agency.<sup>132</sup>

Presumably, the American Major League Baseball Players Association is not terribly concerned about this process given the fact that the union is not fundamentally responsive to applicants who are Japanese players. We have seen that the union has willingly negotiated severe de-facto caps in the form of monetary and draft-loss sanctions relating to draftees in the 2011 agreement, though in the latter instance this was bargained-for enhanced free agent leverage.<sup>133</sup>

Japan and Korea have established leagues, thus the previously noted agreements. Similarly, Mexico has an established league about which it is alleged that Major League Baseball has a “cozy, lucrative, and exclusive relationship.”<sup>134</sup> It is said that some of the Mexican teams arrange to have a commission from

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131. Jason Coskrey, *NPB Players Should Speak out About Posting System*, JAPAN TIMES (Dec. 4, 2012), available at <http://www.japantimes.co.jp/sports/2012/12/04/baseball/npb-play-ers-should-speak-out-about-posting-system/#.UIWY1WT5kqo>.

132. *Id.*

133. BASIC AGREEMENT, *supra* note 91, at 213.

134. *Id.*

signings with American teams even though they have not played for the former and are not under contract with them.<sup>135</sup> Cuba has perhaps the most prestigious although defector-marked league system, which thus far has had no relations with the United States because of the embargo initiated by President Eisenhower and President Kennedy and now solidified by the Helms-Burton Act of 1996.<sup>136</sup> Perhaps it is Cuba as much as the previously described problems in Latin America, particularly the Dominican Republic, which has induced Major League Baseball to take the next step in a process long discussed and debated, e.g., an international draft system. The Cuban free agents, beginning with Orlando Hernandez or El Duque,<sup>137</sup> have negotiated successful free agent agreements subsequent to establishing residence in other countries so as to escape draft coverage that would limit their bargaining.<sup>138</sup>

### III. The International Draft

The idea of an international draft is of long standing: formerly advocated by a so-called “blue ribbon panel” which was created by baseball—the union or no other independent party had any representation—and the reason was the same one behind the institution of the Rule 4 amateur draft in 1965, i.e., to stop the clubs bidding with one another for valuable talent. From the beginning, however, this objective was something that baseball approached with some caution given the earlier-described economic benefits involved in signing young boys at the age of sixteen who came out of academies in the Dominican Republic. In the 2006 collective bargaining agreement, a committee had been established to consider the implementation of the international draft, but the draft did not materialize.

Again in the 2011 collective bargaining agreement, a more extensive so-called “international talent committee” contractual provision was negotiated “to discuss the development and acquisition of international players, including the potential inclusion of international amateur players in a draft, and to examine the rules and procedures pursuant to which international professional players sign contracts with

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135. Complaint at 12–13, *Camacho v. Major League Baseball*, No. 12-CV-2859L, 2012 U.S. Dist. LEXIS 171298 (S.D. Cal. Nov. 30, 2012).

136. Pub. L. 104-114, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021–91 (2006)).

137. *See generally* SEVE FAINARU & RAY SANCHEZ, *THE DUKE OF HAVANA: BASEBALL, CUBA, AND THE SEARCH FOR THE AMERICAN DREAM* (2001) (providing an in-depth background on El Duque).

138. *See, e.g.*, Champion & Norris, *supra* note 66; Frankel, *supra* note 66.

Clubs.”<sup>139</sup> The committee was charged with advising both the Players Association and the Office of the Commissioner on (1) “if there is an international draft, whether international players should be part of a single worldwide draft (including players currently covered by the Rule 4 draft), or a separate draft (or drafts)”; (2) the age for signing such international players; and (3) the status of Puerto Rico in the event that there is more than one draft.<sup>140</sup> Other matters to be addressed are appropriate country-by-country plans (including the revision of plans in Mexico, Korea, Japan, and Taiwan, and “[h]ow Cuban players should be treated in an amateur talent system in light of the legal-political factors that affect their signability”),<sup>141</sup> the establishment of a league in the Dominican Republic,<sup>142</sup> problems relating to representation or in the Dominican Republic the so-called bus-cones,<sup>143</sup> and the programs in the international academies.<sup>144</sup>

Since the negotiation of the agreement in early 2012, Bud Selig has called the international draft “inevitable.”<sup>145</sup> There are built-in motivations. As we have seen, Latin American bonuses, particularly in the Dominican Republic, have been inferior to those obtained by American players. But they are now on the move upward and it may be that a draft would be the best way to retard this development. Moreover, this might assist MLB in addressing age and identity fraud, performance-enhancing drug use—dramatized by the documentary *Sugar*<sup>146</sup>—and abuses including bonus-skimming by agents (or buscones) as well as Americans who work with them.

Problems abound. Many clubs may see their investment in the academies diminished by virtue of the draft. There remains the question of what to do with the established leagues. And an abandonment of the country-by-country program would make MLB vulnerable to charges of more naked imperialism.

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139. BASIC AGREEMENT, *supra* note 91, at 265.

140. *Id.*

141. *Id.* at 266.

142. *Id.*

143. *Id.*

144. *Id.* at 265–66.

145. Josh Leventhal, *Selig Calls International Draft “Inevitable,”* BASEBALL AMERICA (Feb. 23, 2012), <http://www.baseballamerica.com/today/majors/news/2012/2613020.html>.

146. SUGAR (Sony Pictures 2008).

But the elephant in the room is Cuba where, along with the Dominicans, lies the finest talent in the world.<sup>147</sup> Initially confronting the defectors two decades ago, baseball devised a number of drafts for them. Beginning with Orlando Hernandez, who signed with the New York Yankees in 1998,<sup>148</sup> players began to establish residence elsewhere and thus acquire free agent status. It is to this phenomenon that the draft is aimed, as well as in anticipation of the death of Fidel Castro and a new arrangement with Cuba. Thus the collective bargaining agreement creates an incentive, i.e., if there is no draft agreement by June 1 of this year for the 2014 season, new sanctions for violation of the salary caps will be put in place, including an increased tax on “pool overage” and more severe bonus restrictions.<sup>149</sup>

If an international draft is put into effect, antitrust law would be applicable<sup>150</sup> as is the case with the national draft.<sup>151</sup> The fact that the union is signatory to the collective bargaining agreement, and that the agreement as well as the system is bargained, brings into play the non-statutory labor exemption which should immunize the agreement from attack in this country, so long as a collective bargaining relation- ship exists.<sup>152</sup>

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147. Badler, *MLB Delays Cuban Signings*, *supra* note 66; cf. Badler, *Slugging First Baseman Abreu Leaves Cuba*, *supra* note 66; Shereen Marison Meraji, *Cuban Defector Yasiel Puig Ignites Los Angeles Dodgers*, NPR (Sept. 24, 2013), <http://www.npr.org/2013/09/24/225659451/profile-of-dodgers-yasiel-puig>; Leventhal, *supra* note 145 (explaining despite the inevitability of an international draft, Latin American teams may still face difficulties).

148. See FAINARU & SANCHEZ, *supra* note 137, at 66–68, 99. The first Cuban players to defect in the early 1990s were dealt with on a relatively ad hoc basis. In 1991, pitcher René Arocha defected and MLB arranged a special, one-player lottery for teams to bid on the right to negotiate with him. In the following years, special lotteries were organized for small groups of Cuban defectors, including future New York Mets shortstop Rey Ordóñez in 1993. Yet, in 1995, top pitching prospect Ariel Prieto defected and was held eligible for the June amateur draft; he was selected fifth overall in the 1995 draft by the Oakland Athletics. This ad hoc system was phased out of existence after agent Joe Cubas began exploiting the loophole of having his client defectors establish residency outside of the United States, which allowed pitchers Osvaldo Fernández and Liván Hernández (future All-Star and half-brother of Orlando Hernández) to sign lucrative contracts as free agents in 1996. See Frankel, *supra* note 66, at 395–99; Champion & Norris, *supra* note 66, at 221–22.

149. Ben Badler, *Nine Questions MLB Must Address for an International Draft*, BASEBALL AMERICA (May 28, 2013), <http://www.baseballamerica.com/international/nine-questions-mlb-must-address-for-an-international-draft/>.

150. *United States v. Pac. & Arctic Ry. & Navigation Co.*, 228 U.S. 87, 105–06 (1913). The same theme is echoed in Judge Hand’s opinion in *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

151. See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1177 (D.C. Cir. 1978) (discussing the legality of the National Football League draft under antitrust laws).

152. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 248–50 (1996).

But, as in connection with the basketball and hockey labor disputes discussed *ante*, frequently the question is which country's law applies and one of the matters which the committee is to consider relates to the "laws of the countries from which international players are signed and how those laws should affect the actions of the parties."<sup>153</sup> In examining some of the precedent on this subject, it may be useful to consider the most vivid and recent illustration of baseball globalization, the World Baseball Classic.

#### IV. World Baseball Classic

In the wake of the Olympics' 2005 decision to drop baseball,<sup>154</sup> a calculated decision was made based upon the idea that there is a greater prospect for major league players in the United States to participate in other kinds of competition rather than through a two-week interruption in August every four years for the Olympics—the kind of result which Commissioner Selig finds intolerable and which has therefore resulted in the Olympic exclusion of baseball. While the Olympics' decision can be reconsidered, it seems unlikely that baseball will change its mind.<sup>155</sup> Thus the World Baseball Classic ("WBC") is a first step toward a true World Series, the world always viewing our characterization of the Autumn Fall Classic as insular at best and arrogant at worst. More modestly, Selig has openly stated that he hopes that there will be a true World Series between what seem to be the countries with the greatest talent and infrastructure, the United States and Japan.<sup>156</sup>

The WBC has now gone through three iterations, in 2006, 2009, and 2013. With each contest the attendance as well as the profits have increased, albeit gradually.<sup>157</sup> The ratings in Japan and Cuba are far beyond those in the United States,<sup>158</sup> the finals this year in AT&T Park in San Francisco being played to

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153. BASIC AGREEMENT, *supra* note 91, at 266.

154. Lynn Zinser, *I.O.C. Drops Baseball and Softball in 2012*, N.Y. TIMES (July 9, 2005), <http://www.nytimes.com/2005/07/09/sports/othersports/09olympic.html>; William B. Gould IV, *Baseball Classic Mirrors World Events*, SAN JOSE MERCURY NEWS, Mar. 20, 2006, at 13A.

155. In fact, once again baseball has been excluded from the Olympics. See Jeré Longman, *Wrestling, with Revamped Rules, Returns to Summers Games*, N.Y. TIMES, Sep. 9, 2013, at D9, available at [http://www.nytimes.com/2013/09/09/sports/olympics/wrestling-is-re-stored-to-the-olympics.html?\\_r=0](http://www.nytimes.com/2013/09/09/sports/olympics/wrestling-is-re-stored-to-the-olympics.html?_r=0) (noting baseball will not be a part of the 2016 Summer Olympics being held in Rio de Janeiro, Brazil).

156. J.J. Cooper, *Selig: True World Series Is Eventual Goal*, BASEBALL AMERICA (Mar. 8, 2013), <http://www.baseballamerica.com/majors/selig-true-world-series-is-eventual-goal/>.

157. Mike Berardino, *Despite Successes, World Baseball Classic Still Finding Its Footing*, BASEBALL AMERICA (Feb. 28, 2013), <http://www.baseballamerica.com/international/despite-successes-world-baseball-classic-still-finding-its-footing-14790/>.

158. *Id.*

less-than-capacity crowds.<sup>159</sup> (Curiously, however, Cuba played to near-empty stadiums in Fukuoka, Japan, when Japan was not in competition with them.) Japan has won twice, defeating once-preeminent Cuba (hobbled as it is by the numerous defections of its best talent to the United States)<sup>160</sup> and the Republic of South Korea has been a strong competitor. The third championship, in 2013, went to the Dominican Republic, defeating the Commonwealth of Puerto Rico, which had two days earlier upset Japan.<sup>161</sup> The level of play, particularly in the finals in San Francisco, was excellent if not exquisite. Rarely will one be able to see Robinson Canó, José Reyes, and Carlos Santana playing on the same team, with Canó ranging far to his left making the difficult look easy, as did Reyes with his quick hands at short. On the other hand, the United States has never advanced beyond the semifinals and the participation of players signed to major league contracts has been uneven at best because of the fear of injury by the clubs, and subtle discouragement (explicit prohibitions are not permitted) by the clubs of the players.

In fact, it is said that studies show that players who play in the WBC from Major League Baseball are less likely to be on the disabled list than those who do not.<sup>162</sup> But timing is a problem for the WBC in a number of respects. For the United States, the games are played in February and March when Spring Training commences and where exhibitions in Florida and Arizona are not played competitively. Cuba, on the other hand, is marching down the final laps of its pennant race. But Japan is in the same seasonal situation as the United States and the 2013 WBC champion Dominican Republic team was led by players who were part of the American spring training system. Yet, as noted previously, the reality is that clubs are reluctant to have their players play, a factor which undermines competition or at least the position of the United States.

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159. Bill Shaikin, *Is WBC a Success Despite Poor Attendance for Final Round?*, L.A. TIMES (Mar. 19, 2013), <http://articles.latimes.com/2013/mar/19/sports/la-sp-sn-wbc-attendance-bud-selig-20130319>.

160. By some counts, there have been at least 240 Cuban baseball players that have defected to the U.S. over the last few decades. *Complete List of Known Cuban Baseball Defectors*, CUBAN BALL (2012), <http://www.cubanball.com/Images/History/RedBall/Defect/Defect.pdf>. This includes at least thirty former members of the Cuban national team. *List of Cuban Defectors*, BASEBALL REFERENCE (Apr. 8, 2013), [http://www.baseball-reference.com/bullpen/List\\_of\\_Cuban\\_Defectors](http://www.baseball-reference.com/bullpen/List_of_Cuban_Defectors). Of course, Cuba is the only team that has lost its players to Major League Baseball; the Dominican Republic, Venezuela, Puerto Rico, Japan, Korea, and even the Netherlands are playing with some major leaguers. This is because the defecting Cubans cannot return to Cuba. See, e.g., *2013 Baseball Roster for WBC Participating Teams*, BASEBALL REFERENCE, [http://www.baseball-reference.com/bullpen/2013\\_World\\_Baseball\\_Classic\\_\(Rosters\)](http://www.baseball-reference.com/bullpen/2013_World_Baseball_Classic_(Rosters)) (last visited Nov. 25, 2013).

161. *Dominican Republic Blanks Puerto Rico to Win WBC Championship*, ESPN (Mar. 19, 2013, 8:00 PM), <http://espn.go.com/extra/baseball/wbbc/recap?gameId=330319117>; Jim Caple, *Puerto Rico's Upset Upsets Japan*, ESPN (Mar. 17, 2013), [http://espn.go.com/mlb/worldclassic2013/story/\\_/id/9064764/wbc-japan-loss-puerto-rico-gain](http://espn.go.com/mlb/worldclassic2013/story/_/id/9064764/wbc-japan-loss-puerto-rico-gain).

162. Jayson Stark, *Busting the WBC Injury Myth*, JAYSON STARK BLOG (Jan. 17, 2013, 12:24 PM), [http://espn.go.com/mlb/blog/\\_name/stark\\_jayson/id/8853591/busting-world-baseball-classic-injury-myth](http://espn.go.com/mlb/blog/_name/stark_jayson/id/8853591/busting-world-baseball-classic-injury-myth).

Timing is a problem. But if not March, when? The American All-Stars used to tour Japan in November when the weather was still decent in that country (it would not be so in the United States except on the West Coast and perhaps portions of the South). But it is difficult to have players at their highest level at that time, particularly with the now almost year-round regimen beginning in February and concluding after a 162-game schedule—including an All-Star Game which is supposed to be an exhibition but which Selig has now declared otherwise by providing that its winner will have home field advantage in the World Series<sup>163</sup> through the end of October and now sometimes in November itself. Another alternative is the middle of the season around the time of and in lieu of the All-Star Game.

The fact is that the All-Star Game has been denigrated by the strange idea (dictated by the awkward tie game of a decade ago) that the victory determines the location of the rubber game in the World Series. The players have never regarded the game as any more than an exhibition and rightly so. Some of the more vivid testimony to this proposition is the game of 2010 when Jose´ Valverde laughed and smiled with Marlon Byrd as he attempted to show him that he would confuse or fool him on the next pitch. This kind of thing, of course, would never take place in true regular season competition—or a true World Baseball Classic competition. Probably one of the best answers would be to set aside the All-Star Game every three or four years and allow for WBC games then. The difficulty with scheduling all of the games in midsummer is the same problem of the Olympics, a substantial gap of time which will interfere with the regular schedule, particularly just as the pennant race heats up and heads into its final lap.<sup>164</sup>

Until the final four teams emerge as winners, one intermediate position might be to play the WBC through to the final four teams perhaps a little later in March when players are in better shape and to postpone the final series of three games for the time when the All-Star Game is played. This would have the games at peak midseason and when baseball interest is at its greatest, children are out of school, vacations are being taken, etc. In part the lackluster attendance in San Francisco in March was attributable to Japan's departure, and with it the music and songs emanating from the outfield! Of course, no team's entry can be assured. But the identity of the finalists under the existing system is an uncertainty, not this year resolved until the evening before the finals commenced. If the finals were scheduled

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163. GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 274, 279.

164. See Joe Sheehan, *Changing the World*, *SPORTS ILLUSTRATED*, Mar. 18, 2013, at 27. A move to July would also put the WBC on a stage by itself, at a relatively quiet time on the sports calendar: pre-NFL training camps, post-NBA and NHL play-offs. The shift wouldn't be easy; it would require coordination with global leagues, and a year in which the U.S. didn't advance to the final eight—they nearly missed last week—would present a marketing challenge. Major league teams would have to make up the dates by playing a handful of doubleheaders, but sacrificing two or three home dates every four years is a small price. It's too late for this year, of course, but a 2017 World Baseball Classic that takes center stage at baseball's midseason would elevate the event on and off the field.

*Id.*

for midsummer, people would have an opportunity to make plans around the actual competition and even if, as seems likely, the United States is absent, beyond baseball purists and enthusiasts, people from countries such as Japan and the Dominican Republic can make their plans considerably before the time of the games, thus likely swelling attendance, ratings, and general interest.

This is the biggest problem with international competition in baseball—although there are others as well—American dominance and the question of who is to be the host country. Perhaps in future years Japan and (with political changes) Cuba could play this role.

Though baseball has been viewed as America's national pastime, (football's more substantial revenues<sup>165</sup> seem to rebut that proposition today) MLB must be careful to avoid the idea of American hegemony or cultural imperialism. For instance, the bracketing has been excessively in favor of the United States, which has wound up playing teams like Mexico, Canada, and even South Africa, and never in the so-called killer bracket where the Dominican Republic, Venezuela, and Puerto Rico hold sway.<sup>166</sup> Cuba, the only country whose major leaguers in the United States do not play for their own country team inasmuch as they are defectors, was pushed several time zones into the Far East in 2013 up against the highly competitive Japanese and Korean teams—although it must be noted that the Cinderella-story Netherlands team survived both the severe competition and the jetlag as it emerged from the difficult Far East competition itself.<sup>167</sup>

The pitch limit rules<sup>168</sup> are designed to favor the United States (as well as Japan and Korea) given the fact that American players (the Japanese traditionally have had a more severe regimen) are in Spring Training shape. Again, this disadvantages Cuba, which is in the home stretch of its regular season.

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165. Monte Burke, *How the National Football League Can Reach \$25 Billion in Annual Revenues*, FORBES (Aug. 17, 2013), <http://www.forbes.com/sites/monteburke/2013/08/17/how-the-national-football-league-can-reach-25-billion-in-annual-revenues/>; *MLB Revenue Reaches \$7.5 Billion*, YAHOO! SPORTS (Dec. 10, 2012), <http://sports.yahoo.com/news/mlb-revenue-reaches-7-5-164013039—mlb.html>.

166. See GOULD, *BARGAINING WITH BASEBALL*, *supra* note 7, at 274 (noting the need for more balance in bracketing).

167. Jason Coskrey, *Netherlands' Success No Overnight Phenomenon*, JAPAN TIMES (Mar. 9, 2013), <http://www.japantimes.co.jp/sports/2013/03/09/baseball/netherlands-success-no-overnight-phenomenon/#.UhKDPWT70Vk>.

168. *The World Baseball Classic Tournament's Rules and Regulations*, WORLD BASEBALL CLASSIC, [http://web.worldbaseballclassic.com/wbc/2013/about/rules.jsp#rules\\_pitcher](http://web.worldbaseballclassic.com/wbc/2013/about/rules.jsp#rules_pitcher) (last accessed Oct. 9, 2013).

And then there is the matter of the umpires, which are now divided fifty-fifty between the United States and countries abroad. This is better than previous contests, the worst being 2006 when during a major league umpire strike, American minor league umpires almost caused an international incident by blowing a call involving a sacrifice fly by concluding incorrectly that the Japanese runner had left the base too early.<sup>169</sup> It took Sadaharu Oh's calming presence to circumvent more severe international discord.

Penultimately, because Venezuela, like Cuba, poses special diplomatic relations problems for the United States, it is important that the World Baseball Classic adhere to some measure of neutrality. This was not done for instance in 2013 at the time of Hugo Chávez's death:

Chávez's death produced an awkward moment for Major League Baseball. Before Venezuela played the Miami Marlins in Jupiter, Fla., on Tuesday, representatives of the Venezuelan team asked for their country's flag to be lowered and a moment of silence for Chávez to be observed before the game. Both requests were denied.

Major League Baseball, which runs the W.B.C., takes its cue in such matters from the State Department. Chávez was no friend of the United States.<sup>170</sup>

Other kinds of problems must be addressed as we begin to think about a true World Series. And then as well, in that process there is the question of law. Thus far these issues—perhaps presaged by the apparent interest of the Toronto Blue Jays in acquiring the services of Cuba's Omar Linares to play in Canada where there is no embargo and the fact that the writ of Helms-Burton does not run that far—are presented in disputes cutting across national boundaries where leagues are based in the United States but some of the teams are in Canada.

## V. The Law of Sports National Boundary Disputes

The law, as articulated by the United States Supreme Court in *Brown v. Pro Football, Inc.*,<sup>171</sup> has deemed sports leagues to be multiemployer bargaining associations,<sup>172</sup> each franchise constituting one of the employers that is bound together for the purpose of the collective bargaining process in North America.

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169. GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 159.

170. Ken Belson, *Venezuelans Recall Leader's Love of Game*, N.Y. TIMES, Mar. 7, 2013, at B12.

171. 518 U.S. 231 (1996).

172. See Retail Assocs., Inc., 120 N.L.R.B. 388, 391 (1958); Evening News Ass'n, 154 N.L.R.B. 1494, 1495-97 (1965), *enfd.*, 372 F.2d 569 (6th Cir. 1967); El Cerrito Mill & Lumber Co., 316 N.L.R.B. 1005, 1006 (1995).

Because of scheduling, common standards of employment and discipline, as well as player mobility between the teams through both free agency, trades, and releases, the strikes<sup>173</sup> and lockouts<sup>174</sup> and the rules pertaining to them created issues by virtue of collective bargaining agreements negotiated in the United States but covering both the U.S. and Canada.<sup>175</sup> The labor market in sports is unique insofar as it relates to employee mobility and interrelated issues in contrast to regular multiemployer associations.<sup>176</sup> Thus the appropriate unit for the purpose of collective bargaining<sup>177</sup> generally prevails in the absence of so-called “unusual circumstances” within the meaning of NLRB precedent.<sup>178</sup>

Disputes which cut across national boundaries involving relationships between organized labor and multiemployer entities are properly characterized as so-called mixed territory cases because of the fact that more than one country is involved. The touchstone decision reflecting the prevailing consensus about NLRB jurisdiction over conduct in two countries is *California Gas Transport, Inc.*<sup>179</sup> where a unanimous Board held that “it is appropriate to assert jurisdiction over . . . violations which occurred in Mexico” where the “effects in the U.S.” occur within United States borders.<sup>180</sup> This holding, based upon the United States Supreme Court’s 2005 reiteration of an “effects

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173. See NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345–46 (1938); NLRB v. Int’l Van Lines, 409 U.S. 48, 50 (1972); Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 454 (1982).

174. See NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96–97 (1957); Am. Ship Bldg. v. NLRB, 380 U.S. 300, 307, 323 (1965); Weyerhaeuser Co., 166 N.L.R.B. 299 (1967).

175. Silverman v. Major League Baseball Player Relations Comm., Inc. (*Silverman II*), 880 F. Supp. 246, 257 (S.D.N.Y. 1995); Wood v. Nat’l Basketball Ass’n, 809 F.2d 954, 961–62 (2d Cir. 1987).

176. See WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS AND THE NLRB – A MEMOIR 138–41 (2000).

177. See Mallinckrodt Chemical Works, 162 N.L.R.B. 357, 399 (1966); General Motors Corp., Cadillac Motor Car Div., 120 N.L.R.B. 1215, 1221 (1958).

178. Retail Assocs., Inc., 120 N.L.R.B. 388, 395 (1958); see also, e.g., James Luterbach Constr. Co., Inc., 315 N.L.R.B. 976, 982 (1994) (Gould, Chairman, concurring); Chel LaCort, 315 N.L.R.B. 1036, 1036–37 (1994); Resort Nursing Home, 340 N.L.R.B. 650, 651, 654 (2003) (implicitly approving the *Chel LaCort* doctrine), *enf’d*, 389 F.3d 1262 (D.C. Cir. 2004); Lexington Fire Prot. Grp., Inc., 318 N.L.R.B. 347, 348 n.9 (1995) (Gould, Chairman, concurring).

179. 347 N.L.R.B. 1314 (2006), *enf’d*, 507 F.3d 847 (5th Cir. 2007); see also Gen. Dynamics Land Sys., Case No. 19-RC-76743 (N.L.R.B. July 20, 2012) (distinguishing this line of authority from the application of the statute to permanent employment abroad where assignments inside the United States are not present).

180. California Gas Transport, Inc., 347 N.L.R.B. 1314, 1316 (2006).

test,”<sup>181</sup> which allowed for the assertion of jurisdiction regarding conduct engaged in outside the United States where the effect was considerable inside the United States, negated or substantially qualified the presumption against extraterritoriality under the National Labor Relations Act and related statutes followed by the Court until the early 1990s. *California Gas* reiterated the position of the Board taken more than a decade ago when it asserted jurisdiction where the “main effect of the Respondent’s actions . . . was not extraterritorial . . . [in-asmuch as] the results of the [Employer’s] conduct were principally felt in the United States.”<sup>182</sup>

*California Gas* adhered to precedent in the antitrust arena, most particularly a landmark opinion by Judge Learned Hand for the Court of Appeals for the Second Circuit.<sup>183</sup> This precedent was followed in Supreme Court decisions relating to antitrust and other statutes,<sup>184</sup> as well as with regard to foreign flagships operating in U.S. waters and the applicability of American antidiscrimination law to conduct both in and outside of the United States.<sup>185</sup>

Similarly, the Board was following precedent involving NLRB assertion of jurisdiction over employees who have engaged in protected concerted activities while in Canada.<sup>186</sup> In sum, a presumption against extraterritoriality in the United

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181. *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 130–31 (2005).

182. *See Asplundh Tree Expert Co.*, 336 N.L.R.B. 1106, 1107 (2001), *enf. denied*, 365 F.3d 168 (3d Cir. 2004) (involving American workers allegedly discriminated against in violation of the Act while on temporary assignment in Canada).

183. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 446 (2d Cir. 1945); *cf. Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 600–01, 608 (9th Cir. 1976) (concerning the application of U.S. antitrust law to activities in other countries).

184. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 779 (1993); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004).

185. *Spector*, 545 U.S. at 130 (plurality opinion); *see also id.* at 142–45 (Ginsburg, J., concurring in part and concurring in the judgment) (advocating an even broader interpretation of the effects test and less focus on a requirement of explicit congressional intent); *see generally* Todd Keithley, Note, *Does the National Labor Relations Act Extend to Americans Who Are Temporarily Abroad?*, 105 COLUM. L. REV. 2135 (2005) (arguing the Act applies extraterritorially to workers temporarily abroad).

186. *Asplundh Tree Expert Co.*, 336 N.L.R.B. at 1107; *see also Dowd v. Longshoremen I.L.A.*, 975 F.2d 779, 789 (11th Cir. 1992) (the Board asserting jurisdiction over secondary boycott activity engaged in by Japanese unions in Japan acting in concert with their American counterparts); *Coastal Stevedoring Co.*, 323 N.L.R.B. 1029, 1031 (1998) (Gould, Chairman, dissenting). American labor law has been applied to foreign flag-ships, *Int’l Longshoremen’s Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 196 (1970), and the Court has held that a union refusal to upload cargo shipped from the Soviet Union in protest against the country’s invasion of Afghanistan constituted a secondary boycott violation of the Act, notwithstanding the Board’s absence of jurisdiction over either country, *Int’l Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212, 214, 225–26 (1982).

States<sup>187</sup> has not always applied,<sup>188</sup> unless the case involves only American workers permanently assigned elsewhere.<sup>189</sup> Both Canada and the United States have struggled with the question of what this means when sports teams are involved in labor disputes. For instance, the NLRB sought injunctive relief in 1981 and 1995 against Major League Baseball and its constituent teams including the Canadian teams—at that time the Montreal Expos and the Toronto Blue Jays—and was successful in the latter instance<sup>190</sup> but unsuccessful in the former.<sup>191</sup> This decision, though arguably prosecutorial rather than adjudicative,<sup>192</sup> contradicted a position that the Board took in the 1970s in soccer when bargaining practices and procedures had not yet been established.<sup>193</sup> In contrast, as in baseball, jurisdiction was asserted over Canadian teams in basketball by the New York City regional

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187. EEOC v. Arabian Am. Oil Co. (“*Aramco*”), 499 U.S. 244, 248 (1991); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20 (1963). *But see Koibel v. Royal Dutch Petroleum*, 133 S. Ct. 1659, 1664–65 (2013) (potentially reviving the *Aramco* holding).

188. See Keithley, *supra* note 185, at 2145 (“Although it is fair to infer that *Aramco* posited a strict territoriality view, subsequent Supreme Court decisions have backed away from such a strict definition of extraterritorial conduct—and for good reasons . . .”); *id.* at 2149 (“*Aramco*’s strict presumption against extraterritoriality . . . was overtaken by the effects test. Two years after *Aramco*, the Supreme Court endorsed the use of the effects test to evaluate the jurisdictional reach of the Sherman Act.”); *Alcoa Marine Corp.*, 240 N.L.R.B. 1265, 1265 (1979) (holding that, notwithstanding precedent excluding permanent assignments from American labor law coverage, national labor law nonetheless applies to a ship’s “indefinite—even permanent—stay outside United States territorial water”); *Aguayo v. Quadretech Corp.*, 129 F. Supp. 2d 1273, 1280 (C.D. Cal. 2000) (holding that the relocation of facilities to Tijuana, Mexico, for antiunion reasons was unlawful even though the relocation was to a foreign country not covered by the Act, and ordering the employer to restore to its California facility any bargaining unit work which had been subcontracted or relocated to Mexico, thus rescinding all agreements to subcontract work to Mexico) (foot-note omitted). *But see Koibel*, 133 S. Ct. at 1664–65 (potentially reviving the *Aramco* holding).

189. See *Computer Scis. Raytheon*, 318 N.L.R.B. 966, 970–71 (1995) (holding that the Board’s jurisdiction does not extend to cover employees of American companies working at military bases in foreign territories); *GTE Automatic Elec. Inc.*, 226 N.L.R.B. 1222, 1223 (1976) (holding that the Board’s jurisdiction does not extend to cover workers permanently assigned to Iran); *RCA OMS, Inc.*, 202 N.L.R.B. 228, 228 (1973) (holding that the Board’s jurisdiction does not extend to cover Greenland-based employees).

190. *Silverman II*, 880 F. Supp. 246, 250 (S.D.N.Y. 1995); *Silverman I*, 516 F. Supp. 588, 589 (S.D.N.Y. 1981).

191. See *Silverman I*, 516 F. Supp. at 589 n.1.

192. *E.g.*, *Muffley ex rel. NLRB v. Spartan Mining Co.*, 570 F.3d 534, 540 (4th Cir. 2009) (finding that the Board’s ability to seek injunctive relief under section 10(j) is prosecutorial rather than adjudicative); *Overstreet v. El Paso Disposal*, 625 F.3d 844, 852 (5th Cir. 2010) (same); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 847–48 (8th Cir. 2011) (Colloton, J., concurring) (same).

193. *N. Am. Soccer League*, 241 N.L.R.B. 1225, 1228–29 (1979) (holding North American Soccer League to be a single entity, but refusing to exert jurisdiction over the Canada-based clubs on the grounds of extraterritoriality), *enfd*, 613 F.2d 1379 (5th Cir. 1980) (declining to address the extraterritoriality issue).

director.<sup>194</sup> North of the border, the picture is more complicated. For instance, the Ontario Labor Relations Board in both baseball and basketball disputes involving referees has held that, notwithstanding the right to replace in the United States, umpires could not be dealt with in this manner in Canada.<sup>195</sup> On the other hand, in the hockey cases the NLRB General Counsel indicated that case law involving temporary assignments was to be contrasted with the permanent assignment cases, and thus demonstrated an interest in jurisdiction over the NHL.<sup>196</sup> In hockey, both the Alberta<sup>197</sup> and British Columbia boards<sup>198</sup> have declined to assert jurisdiction because of the “unique nature of the league structure . . . [which] can be summarized as an interdependent joint enterprise with a common set of rules.”<sup>199</sup> A similar issue was pending before the Quebec Labor Relations Board,<sup>200</sup> where that Board was to address the same issue prior to the resolution of the 2012-13 hockey lockout, this mooted the legal issues pending in that province in early 2013.

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194. Nat'l Basketball Ass'n, Case No. 2-RD-1354 (N.L.R.B. R.D. July 26, 1995) (on file with author).

195. See *Advice Memorandum: National Hockey League Players' Ass'n*, No. 2-CB-20453 (N.L.R.B. G.C. June 30, 2006) (on file with author) (holding that Canadian franchises, as part of the multi-employer bargaining arrangement, fall within the ambit of the NLRA); Richard Sandomir, *Union Umps Make Call on Replacements*, N.Y. TIMES, Apr. 27, 1995, at B12; Clifton Brown, *NBA Refs Get New Offer*, N.Y. TIMES, Nov. 17, 1995, at B18; GOULD, BARGAINING WITH BASEBALL, *supra* note 7, at 273.

196. In representation proceedings, the NLRB has refused to take jurisdiction over the Canadian clubs. *N. Am. Soccer League*, 236 N.L.R.B. 1317, 1322–23 (1978) (Murphy, Chairman, dissenting in part) (“I agree with the Union and would assert jurisdiction over the Canadian clubs. . . . [T]he exercise of sound discretion compels the Board to do so.”); *N. Am. Soccer League*, 241 N.L.R.B. at 1225, 1226 n.7, 1228 (holding North American Soccer League to be a single entity, but refusing to exert jurisdiction over the Canada-based clubs on the grounds of extraterritoriality), *enf'd*, 613 F.2d 1379 (5th Cir. 1980) (declining to address the extraterritoriality issue).

197. Re: Application Brought by the NHLPA, Chris Butler et al., Board File No. GE- 06474, Alberta Labour Relations Board (Oct. 10, 2012) [hereinafter Application, Chris Butler].

198. Orca Bay Hockey Limited Partnership, [2007] B.C.L.R.B. No. B172/2007 (July 31, 2007), available at [http://www.lrb.bc.ca/decisions/B172\\$2007.pdf](http://www.lrb.bc.ca/decisions/B172$2007.pdf). The British Columbia Labour Relations Board declined to exercise jurisdiction because to do so would undermine that stability which is integral to the collective bargaining process on a multi-employer basis. See *id.*

199. Application, Chris Butler, *supra* note 197, ¶¶ 66–67.

200. Re: Application Brought by the NHLPA, Colby Armstrong et al., C.M. No. CM- 2012-4431, Commission des relations du travail (Sept. 12, 2012). The author was an expert witness in this case as well as the British Columbia case. See John MacDonald, Note, *Don't Cross That Line! The Case for the Extraterritorial Application of the National Labor Relations Act*, 64 U. MIAMI L. REV. 369, 380–81 (2009); William B. Gould IV, *Labor Law Beyond U.S. Borders: Does What Happens Outside of America Stay Outside of America?*, 21 STAN. L. & POL'Y REV. 401 (2010).

Again, the difficulty here is that whatever the persuasiveness of the authority cited, as sports become more international some set of rules regarding a more effective method of dispute resolution will be required.<sup>201</sup>

## Conclusion

Baseball, sparked by Jackie Robinson and his audacious bid to break the twentieth century color bar, was important in diminishing racial barriers in the United States, notwithstanding the unwritten quota which limited black participation in the game to only the most outstanding black American players until the 1970s. The game became truly desegregated toward the end of the 1970s until the past decade or two when the number of black players began to decline appreciably. The factors for this decline are numerous, but some of them can be effectively addressed by the NCAA by establishing parity between athletic scholarships available in the revenue-producing sports like football and basketball, and baseball. Major League Baseball itself can play a role, not only through its continued reliance upon programs aimed at the central cities like the RBI Program, but also by financially augmenting baseball athletic scholarships.<sup>202</sup>

Globalization has been a factor in black American decline and has been relied upon by MLB as it pursues new markets and revenue and labor sources, which have been more inexpensive than the American player pool. The globalization process is valuable in making the game more international along with the benefits always associated with the expansion of the talent pool. Internationalization suffered a setback with baseball's exclusion from the Olympics, the American game bringing this upon itself by refusing to set aside a period of time once every four years to compete. The World Baseball Classic is an important first step toward a genuine World Series which may obtain as much international recognition for the sport than would have been the case had the Olympic route been pursued. The transnational boundary disputes, which have emerged principally in hockey but have affected baseball and basketball, warn us about some of the issues that are likely to arise in connection with both an international draft, contemplated by the 2011 collective bargaining agreement, as well as future international competition.

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201. See Matthew J. Mitten & Hayden Opie, "*Sports Law*": *Implications for the Development of International, Comparative, and National Law and Global Dispute Resolution*, 85 TUL. L. REV. 269, 283, 321–22 (2010).

202. See *supra* notes 51–53 and accompanying text.

## **Sports and the Culture of Performance for Young Males & Men: The “Good”, “The Bad” and “The Need to *Transform*” the “Bully Culture” (1)**

By William S. Pollack, PhD

SPORTS, FOR MANY YOUNG MALES, indeed for a number of grown or “almost grown” men are a form of *intimacy*--they are one of the most important activities in our still somewhat constricted societal codes of masculinity through which males can relate closely, often with other males. At their best, sports provide young men a place where they can take off their “gendered straitjackets”, loosen up, and express a full range of emotions—from the joyful exuberance of a last minute goal to the nagging disappointment of being crushed by the other team, from the excitement of being the one to pull off a brilliant unexpected play, to the embarrassment of fumbling the ball in the last quarter. Sports may provide young men a positive theater for the unfettered expression of their feelings, a place where it’s okay to be spirited, emotive, and passionate. As one young man from a fairly academically intensive college prep program told me, “I get to run fast, shout things out, scream, whatever. It lets me be *me*.”

Through sports, boys and young men are often able to *transform themselves*--from isolated competitors into bonded intimate teammates, sharing purpose, meaning and a deep sense of caring for one another. Despite a common myth in our society that sports, for males, disconnect them from loved ones, play and sports need not take males away from healthy relationships; they may lead young men toward friendships with other young men (and young women), a camaraderie with its own physical vocabulary, its own discipline of love. Sports are *transformational* for young men, by allowing them to assert sides of themselves they ordinarily feel pressured to hide in our society, and by helping them to learn—often through the inevitable experience of *loss*—how to deal openly with their feelings of shame, failure, sadness and the *inevitability of human limitation*.

Sports also can give young men a meaningful sense of teamwork, of invoking a higher mission that goes beyond the self, of accomplishing something together that is valuable and significant. They allow boys --in-transition-to-manhood to feel a dedication to others, experience feelings of love and commonality within comfortable bounds, and learn, in a group setting, how to cope with defeat and savor victory. And for young males from families that couldn’t provide all the loving relationships they really needed, sports can sometimes offer the kinship, affection and support that was missing at home.

But sports can also affect young men and men in far less positive ways. For some young males, playing sports invites unbridled aggression and becomes a place where they let out inappropriate feelings of anger and frustration, engage in physical as well as psychological bullying, a place where they actually try to seriously injure other people. “It’s rough out there,” one football player confided in me, “some guys play hard just the way they should. But other guys just seem like they’re out to get you—you know, they just try to demolish you.”

Sports can thrust young men into a cult of competition --or what I deem a *negative culture of performance*-- manifested by the compulsive goal of winning at any cost and by a quest for narcissistic glory at the expense of others. They can place impressionable young males under the tutelage of coaches who teach combat, rather than teamwork, who value winning more than learning, who mentor far less than they shout, humiliate and abuse.

They are coaches as “bullies” and they represent the negative role models of our greater society’s growing “bully culture” And as much as sports can provide a safe, positive space for young men to express a gamut of feelings, it can also push some boys—especially those who are not interested in sports or who are not skilled at playing them, the proverbial “last boys picked” or “bench warmers”—to feel left out, unworthy, diminished, shameful.

What makes all that is so positive about sports begin to dim, I believe, is when sports cease to be *play*. D.W. Winnicott, the distinguished English pediatrician-turned-child psychoanalyst observed that for children, play was at the heart of healthy, integrated development. His words are especially pertinent to young males whose inner selves are too often suppressed and hidden by society’s rigid and atavistic codes of masculinity; “. . . Playing shows that . . . [the] child is capable . . . of developing a personal way of life . . . eventually becoming a *whole being* . . . welcomed by the world at large.” Sheer competition among young males rarely builds character and does little to bring boys closer to one another. But when we keep sports in proper perspective—when we see sports primarily as a chance to come together for joyful, spirited, high-energy *play*—sports can help young men to discover new competencies, buttress their feelings of self-worth, reconnect their “voice” with the deepest stirrings of emotion in their hearts and widen their circle of genuine emotional *connections*.

### **The Emotional Salience of the Coach**

For many young men, some of their most affectionate, intimate experiences take place in a group when the task is clear and where feelings can be legitimately linked to that task. This highlights the importance of the team and the emotional salience of the coach. So much of what distinguishes all that is good from all that is bad about sports is what young males are taught about sports, what attitudes prevail among those they play with, and how they are treated when they succeed

or fail in playing; and crucial to each of these factors is the Coach. Showell Styles has remarked that sports are “useless like poetry and dangerous like lovemaking.” It is the role of the coach to encourage young men’s aesthetic cooperative sense of play while nudging them away from the dangers of self-serving recklessness.

The coach may be a professional or “amateur”, a paid expert or a volunteer. When I refer to the “coach,” I mean anybody who supervises, in this case, young men, playing sports. So much of a growing males’ experience with sports, I believe, depends on the coach: how aware and sensitive he or she is, whether he or she mentors the young men, how the coach deals with his acolyte’s strengths and weaknesses, his successes and failures. A coach is an emotionally salient figure in a young male’s life. When he or she cheers on boys at all skill levels, models a sense of fairness, and exudes a sense of levity, fun, and fair play that transcends winning or losing, a coach can make playing sports an immensely positive, learning, transformative, experience for young men.

A coach who ensures that sports are an inclusive activity—one who cheerfully embraces young men at all different skill levels (and who makes sure the other boys do too)—can help each young male athlete feel that he is able, skilled, and important—that he really matters to the team. This kind of coaching helps a young man not only to overcome his sense of loneliness and isolation--substituting connection for more removed autonomy--but also to boost his feelings of genuine self-esteem. By contrast, a coach who bullies, derides or humiliates boys when they make mistakes, who constantly pushes young men beyond their natural skill levels, or who only offers words of encouragement when the young men actually win, may cause our sons to feel ashamed, harden themselves in the ways society has done too much of, already, model a culture of negative performance pressure and teach those under their tutelage that bullying is just all part of the game (“boys will be boys”), leaving them; indeed forcing them to hide behind their masks of false self-confidence or hurtful bravado.

Likewise, a coach who teaches the value of balanced disciplined effort (“a personal best”)—rather than stressing fierce competition and winning as the crux of *each and every* game—can play a vital mentoring role that encourages young men to see sports as an opportunity for physical and emotional self-transformation rather than as an outright and impossible test of his masculinity.

A division 1 college athlete responding to an interview question asking him to in his memory associate to his “best” experiences with coaches was taken back to the coach of his high school football team. “Before we began scrimmaging, he led our team through an hour of intense calisthenics. We had to do about one hundred sit-ups, push-ups, deep knee bends, jumping jacks, and a whole bunch of exercises. But Coach didn’t just shout out orders at us. He’s yelling out what to do *while he’s doing it too!* *He was real demanding, but he put himself through the training with us.*”

“He was great because he pushed you hard but had a balanced attitude about it. Like he told us that if we didn’t feel up to practice one day, we try to show up, but we could tell him we’re tired and, for that day, he’d give us a lighter, separate routine to do. Some coaches would just yell at you or push you harder. He was realistic. He never tried to harass, to bully or shame you, or make you feel bad if you couldn’t do something. He just seemed to want to help us do the best we could.”

Coaches can convey a moral stance that is not rigid, punitive or unyielding, but rather deriving from a loving sense of connection between the young men in his charge and this important adult role model. As one boy explained to me about his soccer coach, “his golden rule is don’t ever tell anybody what they can or can’t do—just smile and show them what *you* can do. Nobody’s perfect and the only thing you can really control is your own game. Our coach is great . . . sort of like a camp counselor or something. He tells us that if you do good, other people will be inspired and then they’ll do good too.”

“What’s great about him is that when we win a match, he takes us out for doughnuts and we celebrate. And when we lose a match, we still go out for doughnuts—we’re just a little quieter in that case.”

As the young man’s guide and mentor, the coach is in many respects a stand-in for mother and father, and society, at large. Even young men with two very loving parents may find their afternoons filled with the voice of a coach rather than those of his parents. Especially for the adolescent boy or young man-in-the-making, who may find himself somewhat distanced or detached from his parents, the coach may be one of the few adults to whom he will look for guidance, support and encouragement.

One collegiate athlete sang the paeans of his high school softball coach. “I had to go through a bunch of surgeries to correct my hip from what could have become a permanent limp. I had a lot of problems walking normally, at times, and kids made fun of me because my gait got wobbly and looked weird. Coach told the other kids that anybody that made fun of me would be kicked off the team and that a lot of pro players had hip problems too. When I was able, he let me play in a lot of games and didn’t yell at me when I screwed up. When I was in the hospital, he came by to see me and even lent me his iPhone so that I could listen to music in the recovery room. He kept my hopes up, when I felt down reminding me that if I got good grades and kept on practicing my game, I might be able to get a scholarship at a top school. He’s why I’m here today!”

The coach has an incredible opportunity through sports to help young men feel good about themselves. By avoiding setting up sports in a way that renders it difficult, even impossible, for most boys to succeed, by staying away from the harsh criticisms of our society’s bullying culture, avoiding shaming words, and by

inspiring all young men—no matter what their relative skill level—to feel like they can develop their athletic skills and contribute to the team, coaches help their players to eschew sports as a negatively tinged performance at all costs cult for competition or narcissistic aggrandizement; and instead make sports a place for personal growth.

When I am asked to advise coaches about how to improve their styles from a psychological perspective, I frequently encourage them to think of a teacher or other mentor they had when they were growing up whom they admired—somebody who was thoughtful and encouraging, someone who actually helped them learn and grow. A coach, I tell them, should model himself or herself after such a teacher. For example, imagine if a teacher always started teaching a subject by testing the students with problems that were far above their skill level. Or imagine if a teacher who, every time a student offered an answer in class that was wrong, told the student that he was a “zero” or a “loser.” Or imagine a teacher who told his or her students that if they couldn’t get one hundred percent on all their tests or couldn’t achieve straight A’s, they would become complete failures. Contrast this kind of teacher, I tell coaches, with the teacher who chooses tasks that students, if they try, can actually do reasonably well at, who explains why an answer is wrong (rather than berating the student who offered the incorrect response) and who helps each student—so long as that student is making a good faith effort—to feel good about the academic progress he or she is making. The first kind of teacher, I stress, ends up helping a small segment of students—either those who are already very knowledgeable, or those with incredibly tough skins. The second kind of teacher, by contrast, helps a broad range of students including those who are naturally bright as well as those who struggle academically, those who feel secure as well as those who are less sure of themselves.

Likewise, I explain to coaches, when sports are set up so that young men at all skill levels can participate and master the game, so that boys receive plenty of encouragement, and so that winning is not the end all and be all of the game, those young males will not only enjoy the experience, but also will learn and grow from it enormously. Coaches often find that, in addition to changing the way they act when they’re coaching—by focusing on what each boy is *able* to do as opposed to what he’s *unable* to do—coaches also need to structure sports differently in order to embrace all young men at all skill levels. For example, in one college some coaches have found it helpful—rather than just having varsity and junior varsity teams—to set up three, four or even five different teams. In some cases these teams are divided by skill level, and in some cases they are set up so that boys with top athletic skills are mixed in with boys with less advanced skills. Another approach is to create an “intramural” system where teams that are not ready to play against teams from other schools practice side by side with teams that are ready to take on such outside competition.

But regrettably not all coaches have a positive, nurturing attitude and many have limited interest in structuring sports creatively to embrace young men's varying degrees of skill. Far from helping and reassuring the boys they mentor, some coaches instead resort to handmaiden of the "bully culture", *shame*, exhorting boys to "play with your pain," "get your butt going" and not "act like a girl." One student painfully, almost with tears coming to his eyes, recalled one such traumatizing coach: "He acted like an army officer or something—a total drill sergeant. He would shout out your last name and then just tell you off, like 'Schwartz—you're doing push-ups like a little sissy. Now get your ass in gear!' or 'Schwartz—what the hell are you doing? Can't you see the damn goal? Which side are you playing for anyway?'"

A coach who merely manipulates his players to win at any cost, or models unrestrained anger, communicates the soul-denying harshness of sheer competition, where the essential element of *play* within sports has been removed, and with it the chance for personal growth. I believe it's essential for those in authority over athletics, and to make certain that heir coaches are men or women who see sports as *play*, who project the kind of warmth and understanding that enables their charges to cope with winning and losing, and who consistently encourage their players no matter what their relative skill level. Just as none of us would put up with a teacher who constantly humiliated their son, as advisors, athletic directors or consultants we should make sure our young men are mentored by thoughtful caring coaches, nurturing and empathic coaches *whose actions*, to paraphrase Emerson, *speak as loudly as positively as their words*.

### **Sports as Transformation**

When young men are taught a balanced approach to playing sports—one that stresses learning much more than winning—sports can provide boys an arena in which to share the full range of feelings they are experiencing without fearing that they will be shamed for showing vulnerable emotions. Whether it's football, basketball, baseball or golf, most all sports provoke tremendous highs and lows. Sometimes our victories and defeats are personal—for instance, when we win a game of one-on-one tennis, fall down when we're skiing, or score substantially below par in a round of golf—and sometimes they are communal—a basketball team's defense gets clumsy in the third quarter, a baseball team rallies to hit a string of home runs in the final inning of a home game. But whether we experience them individually or as a team, these ups and downs encourage a plethora of passions: joy, despair, pride, embarrassment, anger, triumph, and humility. The late commissioner of baseball, the Renaissance scholar A. Bartlett Giamatti, referred to, ". . . That aspiration . . . to be taken out of the self . . . for a moment in touch . . . with .a joy . . . free of all constraint. *It is a sensation not of winning, but of fully playing.*" What he described as sports' "reservoir of transformation".

On the court and in the field, boys—if they are not discouraged from doing so—often seem able to share these feelings, free of the emotional straight jackets they usually feel pressured to wear:

“Normally, I would never cry in front of my friends,” explains Jamal, a freshman player on his college’s football team, “but when we lose a game—especially if it’s really close—I’ve seen a lot of guys cry. Sometimes you just can’t hold it back.”

“We almost made it to the state finals,” explained Josh, lamenting his track team’s recent lost match to another local team. “At our last meet, when we lost in pole vaulting and then in the 500 meter run, our captain was so fed up he just got all choked up and started to cry.”

Lionel, the captain of his highly touted high school basketball team, spoke to me about the kind of sharing of emotions he appreciates, “Like when we win, we just get all together in a group huddle and start hugging each other, patting each other on the back. When we won against this undefeated team the other day, one guy on my team came up behind me and just grabbed me. For a second I thought he was going to tackle me. But actually he was just giving me this huge hug. He couldn’t believe we won!”

“Football’s a pretty dangerous sport,” another player, Willis explained, “and a few weeks ago one of our guys got really badly injured and they had to take him away in an ambulance. There was this really long time-out, so our whole team got together, went into a huddle, and started praying for him. Some of the guys were really shaken up by it.”

For many young men, sports are the one place where they sense it’s all right to show what they really feel and who they really are. Because the source of their feelings is external and obvious—a missed goal, a great shot, a huge win, and a narrow loss—the shame they usually experience if they show these ‘vulnerable’ feelings can sometimes fall away. Especially with a coach who does not bully or humiliate them for their mistakes and who instead encourages them no matter how they perform, boys can come to feel less inhibited, freed to take off their masks and to share their feelings honestly without fear of embarrassment. Through sports young men can transform themselves from mere competitors into bonded teammates, sharing a sense of common purpose and meaning. And in this sharing, sports may lead boys toward friendships with other boys, friendships with their own physical vocabulary and their own disciplines of love.

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Indeed, many young males, in our society, often feel more comfortable caring about and nurturing each other in the context of playing sports than in almost any other area of life—so long as the caring and nurturing is expressed in the team

concept and channeled toward the external goals of the game. Boys show these feelings sometimes by using words—“nice going,” “don’t worry about it,” “hey, are you alright?”—And perhaps most often through physical gestures—a pat on the back, an embrace, or thumbs up. In Mark Harris’ baseball novel *Bang the Drum Slowly*, one ballplayer expressed his feelings this way: “. . . You felt warm toward them, and you looked at them, and them at you, and you were both alive, and you might as well said, ‘Ain’t is something? Being alive, I mean! Ain’t it really a great thing at that?’ *And if they would of been a girl you would of kissed them, though you never said such a thing out loud but only went on about your business.*”

Sports, I have found, is often one significant area in our “bully culture” where young men, playing under the aegis of a caring Coach, can have affectionate relationships, and can express feelings of connection and love without fear of being being criticized, bullied or shamed.

### **Sports as Humiliation and Hardening: When Sports Up the Shame Ante**

But as much as sports can give boys ample opportunities to learn and grow, share feelings, and build friendships, regrettably they can also lead some boys—and adults—to mistreat other boys, most usually by shaming them or by pushing them to toughen up. I have found this happens, most often, when boys are prodded to believe that doing well or winning—rather than having joyful playing—is the end all and be all of the game. In sports an overall wish to do well and win, of course, is “part of the game” and perfectly normal. But when being an athletic high achiever or “hero” or “crushing the opponent” becomes the primary thrust of playing a sport, it’s little surprise that to defend against the pain of failing and disappointing others—to avoid being shamed—many boys are forced to harden themselves. When playing sports becomes about winning at any cost—and about humiliating anyone who loses or who contributes to your own loss—boys feel pressured to reapply their emotional armor, act tough, and suppress any feelings that could make them appear weak, vulnerable or afraid.

Thus as much as sports can create a positive space where boys feel comfortable expressing their feelings—what I call the “transformative” experience of sports—it can also thrust boys into a universe of shame and humiliation where they sense their feelings must be buried even further. Just about any parent who has sat through a high school baseball game has heard the cries of “He’s no batter! He’s not batter!” resounding throughout the ball field and has watched the teenage batter—instead of blushing, succumbing to tears, shouting back, or just giving up entirely—actually tighten up his face, concentrate carefully on the oncoming pitches, and apparently ignore the humiliating epithets flying about him. And many parents have had to deal with a son who—less talented than some of his other peers—has been put through the humiliation of being consistently picked last for gym class teams or perhaps regularly taunted as being a “wimp,” a “loser”

or a “faggot” when he’s attempted in vain to succeed at a particular sport. While some of these boys may try to avoid athletic activities altogether, others harden themselves against the pain of being persistently rejected and disgraced.

### **Sammy: The Lessons Start Very Young and Can Last a Lifetime**

The first time I observed Sammy, he seemed rather lost in the large white ice skating rink. I was taking my daughter to her skating lesson, and I noticed one of very few five-year-old boys taking lessons among a majority of girls. Dressed in his miniature hockey uniform, Sammy looked like this was the last place on earth he wanted to be. Still, encouraged by the comments of his father on the side lines, Sammy valiantly struggled to stay up on those skates, but his wobbly legs kept betraying him.

After his forth spill—this one drawing blood from his already skinned knees—little Sammy sought his father’s solace, near the visitors’ gallery. “No more today, Dad,” Sammy pleaded, “My knee really hurts!”

“Nah . . . that doesn’t hurt too much,” his Dad replied, “C’mon keep going—you’re not going to let a bunch of girls beat you out of the competition are ya’?”

The red-faced shame on little Sam’s face was painful to see; he didn’t want the whole world to think he was a “wimp,” less strong than the girls. He barely held back his tears and slid away from his dad, back onto the ice.

And then there was a loud and hard-hitting crash. Before he could steady himself, Sammy was smashed by two teenage girls who, before they could stop themselves, collided with him simultaneously from opposite sides. Sammy was the cheese in this embarrassing pain sandwich, and he fell to the ice crushed both emotionally and physically.

Sammy’s father helped him up, and asked, “Are you OK, kid?”

The beleaguered little boy, looking like Mohammed Ali after too many rounds of too many fights, stammered, “I guess so.”

“You’re OK. You’re fine,” his now-desperate father scolded him, “Shame on you, Don’t give up! *I know just what will help . . . to keep skating . . . it will loosen you up.*”

The forlorn little boy obediently turned around and continued skating . . . falling . . . skating . . . falling.

Almost two years later, I arrived at the rink to pick up my daughter when I noticed that a group of about twenty boys were scrimmaging in preparation for an

upcoming hockey game. Donning a bright green helmet and matching uniform fitted over pads clearly too big for his frame, there perchance was three-foot Sammy skating with the other boys and chasing after the puck.

Within just minutes of observing the practice session, I saw an inevitable repetition of what I had seen a last year or so before. As Sammy maneuvered the puck towards the opposing team's goal, three much larger boys rammed into him from all angles. When Sammy began to lose his balance, one of the boys helped him finish the fall, shoving little Sammy forcefully into the ice.

If just months ago this might have left him immobilized and in tears, today Sammy got right back on to his feet, adjusted his helmet, and skated off after the boys. His skating now significantly improved, Sammy raced after the opponents with abandon. As he approached the kid who had pushed him, Sammy skated even faster. When their two bodies collided almost head on, his opponent went flying against the side board with a forceful bang.

"That a boy!" I heard a man shout from the bleachers just a few feet behind me. Sammy's father stood up, let out a loud whoop, and threw his two fists up into the air to salute his son. As if he couldn't hear his father, Sammy just kept his eyes squarely on the ice and skated off behind his teammates.

\* \* \*

Over the years, I've told the story of Sammy to many groups, and I've learned a lot from the reactions it receives. Some people don't see anything wrong with Sammy's experience or his Dad's conduct. Sammy, they believe, will have to learn to "play rough with the big boys." These folks have resigned themselves to the *shame hardening process*. They see sports as a component—even as a positive component—in helping young males learn how to act tough and endure pain silently, be fierce, quiet, and resilient, act "masculine" in the stereotypical sense of the term. They fear what it would mean if the young men they knew were not willing to submit to this toughening process, dreading the humiliation that would follow for themselves and these "sensitive" young males. While they may not like the sight of Sammy crashing into the ice or the sound of his Coach—in this case, his father—spurring him on to be tough and retaliate against the other boys, many among us see these things as somehow necessary, part of "growing up," of "being a real boy."

Others are fast becoming uncomfortable with the unnecessary shame hardening aspect of sports. They see Sammy as being taught an unattractive kind of ruthlessness—as being pushed, coached, to act in a way that does not actually come naturally to him, at a tender age. They see Sammy's father's behavior as particularly troubling. Why, they ask, would somebody's father---coach *encourage* him to put up with being hurt and cheer him on when he injures others?

As one coach said, “I’m proud of my “men”[meaning his young male players] when they do well at a sport; but being proud doesn’t feel worth it if he’s going to have to go through all of the cruelty, I did as a kid, that goes with it.” Or as another wise colleague remarked about my research, “I don’t completely mind. Or at least can understand what the boys do to each other. But the parents! I can’t stand those parents shouting out the most mean, competitive things from the sidelines. Don’t they realize they’re actually engaging in bullying, hurting and embarrassing our kids?”

The majority of coaches I interviewed, I discovered, felt torn between wanting their young men to excel athletically—to be prepared for the rough and tumble aspect of sports and do whatever hardening is necessary to be counted among the team—and wanting to protect them from the unnecessarily mean-spirited, cutthroat, emotionally shut-down aspects of so many boys’ sporting activities. Though coaches want to do everything they can to help their players do well at sports by giving them the athletic training they need, teaching them to endure the inevitable physical and psychological wounds, and infusing them with a healthy competitiveness, many of them regret the ways in which sports emotionally toughen up their young and often wish that sports could be a more positive, uplifting, and confidence-building experience. They are truly experiencing a moral and ethical dilemma

As one father expressed to me, “When my son, Seth, was the last guy to strike out, I could see how bad he felt. The other boys were hardly talking to him and the coach wouldn’t even look at him, let alone say something to him. Keith was trying to act relaxed about it, but I could see he was miserable. I wished I could go up to him and tell him that he was a good kid and that he actually played very well—that the pitcher on the other side just happened to be pretty damn good. But I thought that maybe that would make him feel worse. I felt like I just wanted to go up to him and give him a big hug. But I knew he would be *really* embarrassed if I did that.”

Indeed many coaches have told me that they feel quite torn about what to do when their players are involved in other sports activities that often leave “their” young men feeling more humiliated than affirmed, more downcast than encouraged. Many, like Seth’s father, worry that if they step in and say or do something, they will only exacerbate the young man’s feelings of shame. But it is here that, in my view, so many coaches miss out on an opportunity to help change things for the better. For as natural as it is not to want to “rock the boat” or make things worse, I believe that coaches (and the rest of us!) can make an enormous difference in what sports are about—without further humiliating anyone—by staying persistently involved in monitoring and overseeing what kinds of attitudes prevail on the court and in the field.

## **Sports and Self-Esteem**

When coaches and other adult mentors work hard to make sure that it does not become a degrading shame-filled experience, playing sports can offer many young men a chance to excel at something that comes naturally to them and thus to boost their self-esteem significantly. Especially for boys who find it difficult to do well academically, sports may be one of the few contexts in which they receive praise. In team sports, boys may be able to feel a sense of success by making small contributions to the team's victories—a good pass, a nice save, a skillful tackle. Even when they're "on the bench" playing a very minor role in a particular game, boys can often derive a sense of vicarious pride and accomplishment through the athletic prowess and success of—and bonding with—other team mates.

When properly mentored, boys may find that sports provide them with a chance to apply skills that come easily to them, receive praise and attention they don't get elsewhere, and thus significantly increase their feelings of self-worth. But the power that sports have to bolster these feelings in young men can often be removed by some of the less desirable aspects of competitive/negative performance based sports. Especially in the absence of an empathic coach, sports can become overly competitive where the focus shifts from self-actualization and achievement to toughening up and destroying the opponent. Also, while I see the confidence-building aspect of sports as a plus, sometimes young men can be pushed to obsess about their athletic performance to the point that they become compulsive or self-destructive.

## **The Brutality of Sports**

I have found that one of the most difficult components of boys' sports is that of the sheer brutality that can sometimes creep into so many of these games. While some sports—such as crew, tennis, golf—do not involve such brutality, many others—such as football, hockey, wrestling—are surprisingly intense. Even soccer—once seen, in the U.S., at least, as a less violent and more forgiving of weakness game than sports like football or rugby—has, in the wrong hands, become terribly violent. For instance, I was recently informed about behavior in suburban soccer leagues that wouldn't be tolerated even in college football—boys brutally injuring other boys, officials tolerating these deliberate fouls, and parents and coaches assaulting players. And listen to this magazine interview with 17-year-old Jimmy, the six-foot, 145-pound designated "enforcer" of his high school soccer team:

"Before, if someone did something to you, for the good of the team you wouldn't retaliate. Now, if somebody gets you, you're going to get them for the pride of the team. If I got hit, and one of the younger kids on my team saw me just back down and not retaliate, that would spread through the whole team. It would be like, you're not a man."

Jim told the magazine about how he almost started a fistfight with a superior player, “We both went up for a head ball and he nudged me in the back. I fell down pretty hard and that triggered something in me. So I swung around—my whole body—and I got up in his face and he said ‘What the f--- are you going to do?’ And I said, ‘What the f--- are you going to do?’ And we started bumping.”

James added: “It used to be the old saying that it doesn’t matter whether you win or lose. *I don’t think anybody lives like that anymore.*”

According to the article, after one game, a boy who permanently injured one of Jim’s teammates in a flagrant foul was suspended from school for five days. The Athletic Director of that high school, a mentor to all student athletes in that school, was quoted as saying, “What do they want us to do? Put him in jail?” Unfortunately with that attitude, that might actually come later

### **The Obsessive Competitive Aspect of Sports**

In addition to allowing—or encouraging—our young men to see sports as an appropriate arena in which to exchange anger and act out hostile or violent feelings, sports sometimes also become a place where boys are pushed to become compulsive about doing well, or compulsive about beating the competition. This compulsive aspect of sports can lead boys to train themselves in an excessive way, mask or ignore serious injuries, or become overly zealous in how they play a particular sport.

#### **Brian: Obsessed with his Weight**

Despite positive success in wrestling, Brian came away so hardened and disconnected from his own needs as the result of being coached by shame)— and so compulsive about succeeding as a wrestler—he no longer knew when and how much to eat

It was actually not until he was a college sophomore watching a made-for-television movie about a woman with an eating disorder, that Brian recognized some of his own behavior. Brian had found himself on a continual eating binge since he had finished high school. He hadn’t thought of himself as having a problem, because hadn’t he always been able to take off weight when he needed to? And, he asked himself, *wasn’t it just girls who starved themselves who had a problem?*

In fact, Brian had been quite successful as a high school wrestler. He didn’t have the size for football or the hand-eye coordination to make the baseball team, but he liked the intellectual puzzles and the disciplined, strategic, one-on-one competition of wrestling.

Brian's coach gave him a consistent message: stick with the daily workouts, learn the right moves, cut weight, and you will win your matches. The hardest part at first was cutting weight. In the peak of his growing years, Brian had to lose almost twenty pounds to compete in the ideal division for his height. He had then regained and re-lost the same ten pounds a dozen times each wrestling season.

"I used to eat a peanut butter and jelly sandwich in fifty bites, just to make the feeling of eating last as long as I could," Brian told me. "I drank gallons of water a day. Then, the day of a match I'd go into the whirlpool bath for an hour to sweat the water out. I'd do anything to have a chance at winning in the one sport I could succeed in."

"Guys who weren't athletes were nerds. They got left out of everything. They hardly had friends, let alone girlfriends. I couldn't let that happen to me."

After four wrestling seasons, Brian left for college and quit the sport. "I decided I couldn't spare the time from my studies, and at first I was relieved that I didn't have to go around thinking about how long I was going to have to stay in the whirlpool bath if I had a doughnut instead of a diet soda. But now I realize I've gone the other way—To this day I can't stop gorging myself," Brian told me. "I'm afraid I'll never be able to eat normally again, and I'll get huge."

\* \* \*

While Brian's story may seem unusual, statistics suggest that dozens of young male wrestlers injure themselves every year by either bingeing or stopping eating normally. Some of these boys suffer only minor health problems while others actually become bulimic or anorexic. Even worse, it was recently publicized that in the United States that each year a small but obviously significant number of young male wrestlers actually die because of harshest affects eating disorders. Apparently, an intense desire to do well and to be praised for their success as athletes, leads many boys to become so obsessive that they actually do harm to themselves.

What is perhaps more common is for boys simply to "overdo" it when it comes to playing sports. Sixteen year-old Scott reported that when he finally found a sport he was good at—running track—he felt he had to just about whatever it took to succeed:

"Most days I get up between 4:30 and 5:00 in the morning to go running. I usually do about five miles and then head home. During the track season, after doing sprints with the team, I run about ten to twelve miles. Off season, I go home each afternoon, get changed, and run around ten miles. On the weekends, I go running about ten to fifteen miles a day. I've always wanted to be good at a sport. Now

that I've got one I can do well at, I'm going to keep on going—maybe even try for the Boston marathon.”

On the surface, these may seem to be boys who have simply become over involved with a sport. The fact that they feel devoted to a particular sport, in and of itself, may be something to be encouraged since it suggests they are motivated, hard-working, destined for success. But I believe it's important for those of us who mentor and coach boys to be vigilant about distinguishing between a young man's healthy devotion to learning a sport and an all-consuming self-destructive obsession--a loss of balance and a lack of respect *for human limitations*. Ideally, playing a sport should enable a boy to develop new skills and build his self-confidence as he hones them. But when playing that sport becomes the sole source of a young man's self-esteem—to the point where he is devoting all of his waking hours to training for and performing that sport—there is some risk that the boy will end up harming himself or others. He can hurt himself through bodily deprivation (for instance by not eating or by continuing to work out following an injury), through exhaustion (by exercising or practicing beyond his capabilities) or by setting himself up for severe emotional distress (for instance, by allowing a limitation in his game to become an intense source of self-hate). He can hurt others by going overboard in playing a game (pushing, checking or tackling too hard), bullying--verbally accosting team members or opponents (by cussing at rivals or “telling off” co-team members when they make mistakes) or by actually injuring others (for instance, by starting a fight during a hockey game or by throwing a baseball at somebody with the intention of hitting them). These kind of damaging behaviors are rare when boys are taught that a game is a game, that sports are a kind of play. But when they are allowed to think of sports as the *supreme* measure of their self-worth—when they become too wrapped up in how well they perform a sport at any particular game on any particular day—boys can end up seriously injuring themselves or others.

### **Facing Loss: The Achievement of Balance-- Losing Is Winning a Life Lesson**

The young men described above, are missing the opportunity to learn one of life's greatest lessons from sports--and a highly significant one for boys--that the other side of winning is, *must inevitably be*, losing. If sports were only about hero fantasies of glorious victory and shame in one's opponents, then they would merely help a young man to avoid facing his vulnerability and learning how to tolerate it without falling prey to self-criticism or depressive withdrawal. They would not transform. But *sports are also about loss*.

Sports inevitably bring boys face-to-face with loss and sanction the expression of disappointment and grief that many boys would not otherwise not have access to. Sports, too, provide a community of men, who, even if in the anonymity of a crowd, make both the joy of sports more intense and their disappointments seem more bearable.

To learn how to deal with defeat is to come to terms with *loss* and *shame*. One learns, as A.E. Housman put it, that glory "withers quicker than the rose." Unfortunately, coaches and mentors may often fail to teach young men about *bearing loss*. It becomes something feared and catastrophic and no pride develops in doing one's personal best or in learning to bear defeat. Like Achilles, in the *Iliad* they wrap themselves in a fragile cloak of false honor. When limits cannot be faced, Icarus keeps on striving to reach the sun—with disastrous consequences.

Good sports are about the recognition of limits. As Phillip Isenberg, my respected mentor and colleague who had achieved the dual success of being both a Harvard Medical School Faculty psychiatrist and, many years prior, the former Harvard football team captain, points out, genuine competition, healthy engagement in sport teaches that you have to live within the limits of the game and of your body, to realize your *relative* talents. It is a good teacher about limits because, unlike in much of life, in sports the limits are so obvious and the consequences for ignoring them are tangible and immediate. In sports one also cannot help realizing the limiting effect of chance. No matter what one's talents, no matter how unfair it might be, one eventually loses.

The Greeks who gave us the legacy of the Olympics, believed that all life must be seen in balance, and that even heroes (including genuine sports heroes, rather than the Hollywood and tinsel variety) must face tragedy and loss. Sports, when genuinely appreciated under the tutelage of a wise mentor-coach can both uplift and humble young men-- at once at the top of their game and almost simultaneously confronted with injury, loss and defeat:

And he, who in his youth secures a fine advantage, gathers hope and flies on wings of manly action, disdaining cost. Men's happiness is early ripened fruit that falls to earth from shakings of adversity.

Men are duty bound. What is a man? Man is a shadow's dream. But when divine advantage comes men gain a radiance and a richer life. (Pindar's Odes, Pythian 8)

The radiance and the shadow's dream -- both are parts of young men that sports may help to reveal and draw out. In the hands of the proper coach, sports provide a *safe space*, a creative ground upon which the rougher edges of boys' love may be softened and transformed. To keep sports in proper perspective and balance, boys need coaches as mentors who help to cultivate the spirit of play, so easily lost to the cult of victory, negative performance pressure or competition for its own sake.

## **Finally**

Oftentimes we in successful Western industrialized countries look upon less developed nations as being backward, and when we speak in less politically

correct terms, "primitive". We often imagine their coaching or mentoring of their male youth to be even harsher and battle-ready. So we might do well as we come to a close in this chapter to read, remembering it was sung as ballad, a solemn chant, as the verses conveyed to boys in one West African country during their "rites of passage " into manhood:

Do not seek too much fame,

But do not seek obscurity.

Be proud.

But do not remind the world of your deeds.

Excel when you must,

But do not excel the world.

Many heroes are not yet born,

Many have already died.

To be alive to hear this song is itself a

Victory.

And once again, we should never forget that is the thoughtful, empathic Coaches—the men and women who eschew living out the culture of bullying and model a success devoid of *negative performance pressure* who will make the young men in our society feel like important members of the team, who will urge these boys on in positive, confidence-building ways, and who will help them to learn to accept the joy of winning or the sadness of losing as an inevitable part of life, without being hard on others, nor transforming their disappointment into anger turned against themselves. In doing so, though I dare say most good coaches are neither quoting nor deriving their technique from it, yet their moral modeling for young males fits so well within it's ethical precepts, are teaching and role modeling the words of the wise Hebrew sage of the 2nd Century BCE, Hillel, who in *The Ethics of the Fathers*, taught; *If I am not for myself, then who will be for me? But if I am for myself alone, then what am I? ; If not now, then when?*

Indeed for the young males whom we seek to rescue from a model of sports as performance pressure alone, to model the importance of eschewing bullying & to find and support the coaches who will provide such role models, revivifying the

positive sense of growth- in- play within the world of sport, I ask: "If not now, then when?"

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**Endnotes**

1. This chapter focuses on males, young men and men, not because the author doesn't consider the issues contained herein as salient for women or young women, nor their needs are not equally pressing and requiring of attention. The focus on young males comes only as the author bases this chapter on his research and clinical work with that group, deriving from his "Listening to Boys Voices Study"

**Selected Bibliography**

Available upon request from the author at [info@williampollack.com](mailto:info@williampollack.com) or from his URL [www.williampollack.com](http://www.williampollack.com)

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## Positive Initiation as Team Building

*An excerpt from an upcoming book on developing effective team culture,  
to be published in Spring 2015 by Balance Sports Publishing*

By Jim Thompson

“YOU HAVE TO MAKE A CONNECTION WITH THE CHILD.  
IF YOU DO, THEY’LL GO TO THE END OF THE WORLD FOR YOU.”

Sean McElhaney, Principal  
Old Mill Middle North  
(quoted in *Sticks & Stones*  
by Emily Bazelon)

### **Hazing: Initiation at Its Worst**

MANY GREAT ORGANIZATIONS effectively use an initiation ritual to bind new members to the organization. Unfortunately, the rule of thumb is often the most negative and least effective form of initiation—hazing.

A stark example of this is the recent example of former Miami Dolphin football player Jonathan Martin who was subjected to demeaning behavior over many months by Richie Incognito and other teammates, although technically Jonathan Martin was not being hazed. He was being bullied.

Bullying has three elements: 1) it is verbally and/or physically abusive; 2) it is repetitive over time; and 3) it involves a power differential—the bully has more power than the one being bullied. Two individuals being nasty to each other or even fighting with each other is not good, but it is not bullying if the individuals are of relatively equal power.

Hazing is a negative form of initiation of new members that ends with the persons being hazed becoming members of the group. Bullying can go on indefinitely. A significant danger in hazing is that it often provides individuals who have bullying tendencies with an apparently sanctioned opportunity to bully.

Hazing also puts individuals who are prone to being bullied—by virtue of being physically weaker or more sensitive or anxious—at great risk. This also poses a risk to the organization, which loses a potential contribution. Individuals with greater anxiety, for example, aren’t necessarily less competent or unable to make a contribution, but their anxiety can make them a prime candidate for being bullied, especially with a bully who perceives that individual’s vulnerabilities.

This seems to be the case with Jonathan Martin. Martin was a starter on one of the top Division 1 college football programs in the country at Stanford University where he was a two-time All-Pac-12 offensive lineman and also was named first-team All American.

Certainly there are many top college players who don't succeed in the National Football League, but a neutral observer would conclude that Martin had the potential to be an effective contributor to an NFL team, and the Miami Dolphins selected him with the overall 42<sup>nd</sup> draft pick in the 2012 draft.

Martin was a starter from the beginning although he struggled with the Dolphins—being shifted from left tackle, where he had shined in college, to right tackle may have made Martin's transition with the Dolphins more difficult. Certainly the bullying that he received from Richie Incognito and other Dolphins didn't help his performance, and Martin acknowledged that his sensitivity to the verbal abuse made it hard for him to shrug it off.

After the suspension of Incognito and the Dolphins' leadership's stated commitment to eradicate bullying from the locker room, Martin was traded to the San Francisco 49ers in March of 2014, where he was reunited with his college coach Jim Harbaugh, and publicly and enthusiastically welcomed by his new 49ers teammates. It will be interesting to see what contribution Martin is able to make on a different team with a supportive team culture. There are thousands of people, in the Positive Coaching Alliance (PCA) Movement and beyond, who are pulling for him to be successful.

### **Lessons From the Desert Survival Exercise**

In graduate school organizational behavior class I participated in the Desert Survival Exercise. I am about to reveal a spoiler about the exercise, so beware.

Teams of MBA students were asked to select from a long list of supplies that are on their plane that has crashed in the desert. No one knows where their plane crashed so they will have to plan on surviving for an indefinite period of time until they are rescued. The team's task is to select in priority order the items that will give them the best chance of survival including a parachute, a mirror, a bottle of liquor, a knife and many more items. The group's task was to agree on a prioritized list of items, which would be compared with those of the other groups to determine the winner.

The "aha" moment for me was not so much that the correct answers were so far away from our guesses. Rather it was that the winning teams had done something our team and the other under-performing teams had not. They started by surveying the members of the group to find out who might have had wilderness experience. And then they listened to that expert in compiling their list.

It turned out that our group had an individual with a lot of wilderness experience but we hadn't paid any attention to him! The reason is a lesson in team building.

Our group was dominated by a couple of verbally articulate "leaders" who took charge and mostly got their way with the list of items. The expert in our group was a quiet fellow who made some suggestions but didn't push them and never said anything like, "Hey, listen to me. I've actually been in the wilderness!" So we ignored him to the detriment of the entire group.

### **The Articulateness Trap**

We tend to think that people who are good at expressing themselves are smarter or that they know more than others. This has been called the "articulateness trap." But it is often not the case, and it certainly wasn't with my desert survival group!

I think that a similar dynamic may have played in the Miami Dolphins' locker room. Players and coaches may have connected being able to handle the nasty give-and-take in the Dolphins locker room with the ability to perform on the field.

Just as articulateness didn't correlate with knowledge of wilderness survival skills, locker room nastiness may not correlate at all with being good on the football field.

A highly sensitive, more anxious individual may turn out to have exactly what the team needs. Allowing hazing or bullying to drive that potential contributor away thus diminishes the team.

Bullying and hazing can erode a team culture without a coach even knowing it is happening, which is why it is so important to establish team norms of treating every member of the team (and outsiders!) with respect early on. Acting to eliminate bullying and hazing can have an overwhelmingly positive impact on the members of a team and connect them in an emotionally deep way to the team and its mission.

### **Keeping the Clean Baby**

Too often the notion of hazing has become conflated with the act of initiation itself and the clean baby (initiation) is thrown out with the dirty bath water (hazing).

Positive Coaching Alliance has many great coaches among our staff and trainers. Rich Pruszynski, PCA's National Partner Development and Support Manager, is also the coach of a state championship lacrosse team. Rich developed a positive initiation ritual for new players at Marquette University High in Milwaukee, Wisconsin.

Just prior to the first competition of the season, the varsity players take each new player's helmet and decorate it with decals. Each new player is called forward while the rest of the team calls out his name as he is given his newly decorated helmet. He then receives a "Marquette clap," and everyone chants, "Once a Hilltopper, always a Hilltopper!"

Rich notes: "It has become a fun ritual that sometimes even gets a little rowdy. It is a way for the veterans to communicate to the new players how lucky they feel to be a lacrosse player at Marquette."

Positive initiations like this one are more effective than hazing in creating an emotional connection in players to the team, and they allow individuals who may be more sensitive or anxious to contribute to the team rather than driving them away which hazing may do.

Creating a positive form of initiation for your team is an important leadership task that lays the groundwork for a strong, positive team culture.

*Excerpts from*

## **Elevating Your Game: Becoming A Triple-Impact Competitor**

By Jim Thompson

### **3.3: Finding Your Moral Courage**

IT TAKES A GREAT DEAL OF BRAVERY TO STAND UP TO OUR ENEMIES,  
BUT EVEN MORE TO STAND UP TO OUR FRIENDS.

Dumbledore, Head of Hogwarts School  
*Harry Potter and the Sorcerer's Stone*  
By J. K. Rawlings

IN 1947 JACKIE ROBINSON broke the color barrier as the first black player in Major League Baseball. Today, with every sport racially integrated, it's hard to imagine how difficult this was. In addition to death threats, Robinson found members of his own team—the Brooklyn Dodgers—didn't want to play with him because of his race.

When the Dodgers played at Crosley Field in Cincinnati in May 1947, Robinson was the target of racist taunts, jeers and death threats. The Dodgers' captain, Pee Wee Reese, made a point of standing with his arm around Robinson as if to say, "This man is good enough to be on my team and I stand with him."

#### **Pee Wee's Moral Courage**

We often think of physical bravery when we talk about courage, for example, a firefighter going into a burning building to rescue a sleeping child. But many of the injustices in the world happen because observers stand idly by because they lack "moral courage." Moral courage is standing *publicly* for what you believe is right even when others—including sometimes, your friends and teammates—don't.

Jackie Robinson's physical and psychological courage in facing the pressure that dogged his career was enormous. Pee Wee Reese showed moral courage in standing up against the prevailing norm for many in that era which valued black people less than white people.

Reese, the only Southern-raised Dodger who refused to sign a petition against Robinson, went against the grain of his upbringing to stand shoulder to shoulder with him. Robinson later credited Reese's support as helping him succeed against all the pressures of being the first African-American player in Major League Baseball. This act of moral courage is commemorated in a statue of Reese and Robinson outside the stadium in Coney Island where the minor league Brooklyn Cyclones now play.

### **Running Mindlessly With the Herd**

Human beings have a deep need to be part of a group. Mostly this is a good thing, and it has helped humankind in important ways. But there is a downside to it. We can want to be part of a group so much that we do things we know are wrong to avoid conflict with others in the group. And sometimes we may not directly participate in wrongdoing but stand idly by while others do bad things.

Because being ostracized from a group is so scary to many people, they are willing to compromise their ethical standards to run mindlessly with the herd. Exhibiting moral courage requires real courage.

### **Standing Up Against Hazing**

In recent years terrible high school hazing incidents where older athletes have violently abused younger teammates have made the news. Each time I hear about a hazing incident, I think of Pee Wee Reese and wonder why no one on these teams tapped their moral courage and stood up for the harassed players, as Reese did for Jackie Robinson. If the high school teams had any Triple-Impact Competitors on them, they would have defended the abused players.

Sometimes this requires bold action, which can put you crossways with teammates. You may just have to take a vocal and public stand and say, "This is not okay. I'm not going to allow my teammates to be abused." But often a small gesture, or asking a pointed question, can lead people to reevaluate what they are doing and stop harmful behavior. Still, even that requires being willing to risk being unpopular with your own teammates.

But that is the price of moral courage—and why it is so important in a world where most people can't find theirs.

### **3.4: Using Your Power to Improve Your School Community**

“IN OUR SCHOOL ATHLETES RUN THE SHOW.”

Edgar Guittierez

Winner, 2008 PCA Triple-Impact Competitor Scholarship

WITH 12 ALL-STAR appearances, 12 Gold Glove Awards, four National League batting titles, and 3,000 hits, Roberto Clemente was one of the greatest baseball players ever. But what people remember most about Clemente is his work *off* the field.

On New Year’s Day, 1972, Clemente boarded a plane loaded with food, clothing, and medical supplies bound for Nicaragua, which had experienced a devastating earthquake. The loaded-down plane Clemente boarded didn’t inspire confidence, but he told his wife, “When your time comes, it comes...And babies are dying. They need these supplies.”

Shortly after take-off, the plane crashed in the ocean, killing all five on board. Because of Clemente’s courage and sacrifice, high schools, stadiums, bridges hospitals, and Major League Baseball’s humanitarian award bear his name. What does Clemente’s story have to do with you?

#### **Athletes Have Power**

Many high school athletes have status because of what they do on the field. Unfortunately, in many schools a “jock culture” exists in which athletes use their status and influence solely for their own benefit. Whether you realize it or not, you have an incredible opportunity to wield your power on campus in productive ways to make your life and the lives of others around you better.

#### **Mentor Younger Athletes**

If you reach out to less skilled or younger teammates, or to JV athletes if you are on varsity, you will have a huge impact on how they feel about themselves and their confidence on the playing field. They may also remember and appreciate your kindness for a lifetime. This might entail simply saying hello to them, showing interest in them on campus or before practice, or “taking them under your wing” to mentor them throughout the season.

#### **Include the Excluded**

High school is a difficult time for many students who feel alienated from the school community. Students, including athletes, often break into cliques that leave many teens feeling isolated and left out. But it doesn’t have to be that way.

Joe Ehrmann, a former NFL Pro Bowl lineman who is now a high school football coach at Gilman School in Baltimore, was the subject of a book by Jeffrey Marx called *Season of Life*. Ehrmann's team has a rule: Nobody eats alone.

If a member of the Gilman Greyhounds football team, often one of the top teams in the country, sees a student eating by himself in the cafeteria, he is required to go and sit with the student or invite him to join the player at his table. Athletes at Gilman make the school better by including people who might otherwise be excluded.

Think about it: When a friend is kind to you, it's nice. When a high-status person you don't know well is kind to you, it can change your entire feeling about school.

### **Help Create an Anti-Bullying Culture**

Half of all students report being bullied at some point by the time they leave high school. Ninety percent of gay teens say they were bullied in the previous year. Many say bullying—exerting power through violence, threat of violence, name-calling, insults, gossip, putdowns, trying to damage a person's relationships, or cyberbullying—is the biggest problem in their lives.

The negative impact of bullying—for the bullied, for bullies, and for bystanders—can be long lasting and sometimes tragic. Here are some ideas to help create a bully-free school culture.

- **Set an Example.** Sometimes athletes bully teammates or other kids, but Triple-Impact Competitors don't bully. So look at your own behavior, and if you are bullying someone, stop. If you have friends who bully, let them know you think bullying is an act of weakness, and that true strength is demonstrated by treating every student in the school with respect.
- **Respond.** If you see someone bullying another student, here are some things you can do that won't escalate the problem:
  - √ Don't use or threaten the use of force. This often makes things worse. Trust me on this.
  - √ Assess the situation to see if you can say something without putting yourself or others in danger. You might simply ask a question such as, "What's going on?" A question can be disarming and more effective than aggressively confronting a bully.
  - √ Talk with a trusted school official about the best way to solve this situation.
  - √ Offer your support to the bullied student and let him know you don't approve of the way he is being treated. This literally can be

life saving, as bullied individuals often feel very alone and despairing

- Join School-Wide Anti-Bullying Efforts. Many schools have anti-bullying initiatives, and some state laws require them. If your school has one, get involved with it. If not, talk with school administrators to see if one can be started. Having athletes involved in leadership positions can help such an effort succeed.

Bullying is not even good for the bully. Bullying does not help people develop strong relationships or succeed in life. Having a strong anti-bullying culture in your school can help bullies correct their behavior before it ruins their lives.

### **Support Other School Activities**

Many school activities do not draw the kind of crowds sporting events draw. Athletes showing up at a school play or a concert can mean a lot to the involved students. Having the varsity support the JV team, or the boys' team support the girls' team in the same sport (and vice versa) is also a great program builder.

### **Get Involved with Community Service**

A life lived only for oneself is a lonely life. People who help others tend to be happier and more successful than people who don't. High school is a great place to begin a life of serving others, and it can help bring the school community together.

If there is already a school-wide community service initiative, get involved with it. If there isn't such an initiative, consider starting one, and involve non-athletes to help break down divisions within the school.

Fortunately, examples abound of high school community service projects:

- √ Organize canned food drives for homeless shelters
- √ Collect stuffed animals for a children's hospital
- √ Volunteer with Special Olympics or Ronald McDonald House
- √ Hold sports clinics for younger athletes
- √ Visit the elderly in retirement communities

### **Student-Athlete Council**

Get involved with your school's student-athlete council to give feedback to the administration and initiate and plan activities. If your school doesn't have one, talk with the athletic director to see about starting one.

### **Athletes and Their Legacies**

One of Roberto Clemente's friends remembered him this way. "I think the bottom line for him was trying to show other(s) . . . if you dedicate yourself to a cause, you can be a winner."

When you are done with your sport, how will others—teammates, opponents, the excluded classmate, the grade-schooler who showed up at your game, your parents—remember you?

Balance Sports Publishing, LLC, Portola Valley, California (2011)

# **Abuse in the NFL?**

## ***The Illustrative Jonathan Martin Case***

By Gary Namie, PhD, Workplace Bullying Institute

### ***Workplace Bullying is Distressful Abusive Conduct***

AT THE WORKPLACE BULLYING INSTITUTE, we have defined this particular form of misconduct as follows: repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators. It is abusive conduct that is threatening, humiliating, or intimidating, work interference and sabotage, or verbal abuse. Adult bullying is not misconduct unless adverse consequences result. Abusive conduct, as a psychosocial stressor, does trigger the human stress response in targeted individuals.

Epidemiological, occupational health, social sciences and neurosciences research clearly documents deleterious effects on humans — those directly targeted for mistreatment as well as those witnessing the bullying. Health is harmed when exposure is prolonged and the individual cannot effect cessation. Health harm encompasses both physical stress-related diseases and emotional injuries.

Jeopardized employee health is the driving force behind the U.S. movement to eradicate workplace bullying. Targeted workers suffer cardiovascular diseases, gastrointestinal disorders, changes in neurological structures, cessation of DNA chromosomal replication and compromised immunological systems. A vast majority endure debilitating anxiety, nearly half are diagnosed with clinical depression and suffer symptoms of trauma.

Organizations experience both tangible and intangible losses. Undesirable turnover of the best and brightest talent leads the list with demonstrable fiscal impact followed closely by costs associated with absenteeism and litigation-related expenses. Among the intangibles are a tarnished reputation making it hard to recruit and retain the most skilled employees.

Rationally, both employees and employers have ample reasons to collaborate to end toxic work environment practices. Instead, abusive conduct is shrouded in shame and silence within organizations. Complainants are banished with impunity except when mistreatment is partially based on discrimination. Then, and only then, employers must deal with harassing incidents in good faith. When harassment is “status-blind,” employers are under no pressure to act in the best

interests of aggrieved workers.

Thus, the United States is the last of the western industrialized nations to not treat workplace abusive conduct as seriously as they do its less frequent and less health-harming sister — illegal harassment. For this reason, we launched a national campaign in 2002 to enact an anti-bullying legislation in the states. The language of our Healthy Workplace Bill was written by Suffolk University Law Professor David Yamada. To date, no state, of the 26 states and 2 territories where it has been introduced, have enacted the full version of the law. Employers demand the right to unfettered managerial prerogative.

It is obvious to most readers that bullying can occur in most workplaces. No story of bullying grabbed the level of national attention for bullying in the workplace as did the National Football League Miami Dolphins' bullying scandal that spanned late 2013 and early 2014.

### *NFL Teams as Work Environments*

American professional football is recognized as a violent game, not only by critics, but now by its own admission. The league, the NFL comprised of team owners settled a huge lawsuit for players who suffered concussions and committed funds to researching the effects of the sport on retired players' health. The fact that retired players chose to die by suicide, a decision driven in large part by the brain damage they suffered, speaks volumes about the sport's level of violence and its injurious consequences to players.

Players privileged to play at the professional level have groomed their playing skills from childhood through high school and college and endured years of boys' locker room antics where social skills are honed. It's one of the most masculine, aggressive environments of all workplaces.

Is it reasonable to expect respect to be part of that cutthroat competitive environment? The answer is necessarily twofold. On the field, probably no. The perfect illustration came in the immediate aftermath of a playoff game, Seattle defensive player Richard Sherman, was stopped by sideline TV reporter Erin Andrews to comment on a superlative play he had made at game's end. He spewed mostly nonsense. The public response revealed ugly racism because he is a Black man.

It was his explanation during calmer times, away from the field in TV studios that informs us here. He spoke of the "barbarism" inherent in the sport during the game. For his personal success, he said he had to act that way and play out of control. However, a switch had to be flipped when not in the game environment. He has to slip into his civilized skin and be a good team member, a good family man, and a

member of nonviolent society. His insight was profound. Modern players cannot afford to be neanderthals incapable of functioning successfully off the field.

The locker room is distinct from on-field activities. Rather than on-field anti-social conduct, requisite from Sherman's perspective, cohesion and collaboration characterize all off-field activities in the NFL. After coaches finalize rosters for the season, important bonding among the finalists is emphasized. The best teams function as the proverbial band of brothers.

From a psychological perspective, the "Sherman switch" requires emotional maturity. Sherman's college coach at Stanford, Jim Harbaugh, reportedly distinguished on-field toughness from mutual locker room respect for his players. Sherman learned well.

Jonathan Martin, an All-American offensive lineman while at Stanford, was Sherman's team mate who also absorbed Harbaugh's message.

I had the pleasure of hearing Adolpho Birch, attorney and NFL Sr. VP of Labor Policy and Government Affairs, unequivocally state at the 2014 Sports Lawyers Association meeting that the Commissioner believes professional football teams are workplaces for employee-players. That is, despite the peculiarities of professional football, owners consider locker rooms workplaces subject to laws, policies and codes of conduct. Locker rooms need not be an unfettered bastion of abusive conduct.

### ***Jonathan Martin's Experience - Public View***

Jonathan is a 6'5" 312 lbs. offensive lineman drafted from Stanford by the Miami Dolphins in 2012, He was a starting player from the beginning of his professional career. That fact speaks to his technical proficiency and skill. He spent one full season and four games with the Dolphins, always a starter. At first glance to the public, he is not what a bullied person looks like.

On Monday Oct. 28, 2013, Martin voluntarily left the team. The team put him on the "non-football injury list," claiming he was dealing with "emotional issues" and was suffering an "illness." This employer's initial portrayal made it sound like Martin was to blame and acting whiny. That day in the dining hall, Martin had hit his limit of taunting and humiliation. Imagine his personal shame in this very macho context. But abuse is abuse and he had had enough.

Dolphins team coaches and managers reported not knowing there were issues until after he left. Martin had told one coach that something was wrong with him in the late spring of 2013 during OTA (organized team activities that involved fitness preparations). Because Jonathan absorbed the blame (wrongly and unnecessarily) for his troubles with the team, management was content to refer him to an 85-yr.

old psychiatrist who worked with the team who invited Jonathan to his home for dinners, not therapy. In fact, he had attempted suicide but told no one, including his family.

When Martin left the Dolphins in October, he told one coach that he had been subjected to what he, Martin, called “an abusive environment.” Martin’s attorney, David Cornwell of Gordon & Rees, LLP, would soon thereafter characterize Martin’s reactions as those of a person who was bullied. Martin named veteran fellow offensive lineman Richie

Incognito and a specific incident of financial extortion for \$15,000 by Incognito. Martin’s salary was a little over \$1 million, while Incognito’s was \$5.4 million per season.

A series of text exchanges between Incognito and Martin ensued. Martin confirmed by text that his relationship with Incognito was still good. Many of his teammates said what Martin endured was “normal stuff.” Martin had been dubbed “Big Weirdo” by teammates.

The Dolphins suspended Incognito for “bullying.” That decision is never done in corporate America. Bullies are not punished following allegations. At first, it was unpaid leave, but in the end, he lost pay for only two games, despite a suspension that lasted the remainder of the entire season and may have effectively ended his professional career.

After Incognito was suspended, the media got hold of a text message he had sent to Martin around the time of the spring OTA containing a racial epithet. For months, the public excoriated Incognito for using the “N-word.” However, most players, sports “man up” pundits and Dolphins teammates defended Incognito. No single incident probably sounded outrageous to Martin’s teammates — it was “just locker room banter.” But the cumulative effect on him was not good, and he reached a breaking point that day he dropped his dining room tray and just walked away.

Jason Whitlock was the atypical pundit who said the NFL workplace has a “prison yard mentality” with which the educated Martin is a bad fit. To casual observers, the NFL workplace is too unique to be comparable to other workplaces. Many employers claim uniqueness as reason to be immune from social norms of decency and civility.

On Nov. 6, the NFL contracted with high profile attorney Ted Wells, of Paul, Weiss, Rifkind, Wharton & Garrison LLP to interview participants in the Martin case and to provide a report. The players union, the NFLPA, equivocated. They said they had to represent Incognito to assure his due process rights were honored by the

Dolphins. The NFLPA did not conduct an investigation; it deferred to the league.

Jonathan Martin waited a long time before speaking publicly. There was a brief statement from his attorney on Nov. 7 describing Martin's efforts to befriend his teammates only to be abused in return.

Incognito granted a TV interview that aired on Nov. 10 to repair his damaged reputation. He professed that his actions toward Martin came from a "place of love" and that he never meant to be malicious toward Martin or his family.

There was a positive profile of the "brainy, brawny nerd" Martin by the Miami Herald on Nov. 19. The league took responsibility for conducting an investigation in the immediate aftermath of Martin's departure from the Dolphins in October, 2013.

For 3 and one-half months, the public knew only of the trouble between Incognito and Martin. Incognito dropped the veneer of civility and smeared Martin via social media just prior to the anticipated release of the Wells report. Martin did finally grant an interview with broadcaster and ex-head-coach Tony Dungy, and frankly a Martin supporter, on NBC on January 29, 2014 just before the Super Bowl. The goal of the interview was to send a message to other coaches that Jonathan Martin still wanted to play football.

### ***Jonathan Martin's Experience - Private View***

I was retained in early December 2013 to provide expertise on workplace bullying for Jonathan. No lawsuit was planned or desired. His legal team and family wanted him to return to a football career, if possible. I advised strongly against a return to the Dolphins. An employer that had failed to provide a safe working environment is unlikely to be willing or able to make adequate adjustments to provide that safety in the future when the organization's leadership remains intact. The Dolphins owner supported his head coach, Joe Philbin.

From the beginning, Martin had three abusers. Martin was African-American with both parents African-American. The press had sloppily referred to him as bi-racial. Incognito, a white player, had called him mulatto. However, the other two tormentors — Mike Pouncey and John Jerry — were Black. The four men comprised the corps of starting offensive lineman on the team.

Traditionally, in high school, college and professional football sub-units of teams bond closely. Offensive lineman, the "O-line," is a group of boys and men who need to coordinate their tactics to be effective. Their off-field social relations typically mirror the on-field technical coordination linemen achieve. That was the tradition with which Martin was familiar. That was what he expected in Miami

when he left college. He needed to be part of the close-knit “O-line” group.

Martin was spoiled by mature coaches who valued respect. By attending Stanford, he was part of an exclusive “O-line” that protected the top drafted college quarterback, Andrew Luck. Stanford, under Harbaugh’s coaching leadership, was no “prison yard.” Further, Jonathan explained to me that he was not “ghetto.” Both parents were Harvard educated lawyers, with his mother’s lineage dating back to scholar and activist W.E. B. Du Bois. Jonathan majored in Classics at Stanford. The “brainy nerd” was headed into a collision with a much different character when he joined the Dolphins as a pro player.

Richie Incognito arrived at the Miami Dolphins by a much different route. He was raised by a militaristic father who used physical aggression to express himself and taught his son to settle conflicts with fists. Incognito was thrown off two college football teams — Oregon and Nebraska — for misconduct. His football skills allowed him to become a pro player. Eventually, he was cut from the St. Louis Rams for the disruptions he created, and was picked up by the Dolphins, a team with a obvious greater tolerance of abusive conduct. He was in his eighth year and voted by peers as one of the “dirtiest” players in the NFL when Jonathan Martin was drafted and joined the team as a rookie.

Incognito was both informal and formal leader on the Dolphins. His style of play drew respect from peers and Dolphins coaches. Coach Philbin selected him to be one of the players on the “Leadership Council,” the players to whom the head coach delegated resolution of player disputes. Self-policing among players allowed Incognito to run roughshod over younger players.

Incognito kept a book, a ledger, of “fines” he arbitrarily imposed on other players. It was extortion. Younger players could not fight back like veterans. Incognito used the money to fund his hell-raising trips to Las Vegas. Though Martin felt the \$15,000 fine leveled against him by Incognito was unfair, he paid rather than incur his wrath.

Incognito had two operating styles — a somewhat funny and friendly jerk when not drunk and “tornado” mode when drunk. The latter was captured on camera at a bar and ran on TV cementing his damaged reputation. And like an abuser in domestic violence situations, others had to adapt to which one of the two Richies they had to live with on any given day.

Martin wanted to be part of the “O-line” group just as he had been all his life. The trouble was that none of the other men had the same character of the players Martin had known at Stanford. There were sociological differences in their backgrounds coupled with the team tolerance, or active encouragement, of aggressive anti-social conduct, that led Martin to suspect it would be useless to complain. And

since there were three of them, Martin also allowed for the possibility that something might be wrong with him. This is typical bullied target thinking.

My job was to explain the hidden truth about the ostensible “friendship” between Incognito and Martin to both attorneys — Cornwell and Wells. Both attorneys had sports backgrounds and did not readily see the power differential between the two players who were not equals. Incognito controlled all aspects of their time together. He considered Martin his “bitch.”

What could have been considered rookie hazing continued in the second year for Martin, despite his hopes that matters would change. When he reported for OTA in his second year, Incognito orchestrated a trip on a yacht and a drinking binge. The amount of humiliation Martin suffered on that afternoon was so great on the yacht, he locked himself into a lavatory and texted his mother. He was feeling self-loathing for not having the courage to stop the ranting Incognito and the others while at sea. The infamous

TMZ video was filmed that day during Incognito’s “tornado” rage. That day led to a suicide attempt by Martin, his second since joining the team and being dominated by Incognito, Pouncey and Jerry — his teammates from whom he once naively expected to receive reciprocated respect and camaraderie.

The breakthrough for Ted Wells was to see the analogy of Jonathan’s helpless situation to that of a battered spouse with few exit alternatives. Indeed, he stopped blaming Jonathan during our conversation. He was able to see the three abusers as unprovoked perpetrators of unconscionable abuse that had positive effect on the team. In fact, they broke one of their brethren, Martin, until he no longer could function in his job.

It was also counterintuitive to explain how Jonathan, a big physical man in a physical sport, deliberately chose to not use force to quell Incognito, Pouncey and Jerry. Jonathan told me that he had fought before in games on the field, but never off the field.

It was part of his personal ethos shaped by his father and his coaches. He learned to restrict the use of force to the field. This was a level of self-control that Incognito and his teammates never learned, nor had to learn. Martin’s own attorney wondered why he had not chosen to fight to earn respect. It takes great bravery to hold onto non-violence when being violently abused by others. Jonathan baffled the non-believers in non-violence.

Of course, all of this restraint and enduring the constant barrage of insults, domination and humiliation took its toll on Martin’s well-being. He reported feeling depressed, though he did not seek therapeutic help. Only after separation from the team did he seek counseling. He checked into a facility for “emotional

issues” after leaving Dolphins before his family retrieved him, returning him home to California.

I readily recognized Jonathan as a bullied target. He fit the profile we crafted after our research and speaking directly with over 10,000 individuals. He is technically skilled and a people pleaser (high need for approval and likable), very ethical and honest (but naively expecting all others to be similar) and oriented toward cooperation (and thus victimized by cutthroat competitors). In other words, he is the prototypical bullied target, despite his outward appearance that fools the public into believing that physically strong people are somehow immune from psychological assault.

### *The Ted Wells Report*

The report was released after the Super Bowl on Friday Feb. 14, 2014 and exonerated Jonathan Martin. Many of the key report conclusions (in bold) illustrate how this NFL story is one of workplace bullying:

- **The mistreatment of Martin is consistent with a case of Workplace Bullying.** The legal team recognized that bullying is abusive conduct and that Martin was the abused party.
- **Martin did not fabricate his allegations of harassment.** As is true with bullied targets, they are not the liars; it is most often the abusers, the bullies, who lie.
- **Repeated acts of harassment contributed to Martin’s departure.** Bullying involves repeated acts
- **Incognito knew that the harassment affected Martin.** Perpetrators are aware that they harm others. The most sadistic derive pleasure from it.
- **The harassment was humiliating and contributed to his mental health issues.** The investigator made the causal link. Humiliation causes mental distress.
- **The bullying trio harassed other Dolphins personnel.** Cruelty spreads like contagion when unchecked
- **It is unclear the extent to which the abuse resulted from racial animus.** Illegal harassment/discrimination can be part of bullying, but bullying often is not based on membership in a protected status group.
- **Culture of the Dolphins offensive line does not excuse the mistreatment.**

Just because it's the NFL doesn't mean bullying is acceptable.

And a marvelous quote from the 148-page Wells report ...

*“. . . even the largest, strongest and fleetest person may be driven to despair by bullying, taunting and constant insults.”*

In the aftermath, the Dolphins owner Steven Ross fired offensive line coach Jim Turner and a trainer. Turner was working in his first NFL job. He is a former Marine Corps infantry officer and reportedly told Incognito to “toughen up” Martin. The General Manager, Jeff Ireland, also left the organization shortly thereafter. It was said that Ireland said Martin should have just punched Incognito.

On March 11, 2014, Jonathan Martin was hired by the San Francisco 49ers. He rejoins his Stanford university coach, Jim Harbaugh. “It can be a very powerful opportunity and motivator for a player to say, ‘It wasn't me, it was my situation,’” Harbaugh said. “Jonathan Martin is another player who will have a powerful opportunity.”

Despite the report about Pouncey's conduct and his vehement discrediting of Martin as unwelcome, Miami Dolphins owner Stephen Ross declared Pouncey an “an outstanding young man” and an “excellent football player.” His 2014 season will get a late start because hip surgery will sideline the center for at least three months.

John Jerry, identified by Wells as the first man to taunt Martin in Miami, was hired by the New York Giants. Head Coach Tom Coughlin said “Whatever part he played in it, there was remorse, sincere remorse.”

On Feb. 28, 2014, Richie Incognito received treatment at a psychiatric-care unit in Scottsdale Arizona after reportedly admitting to police that he damaged his Ferrari with a baseball bat in a fit of rage. Incognito was hospitalized involuntarily. He reportedly accepted the care because of stress from the NFL investigation of his alleged bullying.



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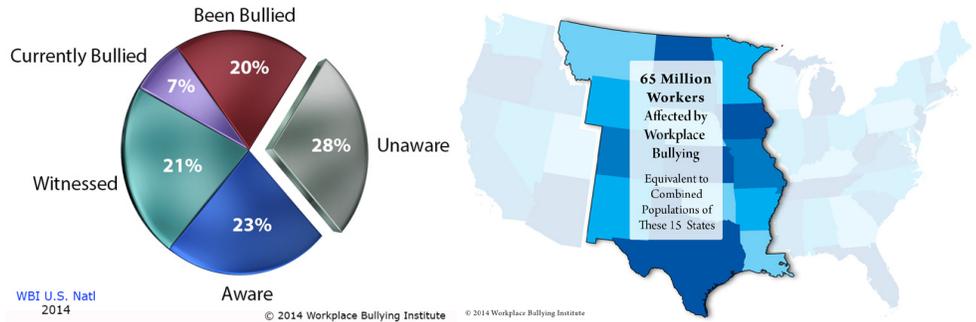
*PSYCHOLOGICAL VIOLENCE • EMOTIONAL ABUSE AT WORK • MOBBING*

**Workplace Bullying remains an American epidemic. In the absence of legal prohibitions against it, employers are failing to take responsibility for its prevention and correction. Bullied individuals pay dearly with the loss of their economic livelihood to stop it.**

## PREVALENCE

Workplace Bullying was defined as repeated mistreatment; abusive conduct that is: threatening, humiliating, or intimidating, work sabotage, or verbal abuse.

This definition is the one used in the Healthy Workplace Bill. Bullying is “abusive conduct,” referring to its most serious forms only. By comparison with the rate of any disease or malady, bullying is an epidemic.

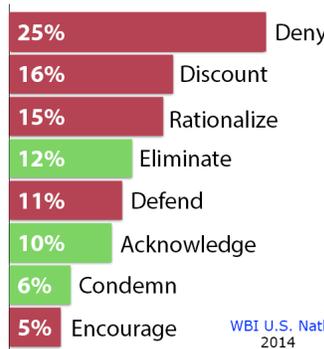


The number of U.S. workers who are affected by bullying – summing over those with direct bullying and witnessing experiences – is 65.6 million, the combined population of 15 states.

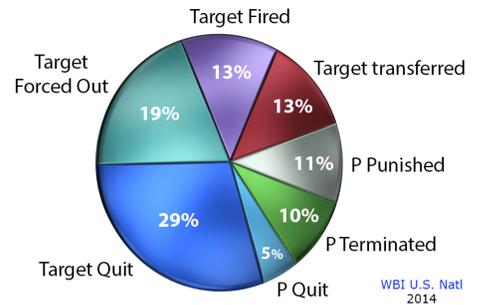
## EMPLOYERS

Employers fail to appropriately react to abusive conduct much more frequently than they take positive steps ameliorate bullying. Denial and discounting were the most common reactions by employers.

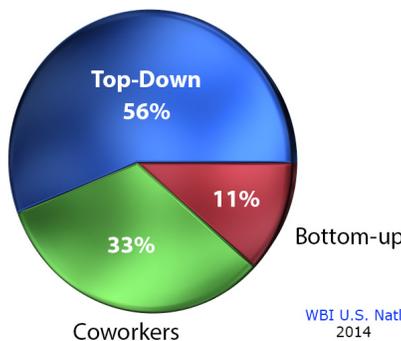
This led to 61% of the targets losing their jobs as the only way to stop the bullying.



## WHAT STOPS IT



## BULLY'S RANK



## KEY FINDINGS

- 27% have current or past direct experience with abusive conduct at work
- 72% of the American public are aware of workplace bullying
- Bosses are still the majority of bullies
- 72% of employers deny, discount, encourage, rationalize, or defend it
- 93% of respondents support enactment of the Healthy Workplace Bill

## SUPPORT FOR HWB



**HEALTHY WORKPLACE Bill**

[healthyworkplacebill.org](http://healthyworkplacebill.org)

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## GAME CHANGER<sup>1</sup>

By Tom Farrey and Steve Fainaru

ON THE EVE of the landmark O’Bannon v. NCAA trial, Michael Hausfeld, the lead attorney for former UCLA basketball star Ed O’Bannon, huddled with his colleagues in a small conference room, overlooking Oakland’s Lake Merritt. The words “WAR ROOM” were written on a Post-it note attached to the doorframe. Around a lacquered table, a half-dozen lawyers and economists stared into laptops save for Hausfeld, who, at 68, still takes handwritten notes and was peering through his round, wire-rimmed glasses like a courtly scrivener.



John Loomis for ESPN

The O’Bannon case boils down to the question of whether the NCAA can legally prevent athletes from earning money on their names and identities, which are plastered on everything from video games to jerseys to ESPN Classic broadcasts. Andy Schwarz, a

*Michael Hausfeld is the lead plaintiffs’ attorney in the Ed O’Bannon v. NCAA antitrust lawsuit that will determine whether college athletes can be paid for the commercial uses of their names, likenesses and images.*

sports economist who has been picking apart the NCAA for more than a decade, brought up Johnny Manziel and Jadeveon Clowney, who would have been multimillionaires years ago, if not for the NCAA restrictions.” You’re going to have to help me out there,” Hausfeld told Schwarz, sheepishly, “because I don’t know who those people are.” Hausfeld wasn’t kidding. He had no clue who Manziel and Clowney were. Just as he had no clue who O’Bannon—the Final Four Most Outstanding Player in UCLA’s 1995 title run—was before O’Bannon agreed to place his name on the lawsuit five years ago. No clue who Oscar Robertson was before he was added as co-plaintiff. No clue about anything, really, related to sports, at least as it’s played between the lines.

But Hausfeld does have one big idea—that the people who run our games ought to play by the rules that govern society and industry—and that has made him one of the most powerful people in sports. He has gone after the NCAA for allegedly

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<sup>1</sup> This article was originally published by ESPN on July 24, 2014. Reprinted with authors’ permission. Please see [http://espn.go.com/espn/otl/story/\\_/id/11255945/washington-attorney-michael-hausfeld-most-powerful-man-sports](http://espn.go.com/espn/otl/story/_/id/11255945/washington-attorney-michael-hausfeld-most-powerful-man-sports)

operating as an illegal cartel. He has pursued the NFL and pushed the league to address the treatment of players in the areas of concussions and licensing rights.

He's even brought heat on the National Federation of State High School Associations in an attempt to hold some entity accountable for the fact that prep football players are nearly twice as likely as college players to suffer a brain injury.

In the coming weeks, a judge will rule on the O'Bannon case, the greatest challenge to the NCAA's economic model in its 108-year history. Hanging in the balance is not just the battered ideal of amateurism—and who gets access to the billions of dollars flowing through college sports—but also what the entertainment product fans consume will look like in the near future. Even a limited injunction could allow the next Manziel to sell his autograph without touching off a national scandal. “A favorable ruling,” Schwarz said, “will expose to the world that the emperor has no clothes.” Hausfeld is hardly the only class-action lawyer descending on sports; according to an analysis by “Outside the Lines,” there are at least 350 cases pending in federal court against the NFL, the NCAA and the major athletic conferences, in what has become an industry-wide attack over issues ranging from concussions to the distribution of prescription drugs by the NFL. The wave of litigation already has helped change how football—from the NFL to Pop Warner—deals with head injuries and has triggered a spate of reform proposals within the NCAA.

But among the hundreds of lawyers seeking to capitalize on the recent frenzy, Hausfeld is, in many ways, the most controversial. A small, balding man who wears bowties and talks so softly his wife says she feels like a “lip reader” at the dinner table, he nonetheless has participated in a disproportionate number of legal knife fights. After 37 years, he was fired from his previous firm via a note left on his chair. Hausfeld is perhaps best described as a legal activist. In 1998, he wrested \$1.25 billion from Swiss banks on behalf of Holocaust survivors seeking to reclaim their dormant assets. Hausfeld doesn't go as far as to compare NFL linemen with concentration camp victims, but he does frame the cases in the same way. “There is no comparison in terms of the gravity of the evil,” he said. “What you need to do is disconnect the gravity of the evil but still look at the magnitude or the systemic nature of the wrong.”

Hausfeld has gained a following among some athletes and reformers as the man who can end the exploitation. “He kind of brings that David versus Goliath thing,” O'Bannon said. But it hasn't always worked out that way. One group of NFL greats believes Hausfeld drew them in with promises of taking on the NFL in the same way he once took on Texaco and Exxon, only to sell them out. “I thought he was sent from God to help us,” said Joe DeLamielleure, the Hall of Fame Buffalo Bills offensive lineman and one of Hausfeld's former clients. “Then I realized he was the devil.”

ALL THE PEOPLE who know Hausfeld—his friends, current and former colleagues, even his wife, Marilyn—shake their heads in amazement at the idea of him presiding over some of the most momentous sports cases in history. Sports is essentially a

foreign language to him. At one point during the O'Bannon trial, Hausfeld referred to the Nike swoosh as a "swish," then attributed the famous logo to Adidas. "When did they change the swish to stripes?" he asked his paralegal, Jim Mitchell. A few years ago, Hausfeld's associates bought him a copy of "Football for Dummies," while Mitchell gave him Football 101 classes on everything from how the draft works to the history of the collective bargaining agreement. "He's come really far. I mean, when I first started working for him I don't think he knew what a touchdown was," said Swathi Bojedla, a 28-year-old associate in Hausfeld's firm. Bojedla, who grew up in Buffalo and still has Bills season tickets, says she frequently finds herself sprinting down the hall with Wikipedia bios to give to her boss when another famous potential client calls. "Who's Oscar Robertson?" Hausfeld asked Bill Isaacson, a prominent antitrust lawyer involved in the O'Bannon case, one afternoon. "Michael, he's an incredibly big deal!" Isaacson replied. Hausfeld takes the ribbing good-naturedly and acknowledges that he knows next to nothing about sports. He says he thinks it might actually help him relate to his famous clients. "It adds to the relationship because they know I'm not responding to them out of sports admiration, I'm responding to them as a person," he said.

Hausfeld was raised in Brooklyn. His father sold material to furriers out of a small shop. Walter Hausfeld had grown up in Poland. Shortly after Germany invaded in 1939, Walter and his brother Meyer fled to New York to join two other brothers who had urged the family to escape. A fifth brother stayed behind. When the Nazis arrived in the Hausfelds' hometown, they liquidated the Jewish population. The brother who had remained behind was marched into the forest and shot. Hausfeld is named after that late uncle, Michael David Hausfeld.

In the early 1970s, Hausfeld met his mentor, Jerry Cohen, a muckraking class-action lawyer who had been chief counsel to the Senate antitrust subcommittee and represented the United Farm Workers. "It was like a father-son relationship," said Marilyn Hausfeld, an actress and singer who met her husband at Brooklyn College. Cohen harbored a suspicion of big business. His 1971 book, "America Inc.," argued that the growing concentration of economic power was dangerous to society. Ralph Nader wrote the introduction. Cohen "always encouraged me to take the cases that I was most interested in on a social basis," Hausfeld said, "and he always supported me in doing them, despite opposition in the firm and whether it made economic sense."

Hausfeld stayed at the firm for 37 years and became a partner and chairman with a significant equity stake. "Michael was looked at as this absolutely creative, independent-minded genius who would pursue cases that others couldn't identify and then run with them," said Steven Toll, the firm's managing partner. "We looked at ourselves as the white hats—individuals against corporate misconduct and greed."

Hausfeld initially took on the Swiss banks pro bono. Invoking international law and even the Nuremberg trials, he won a \$1.25 billion settlement on a lawsuit involving

incidents that had taken place in Europe 50 years earlier. Hausfeld won a \$176 million judgment for African-American employees who accused Texaco of discrimination and, after the Exxon Valdez oil spill, represented Alaska Natives who sometimes paid him in salmon. But in addition to his gift for making implausible cases real, Hausfeld's style sometimes grated on those around him. Some colleagues viewed him as imperious and condescending. He frequently fought with lawyers ostensibly on the same side. He launched projects over the objections of his partners. In the mid-2000s, Hausfeld made it known he wanted to open a London office. Europe had little experience with class-action litigation, and his ambitious project aimed to expand European law. It was a classic clash between Hausfeld's visionary impulses and the practicalities of running a law practice. To some, the London project came to symbolize what they saw as Hausfeld's attempt to take total control over the firm. It eventually ripped the firm apart.

For months in 2008, Hausfeld and his partners rarely spoke, even though they sat within a few feet of one another. "The tension inside the office became unbearable," Toll said. One afternoon, with Hausfeld present, the firm's compensation committee voted to reduce his stake. Almost immediately, Hausfeld's opponents used their new majority to fire him.

The partners dispatched a delegate to give Hausfeld notice he'd been ousted. Hausfeld was away at a settlement conference, and when he returned he found the notice on his chair. "I was to leave the building immediately," Hausfeld said. "I was to take nothing with me. If I was caught on the premises, they would have me arrested as a trespasser." Toll said the partners wanted to move quickly. Hausfeld is such a good lawyer, he said, the partners feared he'd find a creative way out.

HAUSFELD'S ENTRY INTO sports immediately followed that professional debacle. The day after he was fired, he set up a new firm in borrowed office space, along with a dozen lawyers and two assistants who had followed him out the door.

One day he received a call from Ken Feinberg, a prominent lawyer who handled the claims for the victims of the Sept. 11 attacks. Feinberg had served as a mediator on some of Hausfeld's cases. He mentioned Sonny Vaccaro, the street-wise former marketing executive who once shod young basketball players for Nike (and, later, Adidas and Reebok). Vaccaro, as much as anyone, built the empire of camps, tournaments and sneakers that still drives millions of dollars to coaches and universities. He had come to see the NCAA as an exploitative cesspool. By 2008, Vaccaro was touring the country as a reformer and denouncing the NCAA as "the worst organization in the world." "I Googled him and saw who he had gone after: Nazi Germany and the Swiss banks! Apartheid!" Vaccaro said. "His cases were unbelievable."

Vaccaro flew to Washington to meet Hausfeld in his K Street office. "He walks in, and he's this little meek guy with a bowtie, 5-foot-6, maybe 145 pounds, very soft-

spoken,” Vaccaro said. “You wouldn’t think there was any energy there—until we started talking.” For the next hour, Vaccaro described his personal journey. When he finished, Hausfeld walked over and threw his arms around him. “Let’s go after them,” Hausfeld said, according to Vaccaro.

Hausfeld says he took on the case “because it was right.” But it was also a business opportunity his new firm desperately needed. The potential financial payoff for the firm was unclear. “But it was an opportunity for us to say, ‘We’re still here, and we’re doing bigger and better things,’” said Jon King, a lawyer and former walk-on basketball player at Santa Clara who followed Hausfeld to his new firm.

King, who became the lead investigator on the case, said that at the time the firm had no ambitions to expand into sports law. But the NCAA seemed ripe for a challenge. Much of the case was sitting in plain sight. Vaccaro showed Hausfeld the obscure 1997 autobiography of Walter Byers, the NCAA’s executive director from 1951 to 1988. Byers was astonishingly repentant: His book, “Unsportsmanlike Conduct: Exploiting College Athletes,” asserts that, with his help, the NCAA erected a “nationwide money- laundering scheme” that enriches conferences, schools, coaches and TV networks on the backs of unpaid athletes. Byers confessed that he helped invent the term “student-athlete” to shield the NCAA from having to pay the players.

To Hausfeld, the book was “an amazing revelation” that helped convince him he had a case. He found that other economists had reached the same conclusions about the NCAA. Two years after the publication of Byers’ book, a former Berkeley economics professor named Ernie Nadel was watching a bowl game when an announcer mentioned that Florida coach Steve Spurrier earned \$2 million a year. Nadel approached one of his colleagues, Dan Rascher, and asked how it could be that the head football coach for a public university was making so much money. “Because he’s good at recruiting talent,” Rascher said. “And you can’t pay the talent.” “This is legal?” Nadel responded.

That inquiry ultimately led to one of the first class-action antitrust cases against the NCAA. Rascher and fellow economist Schwarz hoped the case would go to trial. But in 2008, attorneys accepted a \$10 million settlement from the NCAA for “bona fide educational expenses” to be distributed to some 12,000 athletes over a three-year period. The lawyers made almost as much money. The NCAA emerged unscathed. Schwarz and Rascher were furious. Hausfeld, who hired them as expert witnesses, gave their cause new life. All Hausfeld needed was a name to attach to the case. “After the hug, that’s when I had to go out and find people,” Vaccaro said.

Over the next two months, he called up nearly a dozen prominent players, trying to persuade one to take on the NCAA. None would agree. Then one day, O’Bannon called him. He explained to Vaccaro how a friend had asked him one day, “Want to see yourself in a video game?” The game featured a UCLA power forward with O’Bannon’s height, weight, skin tone, No. 31 and left-handed shot. He even had the

player's bald head.

O'Bannon wondered how it was possible he wasn't getting paid. Vaccaro put him in touch with Hausfeld, whose lack of sports knowledge did not bother O'Bannon. "I can appreciate someone who is of a certain cause, not a fan but someone who realizes right is right and wrong is wrong," he said.

Ramogi Huma, who has led the recent campaign to unionize college athletes, says Hausfeld is "always on the right side, always fighting for the little guy."

During a bruising deposition in 2012, an NCAA attorney asked Vaccaro whether he had a criminal record. Hausfeld halted the proceedings and accused the NCAA of acting like a state police agency. He asked the lawyer whether he had a criminal record. "Have you? Now you answer," Hausfeld insisted. "It's your turn." Vaccaro says the retort gave him confidence to proceed, knowing Hausfeld had his back. "Michael is like that guy in the Jimmy Stewart story ["It's a Wonderful Life"], that angel looking over me," he said.



AP Photo / Isaac Brekken

*O'Bannon sees Hausfeld, who won judgments for Holocaust survivors and African-Americans in a separate case, as a savior.*

IN 2011, HAUSFELD found a new cause: retired NFL players. Their plight immediately resonated with him. Many of the retirees lacked health insurance, and for those who played in the 1970s and 1980s, when the NFL was transforming into a \$10 billion industry, their pensions were low relative to other major sports leagues. There was growing scientific evidence that football-related head trauma was causing brain damage in an alarming number of players, but the NFL had spent years rejecting the findings. That year, as a lockout paralyzed the sport, Hausfeld filed a lawsuit on behalf of former Vikings defensive end Carl Eller and other players to try to gain a foothold in the labor talks.

The effort failed. Hausfeld spent hours sitting outside the negotiating room, while the NFL and the current players settled on an agreement widely viewed as a victory for the owners, a loss for the current players and troubling for the retirees. Hausfeld soon filed another lawsuit—Eller II—this time against the NFL Players Association. That effort also failed, but Hausfeld says the process gave him insight into the NFL's "victimization" of the older players.

Desperate to be heard, the retirees focused on a lawsuit that had been filed in

Minnesota. Six former players, including former Rams defensive end Fred Dryer, Hall of Fame Oilers defensive end Elvin Bethea and Oilers quarterback Dan Pastorini, argued the NFL had illegally appropriated their identities to promote the league through its lucrative production arm, NFL Films. The league “trades on the ‘glory days’ of the NFL as a marketing and advertising technique to enhance the NFL’s brand awareness and increase its revenue,” the suit alleged. “The retired players who created these glory days, however, have gone almost completely uncompensated for this use of their identities.”

The lawsuit encapsulated all the bitterness that had built up among the retirees. “We considered ourselves to be cattle back in the day,” said Bethea, who made the Pro Bowl in eight of his 16 seasons. “And when it’s over, it’s over.” Upon his retirement, Bethea found he no longer had health insurance. Although his legacy lived on in numerous NFL films, he didn’t see a dime. Bethea, who remained in Houston, picked up a decent paycheck, medical insurance and a pension working 27 years for Anheuser-Busch. The difference between how a beer company and the National Football League treated him always struck him as, “LAUGHABLE, in capital letters,” he said.

Bethea had a friend, singer Betty Wright, who told him about the “mailbox money” she occasionally received, song royalties for which “you sit there and wait for the money to come your way.” “I guess the mailman forgot me,” Bethea said.

One day he was coaching Pee Wee football when a player told him, “Hey, Coach Bethea, I saw you on TV!” That’s when he decided to take action. “I just thought this was not the American way,” he said. “If you do something, you ought to get paid. I felt like I was an entertainer, like a songwriter or a singer or a movie actor—anyone who has performed in front of other people. That’s why I got involved.”

Hausfeld wasn’t originally involved in the suit. He was brought in by another lawyer, Bob Stein, a former NFL linebacker who later ran the Minnesota Timberwolves, in part because Hausfeld was representing O’Bannon over the same issues. Hausfeld positioned himself to the retirees as their champion. To win their support, he courted DeLamielleure, the popular former Bills guard who had been fighting the NFL over medical benefits and pensions for years. Joe D, as he’s known, is mostly deaf in his left ear—from being head-slapped for 13 seasons, he believes. He helps raise money for an orphanage in Mexico.

DeLamielleure was impressed by Hausfeld’s soft-spokenness and stated dedication to their cause. At one of the first meetings with the players, “he brought his grandson,” he recalled. “I was impressed. I’m a real family guy, and that’s how he won me over.” But almost immediately, over the objections of the original plaintiffs, Hausfeld worked to cut a deal with the NFL. The \$50 million settlement called for no direct payment to the thousands of retired NFL players who would be affected. Nor did it provide insurance, which, according to DeLamielleure, was “the only thing we really

wanted.” Most of the money went to a “Common Good Fund,” which Hausfeld says could ultimately be used to provide health benefits to some players. The deal also created a licensing agency that Hausfeld set up with IMG, the marketing giant, to cut deals on behalf of NFL retirees.

The aging players, most of whom had little or no name recognition, thought the licensing agency was worthless and they would see little, if any, of the settlement money. The lawyers, meanwhile, were to receive most of \$8 million set aside to cover legal fees and the establishment of a trust for players.

Stein and the original plaintiffs were livid. They told Hausfeld they wouldn’t support the deal. “He couldn’t convince us it was a fair deal, so he got other people,” said Pastorini, who filed a malpractice suit against Hausfeld that was later dismissed. “He basically dropped us and abandoned us.”

Hausfeld insists he consulted with Stein and the original plaintiffs. He says he believed it was the best deal he could get and it set up a vehicle for them to get paid. “It was clearly a difference of opinion as to what they considered successful and what we felt was successful and achievable,” he said.

Hausfeld also went after the NFL players’ union, another act that led to recriminations. In June 2012, he sent a letter to the AFL-CIO “on behalf of the undersigned” and called on the umbrella federation for U.S. unions to “expel the NFL Players Association . . . for its moral failures.” The “undersigned” included Bethea, but when the letter became public, the Hall of Famer said he was shocked; Hausfeld had never obtained his permission. “I don’t know how he got my name to be part of that letter. I was never going along with this guy,” said Bethea, who once served as the Oilers’ player representative. He and Dryer, whom Bethea was told also supported the request to the AFL-CIO, wrote open letters challenging Hausfeld. Bethea asked for a retraction and an apology. Dryer wrote: “Knowing you as I do now, it is no surprise to me that you would misrepresent facts and the truth in order to manipulate a specific outcome.”

Hausfeld says he was “sure” he had obtained the players’ permission through DeLamielleure, whom he believed spoke for them. DeLamielleure said no such conversation occurred. “He’s bulls---ting,” DeLamielleure said. “I never told those guys to put Elvin’s name on there. Never, that son of a bitch! Why would anybody ask me to put Elvin’s name? This guy is unreal.” “I’m still waiting for my retraction,” Bethea said. He said he became convinced Hausfeld was trying to become the de facto representative of the retired players. “Everything he was selling was snake oil,” Bethea said. “He was going to cure everything.”

In November 2012, the disagreements exploded at a status conference in Minneapolis before the magistrate judge overseeing the lawsuit. Hausfeld invited players he thought supported the settlement. That included DeLamielleure,

who was still, tentatively, in Hausfeld's camp. Dryer, Bethea, Pastorini and the other original plaintiffs also showed up, with Stein and his colleague, Tom Ward. A pre-conference meeting, convened by Hausfeld for players who supported the deal, turned into a free-for-all. Ward burst in with Pastorini and lambasted Hausfeld, accusing him of holding "secret meetings." Players screamed at Ward. Mitchell, Hausfeld's paralegal, feared there might be a physical confrontation before order was restored.



AP Photo / Bill Wippert

*Joe DeLamielleure, the Hall of Fame Buffalo Bills offensive lineman, says Hausfeld sold him and other players out to get a big payday for his law firm.*

The settlement ultimately went through; the judge who approved it described the deal as "truly one-of-a-kind and a remarkable victory for the class as a whole." The original players continued to oppose it; more than 2,000 retired players ultimately opted out. No one has been paid, including Hausfeld, while the case is appealed. DeLamielleure has kept a diary since 1983, and after the Minneapolis meeting he wrote, "I feel like I need a shower." Mitchell escorted Joe D back to the airport in a van. "I don't want to be used anymore," he told Mitchell. "I'm done." DeLamielleure hasn't talked to Hausfeld since. "I felt bad because they used me to bring in a lot of guys," DeLamielleure said. "This was all manipulated to get the lawyers their money." Bethea said he has some advice for any athlete who comes in contact with Hausfeld: "Run!"

FIVE YEARS AFTER entering the sports field, Hausfeld LLP is still waiting for its big payday—or any payday, for that matter. Its greatest hope evaporated this year when the judge in the O'Bannon suit rejected the request for players to pursue damages as a class, which would have allowed them as a group to tap into billions of dollars from past TV revenues. At that point, the case became about changing the system. For a plaintiff's lawyer, the incentive to keep spending money and time on the case was greatly diminished. Win, and all you get are your fees paid. Lose, and you get nothing. "He easily could have said, 'We didn't get it – good luck,'" O'Bannon says. "But he didn't. That's why I love the guy."

But there are ways Hausfeld could still profit, some less obvious than others. Beyond the more than \$15 million he says the NCAA would have to repay his firm in billable hours and fees, he also could play a role in the business of college athletics, should the courts rule in his favor. In 2011, he registered a new organization, the Former College Athletes Association, with the Department of Consumer and Regulatory Affairs in Washington. Its address was listed as 1700 K Street, the headquarters for

Hausfeld LLP.

From its creation, the exact nature and composition of the FCAA has been something of a mystery. The intent is to collect licensing revenue for players after their college careers, says Feinberg, who is helping organize the entity and, along with Vaccaro and Huma, was a founding board member. Hausfeld says he set up the FCAA as a vehicle for a potential settlement in the O'Bannon case, in case the NCAA agreed to distribute licensing revenue to athletes. He acknowledges that the organization could be used to market



AP Photo / Paul Beaty

*Ramogi Huma, who has led the recent campaign to unionize college athletes, is on the board of an agency Hausfeld created that would collect licensing revenue for players after their college careers should Hausfeld win the O'Bannon case.*

current college athletes, should the regulations change. Hausfeld wants to be the FCAA's lawyer, which could put him in position to negotiate everything from TV contracts with ESPN to gaming agreements with EA Sports. "What the FCAA is saying is, 'We will go out and get enough of the athletes to create a critical mass, so that if someone wants a group license we can deliver it,'" he said.

The FCAA's existence surfaced in a 2013 wrongful termination suit filed by Jon King, who for three years served as Hausfeld's lead investigator on the O'Bannon case. King claimed that when asked about the FCAA by other lawyers at the firm, Hausfeld replied: "It's a revenue stream for us." According to the lawsuit, some lawyers expressed concerns that the FCAA created a potential conflict of interest by "creating a business that [Hausfeld] ultimately intended to be a for-profit licensing entity" and that he was using the O'Bannon case "to obtain that source of ongoing profits for the firm."

King had been fired on Oct. 3, 2012, for what he claimed were concerns he raised about potential ethical violations at Hausfeld LLP, including the FCAA issue. Hausfeld denied any improprieties and said King's dismissal was performance-based. The lawsuit was dismissed and sent to an arbitrator. Before a scheduled hearing, King surrendered. The agreement he signed—and which was accompanied by an order issued by the arbitrator—states that he "now understands that the claims previously asserted ... were incorrect" and "acknowledges that he has apologized" to Hausfeld and each of his partners. In an interview, King, who now works for a rival firm, said he dropped the suit because he feared he would be on the hook for more than \$400,000 in legal fees if he lost. But he repeated his assertion that he and others felt Hausfeld's involvement with the FCAA was a potential conflict of interest. Hausfeld says he has "no relationship economically" with the FCAA. Nor, he says, is it a "lock" that he will become the organization's outside counsel. "I'm floating just like anyone else,"

he said. But Feinberg concedes Hausfeld is a favorite, given the sweat equity invested.

Hausfeld is also well-positioned to represent players in future sports litigation, including, potentially, hundreds or even thousands of individual cases that might grow out of the O'Bannon decision. In April, he announced that he and famed lawyer David Boies were forming a joint sports law group. Among other things, Boies and Hausfeld are seeking to become outside counsel to the NBA players' association. Hausfeld says he is preparing his firm for transition to younger leadership. But he shows no signs of slowing down. Hausfeld might know little about sports, but his value to the case was put on vivid display during the O'Bannon trial, when he faced off against one of the NCAA's expert witnesses, James Heckman, a University of Chicago professor who has won nearly every major award in economics, including the Nobel Prize.

Heckman tried to assert that playing college sports does not hurt academic performance and earning power. Hausfeld produced a Knight Commission report showing that, in fact, star athletes are often admitted to universities with little chance of graduating and "are brought into the collegiate mix more as performers than aspiring undergraduates." Aiming his bowtie as if it might squirt water on the witness, Hausfeld bore in. "Do you disagree with that representation of the Knight Commission?" he asked Heckman. "Yes or no." Heckman refused to answer and, flustered, asked Hausfeld a question of his own. The judge, Claudia Wilken, interrupted. "The witnesses can't ask the lawyers questions," she admonished Heckman. "OK, sorry about that, your honor. I'm not a professional witness," Heckman said.

A member of Hausfeld's legal team slipped him a note: "He's toast. Get him off the stage." But Hausfeld ultimately couldn't resist a parting shot. "Dr. Heckman, was there a typo in your report?" he asked. "Is your hourly rate \$2,300?" "Yes," Heckman acknowledged. "I have no further questions, your honor," Hausfeld said.

Investigative reporter Paula Lavigne of ESPN's Enterprise and Investigative Unit contributed to this report.

# Global Match-Fixing and the United States' Role in Upholding Sporting Integrity\*

By Kevin Carpenter \*\*

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## INTRODUCTION

MATCH-FIXING HAS NEVER been more prominent on the global stage than at the current time for a number of reasons including: the badminton scandal at the London 2012 Olympic Games, the recent Europol announcement that 680 soccer games were suspected of being fixed worldwide implicating 425 match officials, club officials, players and criminals<sup>1</sup>, and the arrest and questioning of some of the most wanted criminals in the field.<sup>2</sup> Yet in the United States, considered one of the big closed danger markets for sports betting<sup>3</sup>, it does not appear to be particularly high on the agenda for government or sports governing bodies ('SGBs'). This opinion piece will explore and explain various aspects of match-fixing and why the US has an important role in the fight.

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\* This article was originally published in the Berkeley Journal of Entertainment and Sports Law. This article may be found at 2 BERKELEY J. ENT. & SPORTS L. 214. Reprinted with author's permission.

\*\* Sports Lawyer, Hill Dickinson LLP; on Twitter @KevSportsLaw

1. 'Update – Results from the Largest Match-Fixing Investigation in Europe', europol.europa.eu, 6 February 2013

2. 'Football match-fixing suspect arrested in Italy', BBC News Europe online, 21 February 2013

3. 'Match-fixing: a winnable war?' Panel at Sport & iGaming conference 2012, London, 29 November 2012

## **I. WHAT IS MATCH-FIXING AND WHAT ARE THE DRIVERS?**

There is no one settled definition for match-fixing, however I formulated the following for a presentation I gave back in 2011 which I believe encapsulates it most succinctly:

*A dishonest activity by participants, team officials, match officials or other interested parties to ensure a specific outcome in a particular sporting match or event for competitive advantage and/or financial gain which negatively impacts on the integrity of the sport.*

This can then be broken down into two strands: betting-related match-fixing (largely illegal betting) and sporting match-fixing (non-betting related). There has been far greater focus on the former principally due to the vast sums involved, with it being suggested by INTERPOL (the international police organization) that sports betting has become a \$1 trillion a year industry.<sup>4</sup> There is also the overarching and menacing presence of organized crime, a term which has a greater impact on key stakeholders, particularly politicians, than match-fixing.

It has been repeatedly shown that betting-related match-fixing is driven by high level and increasingly sophisticated criminals, be it the mafia or illegal gambling rings in Asia for instance.<sup>5</sup> They have been able to take an increasing stranglehold on sports as a direct consequence of globalization<sup>6</sup> The following have flowed from an ever globalized world to provide greater opportunities for corruption through sports and gambling and therefore new challenges for all stakeholders in sport: the number of betting possibilities (including the advent of in-play betting and spread betting), betting exchange and great advances in technology.

## **II. RECENT MATCH-FIXING IN GLOBAL SPORTS**

Whilst it is interesting to discuss match-fixing in the abstract it is equally important to provide real instances of where match-fixing has taken place in the past few years.

Being the biggest sport in the world by viewing figures and participation it is hardly surprising that soccer has been targeted, with a significant degree of success, by match-fixers. A number of match-fixing scandals across Africa and Asia (dubbed 'Asiagate') have surfaced in this time, many of them linked with the notorious Singaporean match-fixer Wilson Raj Perumal and the global operation run through his shady Football4U company, through which he has

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4. 'Fifa determined to tackle international match-fixing', Bill Wilson, BBC News Business, 10 October 2012

5. 'Study - Sports betting and corruption: How to preserve the integrity of sport' at page 27, IRIS, University of Salford, Cabinet Praxes-Avocats & CCLS, 13 February 2012

6. 'Match-fixing: How gambling is destroying sport', Declan Hill, BBC Sport, 5 February 2013

profited from the vast sums made by Asian gambling syndicates.<sup>7</sup> The striking nature of these investigations especially for the world governing body of soccer, Fédération Internationale de Football Association ('FIFA'), is that they involved the alleged fixing of senior international matches. Concerns first came to light in Zimbabwe when the football association ('ZIFA') revealed in February 2011 that there was an investigation taking place into tours in which the national team had taken part in between 2007 and 2009. Players involved in those tours subsequently admitted to throwing matches for money.<sup>8</sup> The probe revealed that not only had Asian gaming syndicates paid each player in the Zimbabwe squad \$3,200–\$4,500 in cash for each match lost, but also that in July 2011, Monomotapa Football Club had twice impersonated the country's national team and played Malaysia in international friendlies. As planned, they lost 4-0 and were handsomely rewarded. It has since been announced that 80 Zimbabwean footballers have been suspended by ZIFA pending the outcome of hearings in front of a newly established independent ethics committee. The international friendlies are thought to have been arranged specifically for the purposes of match-fixing through sports betting.<sup>9</sup> These scandals undermined the entire sport in the country. This culminating recently in ZIFA President Cuthbert Dube questioning the integrity of the team in its most recent match, having let a 3-1 lead slip to miss out on qualification for the Africa Cup of Nations, and disbanding the team soon after. This suspicion may have stemmed from the players having told the ethics committee that during the infamous 2009 tour representatives from betting syndicates were present in the changing room at half time dictating to them how the game should unfold!<sup>10</sup> Mr Perumal was caught in the act back in 2011, imprisoned in Finland for a year, and is currently in protective custody in Hungary.

Italy, a nation somewhat notorious in this area, was the subject of yet another tranche of allegations and prosecutions last year. The highest profile actor caught in the crossfire on this occasion was current Italian league champions Juventus, who have a checkered history as regards match-fixing<sup>11</sup>, with their manager Antonio Conte being served a four month ban (reduced from 10 months upon appeal) for failing to report allegations of match-fixing during his tenure at Siena.<sup>12</sup> There were also the extreme actions of Verona striker Emanuele Pesoli who held a four day hunger strike whilst chaining

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7. 'Zimbabwe: Fifa Praise Asiagate Measures', Hope Chizuzu, *The Herald*, 14 February 2012

8. 'Corrupt players will be punished – Zifa chief', Farayi Mungazi, *BBC Sport*, 25 February 2011

9. 'Zimbabwe suspends 80 footballers as part of 'Asiagate' match-fixing probe', David Smith, *The Guardian online*, 1 February 2012

10. 'Zimbabwe chief disbands team', Associated Press, *ESPN Soccer.net*, 2 November 2012

11. See 2006 *Calciopoli* scandal (sporting related match-fixing)

12. 'National Court for Sports Arbitration issued its final ruling on Antonio Conte's position', *Italian Sports Law Research Center, LawInSport*, 1 November 2012

himself to the Italian football headquarters following a three year match-fixing ban being imposed upon him.<sup>13</sup> Perhaps of greatest concern was player Simone Bentivoglio describing an “atmosphere of complete terror” in Italian football having accepted a plea bargain for charges brought against him.<sup>14</sup>

Tennis has also seen itself at the center of more than a handful of match-fixing controversies. Perhaps the most high profile case being in 2007 when Nikolay Davydenko, ranked number four in the world at the time, was involved in a match which betting exchange Betfair said bore all the hallmarks of having been fixed, with around \$10 million having been placed on the game, most of which was placed on his lower ranked opponent. Despite being cleared of all the charges, and therefore innocent in the eyes of the law, Mr Davydenko has been associated with Alimzhar Tokhtakhounov, who in 2002 was accused by the FBI of fixing figure skating events at that year’s Winter Olympics in Salt Lake City.<sup>15</sup>

The tennis authorities continue to keenly monitor and investigate alleged instances of match-fixing activity. The Association of Tennis Professionals (‘ATP’), organizer of the worldwide tennis tour for men, handed down a life ban and \$100,000 fine to Austrian Daniel Koellerer, who had been as high as number 55 in the world. He was found guilty of three offences in relation to match-fixing, both of his own matches and trying to coerce other players to participate in match-fixing between October 2009 and July 2010.<sup>16</sup> Koellerer appealed to CAS in November 2011 but this was rejected.<sup>17</sup> In 2012 CAS once again sided with the tennis authorities in the face of an appeal against a life ban for match-fixing, this time by Serbian player David Savic, “The CAS Panel rejected the Player’s arguments and concluded that the disputed facts had been proven not only by a preponderance of the evidence, but indeed to the Panel’s comfortable satisfaction.”<sup>18</sup>

Even though the above are just a small flavor of the breadth and depth of match-fixing it shows that it is a worldwide, large-scale, multi-discipline problem which creates significant difficulties in terms of detection and prevention. As INTERPOL Secretary General American Ronald K. Noble said in 2012, “As corruption in sports has become a global concern, our response must be global and holistic.”<sup>19</sup>

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13. ‘Emanuele Pesoli ends his hunger strike over match-fixing ban’, BBC Sport, 15 August 2012

14. ‘Midfielder tells of ‘terror’ in Italian game’, Adam Digby, ESPN Soccer.net, 24 August 2012

15. Match-fixing in tennis’, David White, Tennisbet.com, 26 June 2009

16. ‘Former world No 55 Koellerer banned for life as tennis tackles match-fixing’, Mike Dickson, Daily Mail online, 31 May 2011

17. CAS 2011/A/2490 Daniel Kollerer v Association of Tennis Professionals, Women’s Tennis Association, International Tennis Federation & Grand Slam Committee

18. ‘Media Release: The Court of Arbitration for Sport confirms the life ban imposed on David Savic but lifts the fine’, tas-cas.org, 6 September 2012

19. ‘Keeping sport clean needs enhanced policing and prevention, INTERPOL Chief tells summit’, Interpol.int, 25 April 2012

### III. HISTORY OF MATCH-FIXING IN THE UNITED STATES

Match-fixing is not a new phenomenon to the US or American sports. Indeed one of the most famous (or infamous depending on your view) proven cases came from the 1919 baseball World Series involving the Chicago White Sox. The match-fixing conspiracy was organized by White Sox player Arnold “Chick” Gandil who had longstanding ties to underworld figures, including New York Gangster Arnold Rothstein who financed the caper through his lieutenant, a former boxing champion. Gandil enlisted several of his teammates who were motivated by the resentment for the club’s owner who had been underpaying his players for some years. A year later a Grand Jury was convened to investigate the alleged scandal, which had been rumored even before the Series has started with a sudden spike on the Sox’s opponents the Cincinnati Reds. The investigation led to life bans from the sport for all eight players involved.<sup>20</sup> The delayed payment or non-payment of players is still a significant reason why players agree to fix matches in other sports today.<sup>21</sup>

College basketball has also been subject to a number of match-fixing scandals.<sup>22</sup> In 1951 a various schools, including City College, Manhattan College and Kentucky, were implicated in point shaving scandals which led to the arrest of 32 players, who had fixed 86 games in total, and suspensions from the NCAA. The fixers themselves, Cornelius Kelleher and brothers Benjamin and Irving Schwartzberg, who were bookmakers and convicted felons, were also booked on bribery and conspiracy charges.<sup>23</sup> Point shaving is the (highly illegal) act of purposefully holding down the score of a sporting event in order to impact who will win bets against a point spread.<sup>24</sup> It is a form of match- fixing more widely referred to as ‘spot-fixing’. Spot-fixing does not involve making sure a team loses a game, rather it is actions taken to ensure certain events take place during the game, and is exclusively within the realm of betting-related match-fixing.

The most high-profile instance of match-fixing in recent US sports history was that carried out by former NBA referee Tim Donaghy. This was yet another series of incidents of point shaving which were investigated and made public by the FBI, who has its own division of officers specifically tasked with dealing with gambling and fixing in sports.<sup>25</sup> Donaghy was found to have bet on games in which he had officiated, and made decisions affecting the point spread in those games, during the

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20. ‘Integrity in Sport: Understanding and preventing match-fixing’ at page 9, SportAccord, November 2011

21. See FIFPro Black Book Eastern Europe, Section 5.5.2, February 2012

22. See also these scandals: 1959 – NBA, Jack Molina and a suspected mafia murder; 1978 – Boston College, betting syndicates and organized crime

23. ‘Explosion: 1951 scandals threaten college hoops’, Joe Goldstein, ESPN.com, 19 November 2003

24. ‘What is Point Shaving?’, Charlie Zegers, basketball.about.com, accessed 26 February 2013

25. ‘Integrity in Sport: Understanding and preventing match-fixing’ at page 43, SportAccord, November 2011

05/06 and 06/07 NBA seasons. He pleaded guilty to two federal charges related to the investigation and was sentenced to 15 months imprisonment, followed by three years of supervised release. This led to the NBA revising the guidelines on the behavior of its referees, it having been revealed that, despite a ban on gambling in their contracts, all of them admitted to having engaged in some form of gambling.<sup>26</sup> It had been suggested by a prominent bookmaker that referees had to be the prime suspects because the players make too much money to risk losing their careers over match-fixing.<sup>27</sup> I have heard this defense raised a number of times in the US where match-fixing is concerned. However, the Bountygate integrity scandal, where some New Orleans Saints players intentionally broke the NFL rules for as little as \$1000 when they were earning millions each season, dispels this theory I suggest.

Just over the border the US's North American cousins have had the most recent problems with match-fixing. Last September a television program was aired on the Canadian Broadcasting Corporation news channel revealing that at least one game in the semi-professional Canadian Soccer League ('CSL') had been compromised by match-fixing.<sup>28</sup> This was discovered having obtained the wire-tap evidence from the Bochum trial, the biggest match-fixing case ever to come to trial, which centered on a Europe-based crime syndicate that made a reported \$9.8m profit from corrupting players, referees, coaches and federation officials.<sup>29</sup> Many of those involved were given severe prison sentences by the German court. These revelations led the Canadian Soccer Association ('CSA') to sever its ties with the CSL by refusing to sanction it. More worryingly, anonymous sources admitted that the CSA isn't equipped to tackle the domestic match-fixing problem.<sup>30</sup>

#### **IV. THE SERIOUSNESS OF THE THREAT AND WHY FIGHT IT?**

As a major fan of US sports born across the Atlantic it has always seemed that US sport is as much about entertainment as it is about the eventual outcome, which is of course much of its attraction. Yet as a result sometimes the integrity of the sport is conveniently put to the back of the minds of SGBs and fans alike. Take doping in baseball for example and the Balco scandal (among others). So perhaps it is reasonable to ask: if a contest is more intense and entertaining then why worry about match-fixing?

What if you were told that the illegal gains from match-fixing represent up

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26. 'NBA to revamp ref gambling rules; Jackson, Nunn see roles reduced', Chris Sheridan, ESPN.com, 26 October 2007

27. 'Expert explains the many ways a crooked referee could fix bets', Wayne Drehs, ESPN.com, 23 July 2007

28. 'EXCLUSIVE: Canadian soccer match fixed by global crime syndicate', CBC.ca, 12 September 2012

29. 'EXCLUSIVE: Canadian soccer match fixed by global crime syndicate', CBC.ca, 12 September 2012

30. 'CSA cuts ties with Canadian Soccer League', Ben Ryecroft, CBC.ca, 31 January 2013

to \$8.8 billion, which is six times more than the global trade in illegal small arms?<sup>31</sup> Or that in South Korea in 2011 a soccer player was found dead in a hotel room accompanied by a suicide note referring to a match-fixing ring?<sup>32</sup> Or the possibility that soccer players are being trafficked from Africa to play in minor professional soccer leagues (perhaps in the US), told to match-fix and then being abandoned? Another quote from Ronald K. Noble of INTERPOL may convince you, “Organized criminals frequently engage in loan-sharking and use intimidation and violence to collect debts, forcing their desperate, indebted victims into drug smuggling and their family members into prostitution”.<sup>33</sup> This shows not only are we dealing with vast sums of money and organized crime but also facing other related heinous crimes as duress through the threat of violence, human trafficking and money laundering.

Given all of this, what steps do SGBs in the US take to ensure their prized sports are not beset by match-fixing and its associated evils?

## **V. CURRENT APPROACH TAKEN BY US SPORTS GOVERNING BODIES TO MATCH-FIXING**

It is widely viewed, although not by all (including myself), that the ultimate responsibility to keep sport clean from match-fixing lies with SGBs. In a report undertaken for the UK Government in February 2010 by the Sports Betting Integrity Panel (‘SBIP’) the Panel formulated a uniform code of conduct on integrity which it recommended should be implemented across all sports. As part of its report, in coming to the code, the SBIP examined how 12 major SGBs each dealt with the following threats:

1. Placing a bet;
2. Soliciting a bet;
3. Offering a bribe;
4. Receiving a bribe;
5. Misuse of privileged/inside information;
6. Failing to perform to one’s merits; and
7. Reporting obligations.

Worryingly, in 38% of instances the SGBs made no provision for at least one or more of the threats, indeed the IAAF (athletics) and Royal & Ancient/PGA (golf) made no provision in their rules for any of the seven.

Thankfully the major US sports all have rules in place for direct participants, be they players, officials, coaches etc., in relation to betting. In fact the NCAA takes

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31. ‘Integrity in Sport: Understanding and preventing match-fixing’ at page 34, SportAccord, November 2011

32. ‘Match-fixing South Korean footballers banned for life’, BBC News Asia-Pacific online, 17 June 2011

33. ‘FIFA’s historic contribution to INTERPOL in fight against match-fixing’, FIFA.com, 9 May 2011

the hardest stance on this issue.<sup>34</sup> However I doubt that they cater for all of the seven threats. Number 5 is becoming an increasing problem in the match-fixing field, especially with the advent of social media, as players can reveal information sensitive to betting such as injuries on the roster and team selections.

Many of the deficiencies that US SGBs have in their rules could be remedied by developing a closer relationship with legitimate betting operators, be this through specific anti-corruption units, early warning systems or memorandums of understanding. Major League Soccer ('MLS') is to be applauded as they utilize FIFA's own Early Warning System which monitors betting patterns in legalized markets, including Las Vegas. MLS will also from next season be banning mobile phones and other electronic devices from the locker rooms from 60 minutes before and throughout the game.<sup>35</sup> So why won't US SGBs in general engage with betting operators?

## **VI. THE US ATTITUDE TO SPORTS BETTING**

A great deal has been written on sports betting in the US in the past 12 months or so given the high profile litigation currently taking place between the State of New Jersey on one side and the NFL, NBA, NHL, MLB, NCAA and the Department of Justice on the other regarding the constitutionality of the Professional and Amateur Sports Protection Act ('PASPA') (more below). I will not be going into the details of the case but it does highlight some important historical and policy issues that can be seen to impact the fight against match-fixing.

From the scandals described earlier sports betting has always been present, and indeed prevalent, in American society. To give an indication of the scale of sports betting in the country one study estimates that in 2008 \$2.8 billion was wagered legally in Nevada, compared to \$380 billion wagered illegally across the US.<sup>36</sup> However, historically there has never been effective regulation of it by either state or federal government. This came to a head in 1992 when the professional and college sports convinced Congress to pass PASPA into law, making betting on sports a federal offence in all but four states, the principal of which being Nevada for Las Vegas. They convinced Congress to do this on the following grounds:

1. Stopping the spread of sports gambling;
2. Maintain sport's integrity; and
3. Reducing the promotion of sports gambling among America's youth.

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34. 'Integrity in Sport: Understanding and preventing match-fixing' at page 43, SportAccord, November 2011

35. 'Here's Why Soccer Match-Fixing Is Not a US Problem', Brian A. Shactman, CNBC.com, 5 February 2013

36. 'Game Over? The Potential Demise of the Professional and Amateur Sports Protection Act', Jason J. Ranjo, Rutgers Law Journal, Volume 42:213

Although the message PASPA continues to send out in reality is: we know sports betting is happening (and on a grand scale), but due to the perception across the US that gambling is an evil in society, we will drive it further underground into the black market and ignore it! This reasoning is counter-intuitive at best, especially in the context of protecting the integrity of sport.

US SGBs are also accused of hypocrisy and the selective application of integrity where sports betting is concerned. Just this past season in the NFL, the referee lockout during the early weeks of the season, and the numerous blatant errors made by the replacement referees, led to howls of derision that the replacements, and especially the league, had seriously compromised the game's integrity. One article even went as far as to say that, "Roger Goodell's (the Commissioner of the NFL) stance on sports betting has become almost disingenuous [as a result]."<sup>37</sup>

When one looks at Great Britain, considered one of the most liberal jurisdictions for sports betting but also one of the best regulated by the Gambling Commission ('GC'), the stance taken by US SGBs appears even more irrational. The GC was set up under the Gambling Act 2005 to regulate commercial gambling in Great Britain. It is an independent non-departmental public body sponsored by the Department for Culture, Media and Sport<sup>38</sup> (no such equivalent department exists within US government). Ever since its establishment the GC's remit covered sports betting and betting integrity issues. It has also has an intelligence unit specifically for betting integrity.<sup>39</sup> Since it became operational in September 2007, despite the amount of betting on sport and advertising by bookmakers (both onshore and offshore), there have only been two significant match-fixing issues, both in cricket, which suggests the model is working well.

However what the GC, and other national regulators around the world, freely admit is that they only have jurisdiction for their own territory. They do talk to other regulators, share their experiences with them and provide intelligence to other countries when asked but they can't force other countries to take action. Which is where the US, and other illegal gambling markets, must begin to engage and alter their regulatory frameworks. The European Union are going through a similar process at this moment in time. After all, match-fixing is a problem that can only be effectively tackled by concerted action on a global scale.

## VII. EUROPE LOOKING TO LEAD THE WAY

European political institutions have taken it upon themselves to lead a co-ordinated and (hopefully) coherent fight against match-fixing. The European

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37. 'NFL Replacement Referees Have Compromised The Game's Integrity And League's Position on Sports Betting', Darren Heitner, Forbes.com, 23 September 2012

38. 'About Us', gamblingcommission.gov.uk, accessed 27 February 2013

39. 'Betting in sports and integrity at the London Olympics: an insight from the UK Gambling Commission – Part 1', Kevin Carpenter, LawInSport, 26 July 2012

Union ('EU') is approaching this in a number of ways.

One being by working with the Council of Europe ('COE') towards a possible international legal instrument against the manipulation of sports results, notably match-fixing ('the Convention').<sup>40</sup> Functions of the Convention are intended to include (amongst others):

- Betting monitoring systems;
- Judicial co-operation; and
- Uniform sanctions.

Once the Convention is finalized the COE hope to be able to convince countries outside of Europe, including the US, to sign up to it.<sup>41</sup> It is worth stressing at this point that the COE is an entirely separate and distinct body from the EU. It covers almost the entirety of Europe with its 47 member countries while the EU only has 27 Member States. The COE seeks to develop common and democratic principles based on the European Convention on Human Rights.

Another approach by the EU to tackle the thorny issue of match-fixing is happening through the auspices of its review of online gambling within the Community. 'Safeguarding the integrity of sports and preventing match-fixing' is one of five priority areas in the "Towards a comprehensive European framework for online gambling" Communication published by the European

Commission (the executive arm of the EU) in October 2012.<sup>42</sup> Member States themselves are urged to take the following steps:

1. Set up national contact points which bring together all relevant actors within each Member State that are involved in preventing match-fixing;
2. Equip national legal and administrative systems with the tools, expertise and resources to combat match-fixing; and
3. Consider sustainable ways to finance measures taken to safeguard sports integrity.

The final step is one which is often not given great enough importance in the debate about match-fixing. It is laudable having grand plans for trans-national policies and co-operation but who is going to pay for it? In the age of worldwide economic austerity a major obstacle to progress in this area will be governments setting aside the necessary funds. Governments increasingly have to lead as sports themselves are often reticent to do so. One set of stakeholders who have shown the means and will to spend on this issue are the betting operators themselves, which in the US draws a sharp intake of breath. In reality policy makers need to have a more cordial attitude towards policy makers for them to continue, and even enhance, this investment.

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40. 'Match-fixing: European Commission to participate in negotiations for Council of Europe Convention to combat manipulation of sports results', Practical Law Company, 22 November 2012

41. Presentation by Stanislas Frossard of the Council of Europe at SportEU 2012 conference, Lausanne, 22 June 2012

42. SWD(2012) 345 final

The US should also look at a wholesale review of its legal framework for gambling (both online and offline) and match-fixing as currently it can be described as a patchwork at best with the following plethora of federal legislation<sup>43</sup>, before that at individual state level is also considered:

- The Wire Act;
- The Travel Act;
- The Interstate Transportation of Wagering Paraphernalia Act;
- The Illegal Gambling Business Act;
- The Unlawful Internet Gambling Enforcement Act;
- The Sports Bribery Act; and of course
- PASPA.

This creates great uncertainty and opportunities for unscrupulous individuals, including match-fixers, and illegal operators to fall through the cracks. FIFA's Head of Security, Ralf Mutschke, had this to say at the recent jointly hosted Asian Football Confederation and INTERPOL conference on match-fixing in Kuala Lumpur, Malaysia, "We have to bring in the governments because they have to change legislation and laws, because a lot of countries do not have proper laws fighting match manipulation and corruption."<sup>44</sup>

#### **VIII. OTHER JURISDICTIONS WITH SIGNIFICANT ILLEGAL SPORTS BETTING**

It may have seemed so far that the US has been singled out for criticism. Although much of it is justified, it is also fair to say that other nations are more culpable in providing the unregulated gambling markets that allow match-fixing to thrive. Asia is the part of the world most often associated with match-fixing, and for good reason, with the volume of illegal betting and match-fixing estimated to be worth \$500 billion in Asian markets alone.<sup>45</sup> Indeed it is said, with significant evidence in support, that the most prevalent match-fixing ring globally is to be found in Singapore, headed by the most wanted man in the field Dan Tan, who it has been reported recently has been assisting Singapore authorities with their investigations, Italian police authorities having had a warrant out for his arrest.<sup>46</sup>

One of the major criminal match-fixing successes in recent times has been the four Soccer Gambling ('SOGA') operations led and coordinated by INTERPOL. SOGA operations have in total led to more than 7000 arrests, the closure of illegal

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43. 'The Professional and Amateur Sports Act (PASPA): A Bad Bet for the States', Eric Meer, UNLV Gaming Law Journal, Volume 2:281

44. 'FIFA head warns over match-fixing, FoxSports.com, 20 February 2013

45. 'FIFA aware of match-fixing fears', Robin Scott-Elliot, The Independent online, 11 March 2011

46. 'Football 'match-fixer' Dan Tan with Singapore police', BBC News Europe online, 21 February 2013

gambling dens which handled more than US\$2 billion worth of illegal bets and the seizure of nearly US\$27 million in cash.<sup>47</sup> The latest of these operations, SOGA IV, was in the summer 2012, took two months in total and successful raids were carried out by law enforcement officers across Asia in China, Macau, Hong Kong, Malaysia, Singapore, Vietnam and Indonesia.<sup>48</sup>

India, with a population of around 1.2 billion (four times that of the US), is another notorious jurisdiction for illegal sports betting and the match-fixing that comes with it. The national sport in India is cricket, which has faced high profile cases of match-fixing over the years including that of former South Africa national captain Hansie Cronje, with a recent Sunday Times investigation described the situation thus, “The millions of cricket mad gamblers in the teeming cities and slums of India are helping are helping to finance something altogether more sinister – the subversion of the sport by a network of match-fixers.”<sup>49</sup> This investigation also detailed further illegality associated with match-fixing, the use of honey traps, attractive women who ‘cozy up’ to players and persuade them to work for underground bookmakers.

Let’s now look at how the greatest sporting spectacle on earth approached this multi-faceted threat last summer and what can be learned in the US and worldwide in both regulated and unregulated jurisdictions.

## **IX. MATCH-FIXING AND LONDON 2012**

London 2012 marked a watershed for the Olympic Games as it was the first time the Host City Contract contained a sports betting monitoring and co-operation clause to combat the threat of match-fixing. In the lead up to the games the International Olympic Committee (‘IOC’), especially its President Jacques Rogge, promoted the message that match-fixing was the most significant threat to the Games, “Doping affects one individual athlete, but the impact of match-fixing affects the whole competition. It is much bigger.” Accordingly a lot of work was undertaken by many stakeholders to ensure the Olympic Games were not subject to their first ever betting-related match-fixing scandal.

At the Sport & Gambling 2012 conference, held in London on 9 October 2012, the IOC’s Paquerette Zappelli and the GC’s Nick Tofliuk gave a joint presentation entitled ‘Lessons from London 2012’. This was a fascinating insight into what perhaps was the most successful match-fixing operation to date.

At the outset the view was taken that the best way to co-ordinate all the different actors would be to establish a Joint Assessment Unit (‘JAU’). The

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47. ‘Arrests across Asia in INTERPOL-led targeting illegal soccer gambling networks’, Interpol.int, 18 July 2012

48. *See id.*

49. ‘Bollywood honeytrap seduces cricket stars into match fixing’, Mazher Mahmood, The Sunday Times, 11 March 2012

JAU would be a mechanism for the collection, collation and assessment of information, both before and during the London Olympics, by the following stakeholders:

- London Organizing Committee of the Olympic Games ('LOCOG');
- IOC;
- UK police force;
- Non-Olympic sports;
- SGBs;
- Betting operators and associations;
- INTERPOL; and
- Media.

The challenge for the JAU would be two-fold: to protect stakeholder interests and putting theory into practice. A central tenet to the JAU's approach would be to ensure that if any threat were to arise the response would be proportional, which would primarily be a media management issue. One view is that proportionality should underpin the shaping of match-fixing policy, regrettably however it is seemingly all too often overlooked.

Clear and robust relationships between the above stakeholders were paramount, as was timing. The delivery model designed to evaluate the JAU was tested thoroughly through scenario based testing sessions. This raised awkward questions of capabilities and competencies, both for the JAU and its various stakeholders, highlighting the importance of depth of understanding of all the organizations involved.

Perhaps the most valuable thing to take from the JAU's approach was that they profiled each of the Olympic sports in detail to find their respective inherent risks and vulnerabilities. To do this they looked to find where the culture was already compromised by corruption (i.e. through weak or compromised governance, doping or match-fixing). Having completed the profiling they were then able to allocate resources appropriately to the sports they had identified as being of greater risk.

Given the overall sports betting turnover at London 2012 was about 10 times higher than for Beijing 2008, the fact that there were no betting-related scandals uncovered during London 2012 indicates that the model may be able to be used internationally, perhaps as a basis for a WADA-type body in the future (more of which later). What the JAU did not cover, and was never intended to do so, was what unfolded during the badminton women's doubles tournament.

On Tuesday 31 July four pairs took to the court for two of the final matches of the group stages. They had already qualified for the next stage of the tournament. Farcical scenes then ensued whereby the players served woefully into the net and missed easy shots in an attempt to deliberately lose their matches and gain favorable

draws in the knockout stages.<sup>50</sup> During both matches the crowd audibly voiced their disapproval of the debacle. This made headline news around the world drawing heavy criticism from all quarters.<sup>51</sup> This included Lord Coe, Chairman of LOCOG, who described it as, “depressing, who wants to sit through something like that? I know the badminton federation [the ‘BWF’]. . . will take that really seriously. . . it is unacceptable.”<sup>52</sup> Thankfully the BWF did as Lord Coe hoped and, having called a disciplinary meeting the following day, disqualified all eight players from the tournament.

The fallout from this scandal brought a great deal of soul searching for the sport, not just for the BWF but also for the national badminton governing bodies. All four of the pairs received short bans from their national SGB, the prevailing view seeming to be that the offending players had been punished severely enough by being excluded from the opportunity to win an Olympic medal. Given the part of the world where the pairs came from (South Korea, China and Indonesia), the Far East being a hotbed for match-fixing activity and gambling syndicates, there were some suspicions (often voiced through social media) as to whether there was a betting corruption element in addition to the sporting motivations to fix the matches? I put this question to Ms Zapelli and Mr Tofliuk at the Sport & Gambling conference. They said that although it had been prudent for the JAU to investigate the matter there was no evidence found of the misdemeanors being related to betting.

Often the opportunity for sporting-related match-fixing stems from a structural flaw in the tournament/competition.<sup>53</sup> The BWF, having been caught out on the grandest of stages, has already changed the rules for Olympic doubles at Rio 2016. Following the group stage, all pairs finishing second in their groups will be placed into a second draw to determine who they face in the knockout phase. For pairs that top their group, they would have fixed positions equivalent to seeded placing’s in the knockout stage. The BWF hope this will prevent such a “regrettable spectacle” ever happening again.<sup>54</sup>

Even with the unforeseen badminton scandal, publicly London 2012 was viewed as a success in the fight against match-fixing, particularly as regards the most insidious betting-related form.

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50. ‘Disgraced South Koreans have bans reduced’, Reuters, 22 August 2012

51. ‘An athlete’s perspective on match-fixing: what sports’ governing bodies should learn from Shuttlegate’, Emma Mason, LawInSport, 9 November 2012

52. ‘China ‘to probe badminton loss’ as players charged’, BBC News China, 1 August 2012

53. ‘An athlete’s perspective on match-fixing: what sports’ governing bodies should learn from Shuttlegate’, Emma Mason, LawInSport, 9 November 2012

54. ‘Olympics doubles rules changed for Rio 2016 after match-fixing scandal’, Duncan Mackay, insidethegames.biz, 30 November 2012

## **X. IS THERE A SIGNIFICANT APPETITE FOR A WORLDWIDE MATCH-FIXING AGENCY?**

A further aspect of match-fixing that is much discussed is the possibility of a an independent organization along the lines of the World Anti-Doping Agency ('WADA') to be the central body to fight match-fixing worldwide. Chris Eaton, former Head of Security at FIFA and now Director of Sport Integrity at the newly formed International Centre for Sport Security ('ICSS') based in Doha, would not go as far as to model such a body on WADA, rather he favors, "an intelligence-collecting, analyzing and information sharing multi-agency global body – more similar to a Financial Action Task Force ('FATF') type of structure – that would be tasked to provide timely advice to governments, police and sport bodies and to provide direct support to any ad-hoc international investigative task forces."<sup>55</sup>

I strongly believe that funding is the critical hurdle to the establishment of a worldwide match-fixing body in any form. With the continuing grim economic climate globally how will governments, who ultimately need to show willingness to contribute to the pot, economically and politically justify spending money on such a body? Furthermore SGBs themselves cannot agree on who should be responsible for driving out the scourge with Eaton having this to say, "It's about avoiding paying for it, because there's a significant cost to doing these things and ultimately they will have to do it anyway [eventually], so my suggestion is that the earlier they invest in this, the less it will cost them."<sup>56</sup> Even if a worldwide body were to be set-up I suspect it would be lacking in teeth anyway until the US, and the other nations detailed above that through inaction and lack of regulation encourage illegal betting, are convinced politically to take a stand.

## **XI. WHERE DOES THIS LEAVE SPORT AND WHAT ACTION DOES THE US NEED TO TAKE?**

Despite having been reported as an issue as far back as the time of the ancient Greeks<sup>57</sup> match-fixing is still really in its infancy in terms of research an understanding, particularly when compared with other threats to the integrity of sport such as doping. Betting-related match-fixing will remain the primary focus in this field for all stakeholders in sport because transnational criminal organizations continue to take advantage of changes in regulations, flaws in legal and judicial systems, the opening-up of borders and the growth of free trade, all of which are direct consequences globalization.<sup>58</sup>

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55. 'The insidious spread of gambling fraud', Chris Eaton, ICSS Journal, December 2012

56. 'Independent agency needed to fight match-fixing', Brian Homewood, ChicagoTribune.com, 30 November 2012

57. 'Match-fixing: How gambling is destroying sport', Declan Hill, BBC Sport, 5 February 2013

58. 'Study - Sports betting and corruption: How to preserve the integrity of sport' at page 5, IRIS, University of Salford, Cabinet Praxes-Avocats & CCLS, 13 February 2012

Governments and the world of sport, particularly in the US, are not as familiar as they should be with the risks to which they are exposed because they do not always fully understand the world of betting and gambling.<sup>59</sup> Increased awareness and transparency would be two significant benefits should the US, and other unlicensed jurisdictions, move from a model of outright prohibition to one where sports betting is legalized, regulated and taxed.<sup>60</sup> The licensed gambling industry contributes \$4.5 billion to the EU sports sector alone. Yet with the grim economic climate showing no signs of abating for some years to come, people will look to make a quick buck from sports betting (particularly illegal sports betting) which will fuel its growth if concerted action is not taken. Indeed the economy will provide the biggest challenge in finding the necessary resources that all actors need to effectively tackle the problem. This is undoubtedly the largest issue yet to be resolved or even properly addressed. Needless to say resources from US, Chinese and Indian governments, for example, would go a long way in plugging the shortfall.

John Abbott, Chair of the INTERPOL's Integrity in Sport Steering Group, said at a conference in Brazil in November that the five key elements for a successful strategy against match-fixing are: partnerships, information exchange, coordination, prevention strategies and pro-activity.<sup>61</sup> Outright prohibition of sports betting achieves none of these.

For all the good work being done by INTERPOL and others, the key broker in the continuing progress against this threat of utmost severity to the integrity of sport is in my view the IOC because it is seemingly the only body, sporting or otherwise, with the necessary political, social and sporting clout. For that reason the IOC is perhaps best placed to overcome the historic and continuing moral, social and political hurdles in the US.

Although sport is about entertainment, this is ultimately generated and maintained by upholding the integrity of sport. The unique emotions felt through sport, which are like no other in life, stem from sport's natural unpredictability which is without doubt its most important commodity. Match-fixing in any form seeks to destroy this for pure unadulterated and selfish greed. This is why all countries and sports need to stand united and fight match-fixing together.

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59. 'Study - Sports betting and corruption: How to preserve the integrity of sport' at page 55, IRIS, University of Salford, Cabinet Praxes-Avocats & CCLS, 13 February 2012

60. 'The Professional and Amateur Sports Act (PASPA): A Bad Bet for the States', Eric Meer, UNLV Gaming Law Journal, Volume 2:281

61. 'Protecting sport from organized crime the focus of INTERPOL panel at International Anti-Corruption Conference', Interpol.int, 12 November 2012

# It is the Biggest Problem in World Sports Today

By Declan Hill, PhD

THERE IS A GANG OF MATCH-FIXERS centered mainly in Asia – Singapore, Malaysia, Indonesia and Thailand. They have traveled around the world fixing hundreds of matches from minor league games to top international matches.

For those readers who have not heard or seen mention of this scandal, this must seem like fiction. So in this article, I will explain the background to the problem and how we can prevent this corruption from destroying the sport that we love.

There has always been fixing and corruption in sport. At the site of the ancient Olympics, built in 776 B.C. Outside that stadium were a whole collection of statues and shrines to the Gods. They were built with the fines levied on athletes and coaches who were caught cheating or fixing at the games. So corruption has had a long history in sport, back at least two thousand eight hundred years and that type of corruption will be with us for as long we continue to hold competitive sports. It is simply a part of human nature.

However, we of this generation - are facing something almost entirely new. It is a new form of match fixing as if someone has taken fixing and injected it with steroids. It is an utterly modern phenomenon and it will destroy sports as we know them. We have spoken already this morning about governance in sports and youth in sports, but this new form of corruption will, like a Tsunami, sweep aside all these other issues in sports and leave our sport dead and destroyed.

Those are big words and even bigger claims, and many readers may be thinking, “Who is this man and how can he make such wild allegations?” It is all sounds so extraordinary to a person in the United States, so let us go through the *facts* which lead me to make those claims. Many of these facts may be unknown to you, they will seem absolutely unbelievable to U.S. ears, but I want to assure you that they are all absolutely true and that we are facing a very, very serious threat to all forms of sports today.

## ***Who Am I?***

I am an investigative journalist and my work has had the good fortune to win a number of national and international awards. The research for the

book was done over five years and featured interviews with over two-hundred and twenty people inside the sports world – players, referees, coaches, sports officials, policemen, prosecutors, bookmakers, professional gamblers and, most importantly, the fixers themselves. I spoke with match-fixers around the world about their means and methods. A group of Asian fixers brought me into meetings between them and coaches and players when they helped fix matches at the World Cup in Germany. During these meetings I wore a secret recording devices.

However, it was not only this type of research that is the basis for my findings. It is only based on my doctoral thesis at the University of Oxford. To gain my degree I compiled and then analysed a whole range of statistical databases on fixed matches vs. non-fixed matches and players who were approached to fix games who either accepted or did not accept.

Since the publication of my book *The Fix* – which is available now in twenty-one-languages – I have testified before the *International Olympic Committee*, the parliamentary committees of the *Council of Europe*, the *European Parliament* and the British Parliament along with a number of other international sports associations. I also put together the anti-match-fixing education program for *Sport Accord* in Lausanne, Switzerland that is now used by Interpol and FIFA in training athletes.

So I write this article partly as an investigator, partly as an academic, partly as an educator, but always as someone who cares deeply about sports and is independent of any other interests.

### ***The Sports Gambling Market***

If we take the entire sports gambling world at 100%, most of the forms that we are familiar with are relatively small. Las Vegas, for example, only has a small share of the total market, so let us add in the illegal sports gambling market of North America. This market is run by the LCN, or La Cosa Nostra, American organized crime. Let us add in the offshore gambling sites in Costa Rica and the Caribbean. Actually, let us also add in the big British gambling companies like *Ladbrokes*, *William Hill* or *Betfair*. We will even throw in the European sports national lotteries, run mostly by governments, that are comparative midgets in terms of sports gambling, but the only way of legally gambling on sports in many European countries. Combine all of those vastly different organizations and all their billions of dollars that they make in gross turn-over. Combine all of them into large pot and you only have 30-40% of the total world sports gambling market.

The rest is the Asian market. It is huge. It dwarfs the European and North American markets. And much of it is illegal, run by the equivalent of Al Capone. This is a vast, powerful market. Because much of it is illegal it is

difficult to give an accurate estimate of its total size. I do not know the actual size. And I caution anyone looking at this field to be careful as many of the estimates are – like the illegal drug industry – inflated because it benefits the person to make the market seem larger than it is.

However, the president of the *World Lottery Association* (the government-run gambling companies) estimated that the total size of the illegal sports gambling market to be approximately \$90 billion. Conversely, a senior executive of the *Hong Kong Jockey Club*, the largest government-run gambling company in the world and one based in Asia, estimated that the total illegal sports gambling market in Asia to be roughly \$1 trillion.

### *The Carnage of Corruption*

What has happened is that this vast, illegal gambling market has corrupted sport across the continent of Asia. I do not want to exaggerate. There are a few Asian sports leagues which are corruption-free, but they are exceptions. Here are a few examples of this wave of corruption:

- The fixing in Japanese Sumo wrestling is now so bad and so ritualized that it has even been featured in an academic article by the American economists Levitt and Duggan.
- The Taiwanese baseball league has had so many scandals linked to gambling match fixing it has now been reduced to only four teams.
- South Korean sports like soccer, basketball, motor-boat racing or even their computer gaming leagues have all been hit with fixing scandals.. A few years ago, I had a phone call from a South Korean journalist interested in this idea of widespread match fixing. He was convinced that while it was an international problem it would *never* happen in South Korea. Because their athletes would never fix a game they were all far too honourable. Sadly, the joke is on him. In South Korea, we now know that the corruption is so endemic that a large number of their sports are a disgrace to that society.
- “The Chinese soccer league is a national disgrace.” Those are the words of Chinese Premier Hu Jintao, who declared in the fall of 2009, that there was so much match fixing and corruption in their soccer league that it embarrassed China.
- We see the same circumstances in the soccer leagues across the region: Vietnam, Hong Kong, Indonesia, Cambodia, Laos, Thailand, Malaysia and Singapore have all faced similar scandals in their own leagues. In Malaysia, the corruption was so bad that a

cabinet minister there estimated that seventy percent of the matches in their leagues were corrupted. Seventy percent! That means it was more usual for spectators to watch a corrupted match than a regularly played game. When there was an attempt to clean-up their joint, and very, very corrupt, Singaporean-Malaysian soccer league, the two countries came close to a diplomatic rift. The Malaysians claimed that the league was so corrupt because of the gamblers in Singapore were fixing a lot of the games; the Singaporeans said that the league was so corrupt because the criminals in Malaysia were fixing a lot of the games. Neither could agree so the league was disbanded because of the corruption.

- The former President of the *Indonesian Football Association*, the same people who recently tried an unsuccessful bid for the 2022 World Cup, was not just accused of corruption, he was not just charged with corruption, he was not just tried for corruption, but he was convicted and sentenced to 30-months in jail for corruption. However, at no point in that entire process did he ever resign or suspend himself from his post. In fact, he even continued to serve as President of the Indonesian FA and carried out its work from his prison cell. When he got out of prison he went on, for some time, as the head of the Indonesian FA.

Possibly the best case that indicates the depth of corruption in Asian sport is the story of the South-East Asia Games of 2005. The South-East Asian Games are a kind of mini-Olympics of the region, with competitions in a range of athletics, team sports, etc. In November 2005, a few days before the tournament began one of the Vietnamese sports executives in charge of the team held a press conference. At the conference, the Vietnamese journalists expressed concern that their team was not particularly strong and would not win a lot of medals. “Don’t worry,” said the sports executive, “It is all fixed.”

He then explained that the teams had got together and arranged how many medals each national team would get and for which sports. Most of the Vietnamese press corps showed that independence of spirit that makes Communist regimes bastions of free thinking and democracy and did not report the story. However, one lonely AFP reporter at the press conference did write an article. It went out over the international wires where the Filipino journalists, who as a whole suffer from many problems but timidity is not one of them, splashed it all over their front pages. The Thai Prime Minister of the time Thaksin Shinawatra wearily responded when asked about these events at a press conference, that everyone knew that the SEA games were corrupt and they should think about abolishing the games. The Vietnamese government faced with a barrage of public embarrassment carefully reviewed the situation and realized what the problem was – the

AFP reporter. So they pressured her to rescind her article. She apologized for “causing national embarrassment” but did not withdraw the substance of her story.

At the end of the SEA Games in December 2005, two things happened. One, many Filipino journalists took great delight in pointing out that the medal tally of the games correlated exactly with the predictions of the Vietnamese sports executive. And two, eight Vietnamese soccer players were arrested for fixing matches with an international gambling ring.

### *The Spread of the Disease*

Sports fans in Asia are not stupid. They know what is going on. They are not happy about all the corruption in their sports, in fact they are very angry. So what are they doing? They turning their allegiances to teams in other leagues where they think the contests are not corrupt. This is part of the reason why you cannot walk down a street in China and not see people wearing Manchester United or NBA team shirts.

However, far more importantly the punters in that vast illegal Asian gambling league are switching their bets from the local soccer leagues, with all the corruption in them, to European leagues. They are betting on all measures of matches from the big, prestigious Champions League all the way down to tiny games in second division Women’s Soccer in the Netherlands.

There are a number of companies organizing monitors who go to matches across the world. They send people to the sidelines of these games where they stand with their mobile phones or laptops reporting back to the illegal gambling market in Shanghai or Johor Bahru or Manila. Again, they are not just reporting on the big English Premier League, or La Liga or Serie A games. In July 2008, in Copenhagen, Denmark there was the annual Tivoli Cup. The Tivoli Cup is a youth tournament for teams across Denmark aged 11 to 19. It is a big tournament, but most matches are played in parks and watched by a couple of dozen people, mostly parents and that year some of the coaches for the teams found four Chinese gambling monitors reporting on the games back to the gambling market. To repeat, the illegal gambling market in Asia is so powerful that it is worthwhile to monitor games of Danish teenagers playing matches in the park.

This is why I get phone calls every few weeks from journalists in a whole range of different countries – Belgium, Finland, Germany, Switzerland, South Korea, - all asking, essentially the same question, “These are such small games in our smallest leagues, we don’t care about these games, why should someone come thousands of miles around the world to fix them?”

There are a number of companies organizing monitors who go to matches across the world. They send people to the sidelines of these games where they stand with their mobile phones or laptops reporting back to the illegal gambling market in Shanghai or Johor Bahru or Manila.

What are the fixers doing? They too are not stupid and they are trying to do to European leagues what they so successfully did in their own leagues – corrupt them. Now the fixers are coming to Europe and North American and they are forming alliances with local criminals. It is an ideal marriage. The Asian criminals get access to the teams and players; the criminals get access to the lucrative Asian gambling market.

The range of countries that have had fixing scandals in football in recent years is a long one. Here is an incomplete list: Turkey, Greece, Belgium, Switzerland, Germany, Austria, Croatia, Slovakia, Czech Republic, Poland (where one cabinet minister, like his Malaysian counterpart, estimated that over 70% of the games had been fixed), Russia, Rumania, Bulgaria, Macedonia, Cyprus, Malta, Italy, Israel, Bosnia, Finland, Portugal, Hong Kong, China, Indonesia, Singapore, Malaysia, Vietnam, Zimbabwe, South Africa, Nigeria, Honduras El Salvador and South Korea and Canada.

***What can be done?***

The great Irish philosopher and playwright George Bernard Shaw was once asked what he thought of the United States. He replied that America was the only country that had gone from savagery to decadence without passing through civilization.

The joke reminds me of the attitude of many sports officials attitude towards corruption. Seven years ago when I first spoke about these dangers a lot of them do not believe me, “It is not possible,” they said, “that so much corruption could come into our sports.” Now, after all the investigations and scandals, many of those same people have passed from disbelief to resignation without going through combat. They say things like, “It is not possible to do anything about all this corruption.”

They were wrong to deny the problem seven years ago. They are wrong to refuse to fight now to protect their sports and they are wrong to say, “there is nothing we can do.”

I do not agree with the words of Bernard Shaw. Great joke, but really, as we know there are many good people in the United States. One of them, Dr. Martin Luther King once said, “It is always the right time, to do the right thing.”

As a man who has risked his life to protect the sports that he loves, to say there is much that we can do and the time is right to do them.

We can establish an International Anti-corruption Agency, funded in part by the gambling industry that can collect information and help launch investigations. An Anti-corruption Agency that would have the same purpose and structure as the World Anti-doping Agency. We can establish proper training and teaching of young players. We can establish proper pensions and educational benefits for the players. We can establish anti-corruption hotlines for players and referees to report corrupt approaches. There are literally dozens of easy, doable and effective ways of stopping the wide-scale corruption

Yet no international sports agency has yet taken the lead in fighting this dangerous new problem. There has been a veritable merry-go-round of anti-corruption officers coming in and out of the various sports agencies. The International Olympic Committee, for whom I testified, have embarked on a series of meetings with mostly European bureaucrats and officials that have produced lots of words, but no concrete action.

It is easy to understand why no action has been taken. Sports organizations in this matter are a little like owners of a meat-packing plant producing tainted meat, officials have a vested interest in suppressing news of possible corruption in their own sport. This is why the sports world needs an independent anti-corruption agency.

There are many, many things that we can do to protect sport, so we can clean up sport. Sport has become the vessel for many of our hopes and dreams in our societies, so we should clean up sport. And for the sake of our young people and all those come after us, we must clean up sport.

## Time for change: US sports betting regulation<sup>1</sup>

by Kevin Carpenter

*Kevin Carpenter argues that the US should play a greater role in stamping out match-fixing in sport*



*Photo 1: Charles Arnold 'Chick' Gandil (with bow tie) during the investigation into alleged match-fixing at the 1919 baseball World Series.*

MATCH-FIXING HAS drawn the attention of governments in Europe and Asia in the past two years for several reasons, including the badminton scandal at the London 2012

Olympic Games; the recent Europol announcement that 680 football matches were suspected of being fixed worldwide, implicating 425 match officials, club officials, players and criminals; and the arrest and questioning of some of the most wanted criminals in the field. Yet in the United States, considered to be one of the big closed danger markets for sports betting, it does not appear to be particularly high on the agenda for either government or sports governing bodies (SGBs).

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<sup>1</sup> This article was originally published in the International Centre For Sport Security (ICSS) Journal Vol. 2, No. 1. The article was reprinted with permission of the author.

## **What Drives Match-Fixing?**

Match-fixing in its various manifestations can be defined as a dishonest activity by participants, team officials, match officials or other interested parties to ensure a specific outcome in a particular sporting match or event for competitive advantage and/or financial gain that negatively impacts on the integrity of the sport.

The practice can be broken down into two strands: betting-related and sporting-motivated fixing. There has been a greater focus on the former, principally because of the significant associated money flows that are vulnerable to fraud: Interpol suggests that sports betting is now a

\$1 trillion-a-year industry. This honeypot has inevitably attracted the involvement of organized crime – an issue and term that might have a greater impact on key stakeholders, particularly politicians, than match-fixing per se.

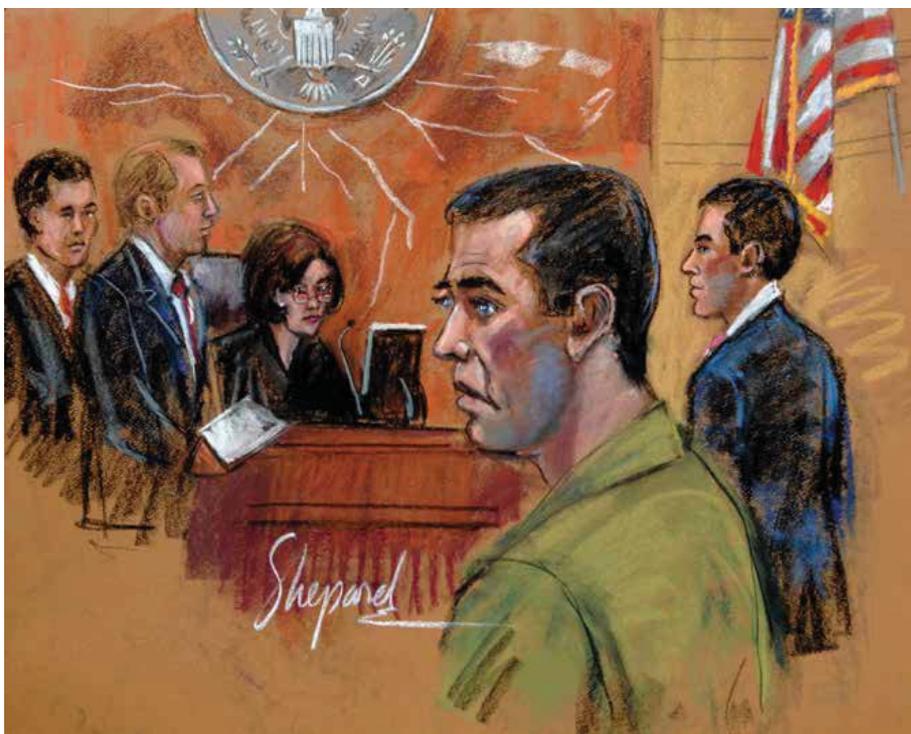
Betting-related match-fixing is now driven by high-level and increasingly sophisticated criminals operating and collaborating worldwide. They have been able to take an increasing stranglehold on sports as a direct consequence of globalization and technology advances that have facilitated growth in the number of betting possibilities (including the advent of in-play and spread betting); new forms such as betting exchange; and new operators based in less-regulated jurisdictions, but available to punters worldwide.

The practice is not a new phenomenon in the US or North American sports generally. One of the most notorious proved cases came from the 1919 baseball World Series. The match-fixing conspiracy was organized by Chicago White Sox player Charles Arnold ‘Chick’ Gandil, who had longstanding ties to underworld figures. New York gangster Arnold Rothstein financed the crime through his lieutenant, former boxing champion Abe Attell.

Gandil enlisted several of his teammates who were motivated by resentment of their miserly salaries. A year later, a grand jury was convened to investigate the alleged scandal, which had been rumored even before the Series started with a sudden betting spike on the Sox’s opponents, the Cincinnati Reds. Although the eight players were acquitted in court, the investigation resulted in life bans from the sport for all eight players involved. The delayed payment or non-payment of players is still a significant reason why players agree to fix matches in sports today.

College basketball has also experienced a number of match-fixing scandals, principally for point-shaving, which is the illegal act of purposefully holding down the score of a sporting event in order to impact who will win bets against a point spread. It is a form of match-fixing similar to ‘spot-fixing’ or ‘micro-manipulation’. Spot-fixing does not involve a team purposefully losing a game – rather it is actions

taken to ensure certain events happen during the game, and is exclusively within the realm of betting-related match-fixing.



*Photo 2: Former NBA referee Tim Donaghy (front) appears in a New York court in 2007 charged with feeding gamblers inside information*

***There is an argument that the ultimate responsibility for keeping sport clean from match-fixing lies with SGBs***

In 1951, various schools, including City College, Manhattan College and the University of Kentucky, were implicated in point-shaving scandals, which led to the arrests of 32 players alleged to have assisted in the fixing of a total of 86 games, and suspensions from the National Collegiate Athletic Association (NCAA). The fixers themselves, Cornelius Kelleher and brothers Benjamin and Irving Schwartzberg, all bookmakers and convicted felons, were also booked on bribery and conspiracy charges. The most high-profile instance of betting fraud by a game official in recent US sports history was that carried out by former National Basketball Association (NBA) referee Tim Donaghy. This was investigated and made public by the Federal Bureau of Investigation's division specifically tasked with investigating gambling and fixing in sports. Donaghy was found to have bet on games in which he had officiated during the 2005/06 and 2006/07 NBA seasons. Donaghy pleaded guilty to two federal charges related to the investigation and was sentenced to 15 months' imprisonment, followed by three years of supervised release. This led to the NBA

revising the behavioral guidelines for its referees, with it having been revealed that almost all admitted to having engaged in some form of gambling – such as betting on golf – despite a ban in their contracts.

A prominent bookmaker has suggested that referees had to be the prime suspects in this case because the players make too much money to risk losing their careers over match-fixing. I have heard this argument raised a number of times in the US. However, the Bountygate integrity scandal, in which some New Orleans Saints players intentionally broke the National Football League's rules for as little as \$1,000 – when they were earning millions each season – challenges this view.

Canada has recently experienced problems with match-fixing. In September 2012, the Canadian Broadcasting Corporation (CBC) alleged that at least one game in the semi-professional Canadian Soccer League (CSL) had been compromised by the practice. This was discovered after CBC obtained the wire-tap evidence from the Bochum trial, the biggest match-fixing case ever to come to court, which centered on a Europe-based crime syndicate that made a reported \$9.8 million profit from corrupting players, referees, coaches and federation officials. Many of those involved were given severe prison sentences by the German court. These revelations led the Canadian Soccer Association to sever its ties with the CSL.

### **The Gravity of the Threat**

It often seems to me that US sport is as much about entertainment as it is about the eventual outcome, which is of course much of its attraction. Consequently the integrity of sport is conveniently put to the back of the minds of SGBs and fans alike. Take doping in baseball, for example, and the huge Balco scandal, which involved sprinters and baseball stars. If a contest is more intense and entertaining, why worry about integrity issues?

One response would be that the illegal gains from match-fixing represent up to \$9.3 billion, which is six times more than the global trade in illegal small arms; another, that in South Korea in 2011 a soccer player was found dead in a hotel room accompanied by a suicide note referencing a match-fixing ring. Or one might point to the possibility that footballers are being trafficked from Africa to play in minor professional soccer leagues (perhaps in the US), told to match-fix and then abandoned. Ronald K Noble of Interpol points out: “Organized criminals frequently engage in loan- sharking and use intimidation and violence to collect debts, forcing their desperate, indebted victims into drug smuggling and their family members into prostitution.”

In the modern world of match-fixing, sport is not only dealing with vast sums of money and organized crime, but also related problems such as threats of violence, human trafficking and money laundering.

Taking all these issues into account, what steps should SGBs in the US take to ensure their sports are not beset by match-fixing and its associated evils?

### **US Governing Bodies' Current Approach**

There is an argument that the ultimate responsibility for keeping sport clean from match-fixing lies with SGBs. In a report published for the UK Government in February 2010 by the Sports Betting Integrity Panel (SBIP), the Panel formulated a uniform code of conduct on integrity which it recommended should be implemented across all sports. As part of its report, the SBIP examined how 12 major SGBs dealt with the following seven threats:

1. Placing a bet.
2. Soliciting a bet.
3. Offering a bribe.
4. Receiving a bribe.
5. Misuse of privileged/inside information.
6. Failing to perform to one's merits.
7. Reporting obligations.

Worryingly, in 38 per cent of instances, the SGBs made no provision for at least one or more of the threats; indeed the IAAF (athletics) and Royal & Ancient/PGA (golf) made no provision in their rules for any of the seven.

The major US sports all have rules in place for direct participants – be they players, officials, coaches or similar – in relation to betting. In fact, the NCAA takes the hardest stance on this issue. However, I doubt that even it caters for all seven of the threats. Misuse of privileged/inside information is becoming an increasing problem in the match-fixing field, particularly with the advent of social media, as players can reveal information sensitive to betting, such as injuries on the roster and team selections.

Many deficiencies in the rules and policies of US SGBs could be remedied by developing closer relationships with legitimate betting operators, be this via specific anti-corruption units, early warning systems or memoranda of understanding. Major League Soccer (MLS) is to be applauded, as this body uses Sportradar's Fraud Detection System, which monitors betting data and patterns from across the world. MLS also bans mobile phones and other electronic devices from locker rooms at certain times to prevent players from communicating with match-fixers (see Scaife, p84). So why won't US SGBs in general engage with betting operators?

## **US Attitudes to Sports Betting**

A great deal has been written on sports betting in the US in the past 12 months, given the high profile litigation currently taking place between the State of New Jersey on one side and the NFL, NBA, National Hockey League, Major League Baseball, NCAA and the Department of Justice on the other. The case concerns the constitutionality of the Professional and Amateur Sports Protection Act (PASPA), which restricts all but a few states from legalizing sports gambling. I will not be going into the details of the case, but it does highlight some important historical and political issues that can be seen to impact the fight against match-fixing in the US.

Sports betting has always been present, and indeed prevalent, in US society, despite restrictions. To give an indication of the scale of sports betting in the country, the National Gambling Impact Study Commission estimates that in 2008 \$2.8 billion was wagered legally in Nevada, compared with \$380 billion wagered illegally across the country. Historically, there has never been effective regulation by either state or federal government. This came to a head in 1992, when the professional and college sports convinced Congress to make PASPA law, making betting on sports a federal offence in all but four states (a notable exception was Nevada, for Las Vegas). They convinced Congress to do this on the following grounds:

1. Stopping the spread of sports gambling.
2. Maintaining sport's integrity.
3. Reducing the promotion of sports gambling among America's youth.

However, the message PASPA really sends out is as follows: we know that sports betting is happening (and on a grand scale), but owing to the perception across the US that gambling is an evil in society, we will drive it further underground into the black market and ignore it! This reasoning is counter-intuitive at best, especially in the context of protecting the integrity of sport.

US SGBs are also accused of hypocrisy and the selective application of integrity where sports betting is concerned. In the 2012 NFL season, the referee lockout during the early weeks of the season, and the blatant errors made by the replacement referees, led to howls of derision that the replacements, and especially the League, had seriously compromised the game's integrity. Darren Heitner in Forbes magazine even went as far as to say that NFL Commissioner Roger Goodell's stance on sports betting "has become almost disingenuous [as a result]". When one looks at Great Britain, considered one of the most liberal jurisdictions for sports betting, but also one of the best regulated by the Gambling Commission (GC), the stance taken by US SGBs appears even more irrational. The GC was set up under the Gambling Act 2005 to regulate commercial gambling in England, Wales and, to a lesser extent, Scotland. It is an independent non-departmental public body sponsored by the Department for

Culture, Media and Sport (no such equivalent department exists within the US government). Ever since its establishment, the GC's remit has covered sports betting and betting integrity issues. It also has an intelligence unit specifically for betting integrity.

Despite all this, what the GC – and other national regulators around the world – freely admit is that they only have jurisdiction for their own territories. They do talk to other regulators, share their experiences with them and provide intelligence to other countries when asked

to do so, but they are not in a position to force other countries to take action where necessary. This is where the US, and other illegal gambling markets, must begin to engage and amend their regulatory frameworks. After all, match-fixing is a problem that can only be effectively tackled by concerted action on a global scale.

***European political institutions have taken it upon themselves to lead a coordinated fight against match-fixing***

European political institutions have taken it upon themselves to lead a coordinated and (hopefully) coherent fight against match-fixing. The European Union (EU) is approaching this in several ways. One is by working with the Council of Europe (COE) towards a possible international legal instrument against the manipulation of sports results, notably match-fixing.

The latest draft of the Convention covers (among other things): betting monitoring systems; judicial cooperation; exchange of information; and uniform sanctions.

**Convention Against Match-Fixing**

Once the Convention is finalized in 2014, the COE hopes to convince countries outside of Europe, including the US, to sign up. It is worth stressing at this point that the COE is an entirely separate and distinct body from the EU. It covers almost the entirety of Europe with its 47 member countries, while the EU has only 28 Member States. The role of the COE is to develop common and democratic principles based on the European Convention on Human Rights. Another approach by the

EU is via its review of online gambling within the Community. 'Safeguarding the integrity of sports and preventing match-fixing' is one of five priority areas in the Towards a comprehensive European framework for online gambling communication published by the European Commission (the executive arm of the EU) on 23 October 2012. Member States themselves are urged to take the following steps:

1. Set up national contact points that bring together all relevant actors within each Member State that are involved in preventing match-fixing.
2. Equip national legal and administrative systems with the tools, expertise and resources to combat match-fixing.

3. Consider sustainable ways to finance measures taken to safeguard sports integrity.

The European Commission has subsequently made an announcement that it will be adopting a Recommendation on the best practices in the prevention and combating of betting-related match-fixing in 2014.

The third step above is rarely given enough importance in the debate about match-fixing. It is laudable having grand plans for transnational policies and cooperation, but who is going to pay for them to be implemented? In the age of worldwide economic austerity, a major obstacle to progress in this area will be governments setting aside the necessary funds. Governments increasingly have to lead as SGBs themselves are often reticent to do so. The betting operators make up one set of stakeholders that has shown the means and will to spend on this issue, which in the US draws a sharp intake of breath. Policymakers need to have a more cordial attitude towards betting operators for them to continue, and even enhance, this investment.



*Photo 3: Ralf Mutschke, FIFA's Director of Security, calls for governments to address match-fixing at a 2013 Interpol conference in Kuala Lumpur, Malaysia*

The US should also look at a wholesale review of its legal framework for sports gambling (both online and offline) and match-fixing, as there is at this time a patchwork plethora of relevant federal legislation, as well as State statutes. This includes the: Wire Act; Travel Act; Racketeer Influenced and Corrupt Organizations Act; Illegal Gambling Business Act; Unlawful Internet Gambling Enforcement Act; Bribery in Sporting Contests Act; and PASPA

This creates great legal uncertainty and opportunities for unscrupulous individuals, including match-fixers and illegal operators, to fall through the cracks. FIFA's Director of Security Ralf Mutschke said at the recent jointly hosted Asian Football

Confederation and Interpol conference on match-fixing in Kuala Lumpur, Malaysia: “We have to bring in the governments because they have to change legislation and laws, because a lot of countries do not have proper laws fighting match manipulation and corruption.”

### **What action does the US need to take?**

Research and understanding of match-fixing is still really in its infancy, particularly when compared with other threats to the integrity of sport, such as doping. Of the two forms, betting-related match-fixing should remain the primary focus in this field for all stakeholders in sport because transnational criminal organizations take advantage of changes and disparity in regulations, flaws in legal and judicial systems, the opening-up of borders and the growth of free trade. Governments and the world of sport, particularly in the US, are not as familiar as they should be with the risks to which they are exposed because they do not always fully understand betting and gambling. Increased awareness and transparency would be two significant benefits should the US, and other unlicensed jurisdictions, move from a model of outright prohibition to one in which sports betting is legalized, regulated and taxed. The licensed gambling industry contributes \$4.5 billion to the EU sports sector alone, so the potential benefits to other jurisdictions are clear.

Some people will always look to make a quick buck from illegal sports betting. However, the size and growth of this black/grey market can be lessened if concerted action is taken. Indeed, national and global economies will provide the biggest challenge in finding the necessary resources that all actors need to tackle the problem effectively. In my opinion, this is undoubtedly the principal issue yet to be resolved or even properly addressed. Needless to say, resources from US, Chinese and Indian governments, for example, would go a long way in plugging the shortfall.

John Abbott, Chair of Interpol’s Integrity in Sport unit, said at a conference in Brazil in November 2012 that the five key elements for a successful strategy against match-fixing are: partnerships, information exchange, coordination, prevention strategies and proactivity. Outright prohibition of betting achieves none of these.

Although sport is partly about entertainment, the thrill of physical competition is ultimately generated and maintained by upholding the integrity of sport. The unique emotions felt through sport, which are like no other in life, stem from sport’s natural unpredictability, which is without doubt its most important commodity. Match-fixing in any form seeks to destroy this for unadulterated and selfish greed. This is why all countries and sports need to stand united and fight match-fixing together.

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