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NATIONAL LETTER OF INTENT'S BASIC PENALTY: ANALYSES AND LEGAL BASES TO END THE PRACTICE

LEONARD W. ARAGON* AND CAMERON MILLER**

ABSTRACT

This article strives to give a fair summary of the National Letter of Intent ("NLI") Program, its development through the history of intercollegiate athletics, and the administrative process college athletes can use to obtain a release from the agreement. It also serves as a guide to future college athletes seeking to avoid the NLI's onerous penalties by setting forth legal arguments that can be used during the release process or, if the athlete is so inclined, in a lawsuit against the NLI's operating entity (and possibly the National Collegiate Athletic Association) in state or federal court. The article concludes by suggesting common-sense reforms that transform the NLI from a one-sided adhesion contract to a mutually beneficial agreement.

INTRODUCTION

On the first Wednesday in February, high school seniors participate in what has become one of amateur athletics' most revered annual traditions: National Signing Day. After a lengthy recruiting process,[1] these young men and women, many of whom

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[1] NCAA institutions routinely offer scholarships to players well before they enter high school. *See* Cam Smith, *Hawaii Football*

are minors, finally put pen to paper and officially mark their collegiate destination (often with millions watching on TV[2]) by signing a National Letter of Intent ("NLI").

But the ensuing celebration can soon turn to frustration for athletes who, for various reasons, feel the institution to which they signed is no longer the one they desire to attend.[3] Under the NLI's Basic Penalty provision, signees who do not attend the institution named in the NLI for one full academic year and instead enroll at a different institution are subject to draconian consequences.[4] These consequences are intended to deter players from transferring.[5]

Offered a Scholarship to a Fifth-Grade QB Named Titan Lacaden, USA TODAY HIGH SCHOOL SPORTS (June 12, 2017), http://usatodayhss.com/2017/titan-lacaden-fifth-grade-hawaii-football; Joseph Zucker, *286-Pound 8th Grade Prospect Jaheim Oatis Offered Scholarships by Alabama, More*, BLEACHER REPORT (July 24, 2017), http://bleacherreport.com/articles/2723544-286-pound-8th-grade-prospect-jaheim-oatis-offered-scholarships-by-alabama-more; *Lane Kiffin Offers Quarterback Who Just Finished Sixth Grade*, USA TODAY HIGH SCHOOL SPORTS (June 5, 2017), http://usatodayhss.com/2017/lane-kiffin-sixth-grader-recruiting-pierce-clarkson; Jason Kirk, *Nevada Reportedly Offers 9-year-old a Football Scholarship, Setting New Record*, SB NATION (June 23, 2017), https://www.sbnation.com/college-football-recruiting/2017/6/23/15857484/football-scholarship-offer-middle-schoolers.

[2] In 2017, the ESPN family of networks aired hours of content related to National Signing Day, including 10 hours of coverage on the network's SEC channel, and no less than 10 live announcements from recruits on other channels. *See* Gracie Blackburn, *Notes and Quotes from SEC Network's National Signing Day Coverage*, ESPN MEDIA ZONE (Feb. 1, 2017), http://espnmediazone.com/us/press-releases/2017/02/notes-quotes-sec-networks-signing-day-coverage/.

[3] In the 2010 signing period, over 700 (out of 36,000) NLI signees requested releases from the agreement. Michelle Brutlag Hosick, *History of the National Letter of Intent*, NAT'L COLLEGIATE ATHLETIC ASS'N (Feb. 2, 2011), http://www.ncaa.com/news/ncaa/2011-02-02/history-national-letter-intent. (Athletes request releases for a number of reasons, including coaching changes, problems with teammates, and family issues).

[4] *Basic Penalty*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/nliProvisions/penaltyBasic.html (last visited Nov. 19, 2017).

[5] *See generally* Aaron Falk, *Joe Tukuafu's Inability to Transfer from Utah State to BYU Without Penalty Shines Light on a Growing*

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Consider the story of Sara Woods, a world-class tennis player who signed an NLI with State University (while still a minor) but later attempted to transfer—nearly derailing her collegiate career. What follows is a true story (which mostly took place in 2016), though the identity of Ms. Woods, the university, and the sport she played have been replaced to protect her and her collegiate and professional career.[6] The authors helped Ms. Woods secure a partial release from the NLI, and her story spawned this article.

Woods, the number-two ranked amateur tennis player in the world and best amateur player in the United States (and an equally strong student), could have easily bypassed college and began life as a professional athlete. Instead, she elected to attend college to earn an education, enjoy the camaraderie of college athletics, and generally enjoy the "college experience." Woods orally committed to State (over the dozens of other universities that recruited her with offers of a full scholarship) early in her high school career due to its traditionally strong tennis program and her belief that its coaching staff—one member of whom had closely followed her progress for years—could develop her into an NCAA and professional champion. Also important to Woods was the opportunity to train with supportive teammates, something she yearned for after years of practicing alone.

Due to NCAA rules, State allows only a handful of athletes from its roster to compete against other schools in NCAA-sanctioned events. These "traveling" spots are highly coveted and reserved for the best players—usually juniors and seniors with full scholarships. Following her verbal commitment, Woods, who would almost certainly take one of the traveling spots from a current player, was the subject of unwelcoming and hostile behavior from members of State's tennis team and their families. Over the remainder of her high school career, Woods was ostracized and alienated by her future teammates at tournaments and during her official visit to State. Despite her efforts to mend and build relationships with her future teammates and their families, she was rebuffed at every turn.

Issue, SALT LAKE TRIB. (Aug. 17, 2017), http://www.sltrib.com/sports/2017/08/17/joe-tukuafus-inability-to-transfer-from-utah-state-shines-light-on-a-growing-issue/.

[6] Ms. Woods consented to the use of her story in this article.

Even after Woods and her parents informed the State coaching staff of these developments, the hostility continued. Despite concerns about her fit within State, Woods still believed in the coaching staff's ability to hone her skills, and therefore honored the verbal commitment she gave to the school by signing an NLI. Woods believed that once she became a member of the team, State's other players would accept her as they strove to win a national championship.

She was wrong. In fact, the abuse continued and worsened after she signed the NLI. Moreover, the coaches did nothing to stop or even ameliorate her future teammates' conduct.

Due to this situation, Woods informed State before her high school graduation that she would be taking a gap year to re-evaluate her academic and athletic options. A few months later, the assistant coach whom Woods believed could best develop her skills departed for another job. With nothing left for her at State, Woods sought a release from her NLI. The school refused, stating that Woods' request was denied "in order to restrict her from immediately competing at a [conference] institution or an institution against whom we are scheduled to compete this academic year." But for intervention by the authors, Woods would likely have been required to sit out a year before competing for a different NLI-subscribing institution *and* lost a year of eligibility, resulting in a delay of her professional career and a lost year of access to elite coaches and training facilities.

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Unfortunately, Woods' story is not unique; hundreds of athletes seek releases from their NLIs each year.[7] It is only when athletes (and their parents) read through the NLI that they find their change of heart has significant consequences. As per the NLI's Basic Penalty, enrolling at an NLI-subscribing institution other than the one with whom the athlete signed results in a ban from athletic competition for one academic year (year-in-residence requirement), *and* a one-year loss of eligibility in all sports.[8] And although the athlete can still receive an athletic scholarship while fulfilling the residency requirement, most schools are unwilling to "waste" one of their valuable scholarships (which are capped in number and value under

[7] *See* Hosick, *supra* note 3.

[8] *See infra* Section II(A)(1).

NCAA rules[9]) on a player unable to contribute to a team's competitive success.

For most athletes, and particularly those who are socioeconomically disadvantaged or whose window of opportunity to pursue a professional athletic career is small and closing, these consequences effectively prohibit transferring—even if the original school becomes inhospitable or another school presents a better athletic or academic opportunity. Now locked in to what some have called the worst agreement in American sports[10] and the "National Letter of Indenture,"[11] NLI signees face an arduous road to free themselves from their original agreements and compete athletically at an institution that better meets their financial, academic, athletic, and personal preferences.[12]

The administrative appeals process to be released from the NLI is a secretive and unnecessarily complicated process that favors the institution with whom the NLI was signed.[13] Most athletes (and their parents) cannot navigate the process alone, and

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[9] *See generally* 2017-2018 NCAA DIVISION I MANUAL Bylaw 15.5, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaapublications.com/productdownloads/D118.pdf (last visited Nov. 19, 2017).

[10] Andy Staples, *Why Prized Recruits Should Refuse to Sign the NLI*, SPORTS ILLUSTRATED (Feb. 9, 2015), https://www.si.com/college-football/2015/02/09/national-letter-intent-punt-pass-pork. *See also* Patrick Hruby, *Why Top NCAA Recruits Shouldn't Sign National Letters of Intent*, VICE SPORTS (Feb. 1, 2017, 10:01 AM), https://sports.vice.com/en_us/article/pgn38z/why-top-ncaa-recruits-shouldnt-sign-national-letters-of-intent.

[11] Jason Belzer & Andy Schwarz, *National Letter of Indenture: Why College Athletes are Similar to Indentured Servants of Colonial Times*, FORBES (Jul. 25, 2012, 8:52 AM), https://www.forbes.com/sites/darrenheitner/2012/07/25/national-letter-of-indenture-why-college-athletes-are-similar-to-indentured-servants-of-colonial-times/.

[12] According to the NLI Program, appeals typically take six to eight weeks to be discharged. *NLI Appeals Process*, NAT'L LETTER OF INTENT, http://www.nationalletter.org/documentLibrary/appealsProcessSheet100110.pdf (last visited Nov. 19, 2017).

[13] *See* Robert Webster, *How the Baylor Scandal Exposes Problems with NCAA and the National Letter of Intent*, LAW & CRIME (June 2, 2016, 5:34 pm), https://lawnewz.com/high-profile/how-the-baylor-scandal-exposes-problems-with-ncaa-and-the-national-letter-of-intent/.

either do not appeal or remain at the original institution—decisions profoundly affecting the athletes' academic, athletic, and professional futures.

Instead of pursuing these administrative remedies exclusively, it may be more effective for college athletes to challenge the NLI's transfer regulations using traditional legal means, or at least use legal arguments to support the administrative request for an NLI release. As described below, the NLI and its Basic Penalty are vulnerable to challenges based in contract, antitrust, and state common law and statutory claims related to fraud and deceptive practices.

Perhaps the strongest argument is that the NLI is not actually a contract. All contracts require consideration—generally some exchange of value—but the NLI gives nothing to the signee and causes no detriment to the school. Without consideration, there is no contract. If the contract is unenforceable, so is the Basic Penalty. And even if the NLI was assumed to be a valid contract, the appeal process (described below in detail) is so unfair it breaches the covenant of good faith and fair dealing inherent in every contract, as do any promises given to the athlete that frustrate the contractual promises in the NLI, such as false claims related to playing time, positions, and scholarships. Further, the Basic Penalty's first clause is effectively a covenant not to compete that is unnecessarily broad and thus unreasonable and unenforceable. These contract-based arguments are in Section IV.

We also briefly discuss the potential for fraud-based claims under state statutes and common law fraud principles. A signed NLI is not necessary to accept a Grant-in-Aid award (an athletic scholarship), yet coaches and university administrators often present the document to recruits without explanation, leading many athletes to believe or assume the NLI is a prerequisite to securing a scholarship. Recruiters also fail to explain that athletes need not sign the NLI to be eligible for NCAA competition. And some coaches and administrators make outright false promises to athletes to induce them to sign the NLI. [14] These misrepresentations and omissions are likely actionable individually and possibly as a class action. The

[14] Notably, these include coaches' promises to remain at the school the athlete is signing with, and then departing after the NLI is signed. *See, e.g.*, Ray Glier, *High School Athletes Think Twice About Signing Letters of Intent*, N.Y. TIMES (Feb. 13, 2015), https://www.nytimes.com/2015/02/15/sports/ncaafootball/high-school-recruits-think-twice-about-signing-letters-of-intent.html?mcubz=0.

common law and statutory arguments to void the NLI are in Section V.

Maybe the most ambitious argument challenging the NLI is that the Basic Penalty constrains trade in violation of the Sherman Antitrust Act. Functioning as both a covenant not to compete and a group boycott, it stifles the free-flow of talent between competing institutions and allows schools to avoid competing against their former athletes. Discussed in light of the recent *Pugh*, *Deppe* and *Vassar* lawsuits involving challenges to the NCAA transfer rules, Section VI outlines how the NLI's limits on player movement can be invalidated based on similar antitrust theories.

In closing, we discuss litigation-averting policy changes that would eliminate onerous penalties on athletes and make the consummation of the recruiting process more judicially defensible and fair. If prospective college athletes take one thing from this article, it is this: **DO NOT SIGN THE NLI**. There is no law or NCAA rule requiring recruited athletes to sign the document, and signees gain nothing through the agreement—but lose their ability to freely transfer to an institution that may offer a more desirable bundle of academic, athletic, and other opportunities.

I. THE NATIONAL LETTER OF INTENT PROGRAM

"[The NLI's] original purpose was to end recruiting once you signed. It evolved into a contract that benefits the institution because it limits the student-athlete's ability to transfer. It puts the student-athlete in handcuffs."

—Former SEC Assistant Commissioner Eugene Byrd[15]

From the genesis of collegiate sports in the mid-nineteenth century, athletic recruiting has been one of the fiercest

[15] Kevin Scarbinsky, *College Athletes' Rights: National Letter of Intent plus NCAA Transfer rules tie student-athletes to schools*, AL.COM (last updated Dec. 4, 2011), http://www.al.com/sports/index.ssf/2011/11/college_athletes_rights_nation.html. (Byrd was an administrator in the NLI Program when it was operated out of the Southeastern Conference (SEC) office).

battles for talent any American industry has ever experienced.[16] Driven by capped labor costs[17] and the potential for significant financial gain,[18] colleges and universities compete for the best high school athletes, hoping these players will bring their lucrative, consumer-appealing skills to the institution. Even in the pre-billion-dollar media rights agreement era, the competition for players was intense, and it was not uncommon for players to be *lured* from one school to another despite having matriculated at the first.[19]

In 1964, a "solution" to this understandable talent competition was implemented.[20] Seeking to curtail recruitment costs by "end[ing] the recruiting once [the athlete] signed,"[21] a group of seven conferences and eight independent institutions, in concert with the Collegiate Commissioners Association ("CCA"), distributed a document to prospective college football players with their athletic scholarship offer. Called the "National Letter of Intent," it was and remains an agreement that obligates the athlete (signee) to attend the institution (full-time) for a single academic

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[16] *See generally* Charles A. Clotfelter, BIG-TIME SPORTS IN AMERICAN UNIVERSITIES 44 (2011).

[17] *See* 2017-2018 NCAA DIVISION I MANUAL Bylaw 15.01.6, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaapublications.com/productdownloads/D118.pdf (last visited Nov. 19, 2017) (capping college athletes' compensation at "the cost of attendance that normally is incurred by students enrolled in a comparable program at that institution.").

[18] In the 2015-16 academic year, public institution athletic departments in the NCAA's Division I generated over $9.7 billion in revenue. Steve Berkowitz, *NCAA Finances*, USA TODAY SPORTS, http://sports.usatoday.com/ncaa/finances/ (last visited Nov. 19, 2017).

[19] Hosick, *supra* note 3 (emphasis added). *See also infra* Section III.

[20] Michelle Hosick, *History of the National Letter of Intent*. NAT'L COLLEGIATE ATHLETIC ASS'N (Feb. 2, 2011, 16:00 EST), http://www.ncaa.com/news/ncaa/2011-02-02/history-national-letter-intent.

[21] Greg Bishop, *Want to Play at a Different College? O.K., but Not There or There*, N.Y. TIMES (June 7, 2013), http://www.nytimes.com/2013/06/08/sports/ncaafootball/college-coaches-use-transfer-rules-to-limit-athletes-options.html?mcubz=0. The stated intent of the NLI Program was to "curb recruiting excesses that began when college sports became a national endeavor." *See* Hosick, *supra* note 3.

year.[22] In "exchange" for that obligation, other institutions must cease recruiting the athlete.[23] According to the NCAA, "[r]ecruits were informed of the recruiting rules from that point on and told that if they didn't hold up their end of the deal, their athletics eligibility would be limited."[24] The CCA, led by former Texas Tech Faculty Athletics Representative J. William Davis, introduced the NLI as a voluntary program, and though it remains one today, approximately 650 Division I and II institutions participate [25] (including all Power Five and Football Bowl Subdivision conferences).[26] Originally for football players only, the NLI is now distributed to athletes in every sport and across both sexes.[27] Importantly, signing the NLI is not (and was never) required to accept an offer of athletic financial aid, though the documents are transmitted in tandem and schools often fail to differentiate between the effects of the two.[28]

The CCA is an unincorporated association of conference commissioners whose primary responsibility is the NLI Program. [29] All thirty-two conference commissioners in the NCAA's Division I are members.[30] Largely a policy-influencing

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[22] *National Letter of Intent 2011-2012*, NAT'L LETTER OF INTENT, https://sc.cnbcfm.com/applications/cnbc.com/resources/editorialfiles/2012/05/03/2226580_NLI_2010_2011.pdf (last visited Dec. 11, 2017).

[23] *Id.*

[24] Hosick, *supra* note 3.

[25] *About the National Letter of Intent (NLI)*, NAT'L LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/ (last visited Dec. 11, 2017).

[26] *See National Letter of Intent Member Schools*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://web1.ncaa.org/onlineDir/exec2/nliListing (last visited Dec. 11, 2017).

[27] *See* Hosick, *supra* note 3.

[28] Pat Forde, *Why Sign NLI Early … If At All?*, ESPN (Apr. 22, 2003), http://assets.espn.go.com/ncb/columns/forde_pat/1542338.html ("But there's one piece of vital recruiting information most prospects never hear from the coaches who vow to treat them like family while developing their jumper: You don't have to sign a national letter of intent.").

[29] *See generally* Hosick, *supra* note 3.

[30] *See* Jeremy Crabtree, *CCA Panel Eyes Early Signing Period*, ESPN (June 15, 2015), http://www.espn.com/college-

(not policy-making) group, the CCA meets twice annually to provide a forum to discuss shared interests and other issues of common concern. However, the group does play some legislative role, as the CCA is allocated four spots on the NCAA's 40-member Division I Council.[31] In 2004, the CCA turned over general operations of the NLI Program to the NCAA's Eligibility Center, though the CCA still maintains oversight of the program and its various subcommittees.[32] Perhaps logical, this overlapping relationship strengthens the notion that the NLI is an NCAA program, leading some athletes to believe signing the document is a necessary step in the athletic recruitment process. To be clear: The NLI is not an NCAA program, nor are any of its provisions codified in the NCAA's bylaws. Rather, it is a wholly voluntary system that a large majority of Division I and II institutions have adopted. This distinction is not well understood by, or communicated to, signees.

In the modern recruiting cycle, the NLI is transmitted to the prospective athlete along with a separate offer of Grant-in-Aid. Both are executed and sent back to the athlete's future institution, effectively ending the recruiting process. While the latter document actually contains the institution's scholarship offer, the NLI is treated as the Holy Grail of the recruiting process. The fetishizing of the NLI by coaches, the media, and impressionable high school athletes has likely contributed to a fundamental misunderstanding of the document's actual meaning, legal and otherwise. We clarify those misconceptions here.

A. THE NLI'S PROVISIONS

The NLI, a three-page document containing 12 provisions, is sent to a prospective college athlete shortly before his or her signing day. The agreement is unambiguously a contract

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football/story/_/id/11105557/collegiate-commissioners-association-panel-formed-explore-early-signing-period-college-football.

[31] *See* Division *I Council*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/governance/committees/division-i-council (last visited Dec. 20, 2017) ("The Division I Council is a high-level group responsible for the day-to-day decision-making for Division I.").

[32] *See About the National Letter of Intent (NLI)*, *supra* note 25. The NLI program operates four subcommittees: NLI Policy and Review Committee, DI Appeals Committee, DII Review Committee and DII Appeals Committee. Hosick, *supra* note 3.

of adhesion because it provides no opportunity to negotiate the incorporated terms and is drafted by the party with superior bargaining strength (the institution).[33] In the opening paragraph, the NLI informs prospective athletes and their parents that signing the document is voluntary and unnecessary to receive athletics aid and participate in intercollegiate athletics. But this is a hollow reminder ignored by athletes, parents, coaches, and administrators alike, with even relatively sophisticated athletes giving the document only a cursory look.[34]

Provision One explains that only first-time enrollees at a four-year institution or transfer athletes graduating from a two-year college may sign NLIs.[35] Provision Two outlines the institution's obligation to deliver a scholarship offer in tandem with the NLI, though it fails to distinguish that scholarship offers, if accepted, are binding with or without an NLI.[36] Provision Three describes the circumstances under which the NLI is considered performed, but, tellingly, the only indicia of performance are actions performed by the athlete.[37] Provision Four, the Basic

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[33] *See, e.g.*, Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 543–44 (1995) (a contract of adhesion is one that the party presented it "must accept" despite "[having] no position to bargain"); Marrama v. Citizens Bank of Massachusetts, 549 U.S. 365, 374 (2007) (contracts of adhesion contain "non-negotiable condition[s]").

[34] *See* Jay Bilas, *Committed to a Coach, But Signed to a School*, ESPN (Apr. 29, 2003, 12:43 PM), http://assets.espn.go.com/ncb/columns/bilas_jay/1541904.html ("When I signed a National Letter of Intent to attend Duke University in April, 1982, I didn't even read it. As an 18-year-old, I looked at the letter then very much the way I look at a rental car contract now. Sign the contract, get a car. Sign the Letter of Intent, get my scholarship."). Bilas earned both undergraduate and law degrees from Duke. *Jay S. Bilas Of Counsel: Overview*, MOORE & VAN ALLEN, http://www.mvalaw.com/professionals-30.html (last visited Dec. 11, 2017). One of the authors had a similar experience when signing his NLI in Feb. 2012.

[35] *National Letter of Intent 2011-2012*, *supra* note 22.

[36] *Id.*

[37] *Id.* The NLI is considered "performed" if a signee attends the institution for a full academic year, or if they graduate from a two-year institution (after having signed the NLI in their first year at the institution or in high school). *Id.*

Penalty, will be discussed further below.[38] Provision Five dictates when the NLI may be signed without incurring a penalty.[39] A general overview of the release and appeal process is in Provision Six, but is devoid of any useful information on an athlete's substantive and procedural rights on appeal.[40] The materials found on the NLI's website (nationalletter.org) explain the procedural rules athletes must follow when requesting a release from an NLI and gives a general overview of the appellate process, but never fully identifies or explains the rules or guidelines member institutions and the NLI's subcommittees must follow when evaluating a request for release, nor is that information available anywhere else.[41]

As set forth in Provision Seven, there are six circumstances in which the NLI is void, including: failure to be admitted to the institution, failure to meet the NCAA's initial eligibility criteria, and situations in which the incoming athlete's eligibility was jeopardized due to recruiting irregularities committed by the institution.[42] The only semblance of any benefit accruing to the athlete under the agreement is in Provision Eight, which is an acknowledgement that NLI-participating institutions agree to discontinue recruitment of NLI signees.[43] As explained below, this is not a benefit for the signee, but rather another benefit for the signing institution. Sanctions for schools violating Provision Eight are not in the NLI itself or the program's website. While primarily devoted to modifying the duration clause of the NLI, Provision 10 states plainly that the NLI is "binding,"[44] which, as explained in Section IV below, is false under well-established contract law.

Blind to the realities of the recruiting process—during which coaches sell athletes on *their* ability (and theirs alone) to develop the athlete into a professional-caliber talent[45]—Provision

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[38] *Id.* See Section II.A.1.

[39] *Id.*

[40] *See id.*

[41] *See id*; *See also* NLI Appeals Process, NAT'L LETTER OF INTENT, http://www.nationalletter.org/documentLibrary/appealsProcessSheet100110.pdf (last visited Dec. 11, 2017).

[42] *See National Letter of Intent 2011-2012, supra* note 22.

[43] *Id.*

[44] *Id.*

[45] *See* Kyle Tucker, *5-Star Guard Diallo Likes Both Duke, UK Pitches*, COURIER JOURNAL (Apr. 25, 2016, 10:45 AM),

11 clarifies the signee's allegiance is to the institution only by prohibiting players from seeking a release from the NLI based on a coaching change.[46] As one men's college basketball coach remarked in 2003: "[t]he player signs with the head coach, not the school. The school isn't recruiting that kid. What if the new coach has a new system that doesn't fit that player's style? That's not fair to him."[47] Ex-Mississippi State basketball player Gary Ervin echoed that sentiment prior to his matriculation at the school in 2003: "[e]veryone goes to a college because of the coach. You want a great relationship with your coach. And it's not the same if he leaves."[48] Dismissive of these realities, coaching changes do not affect the athlete's obligations under the NLI.

1. THE BASIC PENALTY

The Basic Penalty is perhaps the most well-known term in the NLI. It sets forth the consequences (which a former NLI official described as "severe"[49]) signees are subject to if they do not attend the institution for a full academic year as a full-time student:

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http://www.courier-journal.com/story/sports/college/kentucky/2016/04/25/5-star-guard-diallo-likes-both-uk-duke-pitches/83492530/. *See also* Staples, *supra* note 10 ("[A] school is a building. What separates all of these schools? The things these college coaches sell these kids on are relationships. It's the people.").

[46] *See National Letter of Intent 2011-2012*, *supra* note 22.

[47] Andy Katz, *Less-Binding NLI May Give Recruits More Options*, ESPN (Apr. 25, 2003, 5:50 PM), http://assets.espn.go.com/ncb/columns/katz_andy/1542395.html. *See also* Jay Bilas, *Committed to a Coach, But Signed to a School*, ESPN (Apr. 29, 2003, 12:43 PM), http://assets.espn.go.com/ncb/columns/bilas_jay/1541904.html ("[T]he practical reality of the recruiting process is far different. Players don't commit to institutions, they commit to coaches.").

[48] Michael Kruse, *Just Ask the Recruits: It's the Coach that Matters*, ESPN (Apr. 22, 2003, 2:51 PM), http://assets.espn.go.com/recruiting/s/2003/0422/1542325.html.

[49] DOYICE J. COTTEN & JOHN T. WOLOHAN, LAW FOR RECREATION AND SPORT MANAGERS 412 (3d ed. 2003).

> I understand that if I do not attend the institution named in this document for one full academic year and I enroll in another institution participating in the NLI program, I may not compete in intercollegiate athletics until I have completed one full academic year in residence at the latter institution. Further, I understand I shall be charged with the loss of one season of intercollegiate athletics competition in all sports. This is in addition to any seasons of competition expended at any institution.[50]

Understand the dual-sided nature of the Basic Penalty: in the first clause, the provision outlines a one-year ban from collegiate competition; the second clause introduces a reduction in an athlete's overall eligibility. Practically, this means that if Athlete A signed with Institution 1, but ultimately left 1 before matriculating or before completing one academic year at the school and enrolled at Institution 2, A could not compete for 2 for one academic year (two semesters or three quarters). And even then, A would have only three remaining seasons of playing eligibility, rather than the four seasons college athletes initially receive.[51]

For many athletes, and particularly those who are of limited means or have professional aspirations, the Basic Penalty can be devastating. After the one-year residency requirement, college football players have two additional years to recover before being NFL draft-eligible[52]—but the penalty makes them a far less attractive labor option to other schools, who cannot utilize the player's football services for an entire season. Under the NCAA's bylaws, Division I football programs are limited to 85 Grants-in-Aid per year, while men's basketball is limited to 13.[53] Expending even one of those Grants-in-Aid on an athlete unable

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[50] *Basic Penalty*, NATIONALLETTER.ORG, http://www.nationalletter.org/nliProvisions/penaltyBasic.html (last accessed Dec. 12, 2017).

[51] NCAA, 12.8.1.7. 1.2., Division I Manual (2017).

[52] *NFL-NFLPA Collective Bargaining Agreement*, Art. VI, § 2(b) (Aug. 4, 2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.

[53] NCAA Bylaw 15.5.5.1 & 15.5.6.2.

to take the field or court and contribute to the team's competitive success comes at a substantial opportunity cost. For coaches, invariably in win-now mode,[54] carrying the deadweight of an NLI-restricted athlete is a burden many are unwilling to bear. This means college athletes who would receive an athletic scholarship absent the Basic Penalty are unlikely to receive financial assistance or will be forced to accept less aid and/or attend a less-preferred institution.

For elite college basketball players, the dilemma is even more serious: foregoing one year of collegiate competition is a non-starter, as athletes would become NBA draft-eligible when the penalty phase ended.[55] Remaining in the NCAA would entail massive opportunity costs and risk, and most athletes would likely elect to bypass college altogether. Faced with the decision of either returning to fixed-wage compensation at the collegiate level or (relatively) market-driven pay in the NBA, it seems probable that most elite-level basketball athletes would choose the latter.

And for the silent majority (the signees sports other than football and basketball), the NLI is equally as harmful.[56] For these "Olympic" sport athletes, the overwhelming majority of whom will not be pursuing a career in professional sports, the Basic Penalty strips a quarter of their playing eligibility during the peak of their athletic careers. That is one less year of scholarship money, camaraderie with teammates, opportunities for personal and professional growth, and chances to compete for individual and team championships, all because the athlete realized—as many 17and 18-year-olds do—that their initial choice was not their best or preferred one. As one former NLI official has

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[54] San Diego State head football coach Rocky Long on the win-now attitude in collegiate athletics: "It's about making money. In order to finance athletic departments at the Division I college level there must be funds coming in from the revenue-producing sports. If you don't win or don't win pretty quickly, people don't buy tickets and you're not on TV." Kirk Kenney, *Why Coaches Feel Pressure to Win Now*, THE SAN DIEGO UNION TRIBUNE (Nov. 18, 2015, 11:00 AM), http://www.sandiegouniontribune.com/sports/aztecs/sdut-sdsu-aztecs-football-coaching-hirings-firings-2015nov18-story.html.

[55] *NBA-NBPA Collective Bargaining Agreement*, Art. X, §§ 1(b)(i)–(ii) (Jan. 19, 2017), http://3c90sm37lsaecdwtr32v9qof-wpengine.netdna-ssl.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf.

[56] *See* Staples, *supra* note 10.

conceded, "[t]here are sometimes valid reasons for changing one's mind."[57]

Given the consequences of not fulfilling the NLI, the document binds athletes to their institutions, though not in the legal way the document intends. Rather, the NLI ties athletes to institutions by *necessity*.[58] The deterrence effect of the Basic Penalty is so strong it becomes a poison pill provision, discouraging signees from matriculating at other institutions out of fear of the onerous penalties placed on transfer athletes.[59] Revealingly, restricting player movement is *exactly* what the creators of the NLI sought when masterminding the agreement.[60] Viewed from this perspective, the Basic Penalty can be seen for what it is: a labor control tool that rewards an institution's recruiting investment and keeps retained talent out of the hands of competing schools. Athletic transfers can be harmful to institutional interests in several respects, including the loss of the athlete's labor and the now-sunk costs of recruiting the player to the school.[61] It is these interests—talent retention and investment protection—the NLI seeks to safeguard at the expense of the athlete's academic, social, and personal interests, which may be better furthered at a different institution.

The NLI's Basic Penalty was not the first attempt to control and regulate player movement. The origins of the residency requirements incorporated in the NLI had been percolating through the NCAA's governance, legislative, and enforcement agenda for over seven decades before the NLI's creation in 1964.[62]

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[57] COTTEN & WOLOHAN, *supra* note 49, at 412.

[58] *See* Scarbinsky, *supra* note 15.

[59] *See* Zach Helfand, *Is the College Letter of Intent the 'Worst Contract in American Sports'?*, L.A. TIMES (Feb. 13, 2015, 6:10 PM), http://www.latimes.com/sports/la-sp-0214-football-recruiting-lies-20150214-story.html.

[60] "[L]uring away a football player even after he was enrolled on another campus" was one of the "excesses" the creators of the NLI sought to end. *See* Hosick, *supra* note 3.

[61] *See* Steve Megargee, *Widespread Transfers Leave Plenty of Teams Lacking QB Depth*, THE SPOKESMAN-REVIEW (Sept. 7, 2017, 12:11 PM), http://www.spokesman.com/stories/2017/sep/07/widespread-transfers-leave-plenty-of-teams-lacking/.

[62] *See* Michelle Brutlag Hosick, *History of the National Letter of Intent*, NCAA.COM (Feb. 2, 2011, 4:00 PM),

II. THE GENESIS OF TRANSFER REGULATIONS IN COLLEGIATE ATHLETICS

For the first several decades of their existence, intercollegiate athletics were operated and controlled primarily by students.[63] As those sports became more lucrative, dangerous and arguably "abuse"-ridden, institutional faculties and administrations supplanted the control of the students (and the alumni groups that funded their efforts).[64] One of the principal "abuses" targeted by the earliest faculty and administration-led reform efforts was the "tramp athlete"—one who transferred between institutions primarily for athletic reasons. [65]

Emblematic of the "tramp athlete" was an episode involving West Virginia football player Fielding Yost. During the 1896 season, Yost left West Virginia and joined the Lafayette College team immediately before its game against the University of Pennsylvania (Penn). [66] Penn, which came into the contest riding a 36-game undefeated streak, lost 6-4 to Lafayette.[67] Yost then returned to West Virginia to finish his degree.[68] Yost's one-game stint with Lafayette was exactly the type of the player movement administrations attempted to block. Prior to the Yost episode, the Western Conference (the precursor to the modern-day Big Ten) met in 1895 and promulgated several athletic regulations, including one that required transfer students to have attended their current institution for at least a semester before becoming eligible for athletic competition.[69]

The institutions comprising what is now the Ivy League also took a lead role in reform efforts. In 1898, the Ivies, sans Yale, convened at Brown University to discuss "questions arising out of intercollegiate contests and the objectionable features

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http://www.ncaa.com/news/ncaa/2011-02-02/history-national-letter-intent.

[63] RONALD A. SMITH, PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM 8–9 (2011).

[64] *Id.* at 22–23.

[65] *Id.* at 29.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* at 28.

associated with them."[70] Chief among these was the "victory at all costs" mindset that had gripped college sports.[71] The post-mortem Brown Conference Report advocated for a crackdown on students who "entered the university for athletic purposes solely."[72] "Tramp" (transfer) athletes were one such group.[73] The Report recommended those students be required to matriculate for one full academic year before joining a school's athletic program.[74] This year-in-residence requirement, in some form, has governed player transfers ever since.

The Brown Conference Report, whose prescriptions were adopted by most of the Ivies, was not the end of the efforts to limit the freedoms of transfer athletes. In 1905—the same year that at least eighteen college football players died due to injuries sustained on the field—the muckraking magazine *McClure's* decried the "hiring of tramp athletes" in two articles on the commercialistic and cutthroat world of collegiate athletics.[75] Written by Henry Beach Needham, the first of the two exposés contrasted Columbia and Penn as polar opposites in the adoption and enforcement of the year-in-residence requirement.[76] Whereas Columbia's "rules . . . demand one year's residence of every 'student who has ever represented another college or university in an intercollegiate contest,'"[77] Penn regularly flaunted the regulations to gain a competitive advantage over its opponents (ironic, given the earlier episode involving Fielding Yost).[78] For Penn, the need to recruit players from other schools stemmed from its lack of adequate practice facilities for developing its own athletes.[79] Instead, the University let other schools develop quality players, and then offered "inducements" to lure them away from

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[70] Henry Beach Needham, *The College Athlete: How Commercialism is Making Him a Professional*, MCCLURE'S MAG., June 1905, at 115.

[71] SMITH, *supra* note 63, at 31.

[72] *Id.* at 30.

[73] *Id.* at 29.

[74] *Id.* at 33.

[75] Needham, *supra* note 70; Henry Beach Needham, *The College Athlete: His Amateur Code: Its Evasion and Administration*, MCCLURE'S MAG., July 1905, at 260.

[76] Needham, *supra* note 70.

[77] *Id.* at 118.

[78] *Id.* at 127.

[79] *Id.*

their current campuses.[80] One example involved guard William Ellor, whom Penn "kidnapped" straight from a local prep school.[81] Upon hearing the news, one of Ellor's prep school administrators remarked:

> [L]ast week our best football player was kidnapped by the University of Pennsylvania coach . . . . This boy told me that he had been offered at Princeton a summer's board and tutoring if he would come there next year. One can only imagine what the University of Pennsylvania coach must have offered.[82]

A stranger transfer story involved a player named Andrew L. Smith, who began his collegiate career at Pennsylvania State College (now Penn State). Following his "magnificent" performance against Penn on Saturday, October 4, 1902, Smith was seen practicing *with* Penn the following Monday.[83] Under the year-in-residence rule, Smith was ineligible to compete for the Quakers in 1902, and returned to the gridiron in the fall of 1903.[84] It was then discovered that although he was practicing with the Penn squad during the remainder of the 1902 season, he had actually continued *playing* for Penn State that season.[85] Smith's saga inflamed the passions of the Philadelphia press, with the *Public Ledger* demanding that he "forever be debarred from Pennsylvania athletics . . . and should be expelled from the university."[86] Even Needham could not stay neutral on Smith's nomadism, referring to his story as "the sad feature of Pennsylvania athletics."[87]

The *McClure's* piece (disapprovingly) lists several more prominent players who Penn "drafted" from other schools.[88] Needham's tone and the backlash directed at Smith and Penn

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 126.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 127.
[88] *Id.*

demonstrated that athletically motivated transfers were not only frowned upon, but considered one of the great scourges of intercollegiate sport. More importantly, the reason for the outcry revealed the true intent of the one-year residence rules. Few, if any, onlookers appeared disturbed about the transfer's impact on Ellor's or Smith's educational endeavors; rather, the chief concern was the impact on the relative competitiveness of the Penn football team.[89] The only logical conclusion one draws is that the earliest rules restricting the freedoms of transfer athletes were *not* primarily grounded in concerns for the athletes' educational development, but were designed to protect institutions' interests in retaining their talent.

But as of 1905, college athletics did not yet have the unity or regulatory structure to effectively promulgate and enforce the one-year-residency requirement and other eligibility rules on a national basis.[90] The carnage of that fall's football season was the impetus to push institutions to coordinate—and collude—with one another to set national rules and regulations.

With football players succumbing to their on-field injuries nearly every weekend during the 1905 football season, President Theodore Roosevelt summoned the Big Three—Harvard, Yale, and Princeton—to the White House to stem the brutality that had overtaken the game.[91] Although rules regarding on-field play and player safety were the focus of the meeting,[92] the mere act of multi-institutional coordination (by the nation's preeminent universities) would set an example for future agreements between schools on every conceivable type of rule, including transfer restrictions.

Other schools noticed the Big Three's reform attempts, and in December 1905, thirteen institutions met in New York at the invitation of NYU Chancellor Henry MacCracken.[93] Though not attended by the traditional football powers (including the Big Three), the MacCracken Conference was determined to seriously reform college football.[94] After convening for a second time in December 1905, the conference attendees formed the permanent Intercollegiate Athletic Association of the United States

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[89] *Id.*
[90] *Id.* at 115–16.
[91] SMITH, *supra* note 63, at 43.
[92] *Id.* at 44.
[93] *Id.* at 47.
[94] *Id.*

(IAAUS).[95] The IAAUS was rebranded as the National College Athletic Association (NCAA) a year later.[96] Though severely lacking in, if not devoid of enforcement authority, the foundations for the modern-day cartel had been laid.

While formed primarily to address player safety in football, the NCAA also intended to curb athlete "migration" by restricting the freedoms of "tramp athletes."[97] This intent is reflected in the NCAA's original bylaws, passed in 1906.[98] Among them was this provision: "[t]here should be no participation if the athlete . . . had transferred and not remained athletically inactive until he attended for one year."[99] And while eligibility restrictions were somewhat relaxed during World War I, the notion that transfer athletes be required to complete a year-in-residence at their new institution prior to participating in intercollegiate athletics remained strong after the War.[100] In 1922, the NCAA promulgated nine "fundamental principles" intended to "curb athletic excess."[101] One of these "excesses" was the "athlete migrants."[102] Still without the ability to directly enforce its rules and regulations, the NCAA succeeded in encouraging athletic conferences to adopt and enforce its eligibility requirements, with a majority "limiting . . . migrant athletes [transfers] from immediate participation."[103] A year later, in 1923, the Big Three, which had not yet assented to NCAA governance, went a step further: transfer students who had played a sport at one the Big Three could *never* play that sport at another Big Three institution.[104] The principle of severely penalizing the intra-conference transfer—while never adopted by the NCAA—is still common practice for many institutions and conferences.[105]

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[95] *Id.* at 48.
[96] *Id.*
[97] *Id.* at 29.
[98] *Id.* at 53–54.
[99] *Id.* at 54.
[100] *Id.* at 59.
[101] *Id.* at 62.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 100–01.
[105] *See, e.g.*, Southeastern Conference Bylaws 14.5.5, http://a.espncdn.com/photo/2014/0721/FINAL%20Bylaws%207.18.14.pdf (last visited Dec. 17, 2017); *Pac-12 Conference Handbook*, ER 4-3-b, http://compliance.pac-12.org/wp-content/uploads/2014/12/Pac-12-

Unlike definitions of "pay" and general eligibility requirements, transfer regulations have largely stood the test of time, notwithstanding legislative tweaking over the years.[106] Many transfer athletes—and all those in men's basketball and football—still must fulfill the "year-in-residence" at their new institution before becoming eligible for collegiate competition.[107] This requirement is set forth in NCAA Bylaw 14.5.1, which prohibits transfer athletes from competing for their new institution before completing "one full academic year of residence" (this bylaw is wholly separate from the NLI, which contains its own residency requirement).[108] While exceptions to the year-in-residence requirement exist, they are limited, and not available equally to all collegiate athletes, most notably football and basketball players.[109]

In sum: though proclaimed to be in the interests of athletes, the NCAA's transfer restrictions—upon which the NLI's Basic Penalty was likely modeled—appear to have been created

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Intra-Conference-Transfer-Primer.pdf (last visited Dec. 17, 2017); Atlantic Coast Conference Bylaws Art. VI, http://grfx.cstv.com/photos/schools/bc/genrel/auto_pdf/2012-13/misc_non_event/2012_13_ACC.pdf (last visited Dec. 17, 2017); Big-12 Conference Bylaws 6.3, http://www.big12sports.com/fls/10410/pdfs/handbook/ConferenceHandbook.pdf (last visited Dec. 17, 2017); Andy Katz, *Big Ten Makes Changes to Transfer Rule*, ESPN (Apr. 19, 2012), http://www.espn.com/blog/collegebasketballnation/post/_/id/58173/big-ten-makes-changes-to-transfer-rule.

[106] For instance, the NCAA changed its regulations regarding the participation of graduate students in 2007 (*see* NCAA Bylaw 14.6), and recently removed the opportunity for certain athletes to file waivers to transfer and play immediately. *See* Nick Bromberg, *NCAA drops immediate eligibility*

hardship waiver for transfers, YAHOO! SPORTS (Mar. 18, 2015),

https://sports.yahoo.com/blogs/ncaaf-dr- saturday/ncaa-drops-immediate-eligibility- hardship-

waiver-for- transfers-191437627.html.

[107] NCAA Bylaw 14.5.1.

[108] *Id.*; *National Letter of Intent 2011-2012*, *supra* note 22.

[109] Athletes in the sports of baseball, basketball, FBS football and men's ice hockey are not eligible to pursue a waiver to transfer and play immediately. *See* NCAA Bylaw 14.5.5.2.10 ("One-Time Transfer Exception").

and enforced as talent retention mechanisms without regard to the athlete's academic career.

III. CHALLENGING THE VALIDITY OF THE NLI UNDER CONTRACT LAW

Despite the NLI's near-universal acceptance as a binding contract, it is plausible for an athlete to avoid the Basic Penalty by convincing a court there is no legal basis for treating the NLI as a valid contract. Contract law is state-specific, but its fundamentals, including contract formation, are consistent across the country.[110] To form a contract, there must be an offer, acceptance, consideration, and intent to be bound by the offer.[111]

The NLI arguably satisfies three of these criteria but lacks consideration. "Consideration may be either a (1) benefit conferred or agreed to be conferred upon the promisor or some other person; or (2) a detriment suffered or agreed to be suffered by the promisee or some other person."[112] "There is consideration for a contract if the promisee, being induced by the agreement, does anything legal that he or she is not bound to do, or refrains from doing anything that he or she has a right to do."[113] Consideration must also be "bargained-for," meaning the performance or return promise is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.[114]

Despite courts' reluctance to question the adequacy of consideration,[115] the NLI is not an enforceable contract because

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[110] *See* American Airlines v. Wolens, 513 U.S. 219, 233 (1995).

[111] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981); REVISED ARIZONA JURY INSTRUCTIONS (Civil), (5th ed.) CONTRACT 3, DEFINITION AND FORMATION OF CONTRACT; VIRGINIA MODEL JURY INSTRUCTIONS-CIVIL, 45.010 (1993).

[112] WITKIN, SUMMARY OF CALIFORNIA LAW (10TH) CONTRACTS § 203 (2005) (string citing sources); RESTATEMENT (SECOND) OF CONTRACTS § 73 (AM. LAW INST. 1981).

[113] 17A Am. Jur. 2d *Contracts* § 101 (2017).

[114] RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (AM. LAW INST. 1981).

[115] *See, e.g.*, *George R. Hall, Inc. v. Superior Trucking Co.*, 532 F. Supp. 985, 992 (N.D. Ga. 1982); Vance v. Connell, 529 P.2d

the institution suffers no detriment and the signing athlete receives no benefit. And even if we assume there is sufficient consideration to enforce the contract, the consideration was not bargained-for and therefore insufficient to support the contract.[116]

A. THERE IS NO CONSIDERATION

On its website, the CCA describes the NLI as an agreement where "[the athlete] agree[s] to attend the institution listed on the NLI for one academic year in exchange for that institution awarding athletics financial aid for one academic year."[117] But the Grant-in-Aid (athletics-based financial aid) is awarded by the institution in a *separate* contract.[118] The NLI does not provide the signing athlete with financial aid and the NLI expressly states the athlete need not sign the document to receive financial aid.[119] Further, NCAA bylaws do not require the athlete to sign the NLI to receive a Grant-in-Aid.[120] Therefore, an athletic scholarship is not "consideration" for the NLI. When the NLI is signed, the institution is not required to do anything it is not already bound to do, such as provide a Grant-in-Aid to the athlete, nor is it required to refrain from doing anything it has a right to do, such as refraining from recruiting other athletes for the same spot on the team.[121]

Revealingly, the NCAA bylaws describe the NLI as nothing more than a unilateral agreement, without consideration, to attend a particular institution:

1289, 1291 (1974); Irving Leasing Corp. v. M & H Tire Co., 16 Ohio App. 3d 191, 192, 475 N.E.2d 127, 129 (1984).

[116] 17A Am. Jur. 2d *Contracts* § 105 (2017) (explaining consideration is necessary for a valid contract).

[117] *NLI Frequently Asked Questions*, NATIONALLETTER.ORG, http://www.nationalletter.org/frequentlyAskedQuestions/bindingAgreement.html (last visited Nov. 19, 2017).

[118] *Financial Aid Requirement*, NATIONALLETTER.ORG, http://www.nationalletter.org/nliProvisions/financialAid.html (last visited Nov. 19, 2017).

[119] *Id.*; *NCAA Model Athletic Financial Aid Agreement,* https://www.ncaa.org/sites/default/files/ FinAidForm.pdf.

[120] *See* NCAA Bylaw 13.9.1 (describing requirement for a written offer of athletically related financial aid).

[121] *See generally Financial Aid Requirement*, *supra* note 118.

> "**National Letter of Intent**. The National Letter of Intent referred to in this bylaw is the official document administered by the Collegiate Commissioners Association and used by subscribing member institutions to establish the commitment of a prospective student-athlete to attend a particular institution."[122]

The athlete's gratuitous promise to attend an institution, without more, is insufficient consideration to support contract formation.[123] Since admission to the institution, a roster spot, financial aid, and NCAA eligibility is not attained by signing the NLI, the athlete (promisor) receives nothing from the institution (promisee) by signing the document. If the athlete signs *only* the NLI, he or she will not be admitted to the school, given a spot on the team, receive athletics-based financial aid, or be allowed to participate in NCAA events.[124] Those benefits are the subject of other contracts executed by the athlete with the institution or NCAA.[125] Recall that athletes sign the NLI *after or concurrent with*, not before, receiving offers of financial aid, and there is no duty to sign the NLI to obtain financial aid.[126] Because athletes do not receive the alleged consideration (athletics-based financial aid) from the institution in exchange for signing the NLI, there is no bargained for consideration and thus no contract—a promise to

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[122] *See* NCAA Bylaw 13.02.12.

[123] *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 71, cmt. d (AM. LAW INST. 1981) (describing lack of consideration for promise when consideration is based on preexisting duty); *see also* 3 Williston on Contracts § 7:5 (4th ed.); Carroll v. Lee, 712 P.2d 923, 926 (1986) (en banc) ("Adequate consideration consists of a benefit to the promisor and a detriment to the promise.") (internal citations omitted).

[124] *See* NCAA FORM 08-3a (Seven-part contract with the NCAA signed by the athlete covering (1) eligibility, (2) Buckley Amendment consent, (3) affirmation of status as an amateur athlete, (4) statement concerning the promotion of NCAA championships and other NCAA events, (5) results of drug tests, (6) previous involvement in NCAA rules violations, (7) an affirmation of valid and accurate information provided to the NCAA Eligibility Center and admissions office.).

[125] *Id.*

[126] *See Financial Aid Requirement*, *supra* note 118.

do nothing more than an existing obligation is insufficient consideration to support a contract.[127]

The voluntary nature of the NLI does not obviate the need for consideration.[128] The seminal California Supreme Court case, *Western Lithograph Co. v. Vanomar Producers*[129] is illustrative. In *Western Lithograph*, a label manufacturer contracted to sell products to a vendor for a certain price.[130] Unexpectedly, labor and material prices increased and the manufacturer asked the vendor to pay a higher price.[131] Vendor agreed.[132] After a dispute arose, the court held the contract to pay the higher price invalid because the manufacturer did not give consideration for the promise.[133] It was irrelevant, according to the court, that a new promise was made voluntarily and without duress.[134] The parties could have contracted for new price if new consideration was given, such as an earlier delivery date, or a novation (an entirely new contract).[135] Because the parties agreed to the price increase with no detriment to the manufacturer—other than what he was already obligated—the contract was unenforceable.[136]

Here, NLI-subscribing institutions face the same problem—there is no additional consideration for the promise to attend the institution. All changes in the relationship between the school and the signing athlete, including all benefits to the athlete

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[127] *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 et seq. (AM. LAW INST. 1981); *Garcia v. World Savings*, 183 Cal.App.4th. 1031, 1038 (Cal. App. 2010); *U.S. for Use of Youngstown Welding and Engineering Co. v. Travelers Indem. Co*., 802 F.2d 1164, 1169 (9th Cir. 1986) (holding preexisting contractual duty was insufficient consideration for new contract); 1 Witkin, Summary 10th Contract § 218 (citing authority for proposition that doing or promising to do what one is already legally bound to do cannot be consideration for a promise).

[128] *See* Williams v. Hasshagen, 137 P. 9, 11 (1913) (holding a promise based on the "hope" that something will occur is invalid when nothing of value is given for the promise).

[129] W. Lithograph Co. V. Vanomar Producers, 197 P. 103 (1921).

[130] *Id.*

[131] *Id.* at 367.

[132] *Id.*

[133] *Id.* at 370.

[134] *Id.*

[135] *Id.*

[136] *Id.*

and detriment to the school, arise from entirely different contracts: the financial aid agreement and other NCAA documents.[137] Under those documents, the institution agrees to provide financial aid, admit the student to the institution (provided he or she meets admission criteria), and permits the student to participate in NCAA-sanctioned events.[138] Those agreements—not the NLI—trigger the school's duty to provide a Grant-in-Aid and all corresponding duties under NCAA rules related to the Grant-in-Aid award, such as limits on number of scholarships, team members, etc.[139] The NLI does not even guarantee the signee ancillary benefits such as a spot on the team or playing time,[140] or prohibit the institution from recruiting other athletes who play the same position or compete in the same event.[141] Coaches routinely continue to recruit other players to the detriment of the athlete bound by the NLI.[142]

In short, the NLI does nothing other than lock an athlete into attending a particular school for one year. Prospective college athletes need not and should not make this unilateral promise because it provides no tangible benefits.[143] Eugene Byrd, the former NLI administrator, concurred: "There are not many advantages for the students in signing the NLI . . . ."[144]

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[137] *See Athletic Financial Aid Agreement*, *supra* note 119; NCAA Form 08-3a.

[138] *Athletic Financial Aid Agreement*, *supra* note 119.

[139] *Id.*

[140] *Binding Agreement FAQs*, NATIONALLETTER.ORG, http://www.nationalletter.org/frequentlyAskedQuestions/bindingAgreement.html# (last visited Sept. 4, 2017).

[141] *Id*.

[142] *See, e.g. Former NIU Punter Suing NCAA for "Unlawful" Transfer Rules*, DAILY CHRON., (Mar. 9, 2016) http://www.daily-chronicle.com/2016/03/09/former-niu-punter-suing-ncaa-for-unlawful-transfer-rules/a13qgmr/.

[143] There is at least a colorable argument the agreement is void as against public policy or an illegal contract—the former being more viable than the latter—but given the sound legal basis to challenge the NLI, any other challenge would likely supplement the main arguments rather that stand as a separate cause of action. *See generally* Williston on Contracts § 12:1 (4th ed.).

[144] COTTON AND WOLOHAN, *supra* note 49.

B. THE ALLEGED "BENEFITS" OF THE CONTRACT ARE NOT BARGAINED-FOR CONSIDERATION

At least one administrator at a Power 5 conference university has argued to the authors that the NLI's consideration is found in the Recruiting Ban that takes effect after the athlete signs the agreement.[145] The Recruiting Ban requires other schools to cease communications with athletes who have signed NLIs with another institution.[146] But the Recruiting Ban is not a benefit to the signee or a detriment to the signing institution. Signees do not benefit by *not* receiving Grant-in-Aid offers from other institutions. To the contrary, the signing institution is conferred an additional benefit while the athlete is harmed because other institutions—some of whom might be academically preferable or have a more desirable team, facilities, or coaching staff—cannot seek the athlete's services by offering additional benefits. This means the athlete might miss out on maximum financial aid awards or guarantees related to playing time or position.

The university nonetheless argued the Recruiting Ban prohibits other schools from "harassing" prospective athletes or inundating them with offers, but this reasoning is untenable.[147] The recruiting process is highly regulated[148] and harassment is likely not a realistic problem for most recruited athletes, especially those in non-revenue sports—most of whom are happy to be recruited by any school. Even highly recruited athletes in revenue sports who make clear they do not wish to be recruited[149] are not harassed by recruiters and are protected by NCAA rules, and state and local laws regarding harassment.[150] According to one Power 5 head coach interviewed for this article, recruiting harassment

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[145] NLI Appellate Proceeding, Telephonic Hearing, December 19, 2016.

[146] *About the National Letter of Intent (NLI)*, *supra* note 25.

[147] NLI Appellate Proceeding, *supra* note 145.

[148] *See* 2017–18 NCAA Division I Manual, Bylaw 13 (Aug. 1, 2017).

[149] Steven Godfrey & Bud Elliott, *When College Football Coaches Use Negative Recruiting and Why*, SB Nation (Feb. 24, 2016), https://www.sbnation.com/college-football-recruiting/2016/2/24/11092648/negative-recruiting-college-football-coaches.

[150] *See* NCAA Bylaw 13.1 (governing contacts, including telephone calls with recruits); *See*, e.g., A.R.S. § 13-2921 (anti-harassment law for Arizona).

after an athlete has made an verbal commitment is not an issue in his (non-revenue) sport. Similarly, a college football journalist has recently reported, "most staffs are not badgering kids who tell them they do not want to continue to be recruited."[151]

More importantly, the Recruiting Ban is likely not a detriment to the institution, but in fact benefits the institution by reducing the school's recruiting costs and preventing other schools with superior offers of financial aid, facilities, coaches, teams, playing time, etc. from contacting the athlete. Byrd, the former NLI official, confirmed this, saying, "most of the value [of the NLI] is to the university in cutting costs by shortening the recruiting process."[152] The Recruiting Ban, moreover, does not require the signing institution to take any steps to prevent contact between the signee and other institutions.[153] There does not appear to be any "punishment" for a school that violates the Recruiting Ban, making it largely illusory.[154]

But even if the Recruiting Ban is arguably sufficient consideration for the contract, it still is not bargained-for consideration. The CCA's official publication describing the NLI makes clear that the consideration for the agreement is the promise of "athletics financial aid for one academic year" from the institution in exchange for the promise "to attend the institution full-time for one academic year."[155] It is unrealistic to believe the Recruiting Ban—which disadvantages signees by reducing their ability to maximize the financial benefits they receive—induced the promise to attend the institution. The Recruiting Ban is, at best, meaningless to athletes and not the bargained-for consideration for the NLI. And to the extent it is disputed whether the Recruiting Ban is bargained-for consideration, it is likely a question of fact

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[151] Godfrey & Elliott, *supra* note 149.

[152] COTTON & WOLOHAN, *supra* note 49.

[153] Administrative Guidelines and Interpretations for the 2018-2019 National Letter of Intent http://www.nationalletter.org/documentLibrary/administrativeGuidelines.pdf (last visited Nov. 19, 2017).

[154] National Letter of Intent, NATIONALLETTER.ORG, http://www.nationalletter.org/index.html. (last visited Aug. 31, 2017).

[155] *About the National Letter of Intent*, NATIONALLETTER.ORG, http://www.nationalletter.org/aboutTheNli/index.html, (last visited Aug. 31, 2017).

to be determined by a jury who, given the unfair conditions of the adhesion contract, would likely be sympathetic to the athlete.[156]

One commentator has argued there is sufficient consideration because the institution is not obligated to provide financial aid and must forgo providing aid to others if financial aid is given to an athlete who signs an NLI.[157] This argument fails for two reasons. First, the argument is factually incorrect: the athlete does not receive athletic-based financial aid because he signs the NLI, nor is the institution precluded from offering aid to others because an athlete signs the NLI.[158] The institution's limitations regarding financial aid it can offer other prospective athletes arises when the athlete signs the *separate* contract for financial aid with the institution and executes other NCAA documents that allow the athlete to participate in NCAA-sanctioned events.[159] The athlete may sign the NLI and financial aid agreement simultaneously, but the former is not required to execute the latter.[160] And even if the athlete does sign, the NLI creates no legal detriment for the institution—the institution's legal obligations are the same whether there is an executed NLI or not.[161]

Second, the delivery of a separate financial aid agreement is not the bargained-for exchange.[162] According to every representation regarding the NLI, the bargained-for exchange is actual financial aid in exchange for attending the institution, not the delivery of a separate contract for financial aid.[163] And, once again, the institution is not delivering the financial aid agreement because the athlete signs the NLI—the athletics-based financial aid offer is given to the athlete *before or concurrent* to the signing

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[156] Fire Ins. Ass'n v. Wickham, 141 U.S. 564, 581 (1891).

[157] Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by any Other Name*, 35 WAYNE L. REV. 1275, 1338–40 (1989).

[158] *Id*. at 1339.

[159] *See About the National Letter of Intent*, *supra* note 155.

[160] *See Financial Aid Requirement*, *supra* note 118.

[161] *See About the National Letter of Intent*, *supra* note 155.

[162] Voccola v. Forte, 139 A.3d 404, 413-14 (R.I. 2016). *See generally* 17 C.J.S. Contracts § 99 § 106 (consideration must be bargained for, meaning it is sought by the promisor in exchange for his promise and is given by the promise in exchange for that promise.)

[163] *NLI Frequently Asked Questions*, NATIONALLETTER.ORG, http://www.nationalletter.org/frequentlyAskedQuestions/bindingAgreement.html. (last visited Aug. 31, 2017).

of the NLI[164] and is executable even if the NLI is unsigned.[165] Because the separate athletics-based financial aid agreement is the only document affecting the rights of the parties, the institution is not legally obligated to do anything or forgo any right due to the NLI.[166] Thus, there is no consideration based on the delivery of a separate financial aid agreement.[167]

A savvy administrator might argue the financial aid agreement is incorporated by reference into the NLI (or the NLI is incorporated into the financial aid agreement) and therefore constitutes consideration for the agreement.[168] But this argument is easily refuted. To be incorporated by reference "the reference must be clear and unequivocal and must be called to the attention of the other party, he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties."[169] Financial aid offers are separately negotiated agreements that do not mention the NLI and cannot be accepted by signing the NLI only.[170] Most financial aid agreements are also integrated documents, meaning the parties contractually agree no representations or promises have been made other than those set forth in the agreement. Woods' financial aid agreement with State University, for example, states: "This agreement represents the final and entire understanding between

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[164] NLI, ¶2; *see* Leone v. Precision Plumbing and Heating of Southern Arizona, Inc., 591 P.2d 1002 (Ariz. Ct. App. 1979) (holding the performance, or promise to perform, an existing legal obligation or an act that the promisor is bound to perform is not valid consideration unless additional consideration is given.).

[165] *Id.* at Intro.

[166] *See supra* text accompanying notes 159–61.

[167] While not completely frivolous, schools would be hard-pressed to make these nuanced legal arguments in a public venue. The institution would have to argue the student athlete must remain in school or forgo a significant portion of his collegiate athletic career not because he received athletics-based financial aid, but because other schools agreed not to contact him to give him more scholarship money, playing time, etc. or because his financial aid offer, as is customary, was delivered to him before he agreed to attend the university.

[168] *See* Weatherguard Roofing Co. v. D.R. Ward Constr. Co., 152 P.3d at 1229 (Ariz. Ct. App. 2007) (citing 17A C.J.S. Contracts § 199 at 136 (1963).

[169] *Id.*

[170] *Athletic Financial Aid Agreement*, *supra* note 119.

the parties." Thus, the financial aid agreement explicitly precludes integration of the NLI. Even if this language is absent from the financial aid agreement, the NLI states the athlete need not sign the document to receive financial aid, further disclaiming any integration into the financial aid agreement.[171] Because the financial aid documents and the NLI expressly state they operate independently of one another, they are not integrated. The acceptance of one document has no bearing on the acceptance of the other, and the mere temporal connection between the athlete signing the NLI and the financial aid form is not enough to overcome the integrated nature of either document.[172]

Framing the Recruiting Ban as beneficial to prospective college athletes illustrates a fundamental problem with the NLI and similar NCAA rules. On the whole, these regulations subjugate an athlete's athletic and academic interests to the institution's competitive and financial goals. The aim of these restrictions is clearly not educational, because once they have signed the NLI, athletes are penalized for transferring to another school with better educational or athletic opportunities. A school's ability to offer a recruit an education in exchange for their labor is a once-in-a-lifetime opportunity that can change the recruit's life.[173] But the Recruiting Ban limits athletes' educational opportunities in favor of the school's interest in having the athlete compete for the institution. Prohibiting in-season transfers or even transfers during the first-year is not inherently unreasonable. But after the initial year is complete and assuming education is the primary concern—as the NCAA claims it is—there is no basis to limit an athlete's efforts to maximize his ability to receive a higher-quality education by allowing unrestricted, penalty-free transfers. The Basic Penalty and Recruiting Ban—rules designed to further institutions' athletic interests—are nothing more than thinly-veiled restrictions on NLI signees' educational mobility.

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[171] NLI, Introduction Statement ("No prospective athlete or parent is required to sign the NLI for a prospective student-athlete to receive athletics aid and participate in intercollegiate athletics.").

[172] *See* U.S. Sprint Commc'n Co., Ltd. v. Comm'r of Revenue, 578 N.W.2d 752 (Minn. 1998) (holding there is no consideration unless both parties to a contract have adopted it as such.") Here, the institution is not promising to give financial aid as a result of the NLI.

[173] *See* Hosick, *supra* note 3.

C. THE NLI'S BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

Even if the NLI is a valid contract, signees can challenge the Basic Penalty by claiming the NLI release process, including the initial request and subsequent appeals permitted by the Program's rules, violates the covenant of good faith and fair dealing. Described below, the release process is fundamentally unfair to signees and is devoid of the basic elements of due process.[174]

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcements."[175] The covenant requires the parties to exercise discretion given to it under the contract in an objectively reasonable manner, and requires "neither party do anything that prevents the other party from receiving the benefits of their agreement." [176]

Here, signees seeking to transfer are given the right to secure a release from the NLI, but the process is completely one-sided and frustrates the contractual right to obtain a release from the agreement. The initial request for a release from the NLI is submitted to the institution and evaluated by the institution's Director of Athletics and compliance department.[177] There are no objective standards governing the institution's evaluation of this release request. The CCA gives the institution sole "discretion to grant a release or not" on a "case-by-case basis."[178]

The CCA feebly attempts to create a standard by stating there must be "extenuating circumstances" [179] justifying the

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[174] RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e (AM. LAW INST. 1979). (recognizing the abuse of discretion to determine compliance or termination of a contract violates the covenant.

[175] *Id*.

[176] *Id*.; *see also* REVISED ARIZ. JURY INSTRUCTIONS (CIVIL), 5TH CONTRACTS 16.

[177] *NLI Release Request Instructions for the NLI Signee*, NATIONALLETTER.ORG, http://www.nationalletter.org/releaseAndAppeals/releaseInstructions.pdf (last visited Dec. 20, 2017).

[178] Quick Reference Guide to the NLI, NATIONALLETTER.ORG, http://www.nationalletter.org/documentLibrary/nli-guide-2017-18.pdf (last visited Dec. 20, 2017).

[179] *Id.*

release, yet fails to define which circumstances are "extenuating." The CCA gives three examples of *possibly* extenuating circumstances: "illness of the student, illness or death of a parent, or financial hardship of the student's family which prevent the student from attending the signing institution," later confirming these are just examples of what "may" constitute an extenuating circumstance.[180] Confirming there is no contract, the CCA states: "just as the NLI is a voluntary agreement, granting a complete release is voluntary."[181]

The only objective guideline is that a coaching change is not a basis to request a release from the NLI,[182] yet another standard that favors the financial and competitive interests of the institution over those of the athlete. The hypocrisy of the NLI is no more evident than in this rule: a coach can leave freely for better opportunities but the student the coach recruits must remain or suffer the Basic Penalty.[183]

Notably, there is no duty that the institution investigate after receiving an NLI release request.[184] This is true even if the extenuating circumstances cited by the athlete involve allegations of misconduct by the institution, its employees, coaches, or other athletes.[185] And if the institution voluntarily investigates, there is no requirement the institution use a neutral party (or even someone not affiliated with the athletics department) to investigate.[186] There is no hearing, and no mechanism to compel testimony from current coaches, staff, employees or students.[187] After submitting the request, including whatever information the athlete can collect on his own (without the ability compel testimony or document production), the signee receives the

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[180] *Asking for an NLI Release FAQs*, NATIONALLETTER.ORG, http://www.nationalletter.org/frequentlyAskedQuestions/askingForARelease.html (last visited Dec. 20, 2017).

[181] *Id.*

[182] *See Coaching Changes*, NATIONALLETTER.ORG, http://www.nationalletter.org/nliProvisions/coachingChange.html (last visited Dec. 20, 2017).

[183] *See id.*

[184] *NLI Appeals Process*, *supra* note 12.

[185] *See id.*

[186] *See id.*

[187] *See id.*

institution's decision.[188] The institution does not have to explain how it reached the decision or detail the basis for the outcome.[189]

If the request is denied, there is an appeals process administered by the NLI Program.[190] The NLI website sets forth deadlines for filing the appeal and general instructions on how to file, but—once again—there are no substantive standards governing the appeal.[191] The appeal is sent to a secretive "NLI Committee," with no explanation of how the committee is chosen or who comprises it.[192] There does not appear to be a student representative on the NLI committee, or any person not affiliated with the NCAA or an NLI member institution.[193] The athlete seeking a release is asked to provide "extenuating circumstances" warranting a "reduction of the NLI Penalty" and supporting documentation, but, like at the institutional level, there is no explanation of what exactly constitutes an extenuating circumstance or how extenuating circumstances are evaluated.[194]

The institution is given a chance to respond to the appeal, after which the NLI Committee reviews the materials and issues its decision.[195] There is no hearing or opportunity for the athlete to compel testimony or confront an institution's representative regarding the circumstances surrounding the request for release.[196] And like the institutional appeal, there is no investigation by the NLI Committee.[197] The Committee only considers materials submitted by the parties.[198]

If the decision is adverse to the athlete seeking a release, there is an opportunity for a second appeal.[199] Like the first, the signee is afforded no substantive due process and little procedural due process.[200] The athlete may provide new supporting

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[188] *NLI Release Request Instructions for the NLI Signee*, *supra* note 177.

[189] *See id.*

[190] *NLI Appeals Process*, *supra* note 12.

[191] *See id.*

[192] *See id.*

[193] *See id.*

[194] *See Asking for an NLI Release FAQs*, *supra* note 180.

[195] *NLI Appeals Process*, *supra* note 12.

[196] *See id.*

[197] *See id.*

[198] *See id.*

[199] *Id.*

[200] *See id.*

documents of extenuating circumstances, and the school is once again given the opportunity to respond.[201]

The "NLI Appeals Committee is a separate body from the previous NLI Committee" and conducts its "own review of the information provided."[202] The athlete, for the first time, may "speak to the Committee members via telephone conference," but the proceedings are not recorded or otherwise available for review.[203] Signees may not call witnesses, and there is no requirement the school appear at the telephonic conference.[204] The composition of the NLI Appeals Committee is provided to the athlete before the hearing, but the members of the Committee and how Committee members are chosen is not publicized.[205]

Like the first appeals process, the NLI Appeals Committee does not conduct its own investigation, and its decision is based exclusively on materials (including any testimony) provided by the institution and athlete (who still has no mechanism to collect or compel testimony from third parties).[206] The "standard" is the same: the NLI Appeals Committee may "voluntarily" release the athlete from the NLI, but there is no requirement the Committee do so under any circumstance.[207]

To be fair, many release requests are granted each year.[208] But the standard-less and secretive process of "voluntarily" releasing signees at the institution's or NLI committee's sole discretion is not an exercise in good faith when students' requests are denied.[209] An athlete who desires a higher-quality or less

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[201] *See id.*

[202] *Id.*

[203] *Id.*

[204] *See id.*

[205] *See id.*

[206] *See id.*

[207] *See id.*

[208] *See* Glier, *supra* note 14 (According to an NCAA official who oversees the NLI Program, between 96 and 98 percent of release requests are granted.).

[209] *See* Rawlings v. Apodaca, 726 P.2d 565, 572–73 (Ariz. 1986) (en banc) (recognizing adoption of system that unreasonably denies contractual benefits violates covenant of good faith and fair dealing); Bike Fashion Corp. v. Kramer, 46 P.3d 431, 435 (Ariz. Ct. App. 2002) (holding parties breach the implied covenant by exercising "express discretion in a way inconsistent with a party's reasonable expectations and by acting in ways not expressly excluded by the

expensive education, for example, is not guaranteed a release for "extenuating circumstances." [210] The arguments will be fact specific, but many signees whose release requests are denied can successfully argue the denial breached the covenant of good faith and fair dealing (assuming the NLI is a contract) because the appeals process lacked fundamental due process.[211] If successful, the signee can seek damages and require, or at least pressure, the institution to grant the release.[212] An ambitious athlete could also seek an order enjoining the use of the current, unfair appeals process and requiring the CCA to reform the appellate procedures.[213]

Similarly, institutions that mislead athletes through their employees, staff, or coaches regarding any substantive issue that tends to frustrate the NLI agreement, such as playing time, training facilities, educational opportunities, etc., may be liable for breaching the covenant of good faith and fair dealing. [214] Assuming the NLI is a valid contract, the institution must exercise its discretion given under the contract in good faith when dealing with signees. For example, if a coach knew he or she was leaving the institution and misled the prospective athlete to believe they were remaining as inducement to sign the NLI, the athlete would

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contract's terms but which nevertheless bear adversely on the party's reasonable expected benefits of the bargain.").

[210] *See NLI Appeals Process*, NATIONALLETTER.ORG, http://www.nationalletter.org/documentLibrary /appealsProcessSheet100110.pdf.

[211] *See* Beraha v. Baxter Health Care Corp., 956 F.2d 1436, 1443 (7th Cir. 1992) (stating that the exercise of discretion under contract must be in good faith even when contract gives defendant full authority to complete the promise).

[212] *See* Restatement (Second) of Contracts § 357 (1981) (describing availability of specific performance and injunction).

[213] *See* Rest. (2d) of Contracts § 258 (describing availability of injunctive relief for breach of contract); Fed. R. Civ. P. 23(b)(2) (defining injunctive relief class).

[214] *See* Coulter v. Grant Thornton, LLP, 388 P.3d 834, 842 (Ariz. Ct. App. 2017) (holding parties breach covenant by denying the other party the reasonably expected benefits of the contract.) (internal citations omitted). Potential plaintiffs should be aware that some states do not permit claims for breach of the covenant of good faith and fair dealing and others severely limit the claims. *See, e.g.*, English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983).

likely have a claim for breach of the covenant of good faith and fair dealing notwithstanding the NLI provision stating coaching changes are not a basis for NLI releases. The coach's misleading behavior violates the covenant even if the athlete is bound to the contractual provision;[215] the contract (if there is one) does not relieve the coach from telling the truth nor immunize a coach for intentionally misleading recruits. If the coach lies and breaches the covenant, the remedy may be limited to damages, but the economic pressure may be enough to force the institution into a full release.[216] Depending on the egregiousness of the institution's conduct, some courts allow tort damages for breach of the duty of good faith and fair dealing; this means that signees may be able to seek punitive damages in certain jurisdictions under the right circumstances.[217]

In short, a claim for breach of the covenant of good faith and fair dealing may help NLI signees avoid the Basic Penalty.

D. THE NLI IS AN UNENFORCEABLE COVENANT NOT TO COMPETE

As regulators of uncompetitive behavior, courts are routinely presented with cases regarding covenants not to compete. These covenants, often included in employment contracts, involve promises "not to engage in the same type of business for a stated time in the same market as the buyer, partner or employer."[218]

The residency requirement of the NLI's Basic Penalty effectively functions as a covenant not to compete. These

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[215] Bike Fashion Corp. v. Kramer, 46 P.3d 431, 435 (Ariz. Ct. App. 2002).

[216] Restatement (Second) of Contracts § 359 (recognizing that specific performance or an injunction is generally not permitted if damages are adequate to protect the expectation interests of the injured party).

[217] *See, e.g.*, Dodge v. Fid. & Deposit Co. of Maryland, 778 P.2d 1240, 1242–43 (Ariz. 1989) (holding tort damages were available in a bad faith action against a surety on a contractor's performance bond); *see also* Nelson v. Phoenix Resort Corp., 181 Ariz. 188, 197, 888 P.2d 1375, 1384 (Ct. App. 1994) (holding tort damages were no generally available in a bad faith action by an employee against an employer.).

[218] *Noncompetition covenant*, BLACK'S LAW DICTIONARY (10th ed. 2014).

covenants usually consist of two elements: temporal and geographic restrictions.[219] The NLI's Basic Penalty features both. Athletes who fail to complete one academic year at the institution with which they signed and subsequently enroll at another NLI-subscribing school are forbidden from participation in "intercollegiate athletics" for a "full academic year" at the new institution (approximately nine months). [220] The geographic restriction extends to all intercollegiate athletic programs "participating in the NLI Program" (approximately 650 institutions across the NCAA's Divisions I and II, including all Power 5 conferences).[221] An analysis of how covenants not to compete are treated in the employment context illustrates the NLI's fundamental unfairness.

1. COVENANTS NOT TO COMPETE, GENERALLY

In most states, covenants not to compete are enforced only if they are no more restrictive than necessary to safeguard an "employer's legitimately protectable interests." [222] An entity's

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[219] Valley Med. Specialists v. Farber, 982 P.2d 1277, 1284 (Ariz. 1999).

[220] *Basic Penalty*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/nliProvisions/penaltyBasic.html (last visited Nov. 13, 2017).

[221] *About the National Letter of Intent (NLI)*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/index.html (last visited Nov. 13, 2017).

[222] Amex Distrib. Co. v. Mascari, 724 P.2d 596, 601 (Ariz. Ct. App. 1986), citing Am. Credit Bureau, Inc. v. Carter, 462 P.2d 838, 840 (Ariz. Ct. App. 1969). *See also* Nasco Inc. v. Gimbert, 239 Ga. 675, 676-677 (S. Ct. Ga. 1977) (holding that a nondisclosure covenant was unnecessarily restrictive when it "prohibit[ed] disclosure of information not needed for the protection of employer's legitimate business interests."); Sheline v. Dun & Bradstreet, Inc., WL 128494, at 3 (N.D. Texas 1991) (restating that under Texas law, covenants not to compete will be upheld if the "scope of activity to be restrained that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promise."); *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 21 (2015) (finding that "states require that the restrictions in [a non-compete covenant] are reasonable in scope and tailored to protect legitimate business interests.").

interest in insulating itself from competition is not a protectable interest. [223] Courts also recognize the enforcement of such covenants requires sufficient consideration for the party against whom the covenant is enforced.[224] Covenants are not enforced if they unduly encroach on the party's right to contract, or if they offend public policy.[225] Covenants in employee contracts are "not looked upon with favor" [226] by the courts and are " strictly construed against the employer." [227] In most states, while non-compete covenants are not illegal *per se*, [228] they must be reasonable as to duration and location[229] and must be contained

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[223] *Farber*, 982 P.2d at 1281 ("To be enforced, the restriction must do more than simply prohibit fair competition by the employee."). *See also* Vlasin v. Loen Johnson & Co., Inc., 455 N.W.2d 772, 775-76 (S. Ct. Neb. 1990).

[224] *Mascari*, 724 P.2d at 601 ("It is true that the courts will not enforce a covenant not to compete given without consideration…"). *See also* Lucas-Insercto Pharm. Printing Co. of Maryland, LLC v. Salzano, 124 F. Supp. 2d 27 (2000) (restating that under Puerto Rico law, covenants not to compete were valid only when "the employer offers a consideration other than mere job tenure in exchange for the employee signing the non-competition covenant.").

[225] *Carter*, 462 P.2d at 840.

[226] Federated Mut. Ins. Co. v. Bennett, 818 S.W.2d. 596, 597 (Ark. Ct. App. 1991).

[227] *Farber*, 982 P.2d at 1281. If college athletes in Arizona were to be deemed employees, restraints on their future employment in similar work would be "reasonable in duration for the time necessary for the employer to put a new employee on the job and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to the customers." *See*, *e.g.*, Bed Mart, Inc. v. Kelly, 45 P.3d 1219 (Ariz. Ct. App. 2002); Richardson v. Paxton Co. 127 S.E.2d 113 (S. Ct. Va. 1962).

[228] *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenant Not to Compete Agreements, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 753, 757 (2011) (finding that the majority of states allow some enforcement of non-compete covenants).

[229] Wright v. Palmer, 464 P.2d 363, 365 (Ariz. Ct. App. 1970). *See also* Jackson Hewitt, Inc. v. Childress, 2008 WL 199539, at 5 (D. N.J. 2008) ("Most courts have deemed covenants not to compete to be legally binding so long as the clause contains reasonable limitations regarding the relevant geographical area and time period."); Armstrong v. Cape Girardeau Physician Assocs., 49 S.W.3d 821, 825 (Mo. Ct. App. 2001) ("Generally because covenants not to compete are considered restraints on trade, they are presumptively void and are

within an otherwise valid contract[230] bargained in good faith.[231] Other jurisdictions prohibit covenants longer than a certain period of time.[232] When viewed in light of these principles, the NLI's Basic Penalty is both unenforceable and unreasonable.

2. APPLICATION TO THE NATIONAL LETTER OF INTENT

As described in Section IV, the NLI is not a valid contract.[233] But even if the NLI were a valid agreement, the Basic Penalty's residency requirement may still be unenforceable, as it unreasonably restricts the economic rights of signees. It is also broader than necessary to safeguard legitimate institutional interests. The case *Valley Medical Specialists v. Farber*[234] is instructive regarding how courts might view a challenge to the Basic Penalty—particularly in states without statutory prohibitions on non-compete covenants.[235] Assuming our Sara Woods signed the NLI with an institution located in Arizona, she could have relied on this authority in the release process or a civil suit.

In *Farber*, the Arizona Supreme Court considered a medical group's challenge to one of its ex-physician's breach of

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enforceable only to the extent that they are demonstratively reasonable.").

[230] *Carter*, 462 P.2d at 840.

[231] System Concepts, Inc. v. Dixon, 669 P.2d 421, 425–26 (Utah 1983).

[232] Upchurch v. USTNet, Inc., 836 F.Supp 737, 739 (D. Oregon 1993) (Louisiana state law (La.Rev.Stat. § 23:921(C)) prohibits non-compete covenants exceeding two years). *See also* Lucas-Insercto Pharm. Printing Co. of Maryland, LLC v. Salzano, 124 F. Supp. 2d 27 (2000) (Puerto Rico law prohibits restrictive covenants exceeding 12 months).

[233] *See infra* pp. 44–51.

[234] Valley Med. Specialists v. Farber, 982 P.2d 1277, 1281 (Ariz. 1999)..

[235] *See, e.g.*, CAL. BUS. & PROF. CODE § 16600 (West 2014) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."); FLA. STAT. ANN. § 542.33; NEV. REV. STAT., § 613.200; OR. REV. STAT. § 653.295; TENN. CODE ANN. § 47-25-101; WIS. STAT. ANN. § 103.465.

his non-compete agreement.[236] The agreement forbid the physician, a pulmonologist, from practicing medicine for three years and within a five-mile radius of the medical group's offices if he left.[237] The physician subsequently left the medical group and restarted his pulmonology work within the durational and geographic bounds imposed by the covenant.[238] The medical group sued, alleging breach of contract.[239] After conflicting rulings in the trial and appellate courts, the Arizona Supreme Court reinstituted the findings of the trial court, ruling that both the durational and locational aspects of the covenant went far beyond what was necessary to protect the interests of the medical group and were therefore unreasonable.[240]

The NLI's Basic Penalty's sweeping restrictions are similarly flawed. Regarding the durational limits imposed, the *Farber* covenant, which lasted three years, appears more restrictive than the Basic Penalty, which lasts only one.[241] However, as *Farber* recognizes: "Reasonableness is a fact-intensive inquiry that depends on weighing the totality of the circumstances,"[242] and therefore any court reviewing the Basic Penalty's residency requirement must consider the realities of the collegiate athletic market. Whereas a physician's career may last 30 years or more,[243] the college athlete has just five years of eligibility and can only compete in four seasons of athletics within that time period.[244] While the *Farber* covenant affected approximately 10 percent of the physician's career, the Basic Penalty impacts a quarter of the athlete's career.[245] Seen from this

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[236] *Farber*, 982 P.2d at 1280.

[237] *Id.*at 1279.

[238] *Id.*

[239] *Id.* at 1280.

[240] *Id.* at 1285–86.

[241] *Basic Penalty*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/nliProvisions/penaltyBasic.html (last visited Nov. 2, 2017).

[242] *Farber*, 982 P.2d at 1281.

[243] Beth Greenwood, *The Average Length of Doctors' Careers*, HOUSTON CHRONICLE, http://work.chron.com/average-length-doctors-careers-13376.html (last visited Nov. 2, 2017).

[244] *Transfer Terms*, NCAA, http://www.ncaa.org/student-athletes/current/transfer-terms (last visited Nov. 2, 2017).

[245] Applying basic division principals to the durational limitations and the career lengths of both physicians and college

angle, the durational restrictions of the NLI are at least as great as those presented in *Farber*. Further, most jurisdictions have held that temporal restrictions in non-compete covenants should be connected in some way to the "amount of time needed by the former employer to re-establish and solidify its relationships with its customers." [246] There is no evidence suggesting increased movement amongst institutions by college athletes has any deleterious effect on consumer appeal for college sports, and so it is unclear if an athletic department's relationships with its customers need be re-established or re-solidified after a player departs.

Geographically, the Basic Penalty is exceedingly broad, far more so than the *Farber* covenant, covering more than 650 institutions of higher education across the United States. While the *Farber* covenant was exclusively regional—covering approximately 235 square miles[247]—the Basic Penalty is national in scope,[248] placing onerous penalties on athletes for matriculating to a large majority of NCAA Division I and Division II institutions, and all schools within the market for top athletic talent. [249] Because college athletes essentially qualify as employees[250] and thus "cannot be prevented from plying their

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athletes, as discussed in the preceding sentences, yields the percentage impact on each group.

[246] *See* Orkin Exterminating Co. v. Walker, 251 Ga. 536, 538 (1983); *see also* Arpac Corp. v. Murray, 589 N.E.2d 640 (Ill. App. Ct. 1992).

[247] *Farber*, 982 P.2d at 1280.

[248] As indicated by the title of the document, the *National* Letter of Intent applies to institutions throughout the nation. The Basic Penalty is applicable to all who sign a National Letter of Intent, thus it can be inferred that the Basic Penalty applies nationally.

[249] *See Basic Penalty*, *supra* note 243; *About the National Letter of Intent (NLI)*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/index.html (last visited Nov. 2, 2017).

[250] Memorandum GC 17-01, Nat'l Labor Relations Board Office of the Gen. Counsel (Jan. 31, 2017) (on file with author) (finding that "scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act.").

trades by blanket post-employment restraints," [251] the Basic Penalty's geographic restrictions are likely unreasonable and unenforceable.

The class of forbidden activities outlined in the Basic Penalty compares favorably to those in the *Farber* covenant. Even though an athlete signs the NLI intending to compete in a particular sport, the Basic Penalty prevents any participation in "intercollegiate athletics" during the residency period. Ostensibly, this includes participation in *any* athletic program, school sponsored or not, that engages in inter-collegiate competition. This prohibition on competition in *all* sports is nearly identical to the restrictions imposed on the physician in *Farber*: The physician was prohibited from rendering any medical services,[252] not just those incidental to his specialty (pulmonology). The Court struck down this sweeping language as contrary to public policy.[253] It could be argued that the Basic Penalty contravenes public policy as well, as it interferes with the distribution of scholarships providing access to higher education—which is indisputably in the public interest. Viewed in totality, the Basic Penalty is not only similar to other restrictive covenants, but in some aspects, is more onerous than those previously invalidated in Arizona and other states.[254]

These restrictions would then be weighed against the university's interests to determine whether the covenant was more

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[251] Chavers v. Copy Products Co., Inc., of Mobile, 519 So. 2d 942, 945 (Ala. 1988). Table T1.3

[252] *Farber*, 982 P.2d at 1284.

[253] *Id.* at 1286. Other jurisdictions have also found these universal restrictions invalid at common law. *See* Fields v. Rainbow Int'l Carpet Dyeing and Cleaning Co., 380 S.E.2d 693, 693 (Ga. 1989) (holding that a "a restriction of employment in a business 'in any capacity' is overbroad and unreasonable.").

[254] *See, e.g.*, FLA. STAT. § 542.335(1)(d) (If the employer's legitimate business interests do not include trade secrets, restraints of six months or less are presumed reasonable in time, while restraints greater than two years in duration are presumed unreasonable); Birmingham Television Corp. v. DeRamus, 502 So. 2d 761, 764 (Ala. Civ. App. 1986) (invalidating six month-long non-compete covenant); Boch Toyota, Inc. v. Klimoski, 18 Mass. L. Rptr. 80, *2 (Mass. Super. 2004) (upholding a covenant not to compete spanning a duration of twelve months and a geographic scope of thirty-five miles); Baker v. Hooper, 50 S.W.3d 463, 469–70 (Tenn. Ct. App. 2001) (court reduced six-month covenant to two months).

restrictive than necessary.[255] Institutional interests would likely fall into two general categories: economic and philosophical. Schools could assert an interest in protecting the continuity of their athletic teams and argue, as the NCAA did in *Pugh*,[256] that unregulated player movement would decrease the commercial appeal of their athletic contests, perhaps resulting in a loss of revenue from ticket holders, donors, and broadcasting partners. Philosophically, institutions could claim the Basic Penalty safeguards the principle of amateurism, which views college athletics as an integral part of the athlete's educational and personal development. Transferring between institutions for reasons solely related to athletics, schools may argue, is injurious to the "collegiate model" adhered to by the NCAA and its membership. Institutions could also explain the year-in-residence requirement as a benefit to athletes in easing the academic, athletic, social, and personal transition between institutions. A court considering a challenge to the Basic Penalty would be tasked with assessing whether these interests warranted the degree of restriction contained in the NLI. If the institutional interests did not outweigh the regulations placed on athletes, a court could invalidate the Basic Penalty.

These institutional interests, though valid at first glance, are unsupportable. There are no data establishing a connection between consumer appeal for collegiate athletics and athletes' freedom of movement. In other words, there is nothing to suggest that the absence of the Basic Penalty's restrictions would affect the public's interest in college sports. Moreover, the Basic Penalty lacks an exception for exceptionally talented athletes whose academic record suggests they will have no problem adjusting to a new school—undercutting any argument supporting the Basic Penalty's academic benefits.

Another interest institutions could (and often do) present in justifying the restrictions of the Basic Penalty are the competitive implications of permitting athletes to transfer and play immediately. Former Wisconsin men's basketball coach Bo

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[255] *See* NBZ, Inc. v. Pilarski, 520 N.W.2d 93 (Wis. Ct. App. 1994).

[256] Brief in Support of Motion for Partial Dismissal of Plaintiff's Complaint at 8, *Pugh v. NCAA*, No. 1:15-cv-1747, 2016 WL 5394408 (S.D. Ind. Sept. 27, 2016) No. 44-01747, 2016 WL 1593577, at *Section II(A)(1).

Ryan's justification for blocking one athlete's transfer: "[w]e don't want a young man to take our playbook and go to the next school"[257]—is emblematic of this competitive interest. However, it is one most courts would flatly reject. In outlining the state judiciary's history on evaluating non-compete covenants, the *Farber* court concluded "a covenant not to compete is invalid unless it protects some legitimate interest beyond the employer's desire to protect itself from competition."[258] In light of that pronouncement, recall the justification State University gave to Sara Woods in denying her NLI release request: "[State University] will not be releasing [Sara] in order to restrict her from immediately competing at a [conference] institution or an institution against whom we are scheduled to compete this academic year."[259] The reasoning offered by State University in denying Woods her release mirrors that which the *Farber* court wrote could not justify non-compete covenants. In blocking Woods' transfer, State University reveals that its primary concern is safeguarding the competitive success of the team Woods would have otherwise competed on—a goal wholly incompatible with both state and federal antitrust law, as well as the public policy aims of non-compete covenant jurisprudence.[260] Overall, when applying the holdings in *Farber* and its peers to the NLI's Basic Penalty, the provision cannot withstand scrutiny.

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[257] *See infra* note 352. Institutions could argue that playbooks and other team- or program-specific knowledge gleaned from one's athletic participation qualify as trade secrets, and that a residency requirement prevents this information from being used against teams in the short term. This issue is beyond the scope of this article. *See* Michael McCann, *Could 'Wakeyleaks' Scandal Lead to Lawsuit, Criminal Charges?*, SPORTS ILLUSTRATED, (Dec. 14, 2016), https://www.si.com/college-football/2016/12/14/wake-forest-football-leak-illegal-louisville.

[258] *Farber*, 982 P.2d at 1281.

[259] Woods, *supra* note 6.

[260] The intent of judicial regulation on restrictive covenants is to invalidate those covenants that are not tailored as narrowly possible to maximize economic freedom while also protecting the enforcer's legitimate interests. *See* Am. Credit Bureau, Inc. v. Carter, 462 P.2d 838, 840 (Ariz. Ct. App. 1969).

IV. THE NLI AS AN ACT OF CONSUMER FRAUD: A BRIEF DISCUSSION

Depending on the circumstances of an athlete's recruitment, contract claims may not be the only legal basis to invalidate the NLI. Common law tort claims and state statutes related to fraud and unfair and deceptive practices may give NLI signees another legal avenue to avoid the Basic Penalty. Athletes misled by the institution that recruited them would be in the best position to challenge the NLI on these tort and statutory theories. The athletic recruiting realm is particularly ripe for such challenges, as coaches routinely make substantive promises they cannot (or do not) keep during the recruiting process regarding various issues, including financial aid, playing time, and their intent to remain with the program throughout the athlete's career.[261] These promises differ from athlete to athlete, meaning the theories are unlikely to form a strong class case—but could be fruitful legal strategy in individual cases.

A. COMMON LAW CLAIMS

The recent case *Eppley v. Univ. of Delaware* [262] is instructive regarding tort-based common law challenges to contracts between athletes and schools. In *Eppley*, a field hockey recruit was promised a series of partial scholarships at the

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[261] *See* Eppley v. Univ. of Del., No. 13-cv-99 (GMS), 2015 WL156754 (D. Del. Jan. 12, 2015) (coach promised athlete certain scholarship amounts during college career); Bret Stretlow, *Headline-making Kansas State Receiver Corey Sutton Plans to Transfer to App State*, WINSTON-SALEM (NC) JOURNAL (June 23, 2017), http://www.journalnow.com/sports/asu/app_trail/headline-making-kansas-state-receiver-corey-sutton-plans-to-transfer/article_e5ecb838-586e-11e7-ad6f-1f9fba30957a.html (last visited Nov. 13, 2017) (player transferred after coaching staff "didn't follow through on promises regarding playing time"); Zach Helfand, *Is the College Letter of Intent the 'Worst Contract in American Sports'?*, L.A. TIMES (Feb. 13, 2015, 6:10 PM), http://www.latimes.com/sports/la-sp-0214-football-recruiting-lies-20150214-story.html (last visited Nov. 13, 2017) ("There were just too many coaches leaving the day after signing day. It made it so obvious, that everybody knew this was occurring and they were just waiting to lock these kids in.").

[262] *Eppley*, 2015 WL156754, at *1–2

University of Delaware.[263] During her freshman season, her aid would be 35% of a full scholarship, with the award increasing to 75% her sophomore season, and 75% or more during her junior and senior years.[264] The athlete and her family received this offer orally from the program's head coach, and later verified the offer in writing.[265] Spurred by these promises, Eppley signed an NLI and a one-year financial aid agreement expressly disclaiming all previous agreements.[266] During Eppley's freshman year, the coach who originally recruited her retired, and the new coach reduced her aid to 20% (of a full scholarship).[267] After the University denied her appeal, she sued in federal court, alleging negligent misrepresentation and fraudulent inducement.[268] The trial court found Eppley had not established either claim under Delaware law, which required the existence of a fiduciary relationship to prove negligent misrepresentation.[269] The court further found that she disclaimed all previous agreements when she signed her financial aid agreement.[270]

Despite its holding, *Eppley* is not a bar for other athletes seeking relief from the NLI and the Basic Penalty. First, many states do not require a fiduciary duty to support a negligent misrepresentation claim.[271] Generally, parties owe a duty of ordinary care—a relatively easy hurdle to meet when the parties are sophisticated institutions dealing with young athletes, many of who are under the age of consent.[272] Without a need to show a fiduciary duty, the elements are easily met: the coach provided false information; she knew or should have known she was retiring and therefore could not fulfill her promise; she intended

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[263] *Id.* at *2.
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Id.* at *2–3.
[269] *Id.* at *4.
[270] *Id.* at *4–5.
[271] *See* St. Joseph's Hosp. and Med. Ctr. v. Reserve Life Ins. Co., 154 Ariz. 307, 312 (Ariz. 1987); RESTATEMENT (SECOND) OF TORTS § 552(1) (1997).
[272] Van Buren v. Pima Cmty. Coll. Dist. Bd., 113 Ariz. 85, 87 (Ariz. 1976) (quoting West v. Soto, 85 Ariz. 255, 261 (Ariz. 1959)).

that Eppley rely on her promise; and Eppley was damaged by the false information.[273]

Even if the NLI signee must show a fiduciary or special relationship, a court could find there was a relationship of "trust or confidence between the parties" sufficient to rise to the level of a special relationship.[274] In *Eppley*, the "[plaintiff] made no attempt to satisfy the elements of [negligent misrepresentation], and failed to show a fiduciary relationship."[275] This is unfortunate, because the cases cited by the *Eppley* court—which found no fiduciary or special relationship—involved "sophisticated entities advised by capable counsel."[276] No such circumstances exist with the NLI; the parties have disparate bargaining power and one party is often under the age of consent. The entire recruiting process, moreover, is centered on nurturing trust and confidence between player and coach. It is therefore unlikely other courts will find *Eppley* persuasive in potential NLI litigation.

Second, most claims will arise from intentional conduct, not negligence. Coaches, administrators, and staff often make affirmative misrepresentations, or omit material facts, to induce prospective athletes to sign the NLI.[277] Notwithstanding *Eppley*, inducing a party to sign a contract is an actionable claim in many jurisdictions even if the contract contains an integration clause disavowing all other agreements.[278]

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[273] *See* Arizona Title Ins. & Tr. Co. v. O'Malley Lumber Co., 14 Ariz. App. 486 (Ariz. Ct. App. 1971) (holding negligent misrepresentation is "committed by the giving of false information intended for the guidance of others and justifiably relied upon by them causing damages if the giver of the false information fails to exercise reasonable care or competence in obtaining or communicating the information") (citing St. Joseph's Hosp. and Med. Ctr. V. Reserve Life Ins. Co., 154 Ariz. 218, 222, 540 P.2d 690, 694 (1975)).

[274] Niagara Mohawk Power Corp. v. Stone & Webster Eng'g Corp., No. 88-CV-819, 1992 WL 121726, at *17 (N.D.N.Y. May 23, 1992).

[275] *Eppley*, 2015 WL156754, at *4

[276] *Id.*

[277] *See* Katherine Sulentic, *Running Backs, Recruiting, and Remedies: College Football Coaches, Recruits, and the Negligent and Fraudulent Misrepresentations*, 14 Roger Williams U. L. Rev. 127 (2009).

[278] *Cabinet Distributors, Inc. v. Redmond*, 965 S.W.2d 309, 314 (Mo. App. E.D. 1998); *Lollar v. A.O. Smith Harvestore Prods.*,

If the administration misrepresented a material fact to the prospective athlete, he or she would likely have a claim for common law fraud. The elements of fraud are well known:

> (1) A representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury.[279]

The fraud claims will be fact-specific, but misrepresentations, including material omissions, by the institution may be actionable.[280]

For example, if the coaching staff told a prospective basketball player he was guaranteed to start at point guard to induce him to sign an NLI and accept a scholarship, but then recruited another player who was given the starting position instead, the first player would have a valid claim based on the affirmative misrepresentation. The player could claim he was told he would start at point guard and the material omission was that the school was recruiting other players who would be given the starting point guard position. Assuming the school's fraud induced the player to forgo other, better offers of a full scholarship or guarantees related to playing time or position, the athlete would likely have a valid cause of action.[281] The signee could also claim all consequential damages and, depending on the circumstances, may even be able to claim punitive damages.[282] These claims, coupled with a claim for injunctive relief, could bring economic

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Inc., 795 S.W.2d 441, 448–49 (Mo. App. W.D. 1990); *Essex v. Getty Oil Co.*, 661 S.W.2d 544, 549 (Mo. App. W.D. 1983).

[279] Moore v. Myers, 31 Ariz. 347, 354 (1927).

[280] *See* Haisch v. Allstate Ins. Co., 5 P.3d 940, 944 (Ariz. Ct. App. 2000) (recognizing common law fraud claim for omission of material information).

[281] *Id.*

[282] Echols v. Beauty Built Homes, Inc., 132 Ariz. 498, 501–02, 647 P.2d 629, 632–33 (1982) (describing when punitive damages are appropriate based on fraud).

pressure on the school to release the athlete from the NLI and, if successful, may allow the court to release the athlete from the NLI and award damages to the signee.

B. STATUTORY CLAIMS

While common law causes of action form a formidable base to any complaint, there are often equally or more effective causes of action based in state statutes designed to address unfair acts and practices, [283] deceptive acts or practices, [284]

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[283] *See, e.g.*, ALASKA STAT. § 45.50.471(a) (2017) (prohibiting unfair acts that are against public policy, immoral, unethical, oppressive, or unscrupulous; acts need not be deceptive to be considered unfair); State v. O'Neill Investigations, Inc., 609 P.2d 520, 535 (Alaska 1980) (holding the act or practice need not be deceptive to be considered "unfair") (quoting FTC v. Sperry & Hutchinson, Co., 405 U.S. 233, 244–45 n.5 (1972)). Analyzing each potentially applicable is beyond the scope of this article and highly dependent on where the case is file and, more importantly, the facts leading to the lawsuit. A partial list of states with statutes governing unfair acts and practices who also have a significant number of universities who may abuse the NLI process include: California (CAL. BUS. & PROF. CODE § 17200 (West 2016)); Florida (FLA. STAT. § 501.204(1) (2017)); Illinois (815 ILL. COMP. STAT. ANN. 505/2 (West 2017)); Nebraska (NEB. REV. STAT. § 59-1602 (2017)); and Missouri (MO. REV. STAT. § 407.020(1) (2017)).

[284] *See, e.g.*, ARK. CODE ANN. § 4-88-107(a)(10) (2017) (prohibiting deceptive trade practices). Although Arkansas courts have not construed the meaning of the "deceptive," the Act is liberally construed to protect consumers. State *ex rel.* Bryant v. R&A Inv. Co., 985 S.W.2d 299, 302-03 (Ark. 1999); a partial list of other states that preclude deceptive practices with universities who may abuse the NLI process include: Kansas, KAN. STAT. ANN. § 50-626(a) (2017); Minnesota, MINN. STAT. § 325F.69(1) (2017); and New York, N.Y. GEN. BUS. LAW § 349(a) (McKinney 2014). Also note that many state statutes prohibit unfair and deceptive conduct, although the two concepts are fundamentally different. *See e.g.*, HAW. REV. STAT. § 480-2(a) (2017) (prohibiting "unfair or deceptive acts or practices"); Chroniak v. Golden Inv. Corp., 983 F.2d 1140, 1146 (1st Cir. 1993) (defining unfair and deceptive conduct) (quoting N.H. REV. STAT. ANN. § 358-A:2 (LexisNexis 2017)).

misrepresentations or omissions,[285] and unconscionable acts or practices[286]—almost all of which are liberally construed in favor of the plaintiff.[287]

For example, assume our tennis player Woods lived in Arizona and signed an NLI to attend Arizona State University. She may have a viable claim under Arizona's Consumer Fraud Act ("AFCA") against the University, its coaches, or the CCA based on the coaches' conduct.[288] Passed in 1967, the Act reads:

> The act, use or employment by any person of any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely on such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice. [289]

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[285] *See, e.g.*, ARIZ. REV. STAT. ANN. § 44-1522(A) (2013). Virtually all states have a consumer fraud statute prohibiting misrepresentations and omissions in consumer transactions. *See* CAROLYN L. CARTER, CONSUMER PROTECTION IN THE UNITED STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (2009), https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf.

[286] *See* TEX. BUS. & COM. CODE ANN. § 17.45(5) (West 2017); TEX. BUS. & COM. CODE ANN. § 17.50(a)(3) (West 2005).

[287] *See generally* Keegan v. Am. Honda Motor Co., 838 F. Supp. 2d 929, 958 (C.D. Cal. 2012) (acknowledging state consumer protection statutes are generally construed liberally); Holeman v. Neils, 803 F. Supp. 237, 242 (D. Ariz. 1992) (recognizing ACFA is intended to eliminate unlawful practices in merchant-consumer transactions and acknowledging there is a private right of action inherent in the statute).

[288] Lorona v. Ariz. Summit Law Sch., LLC, 151 F. Supp. 3d 978, 994 (D. Ariz. 2015) (dismissing consumer fraud claim on the merits, but recognizing cause of action under ACFA for false representations inducing students to matriculate at private law school). Issues of sovereign immunity, jurisdiction, and agency are beyond the scope of this article, but should be considered before filing any complaint and choosing proper defendants.

[289] ARIZ. REV. STAT. ANN. § 44-1522(A) (West 2013).

The statute was enacted to give aggrieved consumers a "remedy to counteract the disproportionate bargaining power often present in consumer transactions."[290] Given the NLI's adhesionary nature, athletes who execute a sham contract (most as minors) to "purchase" a college education with their athletic talent are precisely the population the statute intends to protect. [291]

Regarding Woods, if the coach who recruited her to State concealed he had no intent to remain or affirmatively stated he would remain at the school during her collegiate career, and she relied on the coach's promises to stay, she could make a colorable claim under the ACFA.[292] Under the statute's plain language, "advertisement" includes "solicitation[s] . . . oral or written"[293] to encourage or persuade another to obtain a share of "merchandise," which includes goods and services.[294] Because the *sine qua non* of recruiting is oral and written "solicitation," and a university education is a good or service, the statute should apply and create a cause of action for Woods.[295] It does not matter that the parties did not exchange money, as the statute covers any form of consideration, including the exchange of services.[296]

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[290] Waste Mfg. & Leasing Corp. v. Hambicki, 900 P.2d 1220, 1224 (Ariz. Ct. App. 1995).

[291] Sullivan v. Pulte Home Corp., 290 P.3d 446, 454 (Ariz. Ct. App. 2012) (recognizing purpose of ACFA is to provide injured consumers with remedy to counteract disproportionate bargaining power present in consumer transactions), *vacated in part on other grounds*, 306 P.3d 1 (2013).

[292] Loomis v. U.S. Bank Home Mortg., 912 F. Supp. 2d 848, 856 (D. Ariz. 2012) (recognizing elements of ACFA claims: a false promise or misrepresentation made in connection with sale of merchandise and plaintiffs' resulting and proximate injury); Cheatham v. ADT Corp., 161 F. Supp. 3d 815, 830 (D. Ariz. 2016) (recognizing omission is actionable under ACFA and need only be material and made with intent that consumer rely).

[293] ARIZ. REV. STAT. ANN. § 44-1521(1) (West 2014).

[294] ARIZ. REV. STAT. ANN. § 44-1521(5) (West 2014).

[295] Haisch v. Allstate Ins. Co., 5 P.3d 940, 944 (Ariz. Ct. App. 2000) (holding merchandise includes sale or advertisement of services).

[296] ARIZ. REV. STAT. ANN. § 44-1521(7) (West 2014) ("'Sale' means any sale, offer for sale or attempt to sell any merchandise for *any consideration*….") (emphasis added).

Unfortunately, the recruiting process is ripe with misrepresentations,[297] but it is beyond the scope of this article to address every conceivable misrepresentation or unfair or deceptive act that might take place. It is also impossible to anticipate every defense an institution may assert. For illustrative purposes only, colorable defenses would likely include arguments such as the applicable statute does not cover transactions between schools and athletes; the athlete did not reasonably rely on the promises; there is no proof of the alleged misrepresentation; or that the athlete was not damaged. The defenses to these arguments will be fact-specific and tailored to the statute's plain language, facts, and relevant case law.

But suffice to say, state statutes provide a valuable tool to fight the NLI. Additionally, unlike contract claims in most jurisdictions, enhanced damages are often available under remedial consumer protection statutes, such as punitive damages, minimum damages, trebled damages, and attorney's fees and costs, depending on the nature of the misrepresentations. [298] Signees seeking to avoid the NLI penalty would be wise to review the applicable state statutes when constructing their arguments in the administrative and/or legal setting.

V. THE ANTITRUST LIABILITY OF TRANSFER REGULATIONS

As witnessed by the forgoing history of transfer regulations in college athletics, the "year-in-residence" principle predates the NLI by decades, and was incorporated into the agreement as the Basic Penalty. The residency requirement deters the movement of athletes between schools, safeguarding institutions' recruiting investments and accumulation of talent. In its absence, athletes could re-matriculate—without onerous penalties—at an institution that better met their personal,

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[297] *See, e.g.*, John Talty, *8 Common Lies Couches Tell Recruits*, AL.COM (Aug. 11, 2014, 1:55 PM), http://www.al.com/sports/index.ssf/2014/08/dana_holgorsen_says_coaches_li.html.

[298] In Arizona, for example, punitive damages may be properly awarded for violations of the ACFA if "the wrongdoer should be consciously aware of the evil of his actions, of the spitefulness of his motives or that his conduct is so outrageous, oppressive or intolerable in that it creates a substantial risk of tremendous harm to others." Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 679 (Ariz. 1986).

academic, and athletic preferences, resulting in a more optimal pairing of player and school without unnecessarily restraining trade. Further, the Basic Penalty stripping transferring athletes of one year of eligibility[299] acts as a group boycott against these players: it is a concerted refusal to deal with a class of athletes who could otherwise exchange their athletic labor for a grant-in-aid for another year. This labor-for-scholarship exchange is the foundation of the NCAA economy, and therefore the NLI restrains trade in the market for collegiate athletic talent.

This line of reasoning has been used to attack the NCAA's transfer rules, but not the NLI's, on antitrust grounds.[300] After reviewing the applicability of the Sherman Act to the collegiate athletic marketplace, we evaluate whether a suit patterned off plaintiffs' arguments in the recent *Pugh v. NCAA*,[301] *Deppe v. NCAA*[302] and *Vassar v. NCAA*[303] cases could invalidate the NLI's Basic Penalty as a matter of antitrust law.

Preliminarily, we reiterate that the CCA—not the NCAA—governs the NLI Program.[304] Any NLI-related antitrust litigation would primarily target the CCA and its member conferences, though the NCAA may be a co-conspirator due to its administration of the program. We review and discuss *NCAA-related* litigation here for several reasons, including the similarity of the transfer regulations promulgated by both entities (which makes NCAA case law instructive on how the courts might handle challenges to the Basic Penalty) and the large overlap in

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[299] "I understand I shall be charged with the loss of one season of intercollegiate athletics competition in all sports. This is in addition to any seasons of competition expended at any institution." *National Letter of Intent 2011-2012*, Provision 4, NAT'L LETTER OF INTENT, https://sc.cnbcfm.com/applications/cnbc.com/resources/editorialfiles/2012/05/03/2226580_NLI_2010_2011.pdf (last visited Dec. 20, 2017).

[300] Justin Sievert, *NCAA Legislation Will Continue to Be Attacked Under Antitrust Law*, SPORTING NEWS (Mar. 17, 2016), http://www.sportingnews.com/ncaa-football/news/ncaa-legislation-antitrust-lawsuit-law-sherman-antitrust-act-mark-emmert/1qhywyk6qhxxo16byd7g0xceq7.

[301] Pugh v. NCAA, No. 1:15-cv-1747, 2016 WL 5394408, at *1 (S.D. Ind. Sept. 27, 2016).

[302] No. 1:16-cv-00528-TWP-DKL, 2017 WL 897307 (S.D. Ind. Mar. 6, 2017).

[303] No. 1:16-cv-10590, (N.D. Ill. Nov. 14, 2016).

[304] *About the National Letter of Intent (NLI)*, *supra* note 25.

membership between the two (conferences in the CCA compromise over half of the NCAA's membership).

A. THE INTENT AND APPLICABILITY OF THE SHERMAN ANTITRUST ACT

Section 1 of the Sherman Antitrust Act declares "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" to be illegal.[305] Section 2 prohibits monopolies and attempted monopolization.[306] The courts have interpreted Section 1 as not prohibiting any restraint of trade, but only those deemed "unreasonable."[307]

As the U.S. Supreme Court held in *NCAA v. Board of Regents*[308] and the U.S. Court of Appeals for the Ninth Circuit held in *O'Bannon v. NCAA*,[309] the regulations promulgated and enforced by the NCAA are subject to the Sherman Act.[310] In *Board of Regents*, the Court found the NCAA had fashioned a "horizontal restraint" in the market for television broadcasts, forbidding institutions from "competing against each other on the basis of price or kind of television rights that can be offered to broadcasters."[311] The NCAA's television plan subjected neither the output (number of games) nor the price of those telecasts to competitive market forces, contravening the intent of the Sherman Act.[312] The Ninth Circuit made a similar finding in *O'Bannon*, albeit regarding different restraints. Reviewing the NCAA's limits

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[305] 15 U.S.C. § 1 (2004).

[306] *Id.* at § 2.

[307] *See, e.g.*, Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 342-43 (1982); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687–88 (1978); Bd. of Trade of City of Chi. v. United States, 246 U.S. 231, 238 (1918).

[308] 468 U.S. 85 (1984).

[309] 802 F.3d 1049 (9th Cir. 2015).

[310] *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 120. The Court's discussion of the "legitimate [purposes]" of the challenged restraint show the Court did intend for the Sherman Act to apply to the NCAA's conduct and regulations. *See* Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 339 (7th Cir. 2012) (holding that "no procompetitive justifications would be necessary for noncommercial activity to which the Sherman Act does not apply"); *O'Bannon*, 802 F.3d at 1079 (holding the "NCAA is not above the antitrust laws").

[311] *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 99.

[312] *Id.*

on maximum-allowable financial aid to athletes, the *O'Bannon* court found these rules to "clearly regulate the terms of commercial transactions between athletic recruits and their chosen schools"[313] and exhorted the judiciary to "not shy away from" applying the Sherman Act to the NCAA's conduct.[314]

Both the *Board of Regents* and *O'Bannon* courts assessed the challenged NCAA bylaws through a burden-shifting balancing test known as the "Rule of Reason."[315] If a restraint cannot be deemed unlawful *per se* (usually naked horizontal agreements on price[316] or group boycotts[317]), courts generally analyze the alleged anticompetitive conduct through "Rule of Reason analysis."[318] The initial burden falls on the plaintiff, who must show the challenged restraint produces an anticompetitive impact in a particular market.[319] The burden then shifts to the defendant to show the restraint's competition-enhancing effects.[320] If pro-competitive justifications are established, plaintiffs must then demonstrate that the restraints are either unnecessary to achieve the pro-competitive goals or can be significantly less restrictive while maintaining their overall effect.[321] With these requirements satisfied, courts will then assess whether the pro-competitive effects of the restraints outweigh the harms to competition; if they do not, restraints can be enjoined.[322]

B. RECENT TRANSFER REGULATION CASE LAW

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[313] *O'Bannon*, 802 F.3d at 1065.

[314] *Id*. at 1079.

[315] *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 103; *O'Bannon*, 802 F.3d at 1064.

[316] Herbert J. Hovenkamp, *The Rule of Reason*, U. PA. L. SCH. FAC. SCHOLARSHIP 1778 (2017), http://scholarship.law.upenn.edu/faculty_scholarship/1778.

[317] *Id.*

[318] Daniel C. Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, 1 ABA SECTION OF ANTITRUST LAW (n. 2) 1 (2013), https://www.americanbar.org/content/dam/aba/publications/antitrust_law/at303000_ebulletin_20130122.authcheckdam.pdf.

[319] *Id.* at 2. In a recent study of antitrust challenges, approximately 90 percent of suits failed at this stage. *Id.*

[320] *Id.*

[321] *Id.*

[322] *Id.*

Challenges to the NCAA's compensation rules and broadcasting regulations are not the only arenas in which player-plaintiffs have attempted to bring the Sherman Act's proscriptions to bear. Since the early 1980s, the NCAA and its member conferences have faced numerous legal challenges to their transfer restrictions.[323] In recent years, these suits have been grounded exclusively in Sherman Act claims.[324] Although largely unsuccessful to date, these cases formulate a useful legal roadmap for potential antitrust challenges to the NLI's Basic Penalty provision.[325]

1. PUGH V. NCAA

Devin Pugh began his college football career at Weber State, a member of Division I's Football Championship Subdivision (FCS).[326] Following his sophomore season, the school's coaching staff informed Pugh that his athletic scholarship would not be renewed.[327] Looking to continue his career elsewhere, Pugh sought a waiver from the NCAA to transfer and play immediately, but was denied.[328] Because he was not eligible to play immediately, interest from Division I schools evaporated, and Pugh ultimately attended a Division II institution on a

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[323] *See, e.g.*, Weiss v. E. Coll. Athletic Conference, 563 F. Supp. 192 (E.D. Pa. 1983); English v. Nat'l Collegiate Athletic Ass'n, 439 So. 2d 1218, 1224 (La. Ct. App. 1983) (holding that despite NCAA's engagement in interstate commerce, transfer restrictions were appropriate, as they safeguarded athletes from the "evils of recruiting".); McHale v. Cornell Univ., 620 F. Supp. 67 (N.D.N.Y. 1985); Graham v. Nat'l Collegiate Athletic Ass'n, 804 F.2d 953 (6th Cir. 1986).

[324] *See, e.g.*, Pugh v. Nat'l Collegiate Athletic Ass'n, No. 1:15-cv-01747-TWP-DKL, 2016 WL 5394408 (S.D. Ind. Sept. 27, 2016).

[325] Again, these suits have challenged the NCAA's regulations on player transfers, not the NLI's Basic Penalty. We review this litigation here due to the NCAA's transfer regulations' similarity to the NLI's Basic Penalty. *Id.*

[326] Class Action Complaint at 23, Pugh v. Nat'l Collegiate Athletic Ass'n, (No. 1:15-cv-01747-TWP-DKL), 2015 WL 9914324 (S.D. Ind. Nov. 5, 2015).

[327] *Id.* at 3.

[328] *Id.*

financial aid package that resulted in greater out-of-pocket expenses.[329]

Pugh filed a class action lawsuit against the NCAA in November 2015, alleging the NCAA year-in-residence requirement "functions as a penalty imposed upon Division I football players for switching schools"[330] in violation of the Sherman Act. Pugh further alleged that, absent the requirement, school selection and player recruiting would be driven exclusively by determinations of value and fit and not constrained by artificial barriers like the residency rule.[331] The NCAA moved to dismiss Pugh's lawsuit, arguing the year-in-residence requirement was a noncommercial eligibility rule, and therefore outside the jurisdiction of the Sherman Act.[332] The NCAA further argued that even if the year-in-residence rule was within the ambit of the Sherman Act, the transfer regulations were pro-competitive insofar as they melded players' academic and athletic endeavors.[333]

The Southern Indiana District Court found for the NCAA,.[334] The court held that because the transfer bylaws were found in the "Academic Eligibility" chapter of the NCAA manual and the word "eligible" appears in the language of the bylaw itself, the rule was entitled to the presumption of pro-competitiveness accorded to all NCAA bylaws governing player eligibility.[335]

2. DEPPE V. NCAA

In March 2016, Peter Deppe filed a suit nearly identical to Pugh's in the same Southern District of Indiana court.[336] Deppe, a punter, was initially a walk-on at Northern Illinois University

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[329] *Id.*

[330] *Id.* at 18.

[331] *Id.* at 19.

[332] Pugh v. Nat'l Collegiate Athletic Ass'n, No. 1:15-cv-01747-TWP-DKL, 2016 WL 5394408, at *4 (S.D. Ind. Sept. 27, 2016).

[333] *Id.* at *5.

[334] *Id.* at *6.

[335] *Id.* at *5 (holding that "NCAA eligibility bylaws are 'presumptively pro-competitive' and, therefore, do not violate the Sherman Act.").

[336] Deppe v. Nat'l Collegiate Athletic Ass'n, No. 1:16-cv-00528-TWP-DKL, 2017 WL 897307 (S.D. Ind. Mar. 6, 2017).

(NIU) but was told that he would receive a scholarship in his second semester at the school.[337] That promise never came to fruition, and Deppe sought to transfer.[338] Like Pugh, Deppe was valuable to other Division I schools only if he could become eligible to compete without fulfilling the year-in-residence requirement.[339] Unable to secure a waiver to avoid the residency requirement, Deppe never played another down of college football.[340]

In his complaint, Deppe argued the transfer rules "unreasonably restrained" the competition NCAA members would have engaged in for his athletic services.[341] Pinned to him like a scarlet letter, Deppe alleged the year-in-residence requirement was within the scope of the Sherman Act because of its impact on "the interstate movement of students and the interstate flow of substantial funds (including, but not limited to, tuition, room and board, and mandatory fees)."[342] Similar to its response in *Pugh*, the NCAA maintained that the transfer rules governed eligibility, and that any downstream effects on financial aid were irrelevant.[343] "Economic motivations or consequences alone are not sufficient to make a non-commercial restraint subject to the Sherman Act,"[344] the NCAA wrote, citing the Sixth Circuit's decision in *Bassett v. NCAA*.[345]

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[337] Class Action Complaint at 4, Deppe v. Nat'l Collegiate Athletic Ass'n, (No. 1:16-cv-00528-WTL-MPB), 2016 WL 888119 (S.D. Ind. Mar. 8, 2016).

[338] *Id.*

[339] *Id.* at 7.

[340] *Id.*

[341] *Id.* at 29.

[342] *Id.*

[343] Brief in Support of Motion for Partial Dismissal and to Strike Irrelevant Allegations of Plaintiff's Complaint at 11–12, Deppe v. Nat'l Collegiate Athletic Ass'n, No. 1:16-cv-00528-WTL-TAB, 2016 WL 7645137 (S.D. Ind. Apr. 14, 2016).

[344] *Id.* at 13.

[345] 528 F.3d 426 (6th Cir. 2008) (holding that the non-commercial nature of the NCAA's prohibitions on "improper inducements and academic fraud" immunized any punishments stemming from the enforcement of those bylaws under the antitrust laws).

Relying once again on the presumptive pro-competitiveness of the NCAA's eligibility regulations,[346] the Southern District of Indiana court summarily dismissed Deppe's challenge of the year-in-residence rule.[347] Deppe appealed the district court's judgment, and the case is currently pending before the Seventh Circuit Court of Appeals.[348]

3. VASSAR V. NCAA AND NORTHWESTERN UNIVERSITY

The most recent suit targeting the NCAA's transfer restrictions—and the year-in-residence requirement in particular—was filed by former Northwestern University basketball player Johnnie Vassar in November 2016.[349] Vassar first enrolled at Northwestern in 2014 after being offered a multi-year athletic grant-in-aid,[350] but was later "run off" the team after falling out of favor with his coaches.[351] Vassar attempted to transfer, but the looming year-in-residence requirement undercut the market for his services.[352] Effectively stripped of Division I transfer options, Vassar remained at Northwestern—but was denied access to the school's athletic training facilities and other benefits attached to his scholarship, forcing him to take out loans to cover his costs.[353]

In November 2016, Vassar sued Northwestern and the NCAA in the Northern District of Illinois.[354] In his class action complaint, Vassar argued that the absence of the year-in-residence requirement would inevitably result in an "optimal and most

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[346] Deppe v. NCAA, No. 1:16-cv-00528, 2017 WL 897307, at *3 (S.D. Ind. Mar. 6, 2017).

[347] *Id.* at *4.

[348] Deppe v. NCAA,Case No. 17-1711. *See Vassar v. National Collegiate Athletic Association (ncaa) et al*, DOCKET BIRD, https://www.docketbird.com/court-cases/Vassar-v-National-Collegiate-Athletic-Assocaition-ncaa-et-al/ilnd-1:2016-cv-10590 (last visited Feb. 19, 2018).

[349] Class Action Complaint at 1, Vassar v. NCAA, No. 1:16-cv-10590, (N.D.Ill. Nov. 14, 2016).

[350] *Id.* at 4.

[351] *Id.* at 10.

[352] *Id.* at 3.

[353] *Id.* at 22–23.

[354] *Id.* at 1.

efficient matching of schools and players,"[355] since neither school nor athlete would be forced to consider an external restraint (residency requirement) in the recruiting process. Preempting the NCAA's academic justifications for the transfer regulations, Vassar's complaint quoted now-former Wisconsin men's basketball coach Bo Ryan's explanation for blocking the transfer of one of his athletes: "We don't want a young man to take our playbook and go to the next school."[356]

In its motion to dismiss, the NCAA again pointed to the classification of the transfer regulations as "eligibility rules," which granted them the veil of pro-competitiveness and shielded them from Sherman Act scrutiny.[357] Vassar pushed back against those claims in his reply brief, arguing that the transfer regulations at issue did govern commercial activity, because they impacted the disbursement of financial aid to transfer athletes.[358]

The *Vassar* litigation is ongoing, with all parties agreeing that the outcome of the *Deppe* case will be determinative of Vassar's antitrust claims.[359]

C. THE SHERMAN ACT'S APPLICABILITY TO NLI'S BASIC PENALTY AND A ROADMAP FOR NLI ANTITRUST LITIGATION

The NLI's Basic Penalty provision carries similar, if not greater antitrust vulnerabilities than the NCAA's year-in-residence requirement. While the Basic Penalty's residency requirement has all the hallmarks of NCAA's rule, its eligibility reduction clause is a more blatant restraint of trade than any other NCAA rule. Given the preceding case law and the economic realities of the NLI, similar Sherman Act challenges could be brought against the Basic Penalty.

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[355] *Id.* at 32.

[356] *Id.* at 36.

[357] Brief in Support of Motion for Partial Dismissal of Plaintiff's Complaint at 6, Vassar v. NCAA, No. 1:16-cv-10590, (N.D. Ill. Jan. 31, 2017).

[358] Memorandum in Opposition Motion for Partial Dismissal of Plaintiff's Complaint at 22, *Vassar v. NCAA*, No. 1:16-cv-10590, (N.D. Ill. Aug. 25, 2017) No. 32-10590.

[359] *See Vassar v. National Collegiate Athletic Association (ncaa) et al*, DOCKET BIRD, https://www.docketbird.com/court-cases/Vassar-v-National-Collegiate-Athletic-Assocaition-ncaa-et-al/ilnd-1:2016-cv-10590 (last visited Feb. 19, 2018).

1. PROVING A "CONTRACT, COMBINATION, OR CONSPIRACY"

The initial threshold of establishing a violation of Section 1 of the Sherman Act is the pleading of a "contract, combination . . . or conspiracy".[360] "Contracts" in constraint of trade are formal agreements between two or more economic actors that "limit the free exercise of business or trade."[361] "Combinations" and "conspiracies" are marked by a "conscious commitment to a common scheme designed to achieve an unlawful objective."[362] Unlike the NCAA, whose bylaws are publicly available, there is no explicit, industry-wide contract to use the NLI. However, there is parallel conduct in the use of the NLI, with over 650 NCAA institutions participating in the program.[363] Moreover, there is a clear connection between the NCAA, a monopoly, and the CCA, as demonstrated by their overlapping memberships, common purposes, and shared interests. In effect, the CCA is a subset of the NCAA's cartel, whose members have formed an internal entity to informally further their interests. Given this structure, "conscious parallelism" may be a more apt term for institutions' concurrent use of the NLI. While parallelism, out of context, is usually insufficient to prove a conspiracy,[364] "opportunities for meetings among the alleged conspirators . . . may be sufficient to permit an inference of conspiracy" (recall that the CAA meets twice yearly for group forums).[365] Other "plus factors" which, if present, could lead to the presumption of an agreement include

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[360] Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001).

[361] *Contract in restraint of trade*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[362] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984).

[363] *See About the National Letter of Intent (NLI)*, NATIONAL LETTER OF INTENT (2016), http://www.nationalletter.org/aboutthenli/index.html.

[364] *See, e.g.*, Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537, 540–41 (1954).

[365] Howard Feller, *A Primer on Antitrust Principles*, ASSOCIATION OF CORPORATE COUNSEL NATIONAL CAPITAL REGIONAL PROGRAM 7 (May 18, 2015), https://www.acc.com/chapters/ncr/upload/Antitrust-Compliance-Training-Program-5-18-and-6-2-2015-Materials.pdf.

incentives to collude and multiple equivalent offers from competitors ("coincidence" factors).[366] Additionally, some conferences have specific agreements to use the NLI on a conference-wide basis,[367] strengthening the evidence that widespread use of the NLI is made possible by a contract, combination, and/or conspiracy.

Defendants in NLI litigation (likely the CCA, member conferences, and possibly the NCAA) could rebut these allegations in several ways. Unlike the NCAA's year-in-residence rule, which has been agreed to and promulgated publicly by the member institutions, the NLI Program operates under no such overtly collusive agreement. The CCA could paint itself as a voluntary trade association—devoid of market-controlling or enforcement authority—offering a voluntary agreement that athletes can voluntarily sign. By highlighting its relative impotence and looser organization vis-à-vis the NCAA, the CCA could assert that no underlying contract, combination or conspiracy is present in the NLI Program.

2. ESTABLISHING AN UNREASONABLE RESTRAINT OF TRADE

A challenge to the NLI's Basic Penalty also must show the NLI acts as an unreasonable restraint of trade or commerce. "Trade" is the "buying or selling of goods and services."[368] "Commerce" is construed to include "almost every activity from which [an] actor anticipates economic gain."[369] As illustrated in *Pugh*, *Deppe*, and *Vassar*, this hurdle would be the toughest for any antitrust challenge to the Basic Penalty to overcome. Relative

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[366] George A. Hay, *Horizontal Agreements: Concept and Proof*, THE ANTITRUST BULLETIN, Vol. 51, No. 4 (2006), at 884–87.

[367] *Letters of Intent*, 2017–18 PAC-12 CONFERENCE HANDBOOK, http://compliance.pac-12.org/wp-content/uploads/2017/07/2017-18-P12-Handbook.v3.compliance-corner.pdf. The Pac-12 has subscribed to the NLI Program continuously since 1966. *Id.*, at 26; Big 12 Conference Bylaw 6.1.1.1, at 32 http://www.big12sports.com/fls/10410/pdfs/handbook/ConferenceHandbook.pdf (last visited Dec. 23, 2017).

Mid-American Conference Bylaw 7.01–7.04, at 54 http://grfx.cstv.com/photos/schools/mac/genrel/auto_pdf/compliance-bylaws.pdf (last visited Dec. 23, 2017).

[368] *Trade*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[369] *See* Agnew v. NCAA, 683 F.3d 328, 340 (7th Cir. 2012).

to the NCAA's transfer regulations, however, the Basic Penalty is far more restrictive overall and does not enjoy the precedent relied on by the NCAA.

By way of review: the NLI can (but is unnecessary to) facilitate the exchange of an athlete's labor for an athletic scholarship and other ancillary benefits.[370] This labor-for-scholarship exchange is the cornerstone of the NCAA economy—without it, none of the billions in revenue collected annually by the NCAA and its member institutions could be generated.[371] The Basic Penalty, like the NCAA's year-in-residence requirement, heavily deters (though does not prohibit) institutions from engaging in these exchanges with transfer athletes.[372] Players who cannot immediately contribute to a program's competitive success are disadvantaged in this labor market, and are often shut out of the Division I market altogether.[373] In practical terms, this means coaches are more likely to award their limited pool of scholarships to athletes immediately eligible for competition, rather than on players who must wait a year before providing the full extent of their athletic labor. Moreover, the NLI's Recruiting Ban means institutions must discontinue their recruiting of NLI signees, cutting off the competition for those players' services that would otherwise occur. In each labor-for-scholarship exchange, the athlete anticipates "economic gain" through the educational expenses they have avoided. Therefore, the Basic Penalty is inextricably tied to commerce and commercial activity. To argue otherwise is to ignore the economic realities that underpin collegiate athletics and the downstream effects of the Basic Penalty provision. Though the courts have soundly rejected this

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[370] *See supra* Section IV.A.

[371] In the last two fiscal years for which its federal tax returns are available (2014 and 2015), the NCAA itself generated over $1.9 billion in combined revenue. Steve Berkowitz, *NCAA Spends $25 Million on Outside Legal Fees, Double from Previous Year*, USA TODAY SPORTS (June 11, 2016), https://www.usatoday.com/story/sports/college/2016/06/11/ncaa-legal-fees-obannon/85772006/.

[372] *See* Zach Barnett, *A federal lawsuit is challenging the NCAA's transfer rules – and cites the coaching market as evidence*, FOOTBALL SCOOP (Mar. 10, 2016), http://footballscoop.com/news/a-federal-lawsuit-is-challenging-the-ncaas-transfer-rules-and-cites-the-coaching-market-as-evidence/.

[373] *See id.*

theory in the context of the NCAA's transfer rules,[374] other jurisdictions may not apply the oft-invoked presumption of pro-competitiveness so readily.[375]

But there is a stronger indicator of the Basic Penalty's restraint of trade: it acts as a group boycott. The Basic Penalty prohibits athletes not only from competing in intercollegiate athletics for a single year, but also docks them "one season of intercollegiate athletics competition in all sports."[376] With respect to the comparative antitrust liability of the NCAA and NLI restrictions, this distinction is crucial: while the NCAA's year-in-residence requirement simply *delays* an athlete's eligibility, the NLI's Basic Penalty *reduces* eligibility, resulting in an earlier exit from the college athlete labor market. Viewed in this light, the Basic Penalty functions as a group boycott, where the CCA member institutions have refused to engage in economic activity with otherwise eligible athletes who did not fulfill the terms of their NLI.[377] Horizontal agreements such as this "have long been held to be in the forbidden category,"[378] and are not justified by "allegations that they were reasonable in specific circumstances".[379] They are illegal *per se*.[380]

NLI defendants, akin to the NCAA, may attempt to unravel these arguments by claiming the Basic Penalty is primarily an eligibility rule, and therefore entitled to the presumption of pro-competitiveness. This rebuttal is fatally flawed. First, and most important, the NLI is a self-proclaimed "voluntary" document that is not necessary to accept an athletic

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[374] *See Agnew*, 683 F.3d at 341.

[375] *See infra* Section VI.C.3. for further discussion on venue for NLI-related antitrust challenges.

[376] *See supra* Section II.A.1.

[377] Note, *Antitrust: Limitation on the Group Boycott Per Se Rule*, 1961 DUKE L.J. 606, 606 (1961) ("A group boycott is an agreement by two or more persons not to do business with other individuals or to do business with them only on discriminatory terms."). Group boycotts are also known as a "concerted refusals to deal." *Boycott*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[378] Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959); *see also* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 453 n.9 (Brennan, J. and Marshall, J., concurring and dissenting) ("'[G]roup boycotts' often are listed among the types of activity meriting per se condemnation.").

[379] *Klor's Inc.*, 359 U.S. at 212.

[380] Hovenkamp, *supra* note 318.

scholarship or participate in the NCAA.[381] As it is not required for collegiate competition, the NLI, or any of its provisions, cannot be classified as eligibility criteria. The NLI's residency requirement is also duplicative of the NCAA's year-in-residence rule, adding nothing to the NCAA's existing eligibility requirements. That the Basic Penalty charges athletes a year of eligibility is irrelevant because, again, the document is completely voluntary and is not enforced until an athlete signs the agreement. It therefore cannot be a rule governing eligibility. Finally, the pro-competitive presumption attached to NCAA eligibility rules, to the extent one exists, cannot be bestowed on the NLI, which is not enshrined in the NCAA's bylaws and is unnecessary to create or preserve amateur athletics.

Unable to rely on the "eligibility rule" panacea, NLI defendants would likely argue that, even accepting as true the Sherman Act's applicability to the Basic Penalty, the pro-competitive justifications of the provision outweigh any anticompetitive harm. Among these pro-competitive justifications might be arguments that the Basic Penalty, by restricting player movement, promotes amateurism and competitive balance, while further integrating academics and athletics and increasing output in the collegiate athletic market.[382] Plaintiffs could strongly refute each of these supposedly pro-competitive justifications.

Promoting Amateurism: The Basic Penalty does not promote amateurism in college sports, and has no connection to the central tenet of amateurism: the notion that athletes must not receive compensation for their participation in collegiate athletics exceeding their full cost of attendance. The NCAA conceded this in *Pugh*, where it admitted transfer regulations do not affect the value or quantity of athletic Grants-in-Aid.[383] A transfer student

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[381] *About the National Letter of Intent (NLI)*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/index.html (last visited Dec. 20, 2017).

[382] *See* Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012).

[383] Reply Brief in Support of NCAA's Rule 12 Motion for Partial Dismissal of Plaintiff's Complaint at 11, *Pugh v. NCAA*, No. 1:15-cv-1747-TWP-DKL, 2016 WL 5394408 (S.D. Ind. Sept. 27, 2016) (No. 1:15-cv-01747 TWP-DKL), 2016 WL 1593577, ("The year-in-residence bylaw addresses only eligibility to compete in NCAA athletic competition, not eligibility to receive financial aid. It does not

who can play immediately will still be an amateur, with the same cap on the value of their Grant-in-Aid. Further, there is no evidence that increased player movement will decrease consumer appeal for collegiate athletics. Even with the rise of a so-called "transfer epidemic" in college basketball in recent years,[384] profitability in this sport has risen continually.[385]

Promoting Competitive Balance: The NCAA often points to maintaining competitive balance as a justification for its rules,[386] including those governing transfer athletes, but this myth has been soundly rejected.[387] Still, defendant(s) in NLI litigation would likely advance a similar argument. But instead of promoting competitive equity (which has never existed in collegiate athletics),[388] transfer rules like the Basic Penalty preserve the hegemony of the Power 5 conferences—the richest and most powerful members of the NCAA[389]—that can expend the greatest resources recruiting and retaining the most coveted

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regulate eligibility for financial aid or any other arguably commercial activity.").

[384] John Kekis et al., *Transfer Epidemic in College Hoops Has Coaches Concerned*, ASSOCIATED PRESS (Nov. 5, 2016, 1:52 AM), https://www.usatoday.com/story/sports/ncaab/2016/11/05/transfer-epidemic-in-college-hoops-has-coaches-concerned/93337732/.

[385] Cork Gaines & Diana Yukari, *The NCAA Tournament is an Enormous Cash Cow as Revenue Keeps Skyrocketing*, BUSINESS INSIDER (Mar. 17, 2017, 2:43 PM), http://www.businessinsider.com/ncaa-tournament-makes-a-lot-of-money-2017-3 (noting that "[a]s recently as 2010, the NCAA's broadcasting rights for the NCAA Tournament were worth just under $550 million per year."). Those rights are now worth $770 million annually until 2025, when their value rises to $1.1 billion per year. *Id.*

[386] *See* Smith v. NCAA, 139 F.3d 180, 185 (3d Cir. 1999) (holding that "the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics."), *vacated on other grounds*, 525 U.S. 459 (1999).

[387] See O'Bannon v. NCAA, 802 F.3d 1049, 1059 (9th Cir. 2015) (citing trial court's finding that economists almost universally agree that NCAA rules do not enhance competitive equity between institutions).

[388] *Id.*

[389] *See* Paula Lavigne, *Rich Get Richer in College Sports as Poorer Schools Struggle to Keep Up*, ESPN (Sept. 6, 2016), http://www.espn.com/espn/otl/story/_/id/17447429/power-5-conference-schools-made-6-billion-last-year-gap-haves-nots-grows.

high school prospects.[390] By locking-in those athletes for at least a year and deterring their movement elsewhere, the Basic Penalty restrains player movement to less-competitive schools and conferences. *There is no competitive balance in collegiate athletics*,[391] and the Basic Penalty only facilitates and strengthens this lack of equity.

Integrating Academics and Athletics: Like the NCAA contended in *Vassar*,[392] NLI defendants could also argue that increased player movement resulting from changes to the Basic Penalty could harm institutions' legitimate interest of melding students' athletic and academic pursuits. This argument is nonsensical when applied to signees of the NLI, the majority of whom have never previously attended college,[393] and thus have

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[390] Unable to recruit players with direct pay, college athletic departments invest in secondary inputs, namely athletic facilities and coaching staffs, to secure players' labor. In 2014, 48 of the 65 athletic departments in the Power 5 conferences spent a combined $772 million on facilities. Will Hobson & Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, CHICAGO TRIBUNE (Dec. 23, 2015), http://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html. Though primarily geared towards football and basketball programs, facility spending transcends the "revenue sports" and is used to recruit athletes across all sports. *Id.*

[391] Andy Schwarz, *The Competitive-Balance Argument Against Paying Athletes Is Bullshit*, DEADSPIN, (May 15, 2014, 2:14 PM), http://deadspin.com/the-competitive-balance-argument-against-paying-athlete-1576638830 (finding that "of the 1,000 top recruited athletes over a decade, 99.3 percent went to power conference schools" which comprise just 65 of the NCAA's 1200-plus institutions). When nearly all of the best, most highly sought-after talent matriculates to about five percent of an association's members, it is clear that competitive balance simply does not exist.

[392] In *Vassar*, the NCAA argued that unfettered player movement, similar to the free-flow of labor in professional sports (which frankly does not exist and is heavily regulated by collective bargaining), "would completely divorce the athletic and academic experience for NCAA student-athletes." Brief in Support of NCAA's Rule 12(B)(6) Motion For Partial Dismissal Of Plaintiff's Complaint at 7, *Vassar v. NCAA*, No. 1:16-cv-10590, (N.D.Ill. Jan. 31, 2017) (No. 21-1).

[393] *See Signing the NLI FAQs*, NLI, http://www.nationalletter.org/frequentlyAskedQuestions/signingTheNli.html (last visited Nov. 15, 2017) (indicating that "[p]rospective

not even begun those "pursuits" yet. As applied to incoming athletes like Woods, who are beginning their first year of college, the rule is designed to punish students who transfer and provides no pro-competitive benefit.

Moreover, schools have not promulgated similar transfer restrictions for non-athlete students and those participating in other extra-curricular activities. The only segment of students to whom these regulations apply are athletes. This serves to further segregate players from their peers and cannot be said to integrate their academic experience with their athletic endeavors.[394]

Increasing Output in the College Education Market: The transfer rules do nothing to increase output in the college education market.[395] There is no revenue sharing system in the NCAA's Division I,[396] so there is no evidence that monies saved by decreasing administrative costs associated with the recruitment and resettlement of transfer athletes would fund scholarships at low-resource institutions. Nor is there any evidence the administrative costs associated with transfer athletes decreases the number of scholarships at low-revenue schools or otherwise materially increases those schools' costs. Even if the costs associated with transferring were prohibitively high, eliminating the Basic Penalty would allow, *not require*, a school to allow penalty-free transfer of athletes to other member institutions.[397] Thus, a school that does not want to allow its students to transfer

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student-athletes enrolling in a four-year institution for the first time can sign an NLI").

[394] Cameron Miller, *Why Transfer Restrictions Are Wrong*, STAN. DAILY (Feb. 10, 2016), http://www.stanforddaily.com/2016/02/10/miller-why-transfer-restrictions-are-wrong/.

[395] When this pro-competitive justification was offered to the *O'Bannon* trial court, the court found it "implausible." O'Bannon v. NCAA, 802 F.3d 1049, 1060 (9th Cir. 2015).

[396] B. David Ridpath, *The College Football Playoff and Other NCAA Revenues are an Exposé of Selfish Interest*, FORBES (Jan. 17, 2017, 1:13 PM), https://www.forbes.com/sites/bdavidridpath/2017/01/17/college-football-playoff-and-other-ncaa-revenues-is-an-expose-of-selfish-interest/#1acea9884e1a.

[397] *See Permission to Contact*, NCAA, http://www.ncaa.org/student-athletes/current/permission-contact (last visited Nov. 15, 2017).

could freely do so, but would have to compete with other schools that offer students the freedom to transfer.

The trial court in *O'Bannon* rejected the second and fourth of these justifications, and partially accepted the first and third.[398] However, in litigation targeting the NLI, the promotion of amateurism justification is completely without merit because the Basic Penalty has no effect on the cornerstone of the "collegiate model" (the Grant-in-Aid cap).[399] That leaves the integration of academics and athletics as the only plausibly pro-competitive benefit of the Basic Penalty. To the extent it is pro-competitive, there are less restrictive means to accomplish this goal, such as exempting academically-driven transfers from NLI penalties or instructing the NLI's Review Committee to exempt athletes whose scholastic record shows they are unlikely to underperform academically at their new school.

3. ESTABLISHING IMPACT ON INTERSTATE COMMERCE

The final element of establishing a Section 1 claim under the Sherman Act is a showing that the restraint of trade "affected interstate commerce."[400] "Interstate commerce" is "trade and other business activities between those located in different states; especially traffic in goods and travel of people between states."[401] The athletic recruiting and scholarship offer-and-acceptance processes are clearly interstate commerce, as they routinely involve the recruiting of out-of-state athletes (the last four Heisman Trophy winners matriculated at schools outside their home state)[402] and the disbursement of valuable Grants-in-Aid. And the NLI's Basic Penalty indisputably impacts this commerce,

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[398] *O'Bannon*, 802 F.3d at 1059–60.

[399] *Amateurism*, NCAA, http://www.ncaa.org/amateurism (last visited Nov. 15, 2017).

[400] Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001).

[401] *Commerce*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[402] *See Heisman Memorial Trophy Winners*, SPORTS REFERENCE, https://www.sports-reference.com/cfb/awards/heisman.html.

regulating and restricting the movement of these recruits between 650-plus collegiate institutions across the country.[403]

Venue would also be a critical factor in any antitrust suit challenging the legality of the Basic Penalty. As evidenced in *Deppe* and *Pugh*, the Seventh Circuit (and the Southern District of Indiana in particular—the home of the NCAA) may not be the most hospitable venue for transfer regulation-related litigation.[404] Suing elsewhere may be more fruitful for athletes looking to invalidate the Basic Penalty. For one, other Circuits have been relatively more sympathetic to the arguments of college athletes than their counterparts in the Seventh Circuit, and could take a different view of transfer regulations.[405] Given the *O'Bannon* Court's pronouncement that "[t]he antitrust laws are not to be avoided by such 'clever manipulation of words,'"[406] labeling the NLI's year-in-residence requirement as an "eligibility rule" may not be received as well in the Ninth Circuit (it is precisely this strategy that allowed the NCAA to prevail in *Pugh*[407] and

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[403] *See* B. David Ridpath, *NCAA Restrictions on Transfer Athletes Continues A Plantation Mentality*, FORBES (Nov. 11, 2015, 10:14 AM), https://www.forbes.com/sites/bdavidridpath/2015/11/11/ncaa-restrictions-on-transfer-athletes-continues-to-resemble-professional-sports/#700d2ae4533f.

[404] The Seventh Circuit has developed the following threshold question for the evaluation of NCAA regulations: whether the challenged NCAA bylaw is "presumptively procompetitive." Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012). In a long line of cases, the Seventh Circuit (and others) have shown deep reverence to the Supreme Court's dicta in *Board of Regents*, which states, "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore pro-competitive because they enhance public interest in intercollegiate athletics." NCAA v. Board of Regents, 468 U.S. 85, 117 (1984).

[405] *See, e.g.*, O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (refusing to apply the dicta in *Board of Regents* regarding the compensation of college athletes); *see also O'Bannon v. NCAA*, 802 F.3d 1049, 1049 (declaring that the NCAA to not be "above the antitrust laws").

[406] *O'Bannon*, 802 F.2d at 1065

[407] *See* Pugh v. National Collegiate Athletic Ass'n., No. 1:15-cv-1747-TWP-DKL, 2016 WL 5394408 (S.D. Ind. Sept. 27, 2016).

Deppe).[408] Further, the *O'Bannon* appellate court criticized the Seventh Circuit's permissive reading of the pro-competitive presumption of eligibility rules,[409] which indicates it may not permit a challenge to the Basic Penalty to be dismissed in the "twinkling of an eye."[410]

VI. SUGGESTIONS FOR REFORM

"[The transfer rule] once had an academic purpose. When freshmen were required to wait one year before competing in varsity sports, it was argued that [the] transfer students also needed a one-year adjustment period free from the pressures of varsity competition. The rule, however, has become a player control measure in the hands of the coach, a sort of option clause.

If the one-year college residence requirement for transfer players is limited to a transfer during the athlete's playing season, that protects the team. Any other transfer restrictions are unnecessary coercion."

—Former NCAA Executive Director Walter Byers[411]

Although a wide swathe of NCAA member institutions have used the NLI for over a half-century, the NLI's potential for legal liability, particularly class-wide legal liability, jeopardizes its continued use in college athletics. To avert costly and lengthy litigation, we suggest the following reforms to the NLI Program. Each reform suggestion aims to create a fairer, more balanced, and legally-defensible agreement that would better protect the interests of athletes while mitigating the risks of litigation against the NCAA, CCA, and its member conferences.

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[408] *See* Deppe v. Nat'l Collegiate Athletic Ass'n, No. 1:16-cv-00528-TWP-DKL, 2017 WL 897307, at 3–4 (S.D. Ind. Mar. 6, 2017).

[409] *O'Bannon*, 802 F.3d at 1064 (rejecting *Agnew*'s "dubious proposition that in *Board of Regents*, the Supreme Court 'blessed' NCAA rules that were not before it, and did so to a sufficient degree to virtually exempt those rules from antitrust scrutiny").

[410] *Deppe*, 2017 WL 897307, at *4.

[411] WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 380 (1995).

A. OPTION 1: REFORMING THE CURRENT NLI PROGRAM

The CCA could preempt lawsuits by undertaking internal reform of the entire document—not just the Basic Penalty. We suggest these revisions, which do not alter the language of the Basic Penalty itself, but rather better educate potential signees, give athletes more flexibility in freeing themselves from the agreement, provide the consideration required by contract law, and reduce the NLI's temporal scope.

Increase emphasis on the voluntary nature of the NLI: While the NLI reminds the signee in the opening paragraph the agreement is not required to "receive athletics aid and participate in intercollegiate athletics,"[412] this does not go far enough in alerting the prospective signee that the document need not be signed to receive their athletic scholarship. We propose a cover sheet be added to the NLI that reads, in boldface, all-caps font:

> **PROSPECTIVE STUDENT-ATHLETE NOTICE: THE ENCLOSED NATIONAL LETTER OF INTENT ("NLI") IS BEING DELIVERED TO YOU BY [INSTITUTION]. SIGNING THIS NLI IS NOT REQUIRED TO ACCEPT [INSTITUTION'S] OFFER OF ATHLETIC FINANCIAL AID, WHICH MUST ACCOMPANY THE NLI. YOUR SIGNING OF THE NLI IS COMPLETELY VOLUNTARY, AND YOU WILL STILL BE ABLE TO COMPETE COLLEGIATELY AND RECEIVE ATHLETIC FINANCIAL AID EVEN IF YOU CHOOSE NOT TO SIGN IT. IF ANYONE AFFILIATED WITH [INSTITUTION] SUGGESTS SIGNING THIS DOCUMENT IS MANDATORY, CONTACT THE NLI OMBUDSMAN AT [CONTACT INFORMATION].**[413]

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[412] NCAA Eligibility Center, *National Letter of Intent 2011-2012* 1, MSNBC MEDIA http://msnbcmedia.msn.com/i/CNBC/Sections/News_And_Analysis/__Story_Inserts/graphics/__PDF/NLI_2010_2011.pdf (last visited Dec. 23 2017).

[413] In addition to its five subcommittees, the NLI Program should add an independent ombudsman committee

> **BE AWARE THAT IF YOU SIGN THE NLI, BUT DO NOT ATTEND [INSTITUTION] FOR ONE ACADEMIC YEAR, YOU MAY BE SUBJECT TO TRANSFER RESTRICTIONS AND LOSS OF ELIGIBILITY. THESE PENALTIES APPLY EVEN IF THE COACH WHO RECRUITED YOU IS FIRED, RETIRED, OR LEAVES THE PROGRAM OR YOUR TEAM IS SUBJECTED TO NCAA PENALTIES (INCLUDING POSTSEASON BANS).**

Further, we suggest placing this language in the header and footer of each page of the NLI:

> **VOLUNTARY DOCUMENT – NOT REQUIRED TO ACCEPT ATHLETIC SCHOLARSHIP OR COMPETE IN THE NCAA.**

Adding this language will make it unequivocal that signing an NLI is not a required and provide the signee with the opportunity to report deceptive practices.

Decrease the Length of the NLI: The NLI is in "full effect" from the date an athlete signs the agreement until the end of their first academic year at the institution.[414] In terms of deterring and restricting athlete transfers, this length is longer than necessary. Once an athlete enrolls at the institution, the NCAA (and possibly conference) transfer regulations come into effect, making the Basic Penalty largely superfluous. To remove a layer of duplicative transfer rules, the NLI and its provisions should be in "full effect" **from the date the recruit signs the document**

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that provides a forum for athletes to report deceptive behavior by coaches or other institutional parties in connection with the NLI. The ombudsman should have the authority to sanction coaches and/or sport programs that mislead prospective athletes on the meaning, necessity, and effect of the NLI. Penalties could include a reduction on the number of NLIs the coach and/or sport program may offer in a single recruiting cycle.

[414] NCAA Eligibility Center, *supra* note 414.

until the date he or she enrolls (begins classes) at the institution. At that point, scholarship release requests and transfers would be governed by applicable NCAA, conference, and institutional regulations, which still place substantial restrictions on transferring athletes. The benefit for athletes is twofold: reducing the confusing overlap between NCAA, conference, and NLI transfer regulations, while allowing them to take advantage of the one-time transfer exception in NCAA Bylaw 14.5.5.2.10.[415]

Bolster Release Request and Appeals Process Information: The NLI Program should develop sets of publicly available operating and hearing procedures for its Policy, Review, and Appeals Committees. These procedures must, at the very least, set forth an athlete's right to be represented by counsel in appellate proceedings; the right to call as witnesses relevant administrators, head coaches, teammates, and (after a showing of relevance) teammates, and to direct cross-examination; an athlete's right to compel the institution to produce all requested materials documenting their participation in the institution's athletics program; the right to have the proceeding recorded; the right to review past appellate decisions; and the right to a disposition of their appeal in 15 days or less. The NLI Program should also alter the composition of its committees so there is at least one student representative in each group.

The NLI Program must also set forth in writing the criteria on which release appeals are judged, thereby creating substantive and procedural due process rights for all parties. This information should be appended to the NLI when delivered to the signee. In addition, the institution must set forth in writing its objective criteria, in detail, for evaluating initial release requests, and must attach that information to the NLI. In anticipation that requests for

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[415] Athletes who fulfill certain criteria may qualify for relief from the residency requirements, but this relief is not available to baseball, basketball, football, or men's ice hockey players. See NCAA Bylaw § 14.5.5.2.10. It is worth noting that Eugene Byrd, the former Associate Commissioner in the SEC who was also an administrator in the NLI Program, once suggested this reform in the mid-2000s, but "couldn't get people to listen to (him)." Kevin Scarbinsky, *College Athletes' Rights: National Letter of Intent plus NCAA transfer rules tie student-athletes to schools*, AL.COM (Nov. 27, 2011), http://www.al.com/sports/index.ssf/2011/11/college_athletes_rights_nation.html. "The people in charge have overextended their power," Byrd said at the time. *Id.*

release will rise under this reformed NLI, the CCA could also contract with the American Arbitration Association, or a similar organization, to offer non-binding consumer arbitrations (paid for by the CCA member conferences) where each party can be represented in front of neutral arbitrator(s).[416]

Add and Revise Conditions Precedent for Voiding of NLI (Provision Seven): In addition to the existing conditions precedent that void the NLI, we suggest adding the following:

> **NCAA Sanctions**. If at any time before my enrollment at [INSTITUTION] the athletic team on which I am to participate is sanctioned by the NCAA's Committee on Infractions or Infractions Appeals Committee, the sanctions result in a postseason eligibility ban, and the underlying conduct occurred before my enrollment at [INSTITUTION] or did not directly involve me, I may request and shall be granted an immediate release of this NLI.
>
> **Reduction or Non-Renewal of Aid**. If at any time before my enrollment at [INSTITUTION] I am informed the value of my athletic aid will not be renewed or will be reduced in future years for non-academic or non-disciplinary reasons, I may request and shall be granted an immediate release of this NLI.
>
> **Hostile Team Environment**. If at any time prior to my enrollment at [INSTITUTION] I no longer want to attend [INSTITUTION] due to a hostile team environment, including but not limited to a belief [INSTITUION] is violating NCAA rules or disparagement by an institutional employee, I shall be granted an expedited hearing in front of the NLI Policy and Review Committee. At this hearing, I shall have the opportunity to describe how and why the team environment would interfere with my student-athlete experience.

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[416] *See generally*, AMERICAN ARBITRATION ASSOCIATION, NON-BINDING CONSUMER ARBITRATION RULES, https://www.adr.org/sites/default/files/Non-Binding%20Consumer%20Arbitration%20Rules.pdf (last visited Dec. 23, 2017).

> Upon a showing of such interference, I shall be released of this NLI.

The Admissions Requirement clause of Provision Seven should be amended to include the following language, because it is unfair to require the student to remain committed to the institution when the institution has not committed to the student:

> **Admissions Notification Requirement**. If I sign this NLI without having received a written notice of admission to [INSTITUTION], the institution will have 20 calendar days from the date of my signing to notify me in writing of an admissions decision. If I do not receive an admissions decision in writing within 20 calendar days of my signing, this NLI is null and void, and the Recruiting Ban shall be lifted. I may choose to re-sign an NLI with [INSTITUTION] if and when I receive a written notice of admission.

Revise Coaching Changes Provision (Provision 11): The NLI does not permit athletes whose programs undergo coaching changes to be automatically released from their agreement.[417] This is one of its most patently unfair aspects, and many college coaches agree.[418] The language of the NLI's Coaching Changes Provision should be altered to read:

> In the event that my team's head coach is fired, resigns, retires or is otherwise replaced as head

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[417] NCAA Eligibility Center, *supra* note 414, at 2.

[418] Andy Katz, *Less-binding NLI may give recruits more options*, ESPN.COM, http://assets.espn.go.com/ncb/columns/katz_andy/1542395.html (last visited Dec. 23, 2017) (Former New Mexico head men's basketball coach Fran Fraschilla: "Signing a NLI is unfair to the recruit and his family because it locks the student-athlete into having to attend that institution regardless of who is coaching the team."). Prominent men's basketball coach John Calipari went as far as inserting an "out clause" in player's NLIs when coaching at the University of Memphis that would have released them from the agreement in the event he left the institution. *See* Mike DeCourcy, *NCAA Says No Conditions Allowed on Letters of Intent*, THE SPORTING NEWS (Oct. 1, 2009), http://www.sportingnews.com/ncaa-basketball/news/119750-ncaa-says-no-conditions-allowed-on-letters-intent.

> coach for any reason prior to my enrollment at [INSTITUTION], I may request and shall be granted a release of this NLI. If any coach besides the head coach is fired, resigns, retires or is otherwise replaced for any reason before my enrollment at [INSTITUTION], I may submit a request for release of this NLI and the request shall be evaluated based on the totality of the circumstances and in accordance with the attached rules and guidelines governing release requests.
>
> In the event that any member of my team's coaching staff is fired, resigns, retires, or is otherwise replaced, suspended or sanctioned by [INSTITUTION] between the signing of this NLI and my enrollment as the result of abusive, illegal, or improper treatment of athletes, I may request and shall be granted a release of this NLI.

Eliminate Early Signing Period In All Sports: Signing during their sport's "early" period comes back to haunt many athletes, when their coaches leave for other jobs or be fired, or the institution sanctioned by the NCAA in the weeks and months that follow.[419] In the interests of athletes, the CCA should eliminate the early signing period in all sports—including the recently-approved early signing period in football.[420] Further, incoming football and basketball players should not be permitted to sign an NLI until February 15 and April 1 of their senior year in high school (or second year at a two-year institution), respectively. For these athletes especially, this allows the proverbial "dust" of the

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[419] *See* John Solomon, *Beware, Football Recruits: Your Coach Likely Won't Stay Four Years*, CBS SPORTS (Jan. 30, 2016), https://www.cbssports.com/college-football/news/beware-football-recruits-your-coach-likely-wont-stay-four-years (finding that "[o]f the 650 head coaches and assistants who were coaching at current Power Five schools in 2011, 66 percent of them left the staff by 2015"). RICH RODRIGUEZ EXAMPLE.

[420] Adam Rittenberg, *Collegiate Commissioners Association Approves Early Signing Period for Football*, ESPN (May 9, 2017), http://www.espn.com/college-football/story/_/id/19339267/collegiate-commissioners-association-approves-early-signing-period-football.

annual offseason coaching carousel[421] to settle before athletes enter into restrictive agreements with institutions. To the extent possible, NLI signing dates should be determined on a per-sport basis and in consideration of when programs are most likely to make coaching changes. As they are under the current rules,[422] athletes would still be able to orally accept offers of financial aid, announce their intention to attend a particular school, and no longer engage in the recruiting process at any time before signing day.

Add Consideration: The NLI lacks the necessary consideration to establish its validity as a contract. We suggest bolstering consideration for the signee in the following manner:

> **Signing Bonus**. Upon receipt of this signed NLI, [INSTITUTION] shall deliver to me, within seven (7) calendar days, an agreement signed by the institution's Director of Athletics and my sport's head coach clarifying that my offer of financial aid is guaranteed at its current level until I graduate from the institution, regardless of my eligibility for collegiate competition or my health status. This agreement shall also set forth [INSTITUTION'S] obligation to cover all costs of diagnosing and treating any medical condition or physical injury reasonably attributable to my participation in the institution's athletic program for no less than ten years following my

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[421] *See, e.g.*, Bill Bender, *Fired, Resigned, Retired: Looking at the FBS Coaching Changes in 2016*, THE SPORTING NEWS (July 20, 2017) http://www.sportingnews.com/ncaa-football/list/fired-coaches-college-football-hired-resigned-tom-herman-charlie-strong-les-miles/1szyiyyx03k3u15dgzmckpidb9 (finding that 23 FBS teams will begin the 2017 season with a new coach); Matt Norlander, *College Basketball Coaching Change Tracker*, CBS SPORTS (July 11, 2017) https://www.cbssports.com/college-basketball/news/college-basketball-coaching-changes-tracker-san-jose-state-opens-up-late (noting that through July 11, 2017, there had been 47 head coaching changes in Division I men's basketball).

[422] *See What is a Verbal Commitment?* NCAA, http://www.ncaa.org/student-athletes/future/eligibility-center/what-verbal-commitment (last visited Dec. 23, 2017).

> graduation from the institution and/or the exhaustion of my collegiate eligibility.[423]

B. OPTION 2: ADOPTING THE NCAA DIVISION III MODEL

The NCAA does not permit Division III institutions to award financial aid based on "athletics leadership, ability, participation, or performance."[424] Therefore, they cannot be members of the NLI Program, and Division III bylaws strictly prohibit any member school from using a letter of intent "or similar form of commitment" in the recruiting process.[425] But this has not stopped these institutions from allowing their incoming athletes to commemorate National Signing Day alongside their Division I and II-bound peers.[426] Since 2015, Division III schools have allowed their incoming athletes to sign a "Nonbinding Athletics Celebratory Form" signifying the athlete's intent to participate in the institution's athletics program.[427] The form—which can only be signed after an athlete has been officially

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[423] These additional benefits already offered in some conferences, but this change to the NLI will impact a far greater number of athletes. *See* Adam Rittenberg, *Big Ten to Guarantee Scholarships*, ESPN (Oct. 8, 2014), http://www.espn.com/college-sports/story/_/id/11666316/big-ten-guarantees-four-year-scholarships-student-athletes ("Scholarships will be 'neither reduced nor cancelled' as long as athletes maintain good standing in school, within the athletic department and in the community. If athletes leave school for 'a bona fide reason,' they will be allowed to return at a later date to complete their degrees on scholarship."); Jon Solomon, *Pac-12 Making Strong Effort to Care for Ex-Athletes' Medical Costs*, CBS SPORTS (June 20, 2015), https://www.cbssports.com/college-football/news/pac-12-making-strong-effort-to-care-for-ex-athletes-medical-costs/ (noting that Pac-12 Conference schools "must provide direct medical expenses for at least four years following the athlete's graduation or separation from the university, or until the athlete turns 26 years old, whichever occurs first.").

[424] NCAA Division III Bylaw 15.01.3.

[425] NCAA Division III Bylaw 13.9.1.

[426] Alan Parham, *Division III Prospects Finally Have a Commitment to Sign*, NATIONAL SCOUTING REPORT (Nov. 17, 2015), https://www.nsr-inc.com/scouting-news/division-iii-prospects-finally-have-a-commitment-letter-to-sign/.

[427] NCAA Division III Bylaw 13.9.1.1.

accepted at the school [428] —does not obligate the athlete to matriculate to the institution and participate in its athletic program, nor does it require the institution to provide a roster spot for the athlete.[429] In other words, the athlete faces no penalty for matriculating to an institution other than the one providing the form, and the institution is not obligated to hold a spot on one of its athletic rosters for the signee.[430]

To avoid legal challenges, the CCA could radically transform the NLI into the mold of the Division III Celebratory Signing Form. The new "NLI" would be delivered to the signee *after* he or she received, signed, and returned the institution's offer of athletic financial aid, and would commemorate their choice to accept the school's offer. The language could be as simple as:

> I, [SIGNEE NAME], have received and accepted an offer of a grant-in-aid (athletics scholarship) from [INSTITUTION]. In addition to my academic responsibilities, I have been recruited to participate in the sport(s) of the [SPORT(S)].

This form commemorates my choice to attend [INSTITUTION]. I understand my signature neither obligates me to attend the institution named in this document and participate in athletics nor does it guarantee me a roster position. I also understand that if I transfer from the institution or cease participation in the institution's athletic program, I may be subject to NCAA transfer restrictions and my financial aid may be affected.

Gutting the NLI and presenting it to the athlete after he or she has executed his or her financial aid agreement with the institution frees the athlete from onerous provisions and penalties. Yet the institution's interests are still protected, both through the

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[428] *Id.*

[429] *2015 NCAA Convention Division III Legislative Proposals Question and Answer Guide*, https://www.ncaa.org/sites/default/files/Q_A%20_2015%20Convention%20First%20Edition.pdf (last visited Nov. 19, 2017).

[430] Neither does the NLI guarantee an athlete a roster spot. In this way, the Division III celebratory form and the NLI are very similar from the athlete's perspective, providing nothing in the way of true consideration and not obligating the institution to suffer any legal detriment. *See* Dan Mickle, *2015 NCAA DIII Changes*, THE COACHES MIND (Jan. 21, 2015), http://thecoachesmind.com/2015-ncaa-diii-changes/.

NCAA and conference transfer regulations (which constrain an athlete's transfer options[431]) and the ability to cancel or reduce the aid if the athlete does not participate in the athletics program (meaning the institution is not "locked-in" to the athlete). Adopting the Division III model better aligns the NLI with the spirit of National Signing Day by presenting athletes with a simple, celebratory, commemorative form—not the biased, adhesion-like legal document in current use.

C. OPTION 3: LOOKING TO THE LAW ON COVENANTS NOT TO COMPETE TO TRANSFORM THE BASIC PENALTY

Covenants not to compete must be reasonable in their duration and geographic restrictions.[432] As outlined in Section IV, the NLI's Basic Penalty provision functions like a covenant not to compete and contains sweeping, overly broad restrictions on the economic freedoms of college athletes. These restrictive aspects of the Basic Penalty must be reformed if the NLI—which may have some place in college athletics—is to withstand judicial scrutiny.

Preliminarily, we note that while not implicated by the law on restrictive covenants, the Basic Penalty's second clause (which deducts a year of eligibility from transferring athletes[433]) has no pro-competitive basis and is legally indefensible. It should be stricken from the NLI entirely.

The non-compete portion of the Basic Penalty can be enforced if the restrictions it places on athletes have geographic and temporal bounds intended to safeguard the institution's legitimate competitive, financial, and philosophical goals.[434] As constituted, the restrictions outlined in the Basic Penalty, when considered in context, are far broader than necessary to protect institutional interests. The following revisions purge the Basic Penalty of its onerous terms and transform the provision into an agreement that could be accepted as "reasonable" by the courts—while still protecting the school's economic interests:

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[431] NCAA Division III Bylaw 14.5.

[432] *See* Wright v. Palmer, 464 P.2d 363, 365 (Ariz. Ct. App. 1970).

[433] *Basic Penalty*, *supra* note 4.

[434] *See Wright*, 464 P.2d at 365.

Limit the Locational (Geographic) Scope of the Basic Penalty. The NLI's Basic Penalty is enforceable at over 650 Division I and Division II institutions.[435] This prohibition on competition at such a wide swathe of schools is far more restrictive than necessary to ensure the signing institution is not unduly prejudiced, as it extends far outside the institution's primary area of operation (its conference).[436] The geographic bounds of the Basic Penalty includes schools the signee's team (a) have not played previously, or (b) are unlikely to play in the near future.[437] For both reasons, the Basic Penalty is unreasonably broad. Revising the prohibition to include **only NLI-subscribing schools in the same athletic conference** is a far more reasonable regulation, since these are the teams the signing institution will compete against several times (if not more) per season.

Limit the Durational (Time) Scope of the Basic Penalty. Athletes who do not fulfill the terms of the NLI must serve a full academic year-in-residence at any NLI-subscribing institution at which they subsequently enroll.[438] In concert with the loss of eligibility clause, the Basic Penalty effectively reduces the college athlete's career by 25 percent.[439] This is similar to a covenant in a doctor's or lawyer's employment contract that prohibited practicing for approximately 7–9

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[435] *About the National Letter of Intent (NLI)*, *supra* note 25.

[436] *See* Caras v. American Original Corp., No. 1258, 1987 Del. Ch. LEXIS 467 (July 31, 1987) (geographic restrictions in areas where employer does not operate were unenforceable); *see also*, Commercial Bankers Life Ins. Co. v. Smith, 515 N.E.2d 110, 112–13 (Ind. Ct. App. 1987); Delmar Studios of the Carolinas v. Kinsey, 104 S.E.2d 338, 344 (S.C. 1958). However, to the extent that collegiate athletic programs can be said to be operating nationally, some courts have upheld universal locational restrictions. *See* System Concepts Inc. v. Dixon, 669 P.2d 421, 428 (Utah 1983).

[437] *See* George S. May Int'l Co. v. Int'l Profit Assocs., 628 N.E.2d 647, 649–50 (Ill. App. Ct. 1993) (geographic restriction covering 36 states plus two Canadian provinces was overly broad and unenforceable because it included areas where company had never conducted business).

[438] *About the National Letter of Intent (NLI)*, *supra* note 25.

[439] *See* Debra D. Burkea & Angela J. Grube, *The NCAA Letter Of Intent: A Voidable Agreement For Minors*, 81 MISS. L.J. 265, 269 (2011).

years.[440] Covenants just one-third of that length have been declared unreasonable and unenforceable.[441] Moreover, temporal restrictions in non-compete covenants are generally unreasonable if they last longer than it takes for the previous employer to install a new employee "and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to the customers."[442] In the context of collegiate athletics, transferring athletes can be replaced before the ensuing athletic season starts, and "effectiveness" is an ambiguous and relative term, so it could be argued that a *de minimis* residency requirement is all that is legally required.

Given an athlete's short college career, a year sit-out period is overly burdensome, and should be reduced to lessen the hardship imposed on the athlete. **Reducing the length of the residency period to the first half of the conference contests in the athlete's next season of play** is a reasonable restriction for both athlete and institution. The burden on transferring players is substantially lessened, which may lead a greater number to seek out institutions that better meet their athletic, academic, and personal preferences. Further, these athletes' labor will be viewed more favorably by institutions, which no longer are forced to wait a year before using the players' skills.[443] For institutions, the new sit-out period is still restrictive enough to deter transfers and protect schools from direct competition from former athletes, while concomitantly reducing their legal liability. Given these revisions, the Basic Penalty now reads:

> I understand that if I do not attend the institution named in this document for one full academic year and I enroll in another NLI-participating institution that is a member of the athletic conference in which [INSTITUTION'S] [SPORT(S)] program competes, I may not compete in any NCAA-sanctioned athletics

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[440] *See generally* Greenwood, *supra* note 245.

[441] *See* Valley Medical Specialists v. Farber, 982 P.2d 1277, 1284–85 (Ariz. 1999).

[442] Bed Mart, Inc. v. Kelley, 45 P.3d 1219, 1223 (Ariz. Ct. App. 2002).

[443] NCAA and conference residency requirements still may apply to these athletes, meaning that any changes in the Basic Penalty still may not result in a "free" transfer.

> contest until my previous team has played at least 50 percent of its intra-conference contests.
> To avoid confusion: If I do not attend [INSTITUTION] for a full academic year and then enroll at [NAME ALL INSTITUTIONS IN SPORT(S)' ATHLETIC CONFERENCE], I cannot participate in NCAA-sanctioned sports until my previous team has played 1/2 of its conference games.
> These penalties do not apply if I enroll at an institution which is not a member of [SPORT(S)'] athletic conference.

CONCLUSION

For decades, collegiate athletic programs have used the National Letter of Intent to tie prospective athletes to the institution for their first academic year. Though not legally binding, the NLI has relied on the strength of its restrictive Basic Penalty to deter athletes from transferring to other institutions. The Basic Penalty is not only patently unfair, but could be deemed unenforceable on several bases—including contract, antitrust, and consumer protection grounds. Plainly, the NLI is not a valid contract; it could implicate a number of common law torts and statutory fraud violations; and it unreasonably constrains competition for the valuable services of college athletes. We caution prospective college athletes against signing NLIs, and encourage those seeking to free themselves of the agreement's unreasonable penalties to use the arguments outlined herein during the release process (and possibly during NLI-related legal action). More importantly, we urge NCAA institutions participating in the NLI Program to undertake substantive, meaningful reform of the NLI by implementing one of the three options above (or a combination thereof). Central to those reforms must be enhancing the NLI's transparency, and we hope this article serves as a valuable educational tool for athletes as they further their academic and athletic interests.

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THE MEME MADE ME DO IT! THE FUTURE OF IMMERSIVE ENTERTAINMENT AND TORT LIABILITY

JASON ZENOR*

ABSTRACT

In June of 2014, two teenage girls lured their friend into the woods and stabbed her nineteen times. The heinousness of the act itself was enough to make it a national news story. But the focus of the story turned to the unique motive of the crime. The girls wanted to appease the Slender Man, an evil apparition who had visited them in their sleep and compelled them to be his proxies. Many people had never heard of the Slender Man, a fictional internet meme with a sizeable following of adolescents fascinated with the macabre. Soon the debate raged as to the power and responsibility of such memes. As for legal remedies, media defendants are rarely held liable for harms caused by third parties. Thus, the producers of this violent meme are free from liability. But this law developed in an era of passive media where there was distance between the media and audience.

This paper examines how media liability may change as entertainment becomes more immersive. First, this paper examines the Slender Man phenomenon and other online memes. Then it outlines negligence and incitement law as it has been applied to traditional entertainment products. Finally, this paper posits how negligence and incitement law may be applied differently in future cases against immersive media products that inspire real-life crimes.

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INTRODUCTION

In June of 2014, a horrendous story captured the headlines: two Wisconsin pre-teens had lured their friend into the woods and attempted to murder her.[1] They stabbed her 19 times; fortunately, she survived.[2] The police arrested the two assailants.[3] When the police interrogated the girls, they claimed that they did it to appease the Slender Man, so he would come and take them to his world.[4]

At that time, few people had heard of this character.[5] That is because the Slender Man is a character on an obscure website that hosts horror stories.[6] However, as the news media investigated the stories, they discovered a sizeable, cult-like, teenage following of these kinds of websites.[7] More accusations surfaced claiming that these horror stories inspired other teenagers to commit heinous crimes.[8]

Wisconsin prosecutors have charged the girls who committed these acts with attempted murder.[9] But what about the creators of this internet meme? Do they face any liability?

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[1] Monica Davey & Steven Yaccino, *Milwaukee Suburb Tries to Cope With Girl's Stabbing*, N.Y. TIMES (June 7, 2014), https://www.nytimes.com/2014/06/08/us/milwaukee-suburb-tries-to-cope-with-slender-man-stabbing.html.

[2] *Id.*

[3] *Id.*

[4] Eric Killelea, *'Slender Man' Trial: What's Next for Morgan Geyser and Anissa Weier*, ROLLING STONE (Oct. 11, 2017), http://www.rollingstone.com/culture/features/slender-man-trial-whats-next-for-geyser-and-weier-w508348.

[5] *See* Caitlin Dewey, *The complete history of 'Slender Man,' the meme that compelled two girls to stab a friend*, WASH. POST (July 27, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2014/06/03/the-complete-terrifying-history-of-slender-man-the-internet-meme-that-compelled-two-12-year-olds-to-stab-their-friend/?utm_term=.2ddd93c106a1.

[6] *See id.*

[7] *See id.*

[8] *See* Rheana Murray, *Slender Man Now Linked to 3 Violent Acts*, ABC NEWS (June 9, 2014), http://abcnews.go.com/US/slender-man-now-linked-violent-acts/story?id=24058562.

[9] Jason Hanna & Dana Ford, *12-year-old Wisconsin girl stabbed 19 times; friends arrested*, CNN (June 04, 2014, 11:58 AM), http://www.cnn.com/2014/06/03/justice/wisconsin-girl-stabbed/index.html.

Under tort liability laws, the First Amendment protects the creator.[10] But other industries that create a product and sell it to the public are subject to some form of product liability.[11] These companies can be held liable if their products cause injury to customers or innocent bystanders.[12] The media industries also create products, but the media industry is essentially exempt from product liability when their entertainment products inspire violence and injury.[13] Courts have ruled that creators of entertainment products receive significant First Amendment protection, giving media creators a preferred position over any other industry.[14] Courts have reasoned that it is unlikely that entertainment producers intend to incite criminal misconduct.[15] Further, courts have rejected much of the media effects research as causation and instead find it merely a correlation.[16] Thus, entertainment producers have not been held liable for those who are inspired by their products.[17]

Crime inspired by a meme is a new twist to the old story of copycat crimes. But, the Slender Man case is still in the context of passive media: it is text on a website accompanied by

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[10] *See infra* Part III.

[11] *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. (AM. LAW INST. 1998).

[12] *See id.*

[13] *See, e.g.*, Juliet Dee, *Basketball Diaries, Natural Born Killers, and School Shootings: Should There Be Limits on Speech Which Triggers Copycat Violence?*, 77 DENV. U. L. REV. 713, 715–19 (2000).

[14] *Id.* "The courts have almost always concluded that to find the media negligent for allegedly inducing people to harm themselves or others would set a dangerous precedent whereby more and more people would attempt to recover damages from media outlets . . . ." *Id.* at 715.

[15] *Id.* at 715–19.

[16] *See* Lorraine M. Buerger, Comment, *The Safe Games Illinois Act: Can Curbs on Violent Video Games Survive Constitutional Challenges?*, 37 Loy. U. Chi. L.J. 617, 635–42 (2006).

[17] *See* Brown v. Entertainment Merchants Ass'n, 564 U.S. 786 (2011). The exceptions are when the speech is commercial (less protection) or the speech is a category not protected by the First Amendment (e.g. incitement). *See infra* Part III.

hoax videos and Photoshopped pictures.[18] But, what will happen when new immersive media technology, such as virtual reality, becomes commonplace? Will it be seen by the public and the courts as a lesser protected form of expression compared to traditional media? Will it have a more direct effect on users, thus creating a legitimate reason for courts to hold creators liable?

Unfortunately, when a "new" media phenomenon appears, it is usually followed by a social panic caused by fear and misunderstanding that is exacerbated by the focus on exceptionally odd cases.[19] Accordingly, this paper posits that future advances in immersive technology may create a vulnerability for creators of media violence and explores how those harmed might exploit that vulnerability in the legal context.[20] First, this paper presents the history of the Slender Man and the crimes it allegedly inspired.[21] Next, the paper outlines two common torts used in media inspired violence cases: negligence and incitement.[22] Last, the paper analyzes the unique factors of virtual reality and how it could be exposed to tort liability in the future.[23]

I. THE SLENDER MAN AND OTHER BOOGIE MEN

The Slender Man's "home" is the *Creepy Pasta* website, which houses many user-generated, fictional horror stories.[24] The Slender Man may be the most popular (and infamous), but other stories have a large following.[25] "BEN Drowned" is about a boy

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[18] *See The Slender Man*, CREEPYPASTA WIKI, http://creepypasta.wikia.com/wiki/The_Slender_Man (last visited Oct. 18, 2017).

[19] MORAL PANICS, SOCIAL FEARS, AND THE MEDIA: HISTORICAL PERSPECTIVES (Sian Nicholas & Tom O'Malley eds., 2013) (containing case studies examining how moral panics come into existence).

[20] *See infra* Part IV.

[21] *See infra* Part II.

[22] *See infra* Part III.

[23] *See infra* Part IV.

[24] *See* CREEPY PASTA, http://www.creepypasta.com (last visited Oct. 18, 2017).

[25] *See* Farhad Manjoo, *Urban Legends Told Online*, NEW YORK TIMES (July 9, 2014), https://www.nytimes.com/2014/07/10/technology/personaltech/slender-man-story-and-the-new-urban-legends.html.

who was drowned by his father and now haunts anyone who uses his old video games.[26] Many online movies allegedly show "found footage" of "real" instances of Ben haunting people.[27] "Jeff the Killer" is about a thirteen-year-old boy who was attacked at a birthday party.[28] His assailants put bleach and alcohol on him before setting him on fire.[29] Jeff survived but went insane, cutting out his own eyelids and carving a permanent smile out of his own face.[30] Jeff then killed his parents with a knife, and then went to kill his brother.[31] The brother awoke to find Jeff standing over him with a knife and whispering "go to sleep."[32] "Jeff the Killer" has many incarnations written primarily by and for young girls, called "Fan Girls."[33]

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[26] *See BEN Drowned*, CREEPY PASTA, http://creepypasta.wikia.com/wiki/BEN_Drowned (last visited Oct. 29, 2017).

[27] *See id.*

[28] See *Jeff the Killer*, FANDOM: CREEPYPASTA CLASSICS WIKI, http://creepypastaclassics.wikia.com/wiki/Jeff_the_Killer (last visited Oct. 29, 2017).

[29] *Id.*

[30] *See id.* This aspect of 'Jeff the Killer' is said to be inspired by an image that went viral in 2008. Analee Newitz, *Who is 'Jeff the Killer'? And is His Picture Haunted by a Real Death?*, IO9 (Aug. 5, 2013, 10:00 AM), https://io9.gizmodo.com/who-is-jeff-the-killer-and-is-his-picture-haunted-by-1016241494. The image shows a ghastly white with a clown-like smile. *Id.* The myth has an added layer in that it is said to be a photo-shopped image of a teenager who went on to commit suicide. *Id.*

[31] *Jeff the Killer*, *supra* note 28.

[32] *Id.*

[33] *See Lawyer Asks that 12-Year-Old Accused of Stabbing Friend in Wisconsin be Moved to Mental Facility*, 10TV (June 3, 2014, 10:10 AM), http://www.10tv.com/content/stories/2014/06/03/us--girls-stabbing-plot-wisconsin.html. The administrator of the Creepy Pasta site claimed that he was concerned about the Fan Girl obsession with Jeff the Killer:

> [T]he Jeff the Killer fangirls and spin-offs, I did find somewhat troubling—I've mentioned before that I feel romanticizing serial killers is not really something I feel comfortable with promoting via publishing all the Jeff love stories and self-inserts that people tried to submit; the only Jeff spin-off I did let through was one that I felt had a decidedly non-romantic view.

A. THE SLENDER MAN

The Slender Man is a fictional character that originated as an internet meme.[34] The character is described as an unusually tall man with a thin-build.[35] He wears a black suit and he has no facial features.[36] The stories of the Slender Man usually feature him abducting and presumably murdering people, primarily children.[37]

The Slender Man's creator is Eric Knudson, whose internet name is Victor Surge.[38] The meme began on the online forum *Something Awful*.[39] The idea arose on the forum from a

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Id.

[34] *See The Slender Man*, CREEPYPASTA WIKI, http://creepypasta.wikia.com/wiki/The_Slender_Man (last visited Oct. 28, 2017). The site describes him as:

> The Slender Man is an alleged paranormal figure purported to have been in existence for centuries, covering a large geographic area. Believers in the Slender Man tie his appearances in with many other legends around the world, including; Fear Dubh (or, The Dark Man) in Scotland, the Dutch Takkenmann (Branch Man), and the German legend of Der Grobmann or Der Grosse Mann (the Tall Man).

Id.

[35] *Id.*

[36] *Id.* "He sometimes is portrayed wear[ing] a hat, which is sometimes a bowler, a fedora, or sometimes a tophat. He may also be seen wearing a long flowing necktie or scarf, which is either red or grey." *Id.*

[37] *See id.* See also *Slender Man Documentary*, CREEPYPASTA, http://creepypasta.wikia.com/wiki/File:Slenderman_Documentary (last visited Oct. 29, 2017). The Slender Man Facebook Page states: "Some say I am evil, but all I ever wanted was [a] friend. I think that a few dozen casualties are to be expected during the quest for friendship." Slenderman, *About*, FACEBOOK, https://www.facebook.com/pg/dial0forslendy/about/?ref=page_internal (last visited Oct. 29, 2017).

[38] *See Slender Man Stabbings: Who is Slender Man?*, CBC NEWS (June 3, 2014, 11:43 AM) http://www.cbc.ca/news/world/slender-man-stabbings-who-is-slender-man-1.2663012.

[39] *See* Patrick Klepek, *A Brief History of Slender Man, The Internet's Boogeyman*, KOTAKU (MAR. 25, 2015, 2:00 PM),

contest to produce paranormal images.[40] The Slender Man story began with two images that were Photoshopped into one image, giving the illusion that he was real.[41] Knudson then added text to the photos, alleging the text was quotes from witnesses who described the entity and stories of abduction:[42] "Whether he absorbs, kills, or merely takes his victims to an undisclosed location or dimension is also unknown as there are never any bodies or evidence left behind in his wake to deduce a definite conclusion."[43]

The stories are rarely graphic, leaving it up to the reader's imagination.[44] Knudson says that the character was inspired by the fictional writings of H.P. Lovecraft, Zack Parson and Stephen King.[45] He wanted to create a character that caused "unease and terror in [the] general population."[46]

Shortly after its creation, the Slender Man went viral.[47] The stories appeared in many different forums online and have been written by many different authors.[48] Along the way, the Slender Man character changed.[49] Slender Man now has

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http://www.kotaku.com.au/2015/03/a-brief-history-of-slender-man-the-internets-boogeyman.

[40] *See Slender Man Stabbing: Who is Slender Man?*, *supra* note 38.

[41] *Id.*

[42] *See* Caitlin Dewey, *The Complete, Terrifying History of 'Slender Man,' the Internet Meme that Compelled Two 12-Year-Olds to Stab Their Friend*, WASHINGTON POST (Jun. 04, 2014), http://www.washingtonpost.com/news/the-intersect/wp/2014/06/03/the-complete-terrifying-history-of-slender-man-the-internet-meme-that-compelled-two-12-year-olds-to-stab-their-friend/.

[43] *The Slender Man*, *supra* note 34.

[44] Shira Chess, *Open-Sourcing Horror: The Slender Man, Marble Hornets, and Genre Negotiations*, 15 INFORMATION, COMMUNICATION & SOCIETY 3, 376 (2012).

[45] *See* DEWEY, *supra* note 24.

[46] Joanna Robinson, *American Horror Story and Slender Man*, VANITY FAIR (Jan. 28, 2016, 3:37 PM), https://www.vanityfair.com/hollywood/2016/01/american-horror-story-slender-man.

[47] *See* Klepek, *supra* note 39.

[48] *See* Chess, *supra* note 44 at 385.

[49] *See The Slender Man*, *supra* note 34. There is Slender Man Youtube channel that has close to 400,000 followers and over 70 million views. Laura Stampler, *The Origins of Slender Man, the Meme*

tentacles coming from his back and the ability to stretch his torso, arms and legs.[50] He is only seen at night, when he peers into open windows and steps out into secluded roads appearing before lone motorists.[51] It is said that his featureless face may appear different to people, depending on their fears.[52] He puts his victims in a hypnotized state, making them unable to stop themselves from going to the Slender Man.[53]

Another *Something Awful*-user created a backstory for Slender Man claiming that a German Folklore story called "Der Grossman" was an early reference to the Slender Man.[54] A different user on *Something Awful* posted a video and alleged the video was footage from a film school project that captured the entity.[55] The Slender Man meme has also been adapted into a video game,[56] an app,[57] and several small-budget films.[58]

Some claim that investigating the Slender Man will draw his attention.[59] He will interfere with video and audio signals.[60] It is also reported that when he is near, people often feel "Slender Man Sickness," with symptoms including nose bleeds, nightmares, delusion, and paranoia.[61] Some of the stories claim

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that Allegedly Drove 12-Year-Olds to Kill, TIME (June 3, 2014), http://time.com/2817725/slender-man-killing.

[50] *See The Slender Man*, *supra* note 34.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Shira Chess, *Open-Sourcing Horror: The Slender Man, Marble Hornets, and Genre Negotiations*, 15 J. INFO., COMM. & SOC. 374, 380–81 (2012).

[56] *See, e.g.*, SLENDER: THE EIGHT PAGES (2012), download available at http://slender.en.softonic.com (last accessed Oct. 28, 2017).

[57] *See* SLENDER-MAN (iOS) (2014), download available at https://itunes.apple.com/us/app/slender-man/id562558324?mt=8 (last accessed Oct. 28, 2017).

[58] *See, e.g.*, Super Movie Bros. Production, *Slender Man - The Movie*, YOUTUBE (Feb. 20, 2013), https://www.youtube.com/watch?v=N5ppqrCIlUQ.

[59] *See* Chess, *supra* note 44, at 384.

[60] *Id.*

[61] *See* Stampler, *supra* note 49.

that he drives young people to become violently insane, while other stories claim that he seduces people to act on his behalf.[62]

B. THE SLENDER MAN PROXIES

The two Wisconsin girls claimed that it was the Slender Man who inspired them to lure their friend into the woods and to stab her repeatedly.[63] The girls learned about the Slender Man from the wiki-site *Creepy Pasta*.[64] One of the girls claimed that the Slender Man came to her in a dream and that he watched her.[65] They also claimed that Slender Man teleported and read their minds.[66]

The girls ultimately wanted to prove themselves to the Slender Man by killing their classmate.[67] In completing the act, the two girls could, in their minds, become proxies of the Slender Man.[68] After the murder, they could run away with the Slender Man and live with him in his forest mansion in Nicolet National Forest.[69] One of girls told the police that "[m]any

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[62] *See* Dustin Rowles, *Who the Hell is Slender Man?*, PAJIBA (Sept. 28, 2016), http://www.pajiba.com/mindhole_blowers/who-the-hell-is-slender-man.php.

[63] Stephanie Slifer, *Could a Fictional Internet Character Drive Kids to Kill?*, CBS NEWS (June 3, 2014), http://www.cbsnews.com/news/could-a-mythological-creature-drive-kids-to-kill.

[64] *Id.*

[65] *Id.* She also claimed to speak to Lord Voldemort from *Harry Potter* and to the Teenage Mutant Ninja Turtles. Eliott C. McLaughlin, *Girl Charged in Slenderman Stabbing Deemed Incompetent*, CNN (Aug. 1, 2014), http://www.cnn.com/2014/08/01/justice/wisconsin-stabbing-slenderman-defendant.

[66] Ellen Gabler, *Charges Detail Waukesha Pre-Teens' Attempt to Kill Classmate*, MILWAUKEE-WISCONSIN JOURNAL SENTINEL (June 2, 2014), http://www.jsonline.com/news/crime/waukesha-police-2-12-year-old-girls-plotted-for-months-to-kill-friend-b99282655z1-261534171.html.

[67] *Id.*

[68] *Id.*

[69] *Id.* The girls' plan was to walk to his mansion after they killed the classmate. *Id.*

people do not believe Slender Man is real . . . [we] wanted to prove the skeptics wrong."[70]

Once the story of the Wisconsin girls was published, others came forward with stories of Slender Man inspired violence. A woman in Hamilton, Ohio claimed that her thirteen-year-old daughter attacked her with a knife.[71] The mother claimed that her daughter had written Slender Man fan fiction and it motivated the attack.[72] In Port Richey, Florida, a fourteen-year-old girl set fire to her house while her mother and nine-year-old brother slept inside.[73] She too had read Slender Man stories online and the police believed that it was a motivating factor.[74] Prosecutors charged her with two counts of attempted murder.[75]

C. FEAR THE MEMES?

Critics fear that virtual worlds will isolate people who want to escape from the real world that they find undesirable.[76]

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[70] Caitlin Dewey, *The Complete History of 'Slender Man,' the Meme that Compelled Two Girls to Stab a Friend*, WASHINGTON POST (July 27, 2016), http://www.washingtonpost.com/news/the-intersect/wp/2014/06/03/the-complete-terrifying-history-of-slender-man-the-internet-meme-that-compelled-two-12-year-olds-to-stab-their-friend/.

[71] Rheana Murray, *Slender Man Now Linked to 3 Violent Acts*, ABC NEWS (June 9, 2014), http://abcnews.go.com/US/slender-man-now-linked-violent-acts/story?id=24058562. This story also mentioned a Las Vegas man who had murdered his wife and two police officers before taking his own life. The man's neighbors claimed that he dressed as the Slender Man, but it is not known if it was just a Halloween costume. *Id.*

[72] *See* Isha Aran, *Teenage Girl Stabs Mother in Another Slender Man Attack* JEZEBEL (June 8, 2014), https://jezebel.com/teenage-daughter-stabs-mother-in-another-slender-man-in-1587818811.

[73] Caitlin Keating, *Florida Girl, 14, Sets Fire to Her House in Another Slender Man Inspired Crime: Police*, PEOPLE (Sept. 6, 2014), http://www.people.com/article/slender-man-inspires-more-crime.

[74] *Id.*

[75] *Id.*

[76] *See* Monica Kim, *The Good and Bad of Escaping to Virtual Reality*, THE ATLANTIC (Feb. 18, 2015), http://www.theatlantic.com/health/archive/2015/02/the-good-and-the-bad-of-escaping-to-virtual-reality/385134.

Users will be addicted to a virtual world that offers a better life.[77] It is foreseeable that this will affect adolescents more significantly because they often struggle with this transitional phase in life.[78] Another concern is that the virtual world disconnects us from human interaction, which not only hurts the development of social skills but also the ability to recognize social cues and have empathy.[79]

Of course, the Slender Man meme uses fairly basic technology.[80] Though it appears on digital sites, it is still mostly text, photoshopped jpegs, and amateur movies using old Hollywood tricks.[81] Yet, it still has created a fascination among young adolescents.[82] But, legitimate concerns exist that virtual reality will have even greater effects on users' thoughts, beliefs, and behavior.[83] In the near future, technology will be more

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[77] *Id.* One World of Warcraft player, who played 60 hours a week, stated that "living inside [the game] seemed preferable to the drudgery of everyday life." *Id.*

[78] *Cf.* David Freeman, *Violent Video Games May Curb Bullying in Vulnerable Children, Study Suggests*, HUFFINGTON POST (Aug. 28, 2013, 8:13 AM), http://www.huffingtonpost.com/2013/08/28/violent-video-games-bullying-children-study_n_3823490.html; Karen Frenkel, *Therapists Use Virtual Worlds to Address Real Problems*, SCIENTIFIC AMERICAN (Apr. 3, 2009), http://www.scientificamerican.com/article/therapists-use-virtual-worlds.

[79] *See generally* Katherine Bindley, *When Children Text All Day, What Happens to Their Social Skills?*, HUFFINGTON POST (Dec. 9, 2011, 1:22 PM), available at http://www.huffingtonpost.com/2011/12/09/children-texting-technology-social-skills_n_1137570.html; These are also the traits that are often used to diagnose sociopathy in young people. *Antisocial Personality Disorder*, MAYO CLINIC, http://www.mayoclinic.org/diseases-conditions/antisocial-personality-disorder/basics/symptoms/con-20027920 (last accessed Oct. 28, 2017).

[80] *See* CREEPYPASTA WIKI, *supra* note 34.

[81] *See id.*

[82] *See supra* Part II.C.

[83] *See generally* Robin Burks, *How Does Virtual Reality Affect the Brain? The Answer May Surprise You*, TECH TIMES (Nov. 25, 2014, 4:04 PM), http://www.techtimes.com/articles/20927/20141125/how-does-virtual-reality-affect-the-brain-the-answer-may-surprise-you.htm. The arguments will be similar to those made by critics of video games. *See e.g.*, Rick Nauert, *Negative Effects of Violent Video Games May*

immersive as virtual reality becomes commercially available.[84] Companies have recently developed holograms that are incredibly life-like.[85] Oculus Rift (a Facebook subsidiary),[86] Microsoft, Samsung, HTC, and SONY[87] have all recently announced that their wearable virtual reality technology will be coming to mass markets soon.[88]

If this technology becomes readily available, then memes like the Slender Man may virtually come to life. In the future, it may be difficult to discern what is real and what is fantasy. It is foreseeable that younger, less-developed (or damaged) psyches will be more susceptible to the messages in the product.[89] If adults can leave a movie theater after seeing *Avatar* with feelings of depression and thoughts of suicide because they had to leave the world of Pandora,[90] it is foreseeable that teenagers will experience similar feelings that they may have difficulty managing.[91]

Build Over Time, PSYCHCENTRAL (Dec. 11, 2012), http://psychcentral.com/news/2012/12/11/negative-effects-of-violent-video-games-may-build-over-time/48918.html.

[84] Marco della Cava, *Facebook's Oculus Rift demo hints at VR's future*, USA TODAY (Mar. 26, 2015), http://www.usatoday.com/story/tech/columnist/2015/03/25/facebook-f8-san-francisco-oculus-rift-demo-future-of-vr/70434214.

[85] A company called Image Metrics have created a photo-realistic hologram called "Emily." S*ee The Emily Project*, IMAGE METRICS, http://image-metrics.com/company/#about (last accessed Oct. 28, 2017).

[86] *See* Marco della Cava, *supra* note 84.

[87] *See* Nathan Olivarez-Giles, *Sizing up Virtual-Reality Headsets: Sony's Morpheus and HTC's Vive*, WALL ST. J. (Mar. 6, 2015, 6:50 PM), http://blogs.wsj.com/personal-technology/2015/03/06/sizing-up-virtual-reality-headsets-sonys-morpheus-and-htcs-vive (stating that Google may be next to enter the market).

[88] *Id.*

[89] *See infra* Part III.

[90] Jo Piazza, *Audience Experience 'Avatar' Blues,* CNN (Jan. 11, 2010, 8:06 AM), http://www.cnn.com/2010/SHOWBIZ/Movies/01/11/avatar.movie.blues/.

[91] *See generally* Steven Tweedie, *Tech Tuesday: The Very Real Dangers of Virtual Reality*, THE MICHIGAN DAILY (Mar. 11, 2014, 7:44 PM),

For example, one study of soldiers affected by post-traumatic stress disorder (PTSD) used the software titled *Virtual Iraq*.[92] This software had the positive outcome of allowing the soldiers to mitigate the effects of PTSD by 'reliving' the war.[93] But, actors who used the software to prepare for roles in a war movie started to show early signs of PTSD as if they were in an actual war.[94] This demonstrates it is possible for situations in interactive virtual media to cause harmful impacts on a person's mental health, particularly when they are unfamiliar with the situation in the real world.

II. THE REJECTION OF PRODUCTS LIABILITY FOR MEDIA INDUSTRIES

As of August 2017, one of the young Wisconsin girls involved in the "Slender Man inspired" stabbing pled guilty to attempted second-degree homicide with a deadly weapon.[95] The other young girl pled "not guilty by reason of mental disease" and is set to face trial in September 2017 to determine whether she can claim a defense of mental illness.[96] Because the teenagers lured their victim into the woods to fulfill their delusions of becoming the Slender Man's proxies, some have called for the creators of the meme to claim some responsibility.[97] But, it is hard to imagine that any case will ever

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https://web.archive.org/web/20140315053919/http://michigandaily.com/blog/filter/tech-tuesday-very-real-dangers-virtual-reality.

[92] David Zax, *"Virtual Iraq" Helps Soldiers Overcome PTSD*, FAST COMPANY (Feb. 17, 2011), https://www.fastcompany.com/1728656/virtual-iraq-helps-soldiers-overcome-ptsd.

[93] *Id.*

[94] *See* Sue Halpern, *Virtual Iraq: Using Simulation to Treat a New Generation of Traumatized Veterans*, NEW YORKER (May 19, 2008), https://www.newyorker.com/magazine/2008/05/19/virtual-iraq.

[95] Katie Reilly, *Wisconsin Teen Pleads Guilty to Stabbing Attack Inspired by 'Slender Man,'* TIME (Aug. 21, 2017), http://time.com/4910238/wisconsin-slender-man-attack-guilty-plea-anissa-weier/.

[96] *Id.*

[97] *See e.g.* Evan McMurry, *Fox's Ablow Demands Warnings on Facebook, Slender Man: 'Where is the Surgeon General?,'* MEDIAITE (June 10, 2015, 9:21 AM), http://www.mediaite.com/tv/foxs-

be successful against the creators of the meme.[98] First, the Slender Man story has taken on a life of its own with many hands playing a role in the creation of the myth, making it difficult to isolate one or two defendants. [99] Moreover, the torts available to a plaintiff in such a case are significantly in favor of the defendant.[100] This section outlines two torts—negligence and incitement—that plaintiffs have used, most often unsuccessfully, against defendants when claiming their injury was inspired by the media.[101]

A. NEGLIGENCE

Negligence is a failure to take reasonable care which results in an injury to another.[102] Negligence lies between intentional torts, which require proof of a plaintiff's intent, and strict liability, which does not concern the actions of the

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ablow-demands-warnings-on-facebook-slender-man-where-is-the-surgeon-general/.

[98] Clay Calvert, *Slender Man Meets the First Amendment: Why Suing the Character's Creator Won't Work,* HUFFINGTON POST (June 9, 2014, 1:00 PM), http://www.huffingtonpost.com/clay-calvert/slender-man-meets-the-fir_b_5470902.html.

[99] *See supra* Part II.

[100] *See infra* Part III. A-B.

[101] Other torts have been used against the media: (1) failure to adequately warn consumers (*see* DeFilippo v. Nat'l Broad. Co., Inc., 446 A.2d 1036 (R.I. 1982); Bill v. Super. Ct. of San Francisco, 187 Cal. Rptr. 625 (1982); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989); James v. Meow Media, Inc., 90 F. Supp. 2d 798 (W.D. Ky. 2000); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002); Watters v. TSR, Inc., 904 F.2d 378 (1990); Wilson v. Midway Games, Inc., 198 F. Supp.2d 167 (D. Conn. 2002); (2) products liability (*see* DeFilippo, 446 A.2d 1036; *James*, 90 F. Supp. 2d 798; Sanders, 188 F. Supp. 2d 1264; Davidson v. Time Warner, Inc., 25 Media L. Rep. 1705 (1997); Herceg, 814 F.2d 1017; Wilson, 198 F. Supp. 2d 167); (3) failure to provide adequate, on-site protection for moviegoers (*see* Bill, 187 Cal. Rptr. 625; Yakubowicz, 536 N.E.2d 1067); (4) RICO (*see* James, 90 F. Supp. 2d 798; Sanders, 188 F. Supp. 2d 1264); (5) unfair trade practices (*see* Wilson, 198 F. Supp. 2d 167); and a (6) Pied Piper theory (*see* Walt Disney Prods., Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981)).

[102] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM (AM. LAW. INST. 2010).

defendant, only the injury to the plaintiff.[103] Basic negligence does not require intent, but does require that defendant's action include risk of injury that is so "sufficiently great to lead a reasonable man in [the actor's] position to anticipate [such injuries], and to guard against them."[104] Juries determine what is reasonable depending on the context and community norms, meaning the outcome of negligence claims can vary greatly depending on the jury and jurisdiction.[105]

To prevail in a negligence claim, a plaintiff must show that: (1) the harm to the plaintiff was foreseeable; (2) the defendant had a duty to act reasonably in such circumstances, but the defendant breached that duty; and (3) the breach was the proximate cause of the plaintiff's injuries.[106] The question of duty is a matter-of-law with policy considerations asking whether the plaintiff is owed protection.[107] However, companies that put products into the stream of commerce always owe a duty to their consumers that the product will be reasonably safe.[108]

In cases involving a third party's criminal action, courts usually consider the third party's act to be a superseding event

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[103] *Id.*

[104] WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 148 (West 3d ed. 1964).

[105] April M. Perry, *Guilt by Saturation: Media Liability for Third-Party Violence and the Availability Heuristic*, 97 Nw. U. L. Rev. 1045, 1049 (2003) (arguing that the trier facts determines the elements of negligence).

[106] Prosser listed the elements of a negligence cause of action to include:

> (1) [a] duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks; (2) [a] failure on his part to conform to the standard required; (3) [a] reasonably close causal connection between the conduct and the resulting injury, [and] (4) [a]ctual loss or damage resulting to the interests of another.

See Prosser, *supra* note 104, at 146.

[107] *See* W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS 357-59 (4TH ED. 1984) .

[108] *See* First Nat'l Bank of Mobile v. Cessna Aircraft Co., 365 So. 2d 966, 968 (Ala. 1978).

breaking the chain of causation.[109] However, there is an exception when a defendant provides a significant "opportunity for criminal misconduct."[110] Thus, a defendant must guard against reasonable risks, if it is foreseeable that the third party will injure a person with the product. [111]

Foreseeability is an important element in negligence law.[112] Foreseeability is often used as a "shorthand for negligence."[113] Foreseeability is a matter-of-fact and is left for juries to decide, thus there is no bright-line rule for what constitutes foreseeability.[114] But, when a jury determines that the plaintiff's injuries were foreseeable, it often establishes duty, proximate cause, and even the extension of the liability to a third party's actions.[115] Without a finding of foreseeability, it is likely a plaintiff cannot meet the other three factors and a court will dismiss the case.[116]

Most often foreseeability is equated to duty. Courts reason that "the morality of an action depends on its foreseeable consequences."[117] Thus, foreseeability creates a duty that may be independent of the relationship between the parties.[118] Essentially, if the defendant could foresee an injury, then he or she has a duty to protect against it.[119]

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[109] *See* PROSSER, *supra* note 104, at 177.

[110] *Id.*

[111] *Id.* at 179.

[112] Perry, *supra* note 105 (arguing that negligence claims hinge on foreseeability).

[113] *Id.* at 1050. "In other words, negligence doctrine becomes circular and illogical when only one criterion must be satisfied to prove all elements of negligence." *Id.* at 1052.

[114] *Id.*

[115] *Id.* at 1049–50.

[116] *Id.* at 1050–52. Foreseeability "so completely lacks all clarity and precision that it amounts to nothing more than a convenient formula for disposing of the case—usually by leaving it to the jury." *See* PROSSER & KEETON, *supra* note 107, at 297.

[117] William H. Hardie, Jr., *Foreseeability: A Murky Crystal Ball for Predicting Liability*, 23 CUMB. L. REV. 349, 349 (1993).

[118] *Id.*

[119] Because of its unclear definition, some commentators believe that "foreseeability is wholly unsuitable as a test for any element of liability or defense submitted to a jury." *Id.* at 398-99.

B. MEDIA NEGLIGENCE CASES

When deciding negligence cases, courts often consider policy implications.[120] These include preventing future harm and the consequence to the community if exercising due care is imposed.[121] In cases of media defendants, the policy concern is the First Amendment and avoiding the chilling of free speech.[122] First Amendment protections reduce the duty requirement of media companies, so they are held to a lesser standard compared to other industries that put products into the stream of commerce.[123] Causation is also difficult to prove against a media company as courts are reluctant to accept social science evidence of correlation as a substitute for causation.[124]

1. NEGLIGENCE & ENTERTAINMENT: MEDIA WINS

In *Zamora v. CBS*, a family sued three television networks claiming the networks caused their son to become addicted to violent television, which caused him to kill his elderly neighbor.[125] The court refused to find that the networks had a duty to refrain from airing violent programming.[126] The

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[120] Prosser & Keeton, supra note 107, at 357–58.

[121] *Id.* at 359.

[122] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) (applying constitutional protection in case between two non-state actors).

[123] *See generally* William Li, *Unbaking the Adolescent Cake: The Constitutional Implications of Imposing Tort Liability on Publishers of Violent Video Games*, 45 ARIZ. L. REV. 467 (2003) (detailing several different media cases in which courts have found no liability distributors of entertainment products).

[124] See Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 800 (2011). Brown was the first time that the Court used the phrase 'direct causal link' in a free speech case. Clay Calvert & Matthew D. Bunker, *Examining the Immediate Impact of Brown's Proof-of-Causation Doctrine on Free Speech and Its Compatibility with the Marketplace Theory*, 35 HASTINGS COMM. & ENT L.J. 391, 392 (2013).

[125] Zamora v. CBS, 480 F. Supp. 199, 200 (1979).

[126] *Id.* at 202–03.

court held that the First Amendment protected the broadcasters from such censorship.[127]

In *James v. Meow Media*,[128] the family of the victims of a school shooting sued the producers of the *Basketball Diaries* for negligence after a high school student was allegedly inspired by the movie to commit a school shooting.[129] The court ruled that this single event was too idiosyncratic for it to be foreseeable:

> We find that it is simply too far a leap from shooting characters on a video screen (an activity undertaken by millions) to shooting people in a classroom (an activity undertaken by a handful, at most) for [the assailant's] actions to have been reasonably foreseeable to the manufacturers of the media that [the assailant] played and viewed.[130]

Moreover, the court was reluctant to attach tort liability to any speech protected by the First Amendment.[131] Additionally, the court stated that the plaintiff could not show proximate causation as the assailant's acts were an intervening, superseding act that broke the chain of causation.[132]

In *Watters v. TSR, Inc.*, a mother brought a wrongful death suit against the producers of *Dungeons & Dragons*, claiming that the board game caused her son to commit suicide.[133] The mother claimed that the game could "dominate his mind" and cause "psychological harm in fragile-minded children."[134] She claimed that her son had succumbed to this and

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[127] *Id.* at 203–07.

[128] James v. Meow Media, 300 F.3d 683 (6th Cir. 2002) (family of murdered child sued creators of entertainment product for negligence and strict liability).

[129] The plaintiffs also sued a video games producer and internet service provider. *Id.*

[130] *Id.* at 693.

[131] *Id.* 695–99.

[132] *Id.* at 699–700 ("Generally, a third party's criminal action that directly causes all of the damages will break the chain of causation.").

[133] *Watters v TSR, Inc.*, 904 F.2d 378, 379 (6th Cir. 1990).

[134] *Id.* at 379-80 (The court stated that the game is not violent and often used by schools for learning exercises).

lost "touch with reality," and "lost control of his own independent will and was driven to self-destruction."[135]

The court held that the manufacturer was not negligent.[136] First, the manufacturer could not be expected to ascertain the mental health of every user before it sells it product.[137] Second, the suicide was not a foreseeable result of the entertainment fantasy game.[138] Finally, the child's suicide was an intervening action breaking the chain of causation.[139]

In *Davidson v. Time Warner*,[140] the family of a murdered police officer sued artist Tupac Shakur and his record label.[141] The family alleged that the assailant had listened to Tupac Shakur's album *2Pacalypse Now* and it had caused him to murder the officer.[142] The court held that the record company and artist were not negligent.[143] The court stated that no state negligence cases had placed "a duty upon a publisher to refrain from distributing a published work."[144] The court also held that their artistic expression received the highest protection and to punish publication on the rare chance that it inspires a crime would chill free speech.[145]

2. NEGLIGENCE & COMMERCIAL SPEECH: MEDIA LOSES

In *Weirum v. RKO General, Inc.*,[146] a radio station offered a cash prize to the first listener who could spot the station's disc jockey wandering through Los Angeles.[147] During

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[135] *Id.* at 380.

[136] *Id.* at 384.

[137] *Id.* at 381.

[138] *Id.* at 381–82 ("But if [the child's] suicide was not foreseeable to his own mother, there is no reason to suppose that it was foreseeable to defendant.").

[139] *Id.* at 383–384.

[140] Davidson v. Time Warner, No. Civ.A. V–94–006, 1997 WL 405907 (S.D. Tex. Mar. 31, 1997).

[141] *Id.* at *2

[142] *Id.* A jury did not believe the criminal defendant, Howard, and sentenced him to death.

[143] *Id.* at *10.

[144] *Id.*

[145] *Id.* at *12.

[146] Weirum v. RKO General, 539 P.2d 36 (Cal. 1975).

[147] *Id.* at 38.

the promotion, a man was killed when his car was forced off the road by a young driver who was searching for the disc jockey.[148] The family of the decedent sued the driver and radio station for wrongful death and was awarded $300,000. [149] The radio station appealed claiming that the extension of duty would open them up to unwarranted liability.[150] The California Supreme Court disagreed, holding that this particular promotion created unnecessary and foreseeable risk for which the station was liable.[151]

In *Norwood v. Soldier of Fortune Magazine*,[152] the plaintiff sued a magazine after he suffered injuries from a hitman hired through the magazine's advertisement.[153] The magazine filed for summary judgment, claiming First Amendment protection, but the motion was denied.[154] The court held that "[r]easonable jurors might conclude that a reasonable person shouldn't be especially surprised when he learns that the gun that had been hired through his advertisement was used to do one of the things that guns often do and are designed to do—hurt people."[155] The parties settled for an undisclosed sum before the start of the trial.[156]

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[148] *Id.* at 37.

[149] *Id.* at 39.

[150] *Id.* at 40–41.

[151] *Id.* at 41. The court held that First Amendment does not bar against "civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to decedent." *Id.* at 40.

[152] Norwood v. Soldier of Fortune Magazine, 651 F.Supp. 1397 (W.D. Ark. 1987).

[153] 651 F. Supp. 1397, 1397–98 (W.D. Ark. 1987). The advertisements were in a 1985 issue of Soldier of Fortune magazine. *Id.* at 1398. The first advertisement read: "GUN FOR HIRE: 37 year-old—professional mercenary desires jobs. Vietnam Veteran. Discreet and very private. Bodyguard, courier, and other special skills. All jobs considered. Phone (615) 891-3306 (I-03)." *Id.* The second advertisement read: "GUN FOR HIRE: NAM sniper instructor. SWAT. Pistol, rifle, security specialist, body guard, courier plus. All jobs considered. Privacy guaranteed. Mike (214) 756-5941 (101)." *Id.*

[154] *Id.* at 1398, 1403.

[155] *Id.* at 1402.

[156] *See* Debbie Lee, *'Gun for Hire' Advertisement That Backfired and Hit the Publisher in the Pocketbook*, 8 LOY. ENT. L.J. 439, 439 n.2 (1988) (detailing out of court settlement).

Eimann v. Soldier of Fortune Magazine was another case involving an advertisement for a hitman in *Soldier of Fortune* magazine.[157] This time a man hired a hitman to kill his estranged wife.[158] The family of the victim sued the magazine for wrongful death and sought over $100 million in damages.[159] *Soldier of Fortune* magazine sought summary judgment, but the court denied it.[160] The case went to trial and a jury determined the magazine should pay $9.4 million to the plaintiffs.[161] However, on appeal the Fifth Circuit reversed the award stating the advertisement was too ambiguously worded to hold the magazine liable.[162]

In *Rice v. Paladin Enterprise*, the family of three murder victims sued the publisher of a "hit man" instructional book for wrongful death.[163] A contract killer had followed the book's instruction in the brutal murder of three people.[164] The publishers argued that the First Amendment barred them from liability.[165] The Fourth Circuit disagreed and held that that "the First Amendment does not pose a bar to a finding that Paladin is civilly liable as an aider and abettor of Perry's triple contract murder" and remanded the case.[166]

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[157] 880 F.2d 830, 831 (5th Cir. 1989).

[158] The hitman was paid $10,000. *Id.*

[159] *See* Eimann v. Soldier of Fortune, 680 F. Supp. 863, 864 (S.D. Tex. 1988).

[160] *Id.*

[161] *Eimann*, 880 F.2d at 831.

[162] *Id.* at 838.

[163] 128 F.3d 233, 233 (4th Cir. 1997). The book was titled *Hit Man: A Technical Manual for Independent Contractors*. *Id.* at 239.

[164] *Id.*

[165] *Id.* at 241.

[166] *Id.* at 243. The case was settled out of court with the publishers paying several million dollars and destroying all the remaining copies. *See* Andrianna D. Kastanek, *From Hit Man to A Military Takeover of New York City: The Evolving Effects of* Rice v. Paladin Enterprises *on Internet Censorship*, 99 NW. U. L. REV. 383, 397 n.113 (2004).

a. Media Incitement

Incitement is another tort that is sometimes used by plaintiffs against a media defendant.[167] Incitement is a category of speech that is not covered by the First Amendment.[168] To prove incitement, a plaintiff must show that: (1) the speech was directed at producing imminent lawless action; and (2) the speech was likely to produce lawless action.[169] Whether a product has caused incitement is a matter of law.[170] The difficulty in suing the media for incitement is that entertainment products are merely meant to entertain, not incite action;[171] and as with negligence, causation is difficult to prove.[172]

In *McCollum v. CBS, Inc*., the family of a man that committed suicide sued the music artist Ozzy Osborne and his record label for negligence and incitement.[173] At the time of the suicide, the man was listening to Osborne's music including the song "Suicide Solution" which generally promoted the act.[174] The court applied the incitement test and found that Osbourne's music was not "a command to an immediate suicidal act," and instead the song merely created a depressing mood by exploring

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[167] *See, e.g*., Byers v. Edmonson, 826 So. 2d 551, 553 (La. Ct. App. 2002).

[168] Byers v. Edmonson, 826 So. 2d 551, 555; *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

[169] McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 193; *See* Hess v. Indiana, 414 U.S. 105, 108 (1973). As with negligence, incitement has an element of causation which is similarly difficult to prove. *See also supra* Part III.A.

[170] *Byers*, 826 So. 2d at 555.

[171] *See* McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 194 (Cal. Ct. App. 1988) ("No rational person would or could believe otherwise nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action."). Incitement also requires proximity which mass media products do not provide. *See id.* at 197.

[172] *See supra* Part III.A.

[173] *McCollum*, 249 Cal. Rptr. at 191.

[174] *Id.* at 190.

the darker side of humanity.[175] Thus, the defendants were not liable for incitement.[176]

In *Byers v. Edmondson*, a couple went on a drug-induced killing spree inspired by the movie *Natural Born Killers*.[177] Byers was one of the victims who survived, but sustained several injuries leaving her a paraplegic.[178] She sued the distributors, Warner Bros., and the director, Oliver Stone, for incitement.[179] The court stated that the incitement test was not the equivalent of an artistic critique of the movie, it was an application of a legal test.[180] In applying the test, the court found that the producers were not liable for incitement.[181] First, the movie does more than glorify violence as it critiques our society's obsession with it.[182] Second, the movie is fantasy and does not have a call to action to commit crimes.[183]

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[175] *Id.* at 193–94.

[176] *Id.* at 195. The court also found that the defendants were not liable for negligence as the descendant's suicide was not foreseeable. *Id.* at 196.

[177] Byers v. Edmonson, 826 So. 2d 551, 553 n.2 (La. Ct. App. 2002).

[178] *Id.* Another victim had died. *Id.*

[179] *Id.* at 554. She also claimed that the movie was obscene. *Id.* at 555.

[180] *Id.* at 556.

[181] *Id.*

[182] *Id. (*"Although we acknowledge that such a portrayal of violence can be viewed as a glorification and glamorization of such actions, such a portrayal does not rise to the level of incitement, such that it removes the film from First Amendment protection.").

[183] *Id. See also* Olivia N. v. Nat'l Broad. Co., 126 Cal. App. 3d 488 (1981) (holding that victim could not sue television broadcaster for airing movie which inspired sexual assault because the movie did not contain a call to action); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (1989) (holding that producers of *The Warriors* were not liable for wrongful death or incitement in the shooting death caused outside of the theatre).

III. HOW VIRTUAL REALITY MAY REVIVE PRODUCTS LIABILITY

Over the last thirty years, many commentators have written about tort liability as it applies to violent video games.[184] Commentators have suggested many different approaches to increase liability for producers, including: lowering scrutiny of regulations of children and media,[185] creating a duty of media companies for their consumers,[186] using social science research as evidence of foreseeability and causation in tort cases,[187] and relaxing or disposing of the incitement test as it pertains to younger audiences.[188]

Lower courts never adopted these proposals when it came to regulating violent video games.[189] In *Brown v. Entertainment Merchants Ass'n*, the United States Supreme Court stated that video games are protected speech.[190] But, the

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[184] *See, e.g.*, Amanda Harmon Cooley, *They Fought the Law and the Law (Rightfully Won): The Unsuccessful Battle to Impose Tort Liability Upon Media Defendants for Violent Acts of Mimicry Committed by Teenage Viewers*, 5 TEX. REV. ENT. & SPORTS L. 203 (2004) (arguing that First Amendment should protect against tort claims).; Juliet Dee, *Basketball Diaries, Natural Born Killers and School Shootings: Should There be Limits on Speech which Triggers Copycat Violence?*, 77 DENV. U. L. REV. 713 (2000) (arguing that society should employ legislative measures to curtail violence in media).; S. Elizabeth Wilborn Malloy, *Taming Terrorists But Not "Natural Born Killers"*, 27 N. KY. L. REV. 81 (2000) (arguing that violent entertainment that does not instruct the viewer on illegal behavior should enjoy First Amendment protection).

[185] *See, e.g.*, Juliet Dee, *Basketball Diaries, Natural Born Killers, and School Shootings: Should There Be Limits on Speech Which Triggers Copycat Violence?*, 77 DENV. U. L. REV. 713 (2000).

[186] *See, e.g.*, James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002), *cert. denied*, 537 U.S. 1159 (2003).

[187] *See, e.g.*, Jonathan Seiden, *Scream-ing for a Solution: Regulating Hollywood Violence; An Analysis of Legal and Legislative Remedies*, 3 U. PA. J. CONST. L. 1010 (2001); *cf.* Brown v. Entm't Merchants Assoc., 131 S. Ct. 2729 (2011).

[188] *See, e.g.*, David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1 (1994).

[189] *See id.* at 32–33.

[190] *See* Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 799 (2011).

video game industry had existed for forty years before the Court spoke on the matter, during which time others had debated the effects of the games and whether video games deserved less protection than other entertainment products.[191] With the number of Slender Man inspired crimes combined with the emergence of commercially available virtual reality technology, there may soon be another call for legislative action and judicial activism to curtail this "new" media violence.[192] The following section outlines how negligence and incitement law may be reinterpreted to support liability for virtual reality entertainment that inspires crimes.

A. NEGLIGENCE AND VIRTUAL REALITY

1. DUTY OF CARE: LESS PROTECTION FOR PRODUCTS THAT PURPOSELY APPEAR REAL

When bringing a negligence case against the media, one of the difficulties for a plaintiff is that entertainment media does not have the same duty of care to their customers as other industries.[193] Courts are concerned that placing such requirements on entertainment producers may chill constitutionally protected speech.[194] But, in cases where the

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[191] Home video games consoles have been around since the 1970s, starting with Atari. But the first wave of cases against video manufacturers did not come until late-1990s as games became more violent and realistic. *See, e.g.*, James v. Meow Media, Inc., 90 F. Supp. 2d 798 (W.D. Ky. 2000), *aff'd*, 300 F.3d 683 (6th Cir. 2002); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002).

[192] The introduction of new media technology often brings about a social panic over its presumed effects. *See generally* SIAN NICHOLAS & TOM O'MALLEY, MORAL PANICS, SOCIAL FEARS, AND THE MEDIA: HISTORICAL PERSPECTIVES (2013) (case studies examining moral panics that coincided with the introduction of new media); *See generally* Vaughan Bell, *Don't Touch that Dial! A History of Media Technology Scares, from the Printing Press to Facebook*, SLATE (Feb. 15, 2010, 7:00 AM), http://www.slate.com/articles/health_and_science/science/2010/02/dont_touch_that_dial.html.

[193] *See supra* Part III.A.

[194] *See* Davidson v. Time Warner, Inc., No. Civ.A. V–94–006, 1997 WL 405907 at *12 (S.D. Tex. Mar. 311, 1997).

speech was found to be more informational than entertainment, courts have required more duty of care on media companies.[195]

Internet memes are more like cultural folklore and may appear more "real" than other media entertainment.[196] Memes like the Slender Man are more like a collective story than the work of a single author:[197] the story changes as each new author adds to it.[198] The story is also individualized to fit the fears and anxieties of its audience.[199]

Moreover, unlike television or movies, the internet offers a reality if one chooses to believe it.[200] Television and movies are commercial products that clearly state who wrote, acted in, and produced the product. In the last decade, Hollywood has tried to combat this by suspending our disbelief with the "found footage" genre, including the *Blair Witch Project* and the *Paranormal Activity* movie franchises, and the *Ghost Hunters* TV series.[201] However, with mass-commercial media, it is impossible to escape the fact that it is a product.

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[195] *See supra* Sections III.B.1–2.

[196] Scholar Shira Chess refers to texts like movies and television as 'fakelore' which originate as commercial products. Shira Chess, *Open-Sourcing Horror: The Slender Man, Marble Hornets, and Genre Negotiations*, 15 J. INFO., COMM. & SOC. 374, 374–83 (2012).

[197] Though the creator of the Slender Man is known, as the story progresses, the origins are often lost on the consumer who is not actively seeking it out. *See generally* Dana Keller, Digital Folklore: Marble Hornets, The Slender Man, and the Emergence of Folk Horror in Online Communities (Dec. 2013) (unpublished B.A. thesis, University of British Columbia) (on file with the University of British Columbia, Vancouver Library).

[198] *See id.* at 3–5.

[199] *See* Chess, *supra* note 198, at 380.

[200] Farhad Manjoo, *How the Internet Is Loosening Our Grip on the Truth*, N.Y. TIMES (Nov. 2, 2016), https://www.nytimes.com/2016/11/03/technology/how-the-internet-is-loosening-our-grip-on-the-truth.html?_r=0 .

[201] *See* Matilda Battersby, *'Based on a True Story' It's the Most Overused Tagline in Cinema at the Moment, but Can We Really Believe It?*, THE INDEPENDENT: CULTURE (U.K.) (Oct. 19, 2012, 11:00 PM), http://www.independent.co.uk/arts-entertainment/films/features/based-on-a-true-story-its-the-most-overused-tagline-in-cinema-at-the-moment-but-can-we-really-believe-it-8216817.html. "There is little legal need to curtail creative use of the truth so long as you are not offending anyone." *Id.*

However, internet sites can hide themselves from commercialism and appearing over-produced (often this is out of necessity caused by lack of funding).[202] This can give the product more ethos, and maybe more power, especially among susceptible persons who want to believe.[203] Add to this the evolving technology of virtual reality, and it may become even more difficult to ascertain what is real and what is make believe.[204]

If memes can use virtual reality technology to appear real and are presented as real, then it can be argued that they should have less speech protection. In First Amendment jurisprudence, opinion speech is given more protection than factual speech.[205] For example, opinion is a defense in libel law.[206] Hard news stories will receive more scrutiny than editorial pieces.[207] Political speech receives the highest order of

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[202] *See, e.g.*, *Official Slender Man Site*, CREEPY PASTA WIKI (Feb. 19, 2017), http://creepypasta.wikia.com/wiki/The_Slender_Man.

[203] Adolescents are the highest risk age groups for the development of Internet addiction. *See* Soo Kyung Park et al., *Prevalence of Internet Addiction and Correlations with Family Factors Among South Korean Adolescents*, 43 ADOLESCENT 895, 895–909 (2008).

[204] *See, e.g.*, *supra* note 84 and accompanying text; *see also* Seth Millstein, *Is Slender Man Real? A Fascinating Deep Dive in Meme's Message Boards,* BUSTLE (June 12, 2014), http://www.bustle.com/articles/27971-is-slender-man-real-a-fascinating-deep-dive-in-memes-message-boards. "In fact, a contingent of the paranormal community believes this creature actually exists[.]" Aaron Sagers, *Slender Man is Real: From Cultural Conversation to Paranormal Topic*, HUFFINGTON POST (Aug. 14, 2014), http://www.huffingtonpost.com/aaron-sagers/slender-man-is-real-from-_b_5481349.html.

[205] *See generally* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980) (holding that purely commercial speech will receive intermediate scrutiny). Commercial speech that is deceptive will not be protected. *Id.*

[206] *See generally* Milkovich v. Lorain Journal Co., 497 U.S. 1, 7 (1990) ("[S]tatement[s] of opinion relating to matters of public concern which do[] not contain a provably false factual connotation will receive full constitutional protection.").

[207] *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (protecting advertorial from libel award).

protection, partly because it is mostly opinion.[208] However, more fact-based speech, like commercial speech, receives less protection.[209]

Similarly, one could argue that entertainment products that appear to be real should receive less protection.[210] If there is no attribution, disclaimer, or age filter, then the speech is trying to present itself as a statement of fact, which receives less protection.[211]

2. PROXIMATE CAUSE: MORE POWERFUL, ADVERSE EFFECTS?

The next element in a negligence case is proximate cause.[212] Proximate cause is difficult for plaintiffs in media cases to show because: (1) the intervening action of the assailant breaks the chain of causation; and (2) when it comes to media effects, social science can only support correlation, not causation.[213] During the debate on whether to regulate video game violence, one of the main arguments against regulation was the lack of strong evidence of effects.[214] Similarly, the effects of virtual worlds are still unknown, with an even smaller body of research than courts and legislatures had with video games.[215]

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[208] *Id.*

[209] *See Central Hudson*, 447 U.S. at 563.

[210] *See generally* Laura Tate Kagel, Note, *Balancing The First Amendment And Child Protection Goals In Legal Approaches To Restricting Children's Access To Violent Video Games: A Comparison Of Germany And The United States*, 34 GA. J. INT'L & COMP. L. 743, 769–74 (2006); *supra* note 188 and accompanying text.

[211] *See Central Hudson*, 447 U.S. at 563. Creepy Pasta posted disclaimers after the Wisconsin crimes occurred. Scott Neuman, *Website Linked to Stabbing of 12-Year-Old Posts Disclaimer*, NPR (June 3, 2014, 8:49 PM), http://www.npr.org/blogs/thetwo-way/2014/06/03/318615699/website-linked-to-stabbing-of-12-year-old-posts-disclaimer.

[212] *See supra* Part III.A.

[213] *Id.*

[214] *See e.g.*, Brown v. Entm't Merchs. Assoc., 564 U.S. 786, 800 (2011) (requiring a direct causal link in order to support content-based regulation).

[215] *See generally* Robin Burks, *How Does Virtual Reality Affect the Brain? The Answer May Surprise You,* TECH TIMES (Nov. 25, 2014), http://www.techtimes.com/articles/20927/20141125/how-does-virtual-reality-affect-the-brain-the-answer-may-surprise-you.htm. The arguments will be similar to those made by critics of video games. *See*

Unfortunately, when there is a lack of empirical evidence, anecdotes tend to fill the vacuum.[216]

A few critics have argued that immersive virtual worlds may have stronger effects than traditional video games.[217] One argument is that minors are more affected because of a less developed sense of the fantasy-reality dichotomy.[218] One study found that 23% of users experienced mood modifications while in the virtual world,[219] and 15% of virtual world users experienced withdrawal when they were no longer immersed in it.[220] Furthermore, 28% of the subjects used the virtual world even if they did not enjoy it.[221] Additionally, 58% of men and 80% of women reported dreaming about themselves living in the virtual world.[222] Another study found that 30% of heavy users of

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e.g., Rick Nauert, *Negative effects of Violent Video Games May Build Over Time*, PSYCHCENTRAL (Dec. 11, 2012), http://psychcentral.com/news/2012/12/11/negative-effects-of-violent-video-games-may-build-over-time/48918.html.

[216] It is an "often reported finding that the normatively weaker, but more vivid anecdotal evidence is more convincing than the normatively stronger, but less vivid statistical evidence[.]" Hans Hoeken, *Anecdotal, Statistical and Causal Evidence: Their Perceived and Actual Persuasiveness*, 15 ARGUMENTATION 425, 428 (2001).

[217] *See* Monica Kim, *The Good and Bad of Escaping to Virtual Reality*, THE ATLANTIC (Feb. 18, 2015), http://www.theatlantic.com/health/archive/2015/02/the-good-and-the-bad-of-escaping-to-virtual-reality/385134.

[218] Nachshon Goltz, *ESRB Warning: Use of Virtual Worlds by Children May Result in Addiction and Blurring of Borders - the Advisable Regulations in Light of Foreseeable Damages*, 11 U. PITT. J. TECH. L. POL'Y 2, 13 (2010). "Six professional organizations in the health field found a connection between video games and behavior in minors: stating that more than 1000 studies point overwhelmingly to a causal connection between media violence and aggressive behavior in some children." *Id.*

[219] *Id.*

[220] NICK YEE, ARIADNE - UNDERSTANDING MMORPG ADDITION 4 (Oct. 2002), http://www.nickyee.com/hub/addiction/addiction.pdf.

[221] *See id.* at 5.

[222] NICHOLAS YEE, THE NORRATHIAN SCROLLS: A STUDY OF EVERQUEST 63 (2001), http://www.nickyee.com/report.pdf.

Second Life reported that the virtual world offers them a better quality of life than the real world.[223]

New evidence of powerful effects of immersive media would change the debate on causation. This could be in the form of social science showing a stronger correlation between violence and virtual reality than the evidence linking violence and contemporary video games.[224] Another development could be research from the "hard" sciences such as neuroscience, which could show stronger neurological effects of virtual reality immersion, as compared to contemporary media.[225] This type of evidence could be more acceptable to courts when establishing proximate cause.[226]

3. FORESEEABILITY: EXCEPTIONS PROVE THE RULE

The final and arguably most determinative element in a negligence case is foreseeability.[227] When plaintiffs sue media companies for media inspired violence, courts usually hold that a single incident is too idiosyncratic for a media company to be held liable for the injury caused by another.[228] But,

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[223] Heavy users are those who use Second Life 30 or more hours a week. JELLE ATTEMA & DAVID DE NOOD, SECOND LIFE: THE SECOND LIFE OF VIRTUAL REALITY 3 (2006) https://ecp.nl/sites/default/files/EPN_report_-The_Second_Life_of_Virtual_Reality_-_2006_October.pdf.

[224] *See* Kim, *supra* note 219.

[225] *See* Burks, *supra* note 217. *See generally* Susan Greenfield, *Modern Technology is Changing the Way Our Brains Work, Says Neuroscientist*, THE DAILY MAIL, http://www.dailymail.co.uk/sciencetech/article-565207/Modern-technology-changing-way-brains-work-says-neuroscientist.html (last visited Oct. 26, 2017).

[226] *See* Francis X. Shen, *The Law and Neuroscience Bibliography: Navigating the Emerging Field of Neurolaw*, 38 INT'L J. LEGAL INFO. 352, 352 (2010). "In the past five years, we have witnessed extraordinary growth in the amount of legal scholarship, legal practice, and public policy at the intersection of law and neuroscience." *Id.*

[227] *See* April M. Perry, *Guilt by Saturation: Media Liability for Third-Party Violence and the Availability Heuristic*, 97 Nw. U. L. Rev. 1045, 1048–50 (2003) (arguing that negligence claims hinge on foreseeability).

[228] *See id.* at 1064–65, 1073.

foreseeability is subjective.[229] Often it is a matter of familiarity—what was once unforeseeable becomes foreseeable once several similar incidents occur.[230]

The "availability heuristic" is a concept from psychology that states that when attention is focused on an odd or novel event, it makes it seem more common.[231] The news media often focuses on acts of random violence because it attracts more viewers compared to commonly occurring events.[232] This effect may be problematic to entertainment creators, as it may decrease the amount of evidence that a plaintiff needs to prove foreseeability in a negligence case.[233]

The nonstop coverage of random violence may give unsubstantiated power to the media texts that are said to inspire

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[229] *See id.* at 1052.

[230] This is common in products liability. A certain malfunction is found and the company will recall the product. They are often not held liable for certain malfunctions if they were not foreseeable. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 684–85 (Hornbook Series Student eds., 5th ed. 1984). But, if later versions of the product have such malfunctions, then it is foreseeable and the company can be held liable. *Id.* The webmaster for Creepy Pasta claimed that he was concerned for the overall obsession of fan girls:

> I've tried to contact writers who sent in things that troubled me – particularly teens who were clearly writing out their own unhealthy, violent revenge fantasies – and tried to direct them to websites or hotlines where they could find someone to talk to if they were having trouble. For the sake of both my own sanity and that of my readers, I have policies about flat-out rejecting things that I believed glorified abuse or suicide.

Statement on the Wisconsin Stabbing, CREEPY PASTA (June 3, 2014), http://www.creepypasta.com/statement-wisconsin-stabbing/.

[231] *See generally* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207, 207–09 (1973).

[232] During the Aurora Movie Theatre Shooting coverage, CNN News saw a 125% spike in viewership. *See* John Nolte, *MSNBC Lost Viewers as Colorado Shooting News Broke*, BREITBART (July 24, 2012), http://www.breitbart.com/big-journalism/2012/07/24/msnbc-lost-viewers-batman-shooting/.

[233] *See* Perry, *supra* note 229 at 1065, 1068.

it.[234] In our digital world, we are inundated with constant information, so events like mass shootings seem more commonplace.[235] The news coverage arouses public fear that a killer could strike at any moment in any place.[236] But it is only the amount of attention and available information that has increased, not the chances of an attack happening.[237] For example, media attention has created a false sense that mass shootings are a new phenomenon—but school shootings in the United States were first reported in the 1800s.[238] The Sandy Hook tragedy seemed like a unique occurrence, but a similar incident had occurred 23 years earlier in Stockton, California.[239]

Naturally, when tragedies occur, people search for an answer, often in a form of a scapegoat. The answer all too often is found in a "new" media.[240] This fear is especially strong for those who do not use the "new" medium and are unfamiliar with it.[241] This is usually an older population, which is also the population more likely to vote, serve in public office, and serve on juries. [242]

a. Incitement and Immersive Media

In an incitement case against the media, the plaintiff must prove that the speech was directed at producing imminent lawless action and that the speech was likely to cause lawless

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[234] *See id.* at 1065. After the tragedy at Columbine, "seventy-eight percent of the respondents stated that 'violence in the media deserved 'some' or 'a lot' of the blame for the recent mass shootings.'" *Id.* at 1066.

[235] *Id.* at 1063.

[236] *Id.*

[237] *Id.*

[238] Jack Schneider, *Long History of US School Shooting Means Obama is Right, NRA is Wrong*, THE CHRISTIAN SCIENCE MONITOR (Jan. 16, 2013), http://www.csmonitor.com/Commentary/Opinion/2013/0116/Long-history-of-US-school-shootings-means-Obama-is-right-NRA-is-wrong.

[239] *Id.*

[240] *See supra* Part I.

[241] *See supra* Part I.

[242] *See supra* Part I.

action.[243] Most incitement cases brought against the media have been dismissed because there is no call to action, as these texts are merely meant to entertain.[244] However, in *Byers*, the court did say that entertainment that glorifies violence may rise to a call to action.[245] But in the case of movies, there is also a story-telling value.[246] More immersive entertainment may not have that context—it may be merely a call to action, such as instruction to kill in order to become a proxy of the character.[247]

Another factor in incitement cases is the requirement of proximity.[248] Courts are reluctant to hold that a producer's speech, put in a movie or television show and consumed in a distant place and time, is geographically or temporally proximate enough to inspire a crime.[249] But, virtual reality may create a universe where the character is no longer a two-dimensional graphic on a screen; instead the image will now appear to be real and in person.[250] Add to that a social media presence in games, and that games can now be interactive and controlled by a person calling for such action.[251] In these cases, the factors may be more akin to the hitman manual in *Rice* and proximity may be established. [252] As the *McCollum* and *Davidson* cases suggest, publications that "clearly condone recipients of their message [to

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[243] *See* Hess v. Indiana, 414 U.S. 105, 108-109 (1973). As with negligence, incitement has an element of causation which similarly difficult to prove. *See supra* Part III.A.

[244] *See supra* Part III.C.

[245] *See* Byers v. Edmondson, 826 So. 2d 551 (La. Ct. App. 2002).

[246] *Id.* at 556.

[247] Slender Man meme did speak of children becoming proxies, though it is a tenuous to describe that as a call to action. *See supra* Part II.A.

[248] *See supra* Part III.C.

[249] *See* McCollum v. CBS, Inc., 202 Cal. App. 3d 989, 1007–08 (1988) (holding recorded song promoting suicide was not proximate cause of death).

[250] *See supra* notes 73–76 and accompanying texts.

[251] *See generally* F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293, 294–99 (2004–2005).

[252] Rice v. Paladin Enters., Inc. 128 F.3d 233, 239–43 (4th Cir. 1997) (holding that First Amendment does not bar incitement claim against publisher).

engage in violence], and perhaps only those that go so far as to exhort violence, will run the risk of liability."[253]

CONCLUSION

It is unlikely that the creators of the Slender Man will ever face liability for harms motivated by the character. The case law makes it difficult to win against entertainment producers on negligence or incitement claims. As the Fifth Circuit said in *Herceg v. Hustler Magazine*: "the constitutional protection accorded to the freedom of speech and of the press is not based on the naïve belief that speech can do no harm, but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas."[254]

Today, the benefits of ideas produced by entertainment products, even with their glorification of violence and fascination with the macabre, outweighs the harm of violence they may inspire. But, if more crimes are inspired by new media platforms, then things may change. More cases may be filed and more courts may be willing to hold media entertainment producers liable. Moreover, in the near future, when entertainment becomes even more immersive, more blame may be placed on the producers—especially if there is a fear of effects or more precise science showing powerful effects. If this happens, entertainment producers should expect courts to hold them to the same duty as companies in other markets.

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[253] L. Lin Wood & Corey Fleming Hirokawa, *Shot by the Messenger: Rethinking Media Liability for Violence Induced by Extremely Violent Publications and Broadcasts*, 27 N. KY. L. REV. 47, 64 (2000).

[254] Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1019 (5th Cir. 1987).

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A LEAGUE OF THEIR OWN: ARE PROFESSIONAL SPORTS LEAGUES IN CONTROL OF THEIR FRANCHISE TEAM'S BANKRUPTCY FILING?

ALEXA DUMITY

INTRODUCTION

Owning a professional sports team makes you a member of an exclusive club. Whether it is a team in the National Football League (NFL), Major League Baseball (MLB), the National Basketball Association (NBA), or the National Hockey League (NHL), it is a highly coveted ownership and membership that only the wealthiest can afford. But even the wealthiest run into financial trouble.

One of the goals of bankruptcy is to provide a debtor with relief from debt while also attempting to pay back as much value as possible to the debtor's creditors. What is one of the most exclusive assets a debtor can possess? A professional sports team. So, when a debtor runs into financial trouble, files for bankruptcy, and then tries to sell his team, how should it be regulated? The Bankruptcy Code provides no specific guidance. But, the bankruptcy court stepped in and regulated in *In re Dewey Ranch I*[1] and *In re Dewey Ranch II*.[2] Those cases arose when the NHL's Phoenix Coyotes filed for Chapter 11 bankruptcy in 2009, hoping to sell the team to the highest bidder.[3] The potential new owner had not gone through the NHL's membership approval process, and wanted to relocate the team to Hamilton, Canada.[4] Finding

[1] *In re* Dewey Ranch Hockey, LLC, 406 B.R. 30 (Bankr. D. Ariz. 2009).

[2] *In re* Dewey Ranch Hockey, LLC, 414 B.R. 577 (Bankr. D. Ariz. 2009).

[3] *In re* Dewey Ranch Hockey, LLC, 406 B.R. at 34.

[4] *Id.* at 34.

that the non-monetary interests of the NHL would not be adequately protected, the court prohibited a section 363 sale to the highest bidder.[5] The bankruptcy court then approved a sale to the NHL for a significantly lower bid.[6]

Professional sports leagues are a world unto themselves. Almost no other business is run in the same manner, and therefore the *Dewey Ranch* holding is almost completely inapplicable to any entity outside of a professional sports league. There are two ways to view the problems associated with professional sports leagues or their teams in bankruptcy. One perspective is that it may be up to the drafters of the Bankruptcy Code to provide guidance for these entities. Alternatively, bankruptcy law should take a backseat while the antitrust issues between leagues and member teams are resolved.

This Article first discusses the Phoenix Coyotes bankruptcy and subsequent antitrust case law that may influence future bankruptcy sales of professional sports teams. Then, this Note analyzes how the holding in *In re Dewey Ranch* I & II could potentially affect (1) other professional sports teams filing for bankruptcy, and (2) other business entities outside of professional sports leagues that file for bankruptcy.

I. THE PURCHASE PROCESS OF A PROFESSIONAL SPORTS TEAM

To purchase a sports team, first a team must be for sale.[7] In the four major leagues (NFL, MLB, NBA, NHL) there are 122 teams.[8] Additionally, professional sports teams are generally fixed in number and thus limited in quantity, and do not come up for

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[5] *In re* Dewey Ranch Hockey, LLC, 414 B.R. at 590–592.

[6] *Bankruptcy Approves Sale of Coyotes to NHL*, REUTERS.COM (Nov. 2, 2009), https://www.reuters.com/article/us-nhl-phoenix/bankruptcy-judge-approves-sale-of-coyotes-to-nhl-idUSTRE5A14B720091102.

[7] Jared F. Bartie, Daniel A. Etna & Irwin A. Kischer, *Navigating the Purchase and Sale of Sports Teams*, NEW YORK LAW JOURNAL, (October 26, 2015), http://www.herrick.com/content/uploads/2016/01/4977f9b2485cdedf36c66365f729c36b.pdf.

[8] *Id.*

sale often.[9] These teams are often sold for significant sums of money due to the demand being greater than the supply.[10]

Furthermore, each league has a constitution and bylaws regulating a team's sale and ownership.[11] Generally, a league's commissioner extensively interviews potential buyers and requires the buyers to submit to an in-depth background check; a comprehensive application; and disclosure of personal, professional, and financial information.[12] Each league differs, but many impose restrictions on (1) the number of investors in a buying group, and (2) the minimum investment required for eligibility to obtain either a majority or minority ownership interest. [13] Leagues are extremely careful to ensure that prospective owners have the resources to undertake team ownership and the related financial obligations.[14]

Other major due diligence considerations during this purchasing process are the arena or stadium, associated practice

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[9] *See id.* "The NHL's Chicago Blackhawks haven't changed ownership since 1954, the MLB's Chicago White Sox since 1981, the NBA's Indiana Pacer's since 1983, [and] the NFL's Arizona Cardinals since 1972 . . . ." *Id.*

[10] *Id.* In 2014 the NBA's Los Angeles Clippers sold for $2 billion dollars. Just before the Clippers sold, in 2014 the NBA's Milwaukee Bucks sold for $550 million. In 2012 the MLB's Los Angeles Dodgers sold for $2 billion. In 2008 the NFL's Miami Dolphins sold for $1.1 billion. Matt Haupert, *How Much Were These Sports Teams Sold For?*, BLEACHER REPORT (June 4, 2014), http://bleacherreport.com/articles/2085481-how-much-were-these-sports-teams-sold-for.

[11] Bartie, Etna & Kischer, *supra* note 7.

[12] *Id.*

[13] *Id.* For example, the NBA has a rule that there can be no more than 25 individual owners and each owner's stake must be at least 1%; also known as the "Jay-Z rule." *See* Zach Lowe, *Say Hello to the Jay Z Rule: The New NBA Cap Is on Ownership*, GRANTLAND (Jan. 29, 2015), http://grantland.com/the-triangle/say-hello-to-the-jay-z-rule-the-new-nba-cap-is-on-ownership. The NFL requires a group looking to buy the team to be led by a single individual who owns at least 30% of the team (essentially a single "face" of a team). Gary Davenport, *What Does it Take to Be the Owner of an NFL Franchise?*, BLEACHER REPORT (July 2, 2013), http://bleacherreport.com/articles/1690767-what-does-it-take-to-be-the-owner-of-an-nfl-franchise.

[14] Bartie, Etna & Kischer, *supra* note 7.

facilities, offices, and parking structures.[15] Facilities can be a source of significant revenue streams, and a potential owner needs to be aware of the condition of the team's current facilities.[16] If the government provided assistance for building an arena or stadium, it is likely that the government conditioned the assistance on the team entering into a non-relocation agreement.[17] Other due diligence considerations when buying a team are expenses; media rights; ticket and suite sales; sponsorship sales; concessions; and merchandise and other revenue opportunities.[18]

After the buyer and league complete their due diligence, the buyer and seller then draft the terms of the franchise sale agreement.[19] Even if the buyer and seller agree on the terms, final approval of the agreement rests with the existing owners of the league's other teams.[20] The owners have relatively wide latitude regarding approval or disapproval of prospective team owners.[21] The other teams' owners review the terms of the pending sale and vote on whether to approve the transaction.[22] Before this final vote, a subcommittee of owners works closely with the league on the pending transaction and must first approve the sale.[23] Once the existing owners approve a potential owner, the transaction is completed and the sale of the team is finalized.

The NHL Constitution and By-laws require consent of three-fourths of the league members for the transfer of a team's ownership.[24] The Constitution also provides that:

> (1) the league shall have exclusive control over all hockey games played by the member teams,

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[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See* Kevin R. Schulz, *Due Diligence in Acquiring a Sports Team*, LAW360 (Feb. 17, 2011), https://www.foley.com/files/Publication/1059d85d-8272-46d6-826e-5a2ac29176be/Presentation/PublicationAttachment/54480ad5-573e-4882-a9ea-5c934ae2d707/DueDiligenceInAcquiringProSportsTeam.pdf.

[19] Bartie, Etna & Kischer, *supra* note 7.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *In re* Dewey Ranch Hockey, LLC, 414 B.R. 577, 581 (Bankr. D. Ariz. 2009).

> (2) the home team shall have exclusive control over the hockey games played in its "home territory," and (3) no games and no franchises shall be granted in a home territory without the written consent of the home team.[25]

"Section 35 of the NHL By-Laws regarding transfers of ownership provides . . . that a proposed new owner should have 'sufficient financial resources to provide for the financial stability of the franchise' and have 'good character and integrity.'"[26] Section 36 of the NHL By-laws addresses transfer of location and requires "a detailed written application for a transfer be filed no later than January 1 of the year prior to the proposed transfer."[27] "An applicant 'shall be afforded an opportunity to make a presentation' to the NHL and its members and the members" may ask questions of the applicant regarding the transaction.[28] The By-Laws list twenty-four factors members may consider in voting on the transfer application, and also allow the league to require a transfer fee and an indemnification fee.[29]

Overall, the process of purchasing a NHL hockey team has a number of strict requirements and it can be a very time consuming and research-intensive process.[30] And even after a potential buyer meets those requirements, the league and team owners may still vote against the sale or relocation.

II. CHAPTER 11 BANKRUPTCY AND SECTION 363 OF THE BANKRUPTCY CODE

Section 363 sales in a Chapter 11 bankruptcy allow a trustee or debtor-in-possession (DIP) to use, sell, or lease property of the estate outside the ordinary course of business, as long as

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[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *See* Tania Kohut, *Sorry, Quebec City: Loonie, geography blamed for NHL team deferral*, GLOBAL NEWS (June 22, 2016, 6:37 PM), https://globalnews.ca/news/2780421/sorry-quebec-city-loonie-geography-blamed-for-nhl-team-deferral/.

there is notice and hearing of the sale.[31] A section 363 sale also provides the debtor the ability to (1) quickly dispose of depreciating assets, and (2) quickly liquidate an estate through a sale without a lengthy Chapter 11 reorganization plan.[32] Overall, the debtor receives significant benefits from the debtor's ability to sell free and clear of liens under section 363(f).[33] Free of these assets, a debtor can work toward paying off creditors and reorganizing successfully.[34] Creditors forego the administrative costs of confirming a plan and ideally a fair return on their claims.[35] Disclosure for a section 363 sale need only contain a description of the property and nothing more, not even the reason for the urgent sale.[36]

Courts generally take a supervisory role in section 363 sale procedures, typically deferring to the debtor's business judgment.[37] Usually the sale authorization process has two stages: (1) the court authorizes the sale and the bidding procedures; and (2) once the auction is complete, the court approves the result of the auction.[38] When there is an auction, many judges believe they should have limited or no involvement because auction results are a more accurate valuation without a judge's intervention.[39] As a result, courts generally defer to the debtor's business judgment and the best offer.[40] The best offer may not always be the highest,

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[31] Alla Raykin, *Section 363 Sales: Mooting Due Process?*, 29 EMORY BANKR. DEV. J. 91, 92 (2012).

[32] *Id.* at 94.

[33] *Id.* at 94 n.4 (citing 11 U.S.C. § 363(f)), ("The section allows such sales provided one of the following: (1) applicable nonbankruptcy law permits; (2) the entity consents; (3) the price of the property to be sold is greater than the aggregate value of all the liens on the property; (4) a bona fide dispute; or (5) the entity could be compelled in a legal or equitable proceeding to accept money satisfaction.").

[34] *Id.* at 95.

[35] *Id.*

[36] *Id.* at 97.

[37] *Id.* at 98.

[38] James H.M. Sprayregen & Jonathan Friedland, *The Legal Considerations of Acquiring Distressed Businesses: A Primer*, 11 J. BANKR. L. & PRAC. 3, 8 (2001).

[39] *Id.* at 9.

[40] Raykin, *supra* note 31, at 99.

but if a DIP chooses to accept a lower offer the DIP must have a compelling reason for why it is superior.[41]

Section 363(f) allows a trustee to sell property free and clear of a third party's interest under certain circumstances.[42] The trustee may sell property when applicable non-bankruptcy law (1) permits such a sale, (2) the third party consents, (3) its interest is a lien and the price of the property exceeds the aggregate value of all liens on the property, (4) the interest is in bona fide dispute, or (5) the entity could be compelled in a legal or equitable proceeding to accept money in satisfaction of its interest.[43] The trustee must provide adequate protection of the entity's interest in the property.[44]

The sale of "any interest" that an entity has in property of the estate has a cloudy scope for the purpose of section 363(f).[45] Some courts have limited the term to *in rem* interests in property,[46] but the trend seems to favor a broader definition that encompasses other obligations that may flow from the ownership of the property.[47] The loosely defined terms of a section 363 sale contrast sharply with the detailed requirements for selling a professional sports team in a non-bankruptcy context.[48] In that context, the requirements on how to sell are clearly outlined and all steps must be fulfilled before the sale is complete.[49] An example of one of the broadest applications of the definition of "interest" was the

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[41] *Id.*

[42] 3 COLLIER ON BANKRUPTCY ¶363.01 (16th ed. 2017).

[43] *Id.*

[44] *Id.*

[45] *Id.* at ¶ 363.06.

[46] *Id*. *See In re* Fairchild Aircraft Corp., 184 B.R. 910 (Bankr. W.D. Tex. 1995).

[47] *Id*. *See In re* Chrysler LLC, 576 F.3d 108, 126 (2d. Cir. 2009) (discussing that any interest in property for the purposes of 363(f) encompasses claims that arise from the property being sold). One court held that the term "interest" is intended to refer to obligations that are connected to, or arise from, the property being sold. *See In re* Leckie Smokeless Coal Co., 99 F.3d 573, 581 (4th Cir. 1996).

[48] *See generally* Bartie, Etna & Kirscher, *supra* note 7.

[49] *Id.*

attempted sale of a professional sports team, the NHL's Phoenix Coyotes, through section 363(f).[50]

III. THE BANKRUPTCY OF THE PHOENIX COYOTES

In January 1996, the NHL granted a change of ownership of the Winnipeg Jets.[51] The team moved to Phoenix, Arizona, and became the Phoenix Coyotes.[52] After originally playing in the Phoenix Suns' arena in downtown Phoenix, the City of Glendale and Arena Management Group, LLC built a new hockey arena in Glendale, Arizona in the early 2000s.[53] The contract to build the arena contained a covenant stating the Coyotes would play all its home games in the Glendale Arena, and would not play home games at any other location for thirty hockey seasons after the arena opened.[54]

The Coyotes have never been a particularly successful team in Arizona.[55] They did not make the playoffs the first six seasons in the new Glendale arena beginning in 2003, and they have lost money every year in Arizona through 2009.[56] In September 2006, Jerry Moyes purchased a controlling interest in the Coyotes.[57]

In August 2008, less than two years after Moyes purchased the Coyotes, he met with the NHL and advised them that he would no longer fund the operating losses of the Coyotes.[58]

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[50] 3 COLLIER ON BANKRUPTCY ¶363.01 (16th ed. 2017). The Phoenix Coyotes bankruptcy case is discussed in-depth in the following pages.

[51] *In re* Dewey Ranch Hockey, LLC, 414 B.R. 577 (Bankr. D. Ariz. 2009).

[52] *Id.*

[53] *See* Angela Gonzalez, *Coyotes Bound For Glendale in $180M Deal,* PHOENIX BUSINESS JOURNAL (April 11, 2001), https://www.bizjournals.com/phoenix/stories/2001/04/09/daily44.html; Emi Komiya, *The Coyotes in Glendale: The Arena Over Time*, Tennessean (June 10, 2015), http://www.tennessean.com/story/opinion/inside-12/2015/06/10/coyotes-glendale-arena-timeline/71017882/.

[54] *In re* Dewey Ranch II, 414 B.R. at 580. Glendale was required to advance $183 million dollars to build the arena. *Id.*

[55] *Id*. at 579

[56] *Id*.

[57] *Id*. at 580.

[58] *Id*.

The NHL then began advancing funds, thus becoming a secured creditor, to pay the Coyotes operating losses.[59] Once the NHL began to fund the operating losses of the team, the NHL and Moyes began to look for a new owner.[60]

In early 2009, Moyes took matters into his own hands and decided to market the team for sale.[61] In spring 2009, PSE Sports and Entertainment LP (PSE) contacted Moyes regarding the purchase of the Coyotes and a subsequent relocation to Hamilton, Ontario.[62] The principal of PSE was Jim Balsillie,[63] the co-CEO of Research in Motion.[64]

PSE and Balsillie had previously attempted to acquire a NHL team.[65] The inquiry about the Coyotes was the third attempt by PSE and Balsillie to purchase a NHL team.[66] In 2006, Balsillie attempted to purchase the Pittsburgh Penguins.[67] Balsillie was approved by the NHL to become an owner but the parties could not agree on a deal, based in large part on relocation issues and the NHL's right to purchase the team from Balsillie if he attempted to relocate the team.[68] Then in 2007, PSE and Balsillie entered into a non-binding term sheet to purchase the Nashville

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[59] Chris Rowe & Jeff Upshaw, *In re Dewey Ranch Hockey, LLC: The Bankruptcy of the Phoenix Coyotes*, TRACE: TENNESSEE RESEARCH AND CREATIVE EXCHANGE, (Spring 2013) http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1008&context=utk_studlawbankruptcy. The NHL gave the Coyotes $31.4 million in cash advances against its share of league-shared revenues in the 2008-09 season as well as a line of credit. *Id*.

[60] *In re* Dewey Ranch II, 414 B.R. at 580.

[61] *Id*.

[62] *Id.*

[63] *See James Balsillie*, FORBES PROFILE https://www.forbes.com/profile/james-balsillie/ (last visited Feb. 24, 2018). Research in Motion launched the briefly popular Blackberry phone. *Id.*

[64] David Friend, *RIM's Rise and Fall: A Short History of Research in Motion*, GLOBAL NEWS (Jan. 28, 2013, 6:25 AM), https://globalnews.ca/news/384832/rims-rise-and-fall-a-short-history-of-research-in-motion/.

[65] *In re* Dewey Ranch II, 414 B.R. at 581.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 581–82.

Predators and relocate them to Hamilton, Ontario. [69] They never completed a binding agreement, and the League never considered whether to approve a change of ownership or relocation.[70]

Initially, Moyes did not seriously consider PSE's inquiry to purchase the Coyotes.[71] But when no other offers came forward, Moyes began negotiations with PSE for the purchase of the Coyotes.[72] NHL Commissioner Gary Bettman advised Moyes not to pursue such a deal because the Coyotes would not be relocating.[73]

A. IN RE DEWEY RANCH I

On May 5, 2009 the Coyotes filed Chapter 11 bankruptcy and executed a purchase and sale agreement with PSE for the sale of the Coyotes conditioned upon the team moving to Hamilton, Ontario.[74] The choice to file for bankruptcy at this time was likely a strategic move for the Coyotes to accomplish a sale to PSE without the NHL's strict approval requirements and instead use the much less exacting requirements of a section 363 sale.

The Asset Purchase Agreement required that (1) PSE would pay the Coyotes $212,500,000 in cash for the team and most of its assets, including the rights as a member team in the NHL; (2) any bankruptcy court order approving the sale would expressly provide that the home games would be played in Southern Ontario, despite the NHL or its members' lack of consent or agreement; and (3) the Asset Purchase Agreement would terminate on June 29, 2009 if the bankruptcy court had not issued the requisite bankruptcy sale order.[75] The Debtors obtained an accelerated hearing on their motion to approve the sale because of the rapidly approaching expiration date of the Asset Purchase Agreement.[76]

On June 15, 2009, the bankruptcy court held a hearing on the Debtors' authority to sell the Coyotes and ability of PSE and

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[69] *Id.* at 582.
[70] *Id.*
[71] *Id.* at 580.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* at 582.
[76] *Id.*

Balsillie to relocate the team to Canada.[77] The Debtors and PSE argued that the bankruptcy court could allow the sale of the Coyotes to PSE and authorize the relocation of the team from Phoenix to Canada under section 363 and section 365 of the Bankruptcy Code.[78] The NHL argued that (1) league member agreements and documents must be assumed and assigned in their entirety including, but not limited to, the requirement to apply for and obtain the League's consent to any change in ownership or relocation; (2) the motion and related pleadings did not establish adequate protection of the League's interests; and (3) there was not a bona fide dispute of the NHL's interests in the Phoenix Coyotes.[79] Additionally, the NHL asserted that the outcome of granting the motion for the sale could "wreak havoc" in the professional sports industry, and that the Bankruptcy Code was neither intended to nor should be used to cause such devastation to the NHL or other professional sporting leagues.[80]

As such, the court considered two issues. First, under section 365 of the Code, could the court authorize the assumption and assignment of the Debtors' contract by removing a non-transferability provision from the contract?[81] Second, under section 363 of the Code, could the court authorize the sale and relocation of the Coyotes free and clear of any creditor's claim, including the NHL's claims and objections, if such claims or interests were non-enforceable under non-bankruptcy law, or in "bona fide dispute?"[82]

Section 365 allows for the assumption and assignment of executory contracts, and allows judges to strike anti-assignment clauses from an executory contract if the clauses harm creditors by preventing a debtor from realizing the full value of its assets.[83] Here, the Debtors argued that the requirement to play in Glendale

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[77] *In re* Dewey Ranch Hockey, LLC, 406 B.R. 30, 30 (Bankr. D. Ariz. 2009).

[78] *Id.* at 35.

[79] *Id.* at 34.

[80] *Id.*

[81] *Id.* at 36.

[82] *Id.* at 38.

[83] 11 U.S.C. § 365 (2012). *See also* 3 COLLIER ON BANKRUPTCY ¶ 365.08 (16th ed. 2017).

was an unlawful anti-assignment provision.[84]The NHL argued that the league grants member franchises the right to participate in the league, and if the court forced a sale based on the rejection of these documents, the NHL would not recognize the sold team in the league.[85] The Judge then considered the section 365 and section 363 sale arguments.[86]

Regarding the ownership terms, the court found that without the relocation issue, there would be no problem proceeding under section 365 for the sale.[87] The NHL had already approved PSE to become a member of the NHL.[88] However, section 365 has other requirements to assume and assign an executory contract. It generally requires (1) curing of enforceable default(s); (2) compensation for any actual pecuniary loss resulting from such default(s); and (3) providing adequate assurance of future performance.[89] The court then considered if these requirements would be met if a relocation were to ensue.[90] The court found the requirement of adequate assurance of future performance could not be met because of the Coyotes' other contract with the City of Glendale to play all home games in Glendale.[91] The Debtors and PSE argued that the requirement to play all home games in the Glendale Arena was an unenforceable provision because it prohibits, restricts, or conditions the assignment under section 365(f), and thus could be excised from the contract under existing case law.[92] While the court acknowledged there had been some short distance relocations of franchises in existing case law, a bankruptcy court had never decided something of this magnitude (Phoenix, Arizona to Hamilton, Ontario).[93] The court then determined it could not excise the requirement to play all games at the Glendale Arena under section 365.[94] The court added that either the requirement (1) of adequate assurance of future performance, or (2) of future

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[84] *In re* Dewey Ranch Hockey, LLC, 406 B.R. 30, 37 (Bankr. D. Ariz. 2009).

[85] *Id.*

[86] *Id.* at 36–40.

[87] *Id.* at 36.

[88] *Id.*

[89] 3 COLLIER ON BANKRUPTCY ¶ 365.06 (16th ed. 2017).

[90] *In re* Dewey Ranch I, 406 B.R. at 36.

[91] *Id.* at 37.

[92] *Id.*

[93] *Id.*

[94] *Id.*

compensation for any actual pecuniary loss resulting from default, dictated that this economic right of the NHL must be appropriately resolved for the motion to satisfy the section 365 requirements.[95]

The court then turned to the Debtors' assertion that under section 363 the court could authorize the sale and relocation of the Phoenix Coyotes free and clear of the geographic limitation in the agreements, notwithstanding the objection or lack of consent of the NHL.[96] The Debtors argued that the sale could proceed as described under either section 363(f)(1) or section 363(f)(4).[97] Section 363(f)(1) allows a sale free and clear of other's interests where "applicable non-bankruptcy law permits sale of such property free and clear of such interest."[98] Section 363(f)(4) allows a sale free and clear where "such interest is in bona fide dispute."[99] The Debtors argued that the applicable non-bankruptcy law pertinent to section 363(f)(1) was antitrust law.[100] And since the Debtors had filed an antitrust action two days after filing for bankruptcy, the Debtors claimed that the interest was in bona fide dispute for section 363(f)(4).[101] Based on Ninth Circuit antitrust law,[102] the court was uncertain whether applicable non-bankruptcy law (antitrust law in this case) would permit the sale.[103] Additionally, because it was unclear how a court would rule in the antitrust action, it was unclear whether there actually was a bona fide dispute.[104] Simply having terms and conditions on relocations

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[95] *Id.*

[96] *Id.* at 38.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* For more on the antitrust action *see infra* Section V.

[102] *Id.* at 38–39. *See* Nat'l Basketball Ass'n v. SDC Basketball Club, 815 F.2d 562, 568 (9th Cir. 1987) (holding that professional sports league franchise movement restrictions are not invalid as a matter or law, and question of reasonable restraint is a matter of fact); L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1397 (9th Cir. 1984) (holding that the unique nature and structure of the NFL product precludes application of per se antitrust rule and to withstand antitrust scrutiny, restriction on team movement must be closely tailored to the needs inherent in producing the NFL Product).

[103] *In re* Dewey Ranch Hockey, 406 B.R. at 39.

[104] *Id.* at 40.

of member teams was not a clear antitrust violation.[105] Because of lack of clarity and lack of clear precedent on the antitrust claims, the court could not find that the Phoenix Coyotes could be sold free and clear of the NHL's interests.[106]

Additionally, the Debtors argued that the court needed to make a decision by the June 29 deadline outlined in the Asset Purchase Agreement with PSE. [107] But, the court was not convinced that it should order the NHL to decide the relocation application by the deadline due to other circumstances.[108] Other professional sports leagues also filed statements arguing that granting this motion could "wreak havoc" on professional sports.[109]

The Bankruptcy Court then scheduled two auctions.[110] The first was a Glendale only auction, for parties wishing to keep the Coyotes in Glendale, and the second was open to all bidders. [111] There were three potential bidders prior to the auctions closing: PSE, Reinsdorf Group, and Ice Edge.[112] By the deadline to submit a bid (August 25, 2009), the Reinsdorf Group and Ice Edge had publicly announced they would not submit a bid to either of the auctions.[113] Reluctantly, the NHL chose to submit a bid because doing so was in the best interests of the NHL, the Coyotes, Glendale, and the creditors.[114] The NHL's bid was $140,000,000 and would keep the Coyotes in Glendale. [115] PSE's final bid was $212,500,000 to relocate the Coyotes, and would have increased

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[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* It was a particularly busy time of the year for the NHL because of the Stanley Cup playoffs that were ongoing at this time.

[109] *Id.* at 42. Glendale also argued that the harm to Glendale if the Phoenix Coyotes were allowed to leave was far greater than the minor benefit to the creditors. However, the court acknowledged that the proposed sale to PSE might, and probably would, provide significant payment the general creditors. *Id.* at 40–41. *See also* Ryan Gauthier, Case Comment, *In re Dewey Ranch Hockey*, 1 HARV. J. SPORTS & ENT. L. 181, 189 (2010).

[110] *In re* Dewey Ranch Hockey LLC, 414 B.R. at 582.

[111] *Id.* at 582–585.

[112] *Id.* at 585.

[113] *Id.*

[114] *Id.*

[115] *Id.*

to $242,500,00 if Glendale had accepted PSE's offer of $50,000,000 to withdraw the City's objection to the sale to PSE.[116]

B. IN RE DEWEY RANCH II

A hearing on September 30, 2009 ended the dispute between the parties. PSE and the Debtors argued it was unfair for the NHL to bid on the team because the League's "insider status" would make their bid more favorable than PSE's bid.[117] PSE and the Debtors also argued that there was a conflict of interest in the decision to approve Balsillie for ownership of a team, because the NHL had planned to submit its own bid.[118] The main objective of PSE's and the Debtors' arguments was to convince the court to authorize the team's relocation based on section 363 and section 365 of the Code.[119] The NHL obviously opposed these claims, and raised a similar argument as in *In Re Dewey Ranch I*, specifically that the court had no basis to relocate the team under section 365.[120] Additionally, the NHL argued that the Coyotes could not be sold to PSE under section 363 because its interests were not adequately protected under section 363(e).[121] Section 363(e) states that when selling property under section 363, a court "shall prohibit or condition such . . . sale . . . as is necessary to provide adequate protection" of the parties' interests.[122]

The court focused its analysis on section 363 of the Code. [123] For the purpose of the analysis, the court assumed that the interests of the NHL were subject to bona fide dispute satisfying section 363(f)(4) to effectuate a sale free and clear of any liens.[124] The bankruptcy court has the discretion under section 363(e) to prohibit or condition a proposed sale if interests are not adequately

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[116] *Id.* at. 587.
[117] *Id.* at 588 n.1.
[118] *Id.* at 588.
[119] *Id.* at 589.
[120] *Id.*
[121] *Id.*
[122] 11 U.S.C. § 363(e) (2012).
[123] *In re* Dewey Ranch II, 414 B.R. at 590.
[124] *Id.* At this time because of pending litigation in the antitrust claim, it was still undecided whether the interest was in bona fide dispute.

protected.[125] Here, the court found it exceedingly difficult to protect the NHL's non-economic interests.[126] PSE argued that paying the required relocation fee could protect the NHL's interests.[127] The NHL argued its interests were that they have rights to: (1) admit only new members who meet its written requirements; (2) control where its members play their home hockey games; and (3) impose a relocation fee, if appropriate, when a member team relocates.[128] The court struggled with how to adequately protect the first two non-economic rights if the team was sold to PSE and relocated.[129] The court mentioned that section 363(e) had very little case law, and none of that case law was applicable to this case.[130] The court then interpreted section 363(e) to mean the court should prohibit sales where the interests could not be adequately protected.[131] Because the court did not know how to adequately protect all of the NHL's interests, it could not approve the sale and relocation.[132] The NHL was required to amend its bid, and on November 2, 2009, the Court approved the sale to the NHL.[133]

C. THE QUESTIONABLE APPLICATION OF SECTION 363(E) TO THE PHOENIX COYOTES BANKRUPTCY

Section 363(e) of the Code does not necessarily require a court to prohibit a sale if adequate interests are not protected. The language offers a court the ability to "prohibit" or "condition" the sale to protect interests adequately.[134] With very little case law, the Bankruptcy Court could have conditioned a sale based on

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[125] 3 COLLIER ON BANKRUPTCY ¶ 363.05 (16th ed. 2017).

[126] *In re* Dewey Ranch II, 414 B.R. at 591.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.* at 591–92.

[132] *Id.* at 591–92 (citing *In re* Magness, 972 F.2d 689, 697 (6th Cir. 1992) ("The interest of the persons presently involved in this orderly succession cannot adequately be protected in any manner except by prohibiting the sale and assignment of the membership")).

[133] Reuters Staff, *Bankruptcy judge approves sale of Coyotes to NHL*, REUTERS (Nov. 2, 2009, 12:03 PM), https://www.reuters.com/article/us-nhl-phoenix/bankruptcy-judge-approves-sale-of-coyotes-to-nhl-idUSTRE5A14B720091102.

[134] 11 U.S.C. § 363(e) (2012).

adequate protection of the NHL's interests, as opposed to completely prohibiting it. This could have left time for the antitrust lawsuit to determine whether the NHL's non-economic interests could be adequately protected. It is interesting that the court in the Phoenix Coyotes' case decided to prohibit the sale altogether under section 363(e), thereby setting a precedent for other sports teams attempting this same route, as well as other industries trying to proceed under section 363 for a sale free and clear of any liens.

Most likely, the outcome here was one of extreme caution. Prohibiting all section 363 sales where every interest, economic or non-economic, is not adequately protected is an extreme response to this issue. Especially because in the Phoenix Coyotes case, there appeared to be a conflict of interest with the secured creditor also being the only other bidder in the auction of team.[135] The results of the *In re Dewey Ranch* cases gave enormous deference to the NHL, an entity that was also a secured creditor and the only bidder in the Glendale-only auction. It also set a strict precedent for any other section 363(e) claims since there is almost no case law on the provision.

This result begs the question of whether the bankruptcy process is meant to protect the debtor, the creditors, or even the integrity of a professional sports league or its potentially arbitrary rules. If the bankruptcy process is meant to protect the debtor, here it is not. By not allowing the debtor to maximize his assets and by selling to the highest bidder, the debtor has less money to repay his debts. If the bankruptcy process is meant to protect the creditors, unless the lower bidder is paying the creditors in full in its bid, it is not protecting the unsecured creditors' interests. In the situation where they are not being paid in full as part of the bid, the unsecured creditors are likely receiving less because of the court's decision to reject the higher bid for the sale of the team, which could have given the unsecured creditors a greater return on their claims. So, in the situation of the bankruptcy of a professional sports team, the bankruptcy process is more lenient to the league than other parties.

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[135] *In re* Dewey Ranch, 414 B.R. at 588.

IV. ANTITRUST ISSUES

In May 2009, the Coyotes filed an adversary proceeding as part of the pending bankruptcy proceeding against the NHL.[136] The Coyotes sought to enjoin the NHL from preventing the sale of the Coyotes in violation of sections 1 and 2 of the Sherman Act.[137] The team sought relief under both federal and state antitrust laws, and claimed impending loss or damages resulting from the NHL's exercise of market power in preventing the Coyotes from moving to Canada.[138]

Article 4.3 of the NHL's Constitution states: "No franchise shall be granted for home territory within the home territory of a member without the written consent of such member."[139] The provision is especially pertinent to the Coyotes dilemma because the proposed relocation to Hamilton would have placed the Coyotes in the "home territory" of the Toronto Maple Leafs, as well as very close to the home territory of the Buffalo Sabres.[140] The Coyotes argued that permitting another franchise to exercise veto power over a competitor's relocation is anticompetitive and detrimental to consumers who benefit from increased competition.[141] The Coyotes also argued that other provisions in the NHL's Constitution and By-Laws pertaining to relocation "are equally exclusionary and anticompetitive and are without pro-competitive justification."[142]

Section 1 of the Sherman Act prohibits any concerted actions that unreasonably restrain trade.[143] To establish concerted action, defendants must not have been acting independently and

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[136] Elizabeth Blakely, Comment, *Dewey Ranch and the Role of the Bankruptcy Court in Decisions Relating to Permissible Control of Nationals Sports Leagues Over Individual Franchise Owners*, 21 SETON HALL J. SPORTS & ENT. L. 105, 113 (2011).

[137] *Id.*

[138] *Id.*

[139] *Id.* at 114.

[140] *Id.*

[141] *Id.* Although there is the league's concern of competitive balance if there are too many teams in one location, in this case all three teams would be operating in different cities.

[142] *Id.* Specifically, Section 4.2 provides: "No member shall transfer its club and franchise to a different city or borough. No additional cities or boroughs shall be added to the League circuit without consent of three-fourths of all the members of the League." *Id.*

[143] 15 U.S.C. § 1 (2012).

in a way that indicated a conscious commitment to a common plan designed to achieve an unlawful objective.[144]

Historically, most professional sports leagues have faced antitrust challenges under section 1.[145] Many leagues have attempted to defend these allegations by characterizing themselves as single entities.[146] As single entities, the leagues would not be subject to section 1 claims because the concerted conduct of individuals (different entities within the league) would not be present.[147] The Supreme Court finally clarified the issue of whether a sports league is a single entity in *American Needle v. National Football League*.[148]

The issue arose when the NFL granted exclusive headwear rights to Reebok, and American Needle brought suit stating that this exclusive licensing agreement violated section 1.[149] The NFL argued that it was incapable of conspiring under section 1 because the NFL and its member teams must be considered a single entity.[150] The Seventh Circuit held that the NFL and its teams operate as a single entity for antitrust purposes, and American Needle petitioned for certiorari from the Supreme Court.[151] The Supreme Court chose to review the American Needle case specifically to determine whether the NFL is exempt from antitrust scrutiny under section 1.[152] The Supreme Court held that "[e]ach of the [NFL] teams is a substantial, independently owned, and independently managed business" and "[w]hen each NFL team licenses its intellectual property, it is not pursuing the 'common interests of the whole' league but is instead pursuing interests of each 'corporation itself . . . ."[153] For antitrust purposes,

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[144] Blakely, *supra* note 136, at 115.

[145] *Id.* Major League Baseball is the only league that has escaped most antitrust scrutiny since it was awarded an antitrust exemption in 1922 that has been reaffirmed in several cases by the Supreme Court. *Id.* at n.73.

[146] *Id.*; *see also* Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25 (1991).

[147] Blakely, *supra* note 136, at 117.

[148] 560 U.S. 183 (2010).

[149] *Id.* at 187.

[150] *Id.* at 188.

[151] *Id.* at 188–89.

[152] *Id.* at 189.

[153] *Id.* at 196–97.

the Court determined that decisions by the NFL regarding teams' intellectual property amounted to concerted action within the meaning of section 1 because they were individuals and not a single entity.[154] This case established a precedent that will likely prevent sports leagues from asserting the single entity defense in federal courts again.[155]

The *American Needle* decision came down in 2010, less than a year after *Dewey Ranch* was finalized. It can be argued that if *American Needle* occurred prior to *Dewey Ranch*, it may have affected the outcome. *In re Dewey Ranch I* relied heavily on the lack of decision on whether non-bankruptcy law would allow the sale.[156] However, *In re Dewey Ranch II* merely assumed that there was a bona fide dispute, allowing for the idea that there may be a valid antitrust issue, and even then the NHL's interests could not be adequately protected.[157]

V. EFFECT OF THE *DEWEY RANCH* CASES ON A BANKRUPTCY SALE OF A PROFESSIONAL SPORTS TEAM

The most obvious lesson from the *Dewey Ranch* holdings for professional sports team owners is to exercise caution when they try to sell a team through a bankruptcy sale. While the NHL heavily speculated in *Dewey Ranch* whether the Coyotes were attempting to use the bankruptcy to push the sale to PSE through, that view was never confirmed. It is entirely possible that Moyes found a viable bidder and was ready to be done drowning in the Coyotes' debt. He could have been in serious financial strain and needed the sale and the bankruptcy to pay off his creditors and receive some relief, just like many other debtors who file Chapter 11. As discussed before, the price tag to purchase a team is at an all-time high, and there are a number of teams that are not particularly profitable. The allure of owning a team may be attributable to the exclusivity of it, rather than the profitability (although many teams are very profitable). It is reasonable to assume that there could be another bankruptcy of a sports franchise, with an intention to sell a team to relieve a debtor of significant debts.

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[154] *Id*. at 202–03.
[155] Blakely, *supra* note 136, at 123.
[156] *See* discussion *supra* Section IV A. *In re Dewey Ranch I*.
[157] *See* discussion *supra* Section IV B. *In re Dewey Ranch II*.

The *American Needle* decision post-*Dewey Ranch* could be significant in the bankruptcy sale context for a professional sports league. The Bankruptcy Court for the Coyotes bankruptcy decided it could not adequately protect the interest of the NHL under section 363(e) because of the NHL's right to admit new members, and the NHL's right to determine where a team can play.[158] If the teams are independently owned and operated businesses, it could be up to them to determine where they can play, and how to determine who can be a member. The NHL, or other professional sports league, regulating this process of individual entities could be seen as a concerted action, as in *American Needle*, and therefore section 363(e) may not be available to a league as a defense to a section 363 sale, assuming the buyer agrees to pay the league's relocation fee.

The outcome of a section 363 sale of a professional sports team in bankruptcy may be significantly different if the new owner does not wish to relocate the team, or the league is not a secured creditor. If a new owner does not wish to relocate the team, and league's non-monetary interests are reduced to the exclusive membership process, this may not be an interest that warrants adequate protection. Conversely, if the league were not a secured creditor, it may not have an interest that would need to be adequately protected under section 363(e) depending on the circumstances.

Therefore, if a professional sports league owner needs to submit himself to the bankruptcy process to receive the same relief that other debtors filing bankruptcy receive, he may be able to sell the sports team to any buyer, regardless of objections by the league. The seller must take caution to ascertain that the requirements of section 363 are met and understand the risk that a bankruptcy court may find that the league's interests are not adequately protected under section 363(e). Additionally, there is the possibility that a court could condition a section 363 sale to proceed as long as the interests of the league are adequately protected, thereby fulfilling section 363(e). There has not been enough case law or guidance beyond *Dewey Ranch* to determine what the bankruptcy court may do in this situation. In any case, a professional sports team owner should not be excluded from the relief of a Chapter 11 filing, and the creditors should not be

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[158] *See In re* Dewey Ranch Hockey, LLC, 414 B.R. 577, 590–92 (Bankr. D. Ariz. 2009).

punished by receiving a smaller payout because of the league's interests.

VI. APPLYING *DEWEY RANCH* BEYOND THE SPORTS WORLD

The business of professional sports is specific and unique. All the teams in a league work together through competition to create one product—competitive sporting events. Therefore, the applicability of *Dewey Ranch* outside of the sporting context is likely limited. Leagues and teams operate at almost a vertical monopoly, with a union to protect players' rights, and team owners to ensure competitive balance within the league. Due to antitrust concerns, there is likely no parallel to this structure outside of professional sports teams.

One of the closest parallels to a professional sports league and its member teams would be a franchisor-franchisee relationship. The judge in *Dewey Ranch* used the same analogy:

> [T]he assertion here is akin to a purchaser of a bankrupt franchise in a remote location asserting that it can be relocated far from its original agreed site to a highly valuable location, for example to New York City's Times Square, because the contractual geographic requirement/limitation is a restriction, prohibition, or condition precluding assignment.[159]

However, this analogy does not seem to be completely accurate, nor does this situation seem to elicit the same holding or consequences as in *Dewey Ranch*. Generally, the relationship between franchisor and franchisee is mainly monetary. Some franchisors require new franchisees to submit to background checks and comply with certain membership restrictions, and some require the franchise to be in specific locations. However, many of the franchise problems can be resolved with money. If a franchisee wishes to run their business in a specific location, the franchisor likely is indifferent as long as the franchisee can continue to make their payments of royalty fees. Additionally, if the franchisor is worried about its interest being adequately

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[159] *In re* Dewey Ranch Hockey, LLC, 406 B.R. 30, 37 (Bankr. D. Ariz. 2009).

protected, it likely could put a monetary value on that concern based on a franchisee in a location where the other franchisee wished to move. Both parties could likely be compensated for a relocation. Therefore, the specific interests in the sports context (to determine where a team can play and who can be a member) are not relevant as long as the franchisor is getting paid and the franchise is being used within the contract terms.

Shopping malls and their retailers are potentially another business similar to professional sports leagues. A shopping mall owner regulates what businesses may lease space in the mall and how a retailer can become a member of the shopping mall experience. However, the *Dewey Ranch* outcome would be inapplicable to a shopping mall because the Bankruptcy Code has a specific provision to deal with shopping malls and bankruptcy. Under section 365(b)(3), a debtor may not assign a shopping center lease unless: (1) the assignee can prove that its finances and operating condition will be similar to the debtor; (2) the assignment is subject to existing lease provisions, including, but not limited to, radius, location, use, or exclusivity; and (3) the assignment does not disrupt the tenant mix or balance in the shopping center.[160]

Should a specific provision in the code be created for professional sports leagues? The assumption would be that not enough of them enter Chapter 11 bankruptcy to warrant a provision in the Code. However, when professional sports teams do enter bankruptcy, there is very little guidance in the Code, and based on existing case law (*Dewey Ranch*), very little relief offered to team owner debtors. It appears that a bankruptcy court must make an antitrust determination or have a previously made antitrust determination to proceed with a sale of a professional sports team in bankruptcy. Leaving the antitrust decision up to a bankruptcy court may be outside the scope of what a bankruptcy court should decide. The shopping center provision in the Code provides guidance on some very similar concerns as a professional sports league, mainly that having too many teams or retailers in a single market will not upset the competitive balance of the league or shopping mall. However, the NHL and other professional sports leagues appear to be significantly concerned with the exclusivity of their members and membership process, which is not addressed in the shopping mall provision, and probably should not be. While a Code provision could provide guidance, ultimately

[160] 11 U.S.C. § 365(b)(3) (2012).

the antitrust issue likely needs to be resolved outside of bankruptcy court to provide clear guidelines to professional sports teams entering bankruptcy.

It is possible that some of these issues may arise with future digital trends. Streaming services come to mind, if only because there are a few companies that monopolize the market and compete with one another for digital media content like Netflix, Hulu, Amazon Video, and HBO GO. If one entity were to purchase these digital streaming services, it could create a professional sports-like universe within the bounds of digital streaming. However, digital streaming services do not have to worry about relocation issues since they exist digitally.

Ultimately, while the boundaries of the *Dewey Ranch* holding seem to specifically target professional sports leagues, it could extend to other types of businesses. This extension could occur where a business that basically had a monopoly over one industry, and that monopoly was maintained by the business keeping a roster of members below it, and the membership was exclusive and tied to specific territorial locations. In this scenario, the main business would have the power to prohibit any debtor sales under section 363 because its non-monetary interests will never be adequately protected as required under section 363(e). Thus, a bankruptcy should prohibit the sale.

CONCLUSION

The bankruptcy filing of the Phoenix Coyotes and the subsequent dispute has left an interesting mark on the business of professional sports leagues and bankruptcy filings. At the time of the Phoenix Coyotes bankruptcy, there was conflicting antitrust case law, and now it has been determined that professional sports teams are independently owned and operated, and leagues are not a single entity. This could create an opening for a bona fide dispute claim to effectuate a sale against the league's wishes. But even with this new antitrust case law, the *Dewey Ranch* holding specifically prohibits a section 363 sale if the interests cannot be adequately protected, both economic and non-economic. And, there was no resulting guidance from the *Dewey Ranch* cases on whether a non-economic interest is compensable. Any subsequent bankruptcy filings by a professional sports team attempting to sell their team and relocate them under a section 363 sale, should be done with caution and attempt to protect all the various interests. The outcome of a section 363 sale in a case where the league is not a secured creditor, or the party interested is not attempting to

relocate the team may be significantly different, so a section 363 sale may still be an adequate remedy for a debtor. However, finding a buyer who is willing to take on a team in an unsuccessful market may be more difficult than a buyer who is willing to relocate the team to a potentially more profitable market. Outside of the professional sports context, the *Dewey Ranch* holding is likely unusable. No other entities are run like a professional sports league—the closest being a shopping mall, where the Bankruptcy Code provides for specific protection when lessors enter bankruptcy. However, as many sports teams are cash strapped, it is absolutely possible that the same scenario as in *Dewey Ranch* will arise again. It is also possible that there could be a significantly different outcome because of clarification and binding precedent on antitrust issues in sports, or future Bankruptcy Code revisions regarding professional sporting teams in bankruptcy, or even more possibly, new section 363(e) case law on how to protect non-economic interests.

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FRANKLY, MY DEAR, I DON'T GIVE A *DARN*—AN ARGUMENT AGAINST CENSORING BROADCAST MEDIA

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"*Writers don't use expletives out of laziness or the puerile desire to shock or because we mislaid the thesaurus. We use them because, sometimes, the four-letter word is the better word—indeed, the best one.*" —Kathryn Schulz[1]

"*Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power.*" —Justice Anthony Kennedy[2]

INTRODUCTION

The First Amendment bars the government from restricting any speech because of its content.[3] Consequently, the

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[1] Kathryn Schulz, *Ode to a Four-Letter Word*, N.Y. MAGAZINE (June 5, 2011), http://nymag.com/arts/books/features/adam-mansbach-2011-6/index1.html.

[2] Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 805 (1996) (Kennedy, J., concurring and dissenting in part).

[3] *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down a statute that proscribed cross-burning and displaying swastikas because the statute discriminated based on viewpoint); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First

government cannot suppress a particular subject matter (*e.g.*, abortion) or viewpoint (*e.g.*, pro-life).[4] Within this framework, courts consider viewpoint-based regulations of speech particularly egregious because such regulations "pose the inherent risk that the Government [will] . . . suppress unpopular ideas or information" or will "manipulate the public debate through coercion rather than persuasion."[5]

Moreover, the Supreme Court explicitly extends First Amendment protection to "indecent" speech[6] (*i.e.*, speech that "describe[s] or depict[s] sexual or excretory organs or activities" in a "patently offensive" manner).[7] In *Cohen v. California*, for example, the Court held that Paul Cohen could not be convicted of disturbing the peace for wearing a jacket that read "Fuck the

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Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

[4] Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLE. ST. L. REV. 199, 201 (1994).

[5] Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 641 (1994). *See also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); *R.A.V.*, 505 U.S. at 430 (Stevens, J., concurring and dissenting in part) ("[In] the matter of content-based regulations, we have implicitly distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious.") (emphasis in original); Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 56 (2000) (noting that subject-matter-based restrictions are rarely upheld, but the Court has *never* upheld a viewpoint-based restriction on speech).

[6] *See, e.g.*, Sable Commc'n of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("[S]exual expression which is indecent but not obscene is protected by the First Amendment . . . ."); Eaton v. City of Tulsa, 415 U.S. 697, 698 (1974); Papish v. University of Missouri Curators, 410 U.S. 667, 669 (1973); Brown v. Oklahoma, 408 U.S. 914 (1972); Lewis v. City of New Orleans, 408 U.S. 913 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Cohen v. California, 403 U.S. 15, 18 (1971).

[7] Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8002 ¶ 7 (2001).

Draft" in the Los Angeles County Courthouse.[8] In an opinion by Justice Harlan, the Court held that the State cannot "remove [an] offensive word from the public vocabulary," even if it is acting under the auspices of "guard[ing] the public morality."[9]

Similarly, in *Erznoznik v. Jacksonville*, the Court struck down as unconstitutional a local ordinance making it a crime for drive-in movie theatres to show movies containing nudity.[10] The Court began by "pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers."[11] "[O]ur pluralistic society," the Court noted, is "constantly proliferating new and ingenious forms of expression," much of which "offends our esthetic, if not our political and moral, sensibilities."[12] Nonetheless, the government is not allowed to "discriminate[] among movies solely on the basis of content."[13] To hold otherwise would allow the government to act as a censor, "shield[ing] the public from some kinds of speech on the ground that they are more offensive than others."[14] "[T]he First Amendment strictly limits [this] power."[15]

In both *Cohen* and *Erznoznik*, the Court noted that the rights of the viewer are often subservient to the rights of the speaker: "[T]he burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[16] So, while the government has a strong interest in protecting its citizens' right to privacy, content-based speech discrimination is not a constitutionally permissible means to protect individual privacy interests.[17] "Any ordinance which regulates movies on the basis of content . . . impermissibly intrudes upon the free speech rights guaranteed by the First and Fourteenth Amendments."[18]

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[8] Cohen v. California, 403 U.S. 15, 26 (1971).

[9] *Id.* at 22–23.

[10] Erznoznik v. City of Jacksonville, 422 U.S. 205, 206, 217 (1975).

[11] *Id.* at 208.

[12] *Id.* at 210.

[13] *Id.* at 211–12.

[14] *Id.* at 209.

[15] *Id.*

[16] *Id.* at 210–11 (citing Cohen v. California, 403 U.S.15, 21 (1971)) (alterations in original) (internal quotations omitted).

[17] *See id.* at 210–12.

[18] *Id.* at 218 (Douglas, J., concurring).

The *Cohen* and *Erznoznik* decisions illustrate several important points regarding the regulation of indecent speech: (1) indecent speech is constitutionally protected; (2) content-based restrictions on indecent speech are presumptively unconstitutional; (3) the rights of the viewer or listener are usually inferior to the rights of the speaker; and (4) the government may only suppress indecent speech if "it [is] impossible for an unwilling individual to avoid exposure to it."[19] In short, the government cannot act as a censor, even if it is trying to shield the public from offensive speech.

The Court, however, has largely ignored the *Cohen* rationale within the context of broadcast media.[20] Most notably, in *FCC v. Pacifica Foundation* the Court held that speech broadcasted over the airwaves has less protection than speech delivered through different media.[21] In ruling for the Federal Communications Commission (FCC), the Court recognized the government has substantial interests in preventing unwanted speech from entering people's homes and shielding children from potentially offensive speech.[22]

This article argues that modern technology has eroded *Pacifica*'s doctrinal underpinnings to the point that the FCC's indecent speech regulations are now unconstitutional under the First Amendment. Part I discusses the frequently cited purposes underlying the freedom of speech and how those purposes are hindered by the *Pacifica* decision and its ilk. Part II gives a brief history of how the Court has grappled with the First Amendment (which was written using a quill and ink) as applied to electronic media. Part III argues that recent technological developments—*e.g.*, the V-chip, parental controls, and other self-censorship

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[19] *Id.* at 212 (citing Redrup v. New York, 386 U.S. 767, 769 (1967)); *see id.* at 210–12.

[20] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 738 (1978) (upholding the FCC's restrictions of broadcast media because these media have less First Amendment protection than other forms of communication). *Compare* Miami Herald Publ'g. Co. v. Tornillo, 418 U.S. 241, 258 (1974) (striking down the "Fairness Doctrine" as applied to newspaper publishers), *with* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 385 (1969) (upholding the "Fairness Doctrine" as applied to radio broadcasters).

[21] *Pacifica*, 438 U.S. at 748 ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection.").

[22] *See id.* at 748–49.

tools—severely undermine the *Pacifica* Court's rationale. Part IV argues that, V-chip aside, the FCC's content-based censorship of broadcast media is categorically wrong. Finally, Part V addresses the likely counterarguments to this Article.

I. THE PURPOSES UNDERLYING THE FREEDOM OF SPEECH

Scholars largely agree on the primary purposes underlying the First Amendment's protection of the freedom of speech.[23] The most cited purposes are: (1) to assure individual self-fulfillment;[24] (2) to help attain the truth;[25] (3) to inform the electorate;[26] and (4) to promote the arts.[27] This section explores each of these underlying principles and how each relates to the FCC's censorship of broadcasters.

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[23] *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963) (arguing that four major principles underlie the freedom of speech: (1) individual self-fulfillment; (2) the attainment of truth; (3) furthering participation in governmental decisionmaking; and (4) creating a balance between stability and change); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (agreeing with Emerson's four principles, but arguing that "self-fulfillment" and "participation in change" are particular "key values"); Alexander Meiklejohn, *The First Amendment as an Absolute*, 1961 SUP. CT. REV. 245, 256–57 (1961) (arguing that the First Amendment should be thought of as a means to further: (1) education; (2) philosophy and science; (3) literature and the arts; and (4) public discussion); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1199–1204 (4th ed. 2013) (adding "promoting tolerance" to the usual list of First Amendment values). *But see* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971) (arguing that constitutional protection should be accorded only to speech that is explicitly political).

[24] *E.g.*, Emerson, *supra* note 23, at 878–79.

[25] *E.g.*, *id.*

[26] *See, e.g.*, Mills v. State of Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

[27] *See, e.g.*, Meiklejohn, *supra* note 23, at 257.

A. ASSURING INDIVIDUAL SELF-FULFILLMENT

It is "a widely accepted premise of Western thought" that every person has an individual "right to form [and express] his own beliefs and opinions."[28] As Justice Thurgood Marshall put it, "[t]he First Amendment serves not only the needs of the polity, but also those of the human spirit—a spirit that demands self-expression."[29] For example, if an Iraq War protestor stood on a street corner chanting "Stop this war now!" or if a PETA member held a sign reading "Fur is Murder," they would likely do so knowing their protests will have little effect on society at large. They protest and chant not to alter public policy, but to define themselves publicly.[30]

The FCC's regulations tread heavily on what some scholars believe to be the preeminent value underlying the First Amendment.[31] In modern society, one of the most popular ways to define oneself publicly is through broadcast media. The FCC, however, limits what words you can say,[32] and in some instances, can punish you for not saying something the government has required you to say.[33] Because the First Amendment embodies a distrust of governmental regulations of speech, the Supreme Court applies "the most exacting scrutiny" to regulations that "suppress, disadvantage, or impose differential burdens upon speech because

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[28] Emerson, *supra* note 23, at 879.

[29] Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

[30] These examples were largely paraphrased from Professor Baker's *Scope of the First Amendment Freedom of Speech* article. Baker, *supra* note 23, at 994.

[31] *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that the Free Speech Clause should primarily be thought of as a means to ensure "individual self-realization"). In his frequently cited article, Professor Redish argued the *Pacifica* Court misapplied the First Amendment by protecting speech based on its social "value." *Id.* at 595.

[32] *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4982 (2004) (noting that any broadcasters who air the "F-Word" will likely be subject to FCC fines).

[33] *See In re* Shareholders of Univision Commc'ns, Inc. and Broad. Media Partners, Inc., 22 FCC Rcd. 5842, 5859 (2007) (requiring Univision to pay $24 million for not airing programming that "served the educational and informational needs of children").

of its content" or "compel speakers to utter or distribute speech bearing a particular message."[34]

The speech you hear over broadcast media is not the pure, unadulterated words of the speaker; it is the redacted, family-friendly speech the government has authorized. Essentially, what the FCC has said is: "You can express your ideas and opinions over the airwaves, so long as your words meet the federal government's standards of decency; if they do not, you may be subject to fines or jail time."[35] The First Amendment demands more.

B. ATTAINING TRUTH

Perhaps the most frequently cited reason for protecting the freedom of speech is the "marketplace of ideas" rationale.[36] This rationale is premised on the theory that the soundest and most rational judgment is arrived at by considering all facts and arguments for and against a given proposition. Thus, the suppression of information, discussion, or ideas prevents people from reaching the most rational judgment. As a result, this theory requires discussion to be kept open no matter how valid an accepted opinion seems to be, and it disallows suppression of any opinions regardless of how false or pernicious they may appear to be.

The theory argues that by suppressing words, you will inevitably suppress ideas.[37] Justice Brennan summarized this sentiment by noting:

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[34] Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994).

[35] Under 18 U.S.C. § 1464, anyone who "utters any obscene, indecent, or profane language" over a broadcast medium may be subject to fines or imprisonment for up to two years.

[36] *See generally* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can safely be carried out."); MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE OF THE THEORY OF THE FIRST AMENDMENT 1–12 (1984). *But see* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967) (arguing that any marketplace of ideas has "long ceased to exist").

[37] *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 805 (1996) (Kennedy, J., concurring and dissenting

> The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word "censor" is such a word.[38]

The FCC's regulations are in direct opposition to the marketplace rationale. The First Amendment requires the government to "remain neutral in the marketplace of ideas." [39] The FCC, however, has refused to remain neutral in the marketplace: it now chooses what speech is acceptable and what speech will be subject to fines.[40] In doing so, the FCC impairs the First Amendment's truth-attaining purpose.

C. INFORMING THE ELECTORATE

Freedom of speech is essential to any democracy. Only through "uninhibited, robust, and wide-open"[41] public debate can voters make informed selections in elections, intelligently influence their government's choice of policies, and hold public officials accountable for any transgressions.[42] There is little doubt on this point.[43] The Supreme Court has often spoken of the ability

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in part) (noting that a word categorized as "indecent" is "often . . . inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power."); *see also* Cohen v. California, 403 U.S. 15, 26 (1971) (noting that the government "cannot…forbid particular words without also running a substantial risk of suppressing ideas in the process.").

[38] FCC v. Pacifica Found., 438 U.S. 726, 773 (1978) (Brennan, J., dissenting).

[39] *Id.* at 745–46.

[40] *Id.* at 748.

[41] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[42] *See* Chemerinsky, *supra* note 23, at 1200–01.

[43] *See Sullivan*, 376 U.S. at 270.

to criticize the government as "the central meaning of the First Amendment."[44]

Professor James Weinstein argues the Free Speech Clause should primarily be thought of as means to ensure participation in the democratic process.[45] While there may be debate about what other values underlie the First Amendment, Weinstein argues, "[t]he opportunity for each citizen to participate in the speech by which public opinion is formed is . . . vital to the legitimacy of the entire legal system."[46] He further argues that "if an individual is excluded from participating in public discourse because the government disagrees with the speaker's views or because it finds the ideas expressed too disturbing or offensive, any decision taken as a result of that discussion would . . . lack legitimacy."[47] This is essentially a rephrasing of the Court's rationale in *Cohen* and *Erznoznik:* the government is not allowed to act as a censor; if it were, it would give our system of government the gloss of an autocracy.[48] That is the crux of this Article.

By proscribing particular words, the FCC prevents television and radio personalities from voicing their full opinions on political candidates. The FCC's fines have substantially chilled speech broadcasted over the airwaves.[49] There is no doubt that in 2016 many television pundits or radio personalities would like to have called Donald Trump a "fucking tyrannical buffoon" or Hillary Clinton a "corrupt, lying bitch," but the federal government prohibits such behavior.

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[44] *Id.* at 273.

[45] James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491 (2011).

[46] *Id.* at 497, 498.

[47] *Id.* at 498.

[48] *See id.*

[49] *See, e.g.*, Noelle Coates, *The Fear Factor: How FCC Fines are Chilling Free Speech*, 14 WM. & MARY BILL OF RTS. J. 775, 779–83, 795–801 (2005); Nasoan Sheftel-Gomes, *Your Revolution: The Federal Communications Commission, Obscenity and the Chilling of Artistic Expression on Radio Airwaves*, 24 CARDOZO ARTS & ENT. L.J. 191, 194–97 (2006); David Bauder, *FCC Decisions Making Hollywood Television Executives Very Nervous*, ASSOCIATED PRESS, (Jan. 24, 2005), http://www.heraldextra.com/lifestyles/fcc-decisions-making-hollywood-television-executives-nervous/article_ebbe2cdd-5a5d-54e5-913f-b0e154827d63.html.

D. PROMOTING THE ARTS

Arguably, the primary impetus behind the Free Speech Clause was to remove the federal government's power to prosecute seditious libel.[50] Prior to the Revolution, the English Crown controlled all publications through a system of licensing schemes that proscribed content out-of-line with official agendas.[51] For example, a watershed colonial moment was the prosecution of New York publisher John Peter Zenger. In the 1730s, Zenger published several satirical articles mocking English royalty.[52] Most notably, his publications included "anti-British song-sheets" and advertisements describing an English royal governor as "a large Spaniel, of about 5 feet 5 inches high . . . lately strayed from his kennel . . ."[53] On its third attempt, the Crown finally indicted Zenger on charges of seditious libel.[54] Zenger then sat in a prison cell for ten months awaiting trial.[55]

The First Amendment's resentment for these repressive licensing schemes has led the Supreme Court to state that "prior restraints on speech and publication are the most serious and least tolerable infringements on First Amendment rights,"[56] and that "[a]ny system of prior restraints of expression comes to [the courts] bearing a heavy presumption against its constitutional

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[50] *See generally* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984); ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 21 (1941).

[51] RUSSELL L. WEAVER ET AL., THE FIRST AMENDMENT: CASES, PROBLEMS, AND MATERIALS 5 (3d ed. 2011).

[52] Elizabeth I. Haynes, United States v. Thomas: *Pulling the Jury Apart*, 30 CONN. L. REV. 731, 744 (1998).

[53] *Id.*

[54] Chad Reid, *Widely Read by American Patriots in* PERIODICAL LITERATURE IN EIGHTEENTH-CENTURY AMERICA 117 (Mark L. Kamrath & Sharn M. Harris. Eds., 2005).

[55] Weaver et al., *supra* note 51, at 5. The attorney who successfully defended Zenger at trial was founding father Alexander Hamilton. *Id.*

[56] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

validity."[57] Yet, the FCC currently oversees one of the largest systems of prior restraints in United States history.[58]

In some respects, the FCC's regulations go further than the Crown's licensing schemes. Under the English system, publishers could at least *request* permission to publish controversial materials.[59] But under the FCC's regime, the federal government has issued blanket restrictions of certain speech regardless of context.[60] Additionally, the FCC's regulations of "indecency" are often more far-reaching than the government's regulation of "obscene" material—which receives *no* First Amendment protection.[61] For example, nudity, by itself, does not make a movie "obscene."[62] Yet, CBS was fined over $500,000 for Janet Jackson's split-second "wardrobe malfunction" during her Super Bowl halftime performance.[63] This exhibition was not even

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[57] N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (citations omitted).

[58] *See* Chemerinsky, *supra* note 23, at 1243 (defining a "prior restraint" as any "administrative system . . . that prevents speech from occurring"); *see also* RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 8 (1996).

[59] Weaver, et al., *supra* note 51, at 434.

[60] *See, e.g.*, Memorandum Opinion and Order, *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4982 (2004) (noting that any broadcasters who air the "F-Word" will likely be subject to FCC fines, regardless of context).

[61] Miller v. California, 413 U.S. 15, 23–24 (1973) (when determining whether a piece of material is "obscene," which means it is "unprotected by the First Amendment," "[t]he basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

[62] Jenkins v. Georgia, 418 U.S. 153, 161 (1974) ("[N]udity alone is not enough to make material legally obscene under the *Miller* standards.").

[63] Forfeiture Order, *In re* Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 FCC Rcd. 2760, 2760 (2006).

considered obscene under the Supreme Court's standards; yet it is considered "indecent" under the FCC's standards. This does not add up.

Furthermore, attorney Nasoan Sheftel-Gomes argues the FCC's vague, *ad hoc* punishments of "indecent" speech have caused broadcasters to chill free speech through self-censorship.[64] These government-mandated "safe-zones" have led to a less creative marketplace of ideas and have adversely affected artists.[65] What is worse, Gomes argues, is that artists who have been censored have no standing to contest the FCC's censorship.[66] In other words, when the FCC requires a radio station to censor an indecent George Carlin bit, George Carlin would have no ability to challenge the content-based censorship of his work.

How can this be? How can an Amendment whose "chief purpose . . . [is] to prevent previous restraints upon publication[s]"[67] allow such broad censorship of these media? This problem will be discussed in more depth in Part IV of the article.

E. CONCLUSION TO PART I

Our Constitution protects the freedom of speech to facilitate individual self-fulfillment,[68] help attain truth,[69] inform the electorate,[70] and promote art and literature.[71] The FCC's regulations do not further these goals. On the contrary, the FCC's system of prior restraints is one of the most glaring affronts to the First Amendment in United States history. Rather than remaining neutral in the marketplace of ideas, the federal government now controls what words can and cannot be said over the airwaves.

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[64] *See* Sheftel-Gomes, *supra* note 49, at 197–99.

[65] *Id.* at 226.

[66] *Id*. at 221–22.

[67] N.Y. Times Co. v. United States, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) (citing Near v. Minnesota, 283 U.S. 697, 713 (1931)).

[68] Emerson, *supra* note 23, at 878–79.

[69] *See id.*

[70] *Id.* at 882–84. *See also* Mills v. State of Alabama, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

[71] Meiklejohn, *supra* note 23, at 257.

This stifling of speech has led to the stifling of ideas. And the FCC's fines have led to unprecedented levels of self-censorship, chilling the freedom of speech in violation of the First Amendment.[72]

II. THE HISTORY OF ELECTRONIC MEDIA AND THE FIRST AMENDMENT

A. FILMS AND THE FIRST AMENDMENT

The First Amendment was ratified in the context of print media and unamplified speech. Early on, the Supreme Court grappled with the emergence of electronic media. For example, in *Mutual Film Corp. v. Industrial Comm'n of Ohio*, the Court held the First Amendment did not apply to "moving pictures" because they did not constitute a member of the "press" within the meaning of the First Amendment.[73] Following this ruling, several States and hundreds of municipalities implemented censor boards to ban and edit films the government deemed inappropriate for public consumption.[74]

Nearly forty years later, however, in *Joseph Burstyn, Inc. v. Wilson*, the Court overturned *Mutual Film Corp.*, holding that film is an artistic medium worthy of First Amendment protection.[75] In *Burstyn*, the Court was confronted with a New York statute that allowed the State's Commissioner of Education to revoke a film's license if it was deemed to be "obscene, indecent, immoral, inhuman, sacrilegious, or [was] of such a character that its exhibition would tend to corrupt morals or incite . . . crime."[76] In 1951, New York's Commissioner used this statute

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[72] *See generally* Coates, *supra* note 49, at 779–83.

[73] Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 244–45 (1915). It should be noted that the Court was applying the Ohio Constitution's protection of the freedom of speech in this case. The language of Ohio's Constitution, however, essentially mirrored the First Amendment.

[74] *See, e.g.*, Samantha Barbas, *How the Movies Became Speech*, 64 RUTGERS L. REV. 665, 666 (2012).

[75] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

[76] *Id.* at 497.

to ban *The Miracle*, a film he believed was "sacrilegious."[77] The Court invalidated the statute at issue,[78] noting that even if it is assumed motion pictures possess a greater capacity for evil, particularly among the youth of a community, "it does not follow that [they] should be disqualified from First Amendment protection."[79] Nor does the First Amendment allow films to be subject to "substantially unbridled censorship."[80] Within ten years of the *Burstyn* decision, film censorship was practically eradicated.[81]

A primary reason the Supreme Court changed course is because the Justices (and society generally) began to recognize the similarities between film and the print media.[82] In the first half of the twentieth century, moviegoers often went to theatres to watch newsreels rather than reading the stories in the newspaper.[83] And by the 1950s, Justice McKenna's fear of film's "[capacity for] evil" [84] seemed hyperbolic. As old and new media converge, society began to realize that—despite Marshall McLuhan's famous statement—the medium is *not* the message,[85] causing the

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[77] *Id.* at 499. More specifically, the film depicted the main character, Joseph, impregnating a peasant who believed she was the Virgin Mary. The film was also voted "Best Foreign Language Film" by the New York Film Critics Circle. William E. Nelson, *Criminality And Sexual Morality In New York, 1920–1980*, 5 YALE J.L. & HUMAN. 265, 293–94 (1993).

[78] *Joseph Burstyn, Inc.*, 343 U.S. at 501–02.

[79] *Id.* at 502.

[80] *Id.*

[81] *See* Barbas, *supra* note 74, at 666 (citing LAURA WITTEN-KELLER, FREEDOM OF THE SCREEN: LEGAL CHALLENGES TO STATE FILM CENSORSHIP, 1915–1981, 247–71 (2008)).

[82] *See id.* at 668–69.

[83] *See id.* at 712–13.

[84] Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 242 (1915).

[85] *Cf.* Barbas, *supra* note 74, at 667. Marshall McLuhan is often credited with the famous quote "the medium is the message." Marshall McLuhan, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 7 (1964) ("[T]he medium is the message. This is merely to say that . . . personal and social consequences . . . result from the new scale that is introduced into our affairs . . . by any new technology."). This rationale appears to explain the Court's thinking in the *Mutual Film* case, where Justice McKenna argued that films themselves are broadly "capable of evil," rather than the messages contained therein.

Mutual Film Court's distinctions between "moving pictures" and "the press" to fade.[86]

But what about the Court's distinctions between broadcast media and print media? Why do we allow the government to censor television in ways we would never allow in the context of print media? In *Near v. Minnesota*, for example, J. M. Near, a bigoted Minneapolis newspaper publisher, planned to publish several articles falsely claiming the Minneapolis Police Chief and other public officials were under the thumb of Minneapolis' Jewish gangs.[87] Before Near could publish these articles, however, the City obtained an injunction that prevented him from publishing the libelous articles.[88] In a landmark decision, the Supreme Court struck down the injunction, holding the City had "impose[d] an unconstitutional restraint" upon Near's First Amendment rights.[89] In writing for the Court, Chief Justice Hughes noted, "the fact that the liberty of the press may be abused . . . does not make any the less necessary the immunity of the press from previous restraint" because "a more serious public evil would be caused" if the government could determine which stories can be published.[90]

Contrast the *Near* decision with several recent FCC orders. In 2003, the band U2 won the Golden Globe Award for "Best Original Song."[91] While accepting his award, Bono said, "this is really, really fucking brilliant."[92] In addressing Bono's offhand remark, the FCC held that "broadcasters . . . will be subject to potential [fines] for *any* broadcast of the 'F-Word.'"[93] Then, in 2007, the FCC required Univision to pay the federal government $24 million because its programming was not

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[86] *See* Barbas, *supra* note 74, at 667.

[87] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 704 (1931).

[88] *Id.* at 704–05.

[89] *Id.* at 723.

[90] *Id.* at 720, 722.

[91] *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4975–76 (2004).

[92] *Id.* at 4976 n.4.

[93] *Id.* at 4982 (emphasis added).

"designed to serve the educational and informational needs of children."[94]

The First Amendment typically forbids the government from subsidizing speech it thinks is "especially valuable"[95] or compelling private actors to speak.[96] In the FCC's view, however, the government may punish broadcasters for not airing government-mandated speech.[97] So, how is it that the First Amendment prohibits the government from silencing J. M. Near's libel, but allows the government to penalize Univision $24 million for failing to broadcast certain content? This article argues that the

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[94] *In re* Shareholders of Univision Comm., Inc. and Broad. Media Partners, Inc., 22 FCC Rcd. 5842, 5859 (2007). In 1990, Congress required the FCC to adopt rules requiring "commercial television broadcast licensees" to devote time to "children's television programming." 47 U.S.C. § 303a(a) (1990). The law further requires the FCC to review how the licensee has "served the educational and informational needs of children" when the licensee applies for license renewal. 47 U.S.C. § 303b(a)(2) (1990). The FCC took this somewhat modest granting of power and used it to issue the largest fine in broadcasting history. *See* Frank Ahrens, *FCC Expected to Impose Record $24 Million Fine Against Univision*, WASH. POST (Feb. 25, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/02/24/AR2007022401453.html.

[95] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 677–78 (1994) (O'Connor, J., concurring and dissenting in part). *But see* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 569 (1998) (allowing the government to take "general standards of decency" into account when awarding government art subsidies).

[96] *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 714 (1977) (holding that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that compelling students to salute the American flag and recite the pledge of allegiance "transcends constitutional limitations on [the State's] power, and invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control").

[97] *See In re* Shareholders of Univision Comm., Inc. and Broad. Media Partners, Inc., 22 FCC Rcd. 5842, 5859 (2007); *see also Children's Educational Television*, FCC, https://www.fcc.gov/consumers/guides/childrens-educational-television (last visited Sep. 27, 2017) ("[b]roadcast television stations . . . have an obligation to offer educational and informational children's programming.").

First Amendment does not recognize such a stark distinction between print media and broadcast media.

B. TELEVISION, RADIO, AND THE FCC

Unlike the silver screen, radio and television have not been deemed worthy of full First Amendment protection.[98] The FCC is charged with regulating these media forms, and the Commission is allowed to impose sanctions—and even jail time—if a station broadcasts material the FCC finds to be "obscene," "indecent," or "profane."[99] Prior to the 1970s, the FCC controlled indecency over the airwaves by sending broadcasters strongly worded letters, chastising them for airing offensive programming.[100] During the 1970s, however, the FCC sought a test case to expand its new definition of broadcast indecency.[101] Then, on October 30, 1973, WBAI (99.5 FM) aired twelve minutes of George Carlin's "Filthy Words" stand-up comedy routine—discussing the "words you [cannot] say on the public . .

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[98] *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

[99] 18 U.S.C. § 1464 (2012) (The law further allows the government to imprison anyone who "utters any obscene, indecent, or profane language" over broadcast media for up to two years). A broadcast is categorized as "indecent" if it "describes, in terms patently offensive measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs…" *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8000 ¶ 4 (2001).

[100] Lili Levi, *"Smut and Nothing But": The FCC, Indecency, and Regulatory Transformations in the Shadows*, 65 ADMIN. L. REV. 509, 520 (2013).

[101] The FCC's new definition of indecency adopted the "patently offensive" test, punishing language that "describes, in terms patently offensive measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs…" *Id.* at 521–22; *see also* Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49, 88 (1992). A potential reason the FCC was eager to get a test case into federal court in the early 1970s may have been because Richard Nixon had recently appointed four new conservative Justices to the U.S. Supreme Court. *See generally* Eric Posner, *Casual with the Court*, NEW REPUBLIC (October 23, 2011), https://newrepublic.com/article/94516/nixons-court-kevin-mcmahon (discussing Nixon's appointments).

. airways . . . the ones you definitely wouldn't say, ever."[102] The FCC found the Carlin broadcast violated its indecency rules.[103] But rather than simply imposing sanctions on WBAI, the FCC actively sought judicial review.[104]

These facts set the framework for the landmark decision in *FCC v. Pacifica Foundation*.[105] The *Pacifica* Court upheld the FCC's power to regulate broadcast media, citing two pervading governmental interests. First, the "uniquely pervasive" nature of these broadcasts allows them to seep into "the privacy of the home" without the consent of the viewer.[106] Second, broadcasting is "uniquely accessible to children" whose "vocabulary [could be enlarged] in an instant" by hearing indecent or profane language.[107] The Court held that these two interests were sufficient to "justify special treatment of indecent broadcasting," thereby allowing the FCC to fine broadcasters for airing inappropriate content.[108]

At first, despite the resounding win in *Pacifica*, the FCC used its new regulatory powers sparingly.[109] In the 1980s, however, the FCC ramped up sanctions for indecent broadcasts as conservative groups and the Reagan Administration expressed concern over the rise of "shock jock" radio personalities.[110] But it was not until the early 2000s that the FCC began to use its

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[102] *Pacifica*, 438 U.S. at 729–30. George Carlin's "seven dirty words" you can never say on television are "shit," "piss," "fuck," "cunt," "cocksucker," "motherfucker," and, of course, "tits." *Id*. at 751.

[103] *Id.* at 732.

[104] Levi, *supra* note 100, at 522 (citing Robert Corn-Revere, FCC v. Fox Television Stations, Inc.: *Awaiting the Next Act*, 2008–2009 CATO SUP. CT. REV. 295, 301 (2008)).

[105] *Pacifica*, 438 U.S. 726. For an exhaustive history of the *Pacifica* decision, see Angela J. Campbell, Pacifica *Reconsidered: Implications for the Current Controversy over Broadcast Indecency*, 63 FED. COMM. L.J. 195, 197–247 (2010).

[106] *Pacifica*, 438 U.S. at 748.

[107] *Id.* at 749.

[108] *Id.* at 750.

[109] Levi, *supra* note 100, at 522–23 (noting that the Commission announced a policy where it would only go after "clear-cut, flagrant cases" of indecent broadcasting, *i.e.*, those where the speaker used one of Carlin's "filthy words").

[110] *See id.* at 523.

regulatory power to its full effect.[111] Between 2002 and 2004, there was a string of notable "indecent" moments during major broadcasted events—including Janet Jackson's infamous Super Bowl "wardrobe malfunction"[112] and Bono's use of the word "fuck" at the 2003 Golden Globe Awards.[113]

Following these events, and others, the FCC began to levy more sanctions with higher dollar amounts—with fines of up to $500,000 for some offenses.[114] Fearing these sanctions, broadcasters began to increasingly self-censor their content.[115] For example, during the 2007 Emmy Awards, FOX used a four-second time-delay and a "Disco Censor-Ball" to avoid FCC scrutiny.[116] To illustrate, that year Sally Field won the Emmy for "Outstanding Lead Actress in a Drama Series."[117] During her acceptance speech—for her role where she played a mother—Field said, "[i]f mothers ruled the world, there would be no goddamn wars in the first place."[118] Instead of airing this line of

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[111] *See id.* at 524; Adam Candeub, *Creating a More Child-Friendly Broadcast Media*, 2005 MICH. ST. L. REV. 911, 922–23 (2005).

[112] CBS Corp. v. FCC, 535 F.3d 167, 171–73 (3d Cir. 2008). The FCC eventually fined CBS $550,000 for this accidental "malfunction." Forfeiture Order, *In re* Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 21 FCC Rcd. 2760, 2760 (2006).

[113] Memorandum Opinion and Order, *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975 (2004). During his acceptance speech, Bono said, "this is really, really fucking brilliant." *Id.* at 4976 n.4.

[114] *See* Sheftel-Gomes, *supra* note 49, at 192, 212–13 (discussing the evolution of the Broadcast Decency Enforcement Act of 2005, 47 U.S.C. 609 *et seq.*).

[115] *See id.* at 212–13 (noting that many broadcasters erred on the side of caution when it came to potentially indecent broadcasts); *see also* Coates, *supra* note 49, at 779–83, 795–801.

[116] Courtney Livingston Quale, *Hear an [Expletive], There an [Expletive], But[t]…The Federal Communication Commission Will Not Let You Say an [Expletive]*, 45 WILLAMETTE L. REV. 207, 211–13 (2008) (citing Lisa de Moraes, *Emmy Awards: The Stars Showed Up. The Viewers Didn't*, WASH. POST, Sept. 18, 2007, at C07).

[117] *Id.* at 212.

[118] *Id.*

Ms. Field's speech, FOX cut the audio and broadcasted a video of a spinning disco ball.[119]

There are countless other examples of networks practicing ridiculous self-censorship techniques.[120] For example, Clear Channel, the nation's largest radio station operator, has issued a "zero tolerance" policy for indecent language, requiring the immediate suspension of anyone who violates the FCC's rules.[121] This robs both the artist of his or her ability to communicate ideas, and it robs the viewer of the benefits that come from receiving new (albeit sometimes uncomfortable) ideas. In *Ferris Bueller's Day Off*,[122] Cameron certainly did not say, "[p]ardon my French, but you're an *aardvark*." But stations have edited the movie in this way to avoid the FCC's Draconian penalties.[123] In *The Exorcist*,[124] Linda Blair never uttered the line, "[y]our mother sews socks that smell." But, once again, the FCC's *ad hoc* enforcement of its vague indecency rules caused broadcasters to self-censor to the point that our paternalistic regulations don't even pass "the laugh test."[125]

This censorship robs these movies of their message. A high school student calling his Principal an "aardvark" is far less funny and rebellious than if he had called him an "asshole." A demon-possessed child telling me my mother "sews socks" that happen to "smell" is not nearly as terrifying or disturbing as the image of my mother "suck[ing] cocks in hell."[126]

What *is* disturbing, however, is the idea that the federal government can censor the depiction of a high school student

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[119] *Id.*

[120] *See, e.g.*, Arika Okrent, *21 Creative TV Edits of Naughty Movie Lines*, MENTAL FLOSS (Apr. 5, 2013), http://mentalfloss.com/article/49927/21-creative-tv-edits-naughty-movie-lines.

[121] *See* Sheftel-Gomes, *supra* note 49, at 213.

[122] FERRIS BUELLER'S DAY OFF (Paramount Pictures 1986).

[123] *See supra* note 120.

[124] THE EXORCIST (Warner Bros. Pictures 1973).

[125] *See supra* note 120. Professor Erik Luna has suggested that the legitimacy of a law can sometimes be gauged by seeing whether it passes the "laugh test" (*i.e.*, is this law so silly that it causes laughter?). *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005).

[126] And, just for good measure, my mother does *not* do what Linda Blair's character suggests. Anne Lindvall is alive-and-well and lives in northern Arkansas—not hell.

calling his principal an "asshole." The fact that FOX is willing to censor Sally Field talking about how more women in politics might lead to fewer wars, solely because she used a word the government has banned, is terrifying. This will be discussed in depth in Part IV of this Article.

C. AN OVERVIEW OF THE CURRENT FIRST AMENDMENT LANDSCAPE

As previously noted, the *Pacifica* Court held the First Amendment allows content-based restrictions on broadcast media to protect children and homeowners.[127] To test the constitutionality of content-based restrictions of speech, the Court first determines whether the speech being regulated occupies a "subordinate position in the scale of First Amendment values."[128] If the speech falls into this "low-value" category of speech, the Court will often define the precise circumstances in which that speech can be regulated.[129] But if the government imposes content-based restrictions on any speech—even low-value forms of speech—the regulation will be subject to strict scrutiny.[130]

In *R.A.V. v. St. Paul*, for example, the Court struck down a statute that forbade placing any symbol, including "a burning cross or Nazi swastika," on "public or private property," if it would "arouse[] anger, alarm or resentment in others" on the basis

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[127] FCC v. Pacifica Found., 438 U.S. 726, 749 (1978).

[128] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987) (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)). This "two-tier" First Amendment theory first appeared in the famous *dictum* in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (noting that "certain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."). *Id.* at 47 n.2.

[129] *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980) (setting forth the test for when commercial speech can be regulated); United States v. O'Brien, 391 U.S. 367 (1968) (setting forth the test for when expressive conduct may be regulated); *see also* Stone, *supra* note 128, at 47–48.

[130] *See* R.A.V. v. City of St. Paul, 505 U.S. 337, 395–96 (1992).

of "race, color, creed, religion or gender."[131] Although this statute was regulating "fighting words," which receive no First Amendment protection, the Court found this statute imposed impermissible content-based restrictions on speakers who expressed views on the subjects of "race, color, creed, religion or gender."[132] The Court held that low-value speech can only be regulated when: (1) "the basis for the content discrimination consists entirely of the very reason the entire class of speech . . . is proscribable;" [133] or (2) the government is regulating a "subclass" of the less-protected speech that has "particular 'secondary effects' . . . so that the regulation is 'justified without reference to . . . content . . . .'"[134]

The FCC's regulations are clearly content-based.[135] In *United States v. Playboy Entertainment*, the Court noted that the essence of a content-based regulation is the degree to which the law "focuses only on the content of the speech and the direct impact that speech has on its listeners."[136] There could not be a clearer case of content-based regulations.[137]

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[131] *Id.* at 380.

[132] *Id.* at 391.

[133] *Id.* at 388. For example, the government can only ban "obscenity" *because of its prurience*, not because of a particular viewpoint within the obscene material. In other words, the government could proscribe particular types of super-obscene material; but it could not ban only obscene material with particular political messages.

Within the context of "indecency," the government can only ban indecent speech *because of its reference to sexual or excretory activities in patently offensive way.* Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8002 ¶¶ 7–8 (2001) (defining "indecency" as any expression that "describe[s] or depict[s] sexual or excretory organs or activities" in a "patently offensive" manner, gauged under contemporary community standards). It could not, however, ban indecent speech *because of the speaker's message*.

[134] *R A.V.*, 505 U.S. at 389 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

[135] *Id.* at 421–22 (Stevens, J., concurring) (conceding that *Pacifica* allowed for content-based regulations of specific words).

[136] United States v. Playboy Entm't Grp., 529 U.S. 803, 811 (2000); *see also* Chemerinsky, *supra* note 4, at 202.

[137] Justice Stevens, the author of *Pacifica*, openly admits that the FCC issues content-based regulations of speech. *R.A.V.*, 505 U.S. at 421–22 (Stevens, J., concurring).

Indecency, moreover, is inextricable from many forms of expression.[138] In artistic and political contexts, indecency often has strong communicative conduct; it allows speakers to "protest[] conventional norms or giv[e] an edge to a work by conveying otherwise inexpressible emotions."[139] In scientific contexts, "the more graphic the depiction (even if to the point of offensiveness), the more accurate and comprehensive the portrayal of the truth may be."[140] The Court developed the content-based versus content-neutral dichotomy to ensure the government could not "drive certain ideas or viewpoints from the marketplace."[141] The FCC's regulations run afoul of this guarantee.

Thus, the FCC's regulations likely would be subject to strict scrutiny.[142] In *Playboy*, the Court unanimously applied strict scrutiny to the regulation of indecent content shown on cable television.[143] This strict scrutiny standard would require the government to show that its regulations are "reasonably

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[138] Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 805 (1996) (Kennedy, J., concurring in part and dissenting in part).

[139] *Id.* (citing Cohen v. California, 403 U.S. 15, 26 (1971) (internal quotes omitted)).

[140] *Id.*

[141] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

[142] *See R.A.V.*, 505 U.S. at 391, 395–96; *cf. Denver Area Ed.*, 518 U.S. at 805–812. I say strict scrutiny would *likely* be applied because the Supreme Court is often unpredictable. While *Renton* was pending, no scholar would have predicted that the Court would begin to gauge whether a law is content-neutral based upon the legislature's purpose when passing the law; but that is what happened. Chemerinsky, *supra* note 4, at 60. In this case of broadcast media, the Court could return to its lower-protection-for-lower-value-speech rationale. But after the retirement of Justice Stevens—the main proponent of this rationale—that course does not seem likely. *See* Joshua B. Gordon, Note, *Long Live Pacifica: Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451, 1469, 1476 (2006) (noting that Justice Stevens was quick to use the "low-value speech" rationale, but that rationale has "increasingly become an outlier in First Amendment law").

[143] United States v. Playboy Entm't Grp., 529 U.S. 803, 814, 836 (2000).

necessary" to achieve a "compelling [governmental] interest."[144] In applying strict scrutiny to the FCC's indecency regulations, the government's interests would be: (1) to prevent unwanted speech from entering the home, and (2) to protect children from profanity. Both can be assumed to be compelling interests.[145] The question then becomes whether the FCC's regulations are reasonably necessary to serve those interests.

In 1978, when *Pacifica* was decided, the issue of whether these regulations passed constitutional muster was undoubtedly a close call.[146] But it is no longer 1978. With the advent of modern technology, can the FCC really prevent children from being exposed to profanity by penalizing broadcasters? And are the FCC's regulations *necessary* to protect society from unwanted speech entering our homes? In other words, does the *Pacifica* rationale hold up in 2017?

The FCC claims to have a rigorous, multi-faceted process for determining what speech is "indecent."[147] First, the FCC determines whether the challenged material fits into the proscribable category of "sexual or excretory depictions" (in other words, the FCC only purports to censor Carlin's "filthy words" and the like).[148] Next, if the first prong is satisfied, the FCC engages in a "highly fact-specific" analysis to determine whether the broadcast was "patently offensive" under "contemporary community standards."[149] In determining whether a broadcast was

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[144] *R.A.V.*, 505 U.S. at 395–96; Boos v. Barry, 485 U.S. 312, 321 (1988). The Court often uses different phrasing when framing its strict scrutiny standard of review. *See* Stone, *supra* note 128, at 48–50 (identifying seven different standards of review the Court has used when dealing with content regulations). Regardless of the phrasing, however, the Court will invariably strike down every content-based restriction on speech. *Id.* at 48.

[145] I might argue, however, that "enlarg[ing] a child's vocabulary" is a good thing, despite Justice Stevens' assertion in *Pacifica*. FCC v. Pacifica, 438 U.S. 726, 749 (1978).

[146] *Pacifica* was a 5-to-4 decision that prompted two strongly worded dissents by Justices Brennan and Stewart. *Id.* at 757.

[147] *See* Levi, *supra* note 100, at 526–27.

[148] Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8002 ¶¶ 7, 8 (2001).

[149] *Id.* at 8003. These phrases were taken from the Court's language in *Miller v. California*, 413 U.S. 15, 15 (1973).

patently offensive, the FCC looks at the "explicitness" of the broadcast, the duration of the broadcast, and whether the material was meant to "titillate" for "shock value."[150] On their face, these extensive processes may display sufficient tailoring to uphold the regulations. In practice, however, the FCC does not abide by its own standards.[151]

Additionally, with the advent of parental controls and other self-censorship tools, it is easier than ever to ensure unwanted speech does not enter the home. In *United States v. Playboy*, the Court noted that cable providers "have the capacity to block unwanted channels on a household-by-household basis."[152] Thus, this sort of "targeted blocking is less restrictive than banning," and "if a less restrictive means is available for the Government to achieve its goals, the Government must use it."[153]

Pacifica's rationale does not hold up in 2017. Any child who has ridden a public school bus has likely had their "vocabulary [enlarged] in an instant."[154] Any child who has perused the Internet has undoubtedly come across something the Court would find to be "indecent." And any child with an older sibling has likely been called a "scurrilous epithet."[155] The Second Circuit captured this sentiment by observing that "the past thirty years has seen an explosion of media sources, and broadcast television has become only one voice in the chorus."[156] The FCC cannot "bleep" reality. Children are going to learn these words,

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[150] *Id.*

[151] *See, e.g.*, Sheftel-Gomes, *supra* note 49, at 197–199 (arguing that the FCC's *ad hoc* administration of its indecency policy leaves broadcasters confused and leaves artists without recourse); *supra* notes 32 and 33 (showing examples of how the FCC levies fines irrespective of context).

[152] United States v. Playboy Entm't Group, 529 U.S. 803, 815 (2000).

[153] *Id.*

[154] FCC v. Pacifica Foundation, 438 U.S. 726, 749 (1978).

[155] Cohen v. California, 403 U.S. 15, 22 (1971).

[156] Fox TV, Inc. v. FCC, 613 F.3d 317, 326 (2d Cir. 2010) (*Fox III*); *see also* Nick Gamse, *The Indecency of Indecency: How Technology Affects the Constitutionality of Content-Based Broadcast Regulation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 287, 288 (2012) (noting that broadcast media is no longer a dominant force).

and the government's censorship is only delaying the inevitable.[157]

The Court has stated that *stare decisis* may not apply when subsequent cases or circumstances have "undermined" the original case's "doctrinal underpinnings." [158] The following section argues that modern technology has substantially undermined the *Pacifica* Court's rationale for allowing content-based restrictions on speech. In other words, the FCC's regulations are no longer reasonably necessary to serve any governmental interests and are therefore unconstitutional under the First Amendment.

III. THIS IS THE 21ST CENTURY: MODERN TECHNOLOGY HAS SEVERELY UNDERMINDED *PACIFICA*'S RATIONALE

A. AN OVERVIEW OF MODERN SELF-CENSORING TOOLS

There are several prominent tools that allow television viewers to self-censor their programming—the most prominent being the "V-chip." The V-chip was first introduced in 1993 by Congressman Edward Markey (D-Mass.) as part of the proposed Television Violence Reduction Through Parental Empowerment Act.[159] The Bill stalled, however, due to strong pushback from

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[157] *See* King Waters, Pacifica *and the Broadcast of Indecency*, 16 HOUS. L. REV. 551, 591 (1979) ("A short stroll along any Texas pier when fish are not biting would offer an observant child the full gamut of [George] Carlin's monologue."); Travis Wright, *Kids Are Learning Curse Words Earlier Than They Used To*, WASH. POST, Aug. 7, 2015 (citing Kristin L. Jay & Timothy B. Jay, *A Child's Garden of Curses: A Gender, Historical, and Age-Related Evaluation of the Taboo Lexicon*, 126 AM. J. OF PSYCH. 459, 459 (2013) (finding that children are learning the words we categorize as "profane" by age four)).

[158] Dickerson v. United States, 530 U.S. 428, 443 (2000).

[159] *See* 139 CONG. REC. 19,520 (1993) (statement of Rep. Markey, introducing the Television Violence Reduction Through Parental Empowerment Act of 1993, H.R. 2888). The Legislation contained two main requirements: (1) TV sets must be capable of blocking programs based on a violence rating sent electronically by broadcasters, and (2) TV sets must be capable of blocking the display of programs or time slots as well as channels so that parents can block an individual program even if it does not carry an advisory. *Id.* at 19,521.

broadcasters.[160] It was not until 1996, when President Clinton expressed support for the V-chip in his State of the Union Address, that the proposal gained traction.[161] Eventually, Congressman Markey's V-chip proposal became law as an amendment to the Telecommunications Act of 1996, despite strong opposition in the Senate.[162]

The V-chip allows viewers to block certain content on their televisions.[163] Each television program is given a rating based on its content, and the rating of each program is sent electronically to the V-chip.[164] If the viewer has blocked programs with that rating, it is not broadcasted through the television.[165] More specifically, programs fall into one of six age-based categories: TV-Y, TV-Y7, TV-G, TV-PG, TV-14, or TV-M.[166] A "TV-Y" program is "designed to be appropriate for all children" and suitable for "a very young audience."[167] While a "TV-14" program may "contain some material that parents would find unsuitable for children under 14 years of age," so parents are "urged to exercise greater care in monitoring this program."[168] Thus, a parent could direct her television's V-chip to block all programs with a TV-14 or TV-M rating.

Similarly, cable and satellite subscribers can filter and block unwanted broadcast programming by password-encrypting their set-top boxes.[169] For example, DirecTV has a "Locks & Limits" feature that allows subscribers to "block specific movies, . . . lock out entire channels, and set limited viewing hours."[170] In

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[160] Lisa D. Cornacchia, Note, *The V-Chip: A Little Thing But A Big Deal*, 25 SETON HALL LEGIS. J. 385, 393–94 (2001).

[161] *Id.* at 395.

[162] *Id.* at 396–97 (noting that there was bipartisan concern about the First Amendment implications of the V-chip).

[163] *Id.* at 390.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 401.

[167] *Id.* at 401 n.83.

[168] *Id.*

[169] Christopher M. Fairman, *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, 2013 MICH. ST. L. REV. 567, 607 (2013).

[170] Brief of the Cato Institute, Center for Democracy & Technology, Electronic Frontier Foundation, Public Knowledge, and TechFreedom as Amici Curiae Supporting Respondents, FCC v. Fox

addition, "specialized remote controls can . . . limit children to channels approved by their parents," and "[s]creening tools such as TVGuardian offer . . . a 'Foul Language Filter' that can filter out profanity (even from broadcast signals) based on closed captioning."[171]

Outside of these remedies, there are hundreds of companies that now sell downloadable software capable of blocking inappropriate content.[172] For example, Kaspersky Lab, a leader in parental control software, has a program that allows parents to filter inappropriate content, set time limits on when and how their children can use electronic devices, and receive notifications about their children's internet habits—all for just $14.99.[173]

B. THESE SELF-CENSORSHIP TOOLS SEVERELY UNDERMINE *PACIFICA*'S RATIONALE

These self-censoring tools' ability to block certain programming clearly undercuts the *Pacifica* Court's rationale. The Court's rationale for allowing content-based restrictions on broadcast media is to prevent unwanted speech from entering the home and to protect children from indecent speech.[174] But the V-chip allows parents to do the FCC's job. Don't want the "F-word" to come through your television speakers? Go to your TV's settings and block "TV-M" programming. The V-chip allows parents, not the federal government, to choose what they and their children watch. The V-chip is a narrowly tailored means by which the government can further its interests; levying broad content-based restrictions on broadcasters is not.

As previously noted, "if a less restrictive means is available for the Government to achieve its goals, the Government

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Television, 567 U.S. 239 (2012) (No. 10-1293) 2002 WL 1987618, *17–18 (quoting Thomas W. Hazlett, *Shedding Tiers for a la Carte? An Economic Analysis of Cable TV Pricing*, 5 J. ON TELECOMM. & HIGH TECH. L. 253, 266 n.39 (2006)).

[171] *Id.* at *18.

[172] *See generally* Neil J. Rubenking, *The Best Parental Control Software of 2017*, PCMAG (Jan. 5, 2017, 1:23 PM), http://www.pcmag.com/article2/0,2817,2346997,00.asp.

[173] *Id.*

[174] FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

must use it."[175] As for the FCC's regulations, there are obvious less-restrictive means: the FCC could require viewers to opt-in to receiving channels that air indecent programming; the FCC could set forth a system that allows viewers to opt-out of indecent channels; or, as the government has already chosen, it could require televisions to contain a device that allows viewers to self-censor channels to meet their own preferences. With these available alternatives, the FCC's regulations are far too overinclusive to pass constitutional muster.

C. CONCLUSION TO PART III

Under 2017 standards, the FCC's regulations are not reasonably necessary to prevent unwanted speech from entering the home. The V-chip and other self-censorship tools have made the FCC's regulations superfluous. Viewers now have control over the content of the media they consume to an extent that was unavailable in the 1970s. The FCC's regulations, thus, are overinclusive and cannot survive judicial scrutiny. Additionally, under 2017 standards, the FCC's regulations are not reasonably necessary to prevent children from being exposed to indecent material. In this respect, the FCC's regulations are woefully underinclusive. Because the FCC cannot regulate the Internet,[176] private speech,[177] or broadcasters during certain hours,[178] the FCC's regulations only protect children from profanity in a very limited sense. If the government's true purpose is to prevent children's vocabulary from being "enlarged . . . in an instant,"[179] the regulations would need to be much larger in scope. However,

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[175] United States v. Playboy Entm't Grp., 529 U.S. 803, 815 (2000).

[176] Reno v. ACLU, 521 U.S. 844, 849 (1997) (striking down the anti-decency provisions of the Communications Decency Act for violating the First Amendment).

[177] *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971).

[178] Action for Children's Television v. FCC, 58 F.3d 654, 656 (D.C. Cir. 1995) (holding that the FCC cannot prevent the broadcast of indecent speech between 10 p.m. and 6 a.m.).

[179] *Pacifica*, 438 U.S. at 749.

regulations of this magnitude would run afoul of the Constitution.[180]

Accordingly, what you are left with is the federal government issuing broad, content-based restrictions with little, if any, benefits. Because viewers can self-censor their televisions on a household-by-household basis, broadcasters' content is no longer "uniquely pervasive" or "uniquely accessible to children."[181]

IV. REGARDLESS OF MODERN DEVELOPMENTS, *PACIFICA* WAS WRONG WHEN IT WAS DECIDED

Advances in technology have made Justice Stevens' rationale in *Pacifica* untenable. By allowing viewers to select what content enters their home, the V-chip and other parental controls make the FCC's regulations woefully over-inclusive. However, there is a larger point that needs to be made: *Pacifica* was wrong when it was decided. Courts and scholars have largely criticized the *Pacifica* Court's rationale for upholding the FCC's content-based regulations.[182]

Content neutrality is a core principle of free speech analysis. Without this principle, the government would be able to "effectively drive certain ideas or viewpoints from the

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[180] *See Reno*, 521 U.S. at 875 (noting that protecting children is not a sufficient interest when regulating broadcasts addressed toward adults).

[181] For a summary of the general grievances against the FCC, including the problem of technological developments, see generally Joshua B. Gordon, *Long Live* Pacifica: *Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451, 1472–84 (2006).

[182] *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 530 (2009) (Thomas, J., concurring) (questioning the continuing viability of *Pacifica*); *id.* at 545 (Ginsburg, J., dissenting) ("[T]here is no way to hide the long shadow the First Amendment casts over what the [FCC] has done."); Action for Children's Television v. FCC, 58 F.3d 654, 673 (D.C. Cir. 1995) (Edwards, C.J., dissenting) ("Whatever the merits of *Pacifica* when it was issued almost 20 years ago, it makes no sense now."); Christopher M. Fairman, *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, 2013 MICH. ST. L. REV. 567, 608–15 (2013) (arguing that the government failed to fully demonstrate that it had a legitimate interest in protecting children from indecent language); Gordon, *supra* note 181, at 1472.

marketplace."[183] This, along with the theoretical and doctrinal inconsistencies in the Court's broadcast media decisions, shows that *Pacifica* is an anomaly that should be discarded.

A. DOCTRINAL PROBLEMS WITH *PACIFICA*'S HOLDING

Under the current First Amendment landscape, protestors can burn the American flag;[184] neo-Nazis can march through Jewish communities;[185] Klan members can burn crosses;[186] and members of the Westboro Baptist Church can protest soldiers' funerals, carrying signs that read "God Hates Fags."[187] The Court did not believe these acts would cause sufficient harm to children or an unwilling audience to carve out a First Amendment exception. But, apparently, George Carlin's utterance of the word "tits" over the radio "amply justif[ies] special treatment of indecent broadcasting,"[188] because an "individual's right to be left alone plainly outweighs the First Amendment rights of [broadcasters]."[189] This does not make sense. Justice Stevens' rationale stands alone in First Amendment jurisprudence, and the Court has refused to extend *Pacifica*'s rationale to any other form of technology.[190]

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[183] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991); *see generally* Chemerinsky, *supra* note 5, at 53.

[184] United States v. Eichman, 496 U.S. 310, 312 (1990) (striking down the federal Flag Protection Act of 1989); Texas v. Johnson, 491 U.S. 397, 399 (1989).

[185] Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 43 (1977) (allowing neo-Nazis to march through Skokie, Illinois, a town with a large Jewish population, despite numerous threats).

[186] Virginia v. Black, 538 U.S. 343, 347 (2003) (allowing cross burning so long as the act does not amount to a true threat of harm).

[187] Snyder v. Phelps, 562 U.S. 443, 448 (2011).

[188] FCC v. Pacifica Found., 438 U.S. 726, 750, 751 (1978).

[189] *Id.* at 750.

[190] United States v. Playboy Entm't Grp., 529 U.S. 803, 811 (2000) (refusing to apply *Pacifica* to cable television); Reno v. ACLU, 521 U.S. 844, 867 (1997) (refusing to apply *Pacifica* to the internet); Sable Comm. of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989) (refusing to apply *Pacifica* to phone sex services); *see generally* Gordon, *supra* note 181, at 1476–80.

Many people may have found George Carlin's "Filthy Words" monologue to be offensive. But there is no doubt that many people are also offended by burning crosses and desecrated American flags; yet the Court has made it clear that speech cannot be suppressed merely because it offends the majority of citizens.[191] If the First Amendment means anything, it means that the government cannot ban speech just because a majority of citizens find it distasteful.[192] "[T]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."[193]

V. COUNTERARGUMENTS CONSIDERED

A. HOW WOULD ALLOWING PROFANITY TO BE BROADCASTED OVER THE AIRWAVES *FURTHER* ANY OF THE FIRST AMENDMENT VALUES LISTED IN PART II?

Response: Allowing speakers to use every word at their disposal allows them to effectively communicate their intended message. This is especially true in the arts, comedy, and political speech. If Paul Cohen had worn a jacket that said, "I Strongly

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[191] *See supra* notes 185–188 and accompanying text; *see also Pacifica*, 438 U.S. at 766 (Brennan, J., dissenting) ("Where the individuals constituting the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds.").

[192] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55–56 (1988); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) ("Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit [the] government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."); Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); Cohen v. California, 403 U.S. 15, 25 (1971) ("[O]ne man's vulgarity is another's lyric.").

[193] Consol. Edison Co. of NY, Inc. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 (1980).

Disagree with the Draft" in the L.A. County Courthouse, I doubt it would have conveyed the same message. And, as the title of this article suggests, if the final line in *Gone with the Wind* was, "Frankly, my dear, I am indifferent," it would not have struck the audience as particularly powerful.

Allowing Sally Field to express her disdain for all the "goddamn wars,"[194] rather than just "wars," adds an emotional element to the sentence. Profanity "convey[s] an emotion or intensif[ies] a statement."[195] Justice Harlan acknowledged this truism in *Cohen* when he noted that the government "cannot . . . forbid particular words without also running a substantial risk of suppressing ideas in the process."[196] As Justice Brennan put it:

> The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word "censor" is such a word.[197]

In short, you cannot silence particular words without also silencing particular messages.[198] As Justice Kennedy has noted:

> In artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying "otherwise inexpressible emotions." In scientific programs, the more

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[194] Quale, *supra* note 116, at 212.

[195] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 546 (2009) (Ginsburg, J., dissenting).

[196] Cohen v. California, 403 U.S. 15, 26 (1971).

[197] FCC v. Pacifica Found., 438 U.S. 726, 773 (1978) (Brennan, J., dissenting).

[198] *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 805 (1996) (Kennedy, J., concurring and dissenting in part).

> graphic the depiction (even if to the point of offensiveness), the more accurate and comprehensive the portrayal of the truth may be. Indecency often is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power. And allowing speakers to use their full vocabulary adds a new dimension to the public discourse.[199]

Overturning *Pacifica* would add clarity to the ideas competing in the marketplace; it would add an emotive element to many forms of artistic expression; and it would allow the individual, not the federal government, to decide what media is appropriate for their personal consumption.

B. IN *R. A. V. V. ST. PAUL*, THE COURT HELD THAT THE GOVERNMENT CAN PROSCRIBE LOW-VALUE SPEECH IF IT ADDRESSES HARMFUL "SECONDARY EFFECTS" ASSOCIATED WITH THE SPEECH. IS THAT NOT THE CASE HERE? IS THE GOVERNMENT NOT SIMPLY TRYING TO LIMIT THE EFFECTS OF WIDESPREAD PROFANITY?

Response: No. All speech gives rise to certain secondary effects. When you see a political advertisement, it might cause you to vote for a particular political candidate. When you see a Nike advertisement, it might cause you to buy a Nike product. And when you hear George Carlin say his "seven dirty words," it may "curve your spine."[200] These are all effects of speech, but they are not the kind of secondary effects that allow the speech to be proscribed. In *Renton v. Playtime Theaters*,[201] for example, the Court upheld a local ordinance that forbade any "adult motion picture theatre" to be located within 1,000 feet of any residential zone.[202] Although the ordinance appeared to be content-based, the Court held that it was "aimed . . . at the secondary effects of such theatres," and "not at the dissemination of offensive speech."[203]

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[199] *Id.*

[200] *Pacifica*, 438 U.S. at 751.

[201] Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

[202] *Id.* at 43.

[203] *Id.* at 47, 49 (quoting Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 n.34 (1976)).

Unlike the ordinance in *Renton*, the FCC's regulations are explicitly designed to prevent "the dissemination of offensive speech."[204] The *Renton* Court made clear that "[the] government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[205] That is precisely what the FCC is doing. The City of Renton was attempting to prevent crime and maintain property values.[206] The FCC, on the other hand, is driving certain speech out of the marketplace because it disagrees with the messages conveyed. This is unacceptable under the First Amendment.

C. IF WE ALLOW STATIONS TO BROADCAST INDECENT PROGRAMMING 24/7, WE ARE GOING TO BE INUNDATED WITH PROFANITY, WHERE IT WILL LIKELY BECOME COMMONPLACE IN OUR EVERYDAY LANGUAGE. IS THAT REALLY THE KIND OF SOCIETY WE WANT TO FOSTER?

Response: Perhaps, considering the alternatives. There is, of course, nothing constitutionally impermissible about wanting our society to avoid using profane language. The question is how do we go about achieving that goal? Under our current system, the answer seems to be: by giving the federal government the power to decide which words are suitable for us to hear. That is a radical proposition. If *Pacifica* was overturned, perhaps we would be subject to more profanity, and maybe it would become more commonplace in our speech. But that is far less upsetting than allowing a group of unelected federal officials to determine what we can say and what we can hear.

Additionally, is it such a bad thing that we might use "curse words" more often? The only reason these words cause so much distress is because we allow them to. Yes, the word "fuck" may conjure up "sexual or excretory activities and organs"[207]—

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[204] *Id.* at 49 (quoting *Young*, 427 U.S. at 71 n.34).

[205] *Id.* at 48–49 (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972)).

[206] *Id.* at 48.

[207] Policy Statement, *In re* Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, ¶ 7 at 8002 (2001) (defining "indecency" as any expression that

but so does the phrase "sexual or excretory activities and organs." In *Gone with the Wind*, when Clark Gable told Vivian Leigh that he did not "give a damn," that line shocked and offended many viewers.[208] But now the word is commonplace; few, if any, are offended by its usage. The same can be done with other vulgar terms.

A taboo is "a cultural proscription on behavior."[209] And at least one scholar has called the FCC's current indecency regime "institutionalized word taboo."[210] Society, for whatever reason, has made certain words "taboo." For this reason, certain words cause many people discomfort—some more than others. For all intents and purposes, however, there is no meaningful difference between the phrase "sexual intercourse" and the word "fucking." The point of speaking is to use sound to conjure up an image or idea in the mind of the listener, and these two phrases largely conjure up the same images and ideas. Yet the word "fuck" is somehow worse than the phrase "sexual intercourse." Why? Because society has collectively decided that the word "fuck" should be taboo.

Having societal taboos is, to some extent, irrational. But under our current indecency scheme, we have gone much farther than irrationality—we have "institutionalized" these taboos. In most modern cultures, if someone does something "taboo" (for example, uses profanity around children), they might be scolded by their peers; warned that their behavior is inappropriate; or maybe, if their behavior was bad enough, be asked to leave. But, in America, if a person dares say a taboo word on television, they can be fined thousands of dollars or imprisoned.[211] This degree of punishment for violating a social norm is—for lack of a better phrase—cruel and unusual.

"describe[s] or depict[s] sexual or excretory organs or activities" in a "patently offensive" manner, gauged under contemporary community standards).

[208] *See* Amanda Garrett, *'Frankly, My Dear' From Gone With The Wind*, OLD HOLLYWOOD FILMS, http://www.oldhollywoodfilms.com/2016/03/frankly-my-dear-from-gone-with-wind.html (Mar. 4, 2016) (noting that producer David O. Selznick wrote many other lines—such as "Frankly, my dear, I don't care" and "Frankly, my dear, I don't give a hoot"—but none had "the impact of the original").

[209] Fairman, *supra* note 182, at 616.

[210] *Id.* at 615–32.

[211] 18 U.S.C.A. § 1464 (2015).

D. WHEN STATIONS "BLEEP" WORDS, ADULTS CAN USUALLY INFER THE PARTICULAR INDECENT WORD USED. WHY, THEN, SHOULD WE NOT ALLOW THIS CENSORSHIP TO PREVENT CHILDREN FROM HEARING THESE WORDS?

Response: Because we are just delaying the inevitable. Most research shows that children are learning most of the words we would call "profane" by age four.[212] By the time children are in kindergarten, "they're saying all the words . . . we try to protect them from on television."[213] This marginal positive benefit is not worth sacrificing our First Amendment freedoms. Additionally, most studies show that children under age twelve don't understand sexual language and innuendo (after all, if a child is unfamiliar with the concept of sex—as most children are—how could any word conjure up prurient images in their mind?).[214] So, the FCC is trying to protect children from hearing words they already know, yet don't understand.

Another point: When you "bleep" a profane word, you are often drawing more attention to the word. Children are inherently curious. When they hear a censored word, they know it might be "naughty," and their first instinct is to try to understand this new, bad word.[215] But when they hear an uncensored word they know nothing about the word—it is simply a new word. It is then up to parents to dispel the stigma surrounding that word—to educate their children rather than keep them in the dark about these words. This is how adults should confront uncomfortable situations: head-on. Instead, we allow the federal government to shield us

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[212] Travis Wright, *Kids Are Learning Curse Words Earlier Than They Used To*, WASH. POST (Aug. 7, 2015), https://www.washingtonpost.com/posteverything/wp/2015/08/07/kids-are-learning-curse-words-earlier-than-they-used-to/?utm_term=.c4fe81e5928c (citing Kristin L. Jay & Timothy B. Jay, *A Child's Garden of Curses: A Gender, Historical, and Age-Related Evaluation of the Taboo Lexicon*, 126 AM. J. OF PSYCHOL. 459 (2013)).

[213] *Id.*

[214] *E.g.*, Barbara K. Kaye & Barry S. Sapolsky, *Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television*, 7 MASS COMM. & SOC'Y 429, 433 (2004).

[215] *See*, Patty Wipfler, *Bad Words from Good Kids*, HAND IN HAND, https://www.handinhandparenting.org/article/bad-words-from-good-kids (last visited Sept. 19, 2017).

from these situations so we can avoid talking to our children about uncomfortable topics. By doing this we have allowed our superstitions and subconscious feelings to triumph over reason.[216]

E. THERE IS SO MUCH INDECENCY IN THE WORLD AS IT IS—ON THE INTERNET, IN OUR MOVIES, IN OUR MUSIC. WHY CAN'T TELEVISION JUST BE OUR "SAFE SPACE" WHERE WE DON'T HAVE TO WORRY ABOUT BEING BOMBARDED WITH PROFANITY?

Response: It can. But it should not be imposed by a federal agency with little oversight. In his famous critique of the FCC, Ronald Coase argued that the marketplace is a more effective and more efficient manager of rivalrous goods (*e.g.*, television stations). [217] Because the marketplace has better information, he suggested, it can more efficiently allocate spectrum space to the most effective operators.[218] As shown in Part III, moreover, you can self-censor your televisions using your government-mandated V-chip. The free market is capable of weeding-out programs that don't conform to society's standards of decency. Many are familiar with the phrase, "vote with your feet." Within this context, if you dislike the programs being broadcasted, "vote with your fingers."

CONCLUSION

The FCC currently oversees one of the largest systems of speech censorship in U.S. history. Under this regime, a group of unelected federal officials has broad authority to determine what words deserve suppression. This is the quintessential example of the government refusing to "remain neutral in the marketplace of ideas." The FCC's regulations do nothing to further the purposes underlying the First Amendment. To the contrary, they stifle free expression and represent an intolerable content-based restriction on speech.

Under the *Pacifica* decision, the Court allowed the FCC to issue these content-based restrictions because (1) the "uniquely pervasive" nature of broadcast media allows them to intrude into

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[216] For a more detailed explanation of this argument, *see* Fairman, *supra* note 182, at 615–16.

[217] R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 17–34 (1959).

[218] *Id.*

the unwilling listener's home, and (2) broadcast media are "uniquely accessible to children" whose "vocabulary [could be enlarged] in an instant" if they were exposed to indecent language.[219] These concerns no longer exist. Modern technology has severely undermined *Pacifica*'s rationale. As of the year 2000, all televisions sold in U.S. markets have been required to contain a "V-chip"—a self-censorship tool that allows television viewers to block certain programs based on its rating. If a homeowner does not want certain content to intrude into the home, he or she may simply access the V-chip and block the programming.[220] The V-chip also prevents children from being exposed to indecency—if a parent wants to prevent his or her children from hearing profane language, block it with the password-encrypted V-chip.

The FCC's content-based regulations of speech tested the boundaries of the First Amendment in the 1970s—when the FCC exercised a great deal of discretion and rarely levied sanctions. Today, however, the FCC exercises little-to-no discretion and often doles out massive fines. These fines have led to an unprecedented chilling of speech that the First Amendment cannot allow. It is time for the Court to revisit its decision in *Pacifica* and rid the country of this unconstitutional systematic censorship.

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[219] FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

[220] THE V-CHIP: OPTIONS TO RESTRICT WHAT YOUR CHILDREN WATCH ON TV (2017), https://www.fcc.gov/consumers/guides/v-chip-putting-restrictions-what-your-children-watch.

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THE NFL AND MARY JANE: THE EARLY MAKINGS OF A LOVE STORY

IMAN KENDRA MCALLISTER

If Ten-Percent of Moms Decide that Football Is Not Safe, the NFL Is Dead.[1]

INTRODUCTION

Former National Football League (NFL or League) running back Ricky Williams may be the NFL's most notorious stoner athlete. A Heisman Trophy winner and an All-Pro running back, Williams first retired in 2004 after a failed drug test and amid speculation he would be suspended for a whole season.[2] He retired for the second and final time in 2011.[3] "It's kind of true, but not the way that people see it, that I quit football to go smoke weed," says Williams.[4]

A group of retired NFL players spent the days leading up to Super Bowl 51 promoting pot. Former players attended the Cannabis in Professional Sports forum in Houston to raise

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[1] *Seau's Suicide Helped to Make Concussions in Football a Nat'l Issue*, NPR (Dec. 22, 2015, 5:06 AM), http://www.npr.org/2015/12/22/460656805/junior-seaus-suicide-helped-to-make-concussions-in-football-a-national-issue (quoted in CONCUSSION (Columbia Pictures 2015)).

[2] Greg Bishop, *Ricky Williams Takes the High Road*, SPORTS ILLUSTRATED, http://www.si.com/longform/2016/ricky-williams-weed/ (last visited Feb. 16, 2017).

[3] *Id.*

[4] *Id.* RICKY WILLIAMS TAKES THE HIGH ROAD (Sports Illustrated Films 2016).

awareness about "addictive and destructive opioid painkillers."[5] Players spoke of their struggles managing chronic pain. Players spoke of being driven close to suicide by addictive medications prescribed to ease their pain. They expressed frustration with the NFL's drug policy, criticizing the league's willingness to push addictive prescription painkillers while penalizing less harmful alternatives.[6]

Though Ricky Williams' NFL career met a few road bumps, he was successful on the field—a success he says was made possible by marijuana. "I wouldn't have won the 1998 Heisman Trophy, or played 11 NFL seasons, without cannabis," he claims.[7] "I think when the only options are Toradol or Indocin or Vicodin, that's the NFL not doing a very good job," he continued, referring to the NFL's responsibility to help players take care of their bodies.[8] "If you're going to say we can put that poison in our bodies but we can't put cannabis in our bodies, I don't think that's fair."[9] And Williams is not alone.

"Why does the NFL choose to test for marijuana?" ESPN sports commentator Mike Kellerman asks.[10] "That's a choice they're making," he continues, "[t]his is a league that is in bed with companies that peddle alcohol. They're sponsored, they take money from companies that say 'here, drink this.'"[11] Kellerman goes on to point out that in every objective study to date, the effects of alcohol are proven to be far worse than marijuana.[12] If alcohol is the threshold, why does the NFL choose to test for marijuana?[13]

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[5] Steve Birr, *NFL Players Rescued From 'Suicide' Push Pot Over Painkillers*, THE DAILY CALLER (Feb. 05, 2017, 2:49 PM), http://dailycaller.com/2017/02/05/nfl-players-rescued-from-suicide-push-pot-over-painkillers-at-super-bowl/.

[6] *Id.*

[7] Alec Banks, *Is the NFL's Marijuana Policy Racist & Short-Sighted?*, HIGHSNOBIETY (Nov. 18, 2016), http://www.highsnobiety.com/2016/11/18/nfl-drug-policy-weed/.

[8] RICKY WILLIAMS TAKES THE HIGH ROAD (Sports Illustrated Films 2016).

[9] *Id.*

[10] Banks, *supra* note 7.

[11] *Id.*

[12] *Id.*

[13] *Id.*

Marijuana—formally known as cannabis, and less formally known as Mary Jane, pot, reefer, and dope—has therapeutic benefits that have been overlooked and ignored for decades. This article discusses the effects of the NFL's current marijuana policy and proposes a more relaxed marijuana policy that would benefit both the League and its players.

Part II discusses the NFL's current marijuana policy. Part III explores the drug's history, and the contradiction between federal marijuana policy and US Patent No. *6,630,507* (which presents a medical use for marijuana). Part IV discusses Cannabidiol (CBD), a non-psychoactive marijuana component; Part V discusses chronic traumatic encephalopathy (CTE), the neurodegenerative brain disease now known to be common among retired NFL players; and Part VI concludes with a proposal to the NFL to reconsider its marijuana policy.

I. THE NFL CONTINUES TO FIGHT FATE

I don't think there's any question that pot is better for your body than Vicodin . . . And yet, athletes everywhere are prescribed Vicodin like it's Vitamin C.

–Steve Kerr, Golden State Warriors Head Coach [14]

The NFL adopted a policy prohibiting marijuana use in 1982, and the policy granted the League broad discretion to test players and to discipline those who fail.[15] Despite forty-four states and the District of Columbia legalizing some form of marijuana use,[16] the NFL's policy still lists marijuana on its

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[14] Roger Groves, *The Science That Justifies Marijuana in the NFL and NBA*, FORBES (Dec. 6, 2016, 12:40 PM), http://www.forbes.com/sites/rogergroves/2016/12/06/the-scientific-secret-that-justifies-marijuana-in-the-nfl-and-nba/#337b71c5719b.

[15] David Sisson & Brian Trexell, *The National Football League's Substance Abuse Policy: Is Further Conflict Between Players and Management Inevitable?*, MARQUETTE SPORTS L. REV. 1, 3-9 (1991).

[16] *See, e.g.*, State Medical Marijuana Laws, NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 2, 2017), http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx. Recreational marijuana use is legal in Alaska, California, Colorado,

banned substance list.[17] The League's list, known as the "NFL Drug Panel," bans marijuana along with synthetic cannabinoids,[18] amphetamines, opiates (for example, morphine and codeine), opioids (for example, hydrocodone and oxycodone), Phencyclidine (PCP), and Methylenedioxymethamphetamine (MDMA).[19] The NFL Drug Panel also includes alcohol, but specifies that alcohol is only prohibited if a Player's Treatment Plan explicitly prohibits alcohol.[20]

Under the NFL's substance abuse program, there are four types of testing: pre-employment, pre-season, intervention

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Massachusetts, Nevada, Oregon, Washington, and Washington DC. *Id.* Medical marijuana is legal in Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, and Vermont. *Id.* Limited medical marijuana laws allow for the use of "low THC, high cannabidiol (CBD)" products for medical reasons in limited situations or as a legal defense, and have been approved in sixteen states—Alabama, Georgia, Iowa, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming. *Id.*

[17] NFL PLAYERS ASS'N, NAT'L FOOTBALL LEAGUE POLICY AND PROGRAM ON SUBSTANCES OF ABUSE, 7–8 (2016), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/2016SOAPolicy_v2.pdf.

[18] Synthetic cannabinoids, often called "synthetic marijuana," refers to man-made mind-altering chemicals. They are not actual cannabis products, but are called cannabinoids because they bind to cannabinoid receptors. Synthetic cannabinoids affect the brain much more powerfully than marijuana. Their effects are unpredictable and may be severe. *Synthetic Cannabinoids*, NATIONAL INSTITUTE ON DRUG ABUSE (last updated Nov. 2015), https://www.drugabuse.gov/publications/drugfacts/synthetic-cannabinoids; *see also* Steve Featherstone, *Spike Nation*, THE NEW YORK TIMES MAGAZINE (July 8, 2015), https://www.nytimes.com/2015/07/12/magazine/spike-nation.html.

[19] NFL PLAYERS ASS'N, NAT'L FOOTBALL LEAGUE POL'Y AND PROGRAM ON SUBSTANCES OF ABUSE, 7–8 (2016), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/2016SOAPolicy_v2.pdf.

[20] *Id.* at 8.

program, and testing by agreement.[21] Pre-employment tests may be administered to rookie or veteran players contemplating a contract with an NFL club, in addition to draft-eligible players during the annual scouting combines.[22] Pre-season testing involves all players under contract with an NFL team; all players are tested at least once between April and August.[23] Players in the Intervention Program, those who have failed at least one drug test, are tested at the discretion of the league's medical advisor.[24] Testing by agreement involves an agreement between an NFL team and a player, providing that the player agrees to unannounced testing during the term of his contract, given the team has a reasonable basis for requesting the tests.[25]

A positive test initiates a graduated series of disciplinary measures including entry into the NFL's Intervention Program, fines and suspensions.[26] On average, a player misses four games for a first-time marijuana violation.[27] Ironically, Adrian Peterson missed just one game following an indictment for child abuse.[28]

NFL players who fail a drug test for the first time are immediately sent to the League's Intervention Program.[29] Subsequent positive tests lead to escalating repercussions, including one or more of the following: (1) fines of two- to four-seventeenths of the player's salary; (2) suspension without pay for four or ten competitive games, including postseason games; or (3) banishment from the NFL for a minimum of one calendar year.[30]

The NFL's marijuana policy is arguably the most restrictive policy when compared to rules governing other

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[21] *Id.* at 8–9.

[22] *Id.* at 8.

[23] *Id.* at 9.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 12–18.

[27] Jillian Rose Lim, *The NFL Pot Policy, By the Numbers*, MEN'S JOURNAL, http://www.mensjournal.com/health-fitness/health/the-nfl-pot-policy-by-the-numbers-20140916 (last visited Sept. 9, 2017).

[28] *Id.*

[29] *See* NFL PLAYERS ASS'N, *supra* note 19 at 12.

[30] *See* NFL PLAYERS ASS'N, *supra* note 19 at 12–18.

professional athletes.[31] Major League Baseball (MLB) players are not tested for marijuana unless there is "reasonable cause" to suspect they are using it,[32] and the MLB does not discipline players who test positive beyond fines for excessive positive marijuana tests.[33] At a 50 ng/ml threshold, THC is unlikely to be detected in a one-time marijuana smoker's urine sample beyond three days; for a 20 ng/ml threshold, THC is unlikely to be detected beyond seven days.[34] For moderate marijuana use, approximately four times a week, the detection window is five to seven days.[35] THC will remain detectible in a daily marijuana user's urine for ten to fifteen days, and may take thirty days or more to drop below 50 ng/ml for habitual smokers.[36]

A. THE WORLD ANTI-DOPING AGENCY & MARIJUANA: RELATIONSHIP GOALS

The World Anti-Doping Agency (WADA), the agency that sets the rules for Olympic drug use, has listed marijuana as a banned substance since the organization's inception in 2003.[37] Richsteard Pound, the first head of WADA and still a member of

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[31] *See* Tom Junod, *Eugene Monroe Has a Football Problem*, ESPN THE MAGAZINE (Nov. 2, 2016), http://www.espn.com/espn/feature/story/_/id/17943168/retired-baltimore-ravens-tackle-used-marijuana-quit-football.

[32] *See* MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM 18–20, http://mlb.mlb.com/pa/pdf/jda.pdf (last visited Sept. 17, 2017).

[33] *See* Junod, *supra* note 31.

[34] Mena Raouf, *Two Puffs Too Bad: Demystifying Marijuana Urine Testing*, PAIN DR. (Aug. 30, 2015), http://paindr.com/two-puffs-too-bad-demystifying-marijuana-urine-testing/.

[35] *Id.*

[36] *Id.*

[37] Ted Hesson, *Why Are the Olympics Testing for Marijuana?*, ABC NEWS (May 19, 2013), http://abcnews.go.com/ABC_Univision/Politics/olympics-testing-marijuana/story?id=19212672. (More than 600 sports associations are governed by WADA's drug policy). WORLD ANTI-DOPING AGENCY, https://www.wada-ama.org/en/what-we-do (last visited Feb. 16, 2017). (The World Anti-Doping Agency (WADA) was founded in 2004, with the goal of bringing consistency to anti-doping policies within sport organizations and governments across the world).

its board, "was rather ambivalent [toward marijuana] [from a sports perspective]," but explained that the United States was "keen to have it included."[38] Needless to say, marijuana made it onto the banned substance list because of pressure from the United States.

Under the original rules, athletes were disciplined if they had THC blood levels of 15 ng/ml or higher.[39] Ten years later, in 2013, WADA raised that threshold substantially.[40] Now WADA cannot punish Olympic athletes for anything less than 150 ng/ml.[41] WADA essentially made it so that the only time an athlete *will* get disciplined is if they get high right before or during an event.[42] Olympic athletes do not get punished for trace amounts of THC, which means they may smoke marijuana in their personal lives without fear of disqualification. The WADA drug policy establishes marijuana and cannabinoids as substances that are prohibited *in competition*.[43] Furthermore, Olympic athletes may seek a Therapeutic Use Exemption (TUE) for marijuana, allowing them to circumvent this rule.[44]

B. A LITTLE REALITY CHECK

When asked whether the NFL had a pot problem, NFL's Executive Vice President of Health and Safety Jeff Miller, responded with an explanation of the league's drug testing policy. "We have a program for testing jointly negotiated with the players' association on the advice of our medical advisors," he explained.[45] Players are tested and "should they test positive

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[38] Hesson, *supra* note 38.

[39] *Id.*

[40] Nick Lindsey, *Olympic Athletes Can Now Smoke Weed Without Being Disqualified*, GREEN RUSH DAILY (Aug. 5, 2016), https://www.greenrushdaily.com/2016/08/05/olympic-athletes-can-now-smoke-weed/.

[41] *Id.*

[42] *Id.*

[43] *See generally id.*

[44] *USADA Therapeutic Use Exemption Policy*, U.S. ANTI-DOPING AGENCY, https://www.usada.org/substances/tue/policy/ (last updated Jan. 30, 2017).

[45] *See* Junod, *supra* note 31.

they hopefully get the kind of help and assistance they need."[46] If they repeatedly test positive, they are punished.[47]

State laws and public opinion are changing fast, with only six states prohibiting all forms of marijuana use.[48] Unfortunately the NFL's policy—"a policy consistent with prevailing medical opinion and federal law"—likely will remain unchanged until its medical advisors see the need to make a change.[49]

Is the NFL's drug policy consistent with prevailing medical opinion and federal law? Definitely not if you ask the hundreds of former players involved in the suit against the NFL, alleging that the various clubs made intentional misrepresentations regarding medication in violation of the Controlled Substance Act and the Food, Drug, and Cosmetic Act.[50] The answer would also be "no" from former players Eugene Monroe and Kyle Turley; Monroe describes standing in line for shots of Toradol.[51] It's possible we could also infer a "no" from former wide receiver Calvin Johnson, who claims the NFL handed out painkillers like Skittles.[52]

The League likely has an opioid problem, but what about a *pot* problem? According to ESPN senior writer Tom Junod, the

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[46] *Id.*

[47] *Id.*

[48] *See, e.g.*, NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 16.

[49] *See* Junod, *supra* note 31.

[50] *See* Dent v. NFL, No. C 14-02324 WHA, 2014 U.S. Dist. LEXIS 174448, at *3-4 (N.D. Cal. Dec. 17, 2014) ("Since 1969, doctors and trainers from the individual clubs have allegedly supplied players with a consistent string of pain medications," oftentimes without a prescription and with "little regard for a player's medical history or potentially-fatal interactions with other medications."); Evans v. Ariz. Cardinals Football Club L.L.C., No. C 16-01030 WHA, 2016 U.S. Dist. LEXIS 86207, at *15 (N.D. Cal. July 1, 2016) (an order denying the NFL member clubs motion to dismiss the class action brought against it by former players challenging the league's administration of painkillers).

[51] Junod, *supra* note 31.

[52] Dr. David Chao, *Monday Morning MD: Giving Out Pain Medicine "Like Candy"*, NFPOST.COM (July 11, 2016), http://www.nationalfootballpost.com/monday-morning-md-giving-out-pain-medicine-like-candy/.

problem with NFL's pot problem "is that it is the least of the NFL's problems."[53] Junod believes the League's gravest problem is that football is inherently dangerous.[54] An increasing number of players are reluctant to bear the risks and continue playing.[55] For those who are willing to play, the NFL needs to either forget about marijuana and focus on its opioid problem, or focus on marijuana research and marijuana's potential as an alternative drug. That is the least the NFL can do for the players who put on a jersey and represent the League. For a sport that "thrives on pain and a virtual 100% injury rate,"[56] it is important that the NFL explores pain relief alternatives besides addictive opioids.

At Super Bowl 50 in 2016, NFL Commissioner Roger Goodell said that the League knew of the scientific developments in marijuana studies.[57] Yet he remained confident that the NFL's current policy is still in the players' best interests.[58] On the other hand, Ricky Williams wonders how the NFL can remain so comfortable with the opioids it feeds players.[59] It appears the League's current policy may not be in the best interest of players when you actually listen to the players' opinions. "I know that Junior would be here, David Duerson would be here, Andre Waters, Justin Strzelczyk." Every single one of those guys would be here," said Kyle Turley, "[i]f they knew what cannabis could do for them."[60]

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[53] *See* Junod, *supra* note 31.

[54] *Id.*

[55] *Id.*

[56] Chris Lemieux, *Here's What We Learned From the Calvin Johnson Interview*, SB NATION PRIDE OF DETROIT (July 8, 2016, 11:00 AM), http://www.prideofdetroit.com/2016/7/8/12126370/calvin-johnson-interview-recap-what-we-learned.

[57] Greg Bishop, *Ricky Williams Takes the High Road*, SPORTS ILLUSTRATED, http://www.si.com/longform/2016/ricky-williams-weed/ (last visited Feb. 16, 2017).

[58] *Id.*

[59] *Id.*

[60] *Cf.* BISHOP, *supra* note 57. ESPN.com News Services, *Junior Seau Dies at 43*, ESPN (May 3, 2012), http://www.espn.com/nfl/story/_/id/7882750/junior-seau-former-san-diego-charger-found-dead-cops-probe-suicide. (Junior Seau, the "emotional leader of the San Diego Chargers for [thirteen] years," committed suicide in 2012, two years after his retirement). Brent

Former offensive lineman Eugene Monroe began taking painkillers in college while he was recovering from a knee injury, and continued taking them throughout his professional

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Schrotenboer, *Former NFL Doctor Gets Probation in Junior Seau Case*, (Jan. 5, 2017, 9:36 PM), http://www.indystar.com/story/sports/nfl/2017/01/05/david-chao-chargers-doctor-settlement-junior-seau-Mark Fainaru-Wada et al., *Doctors: Junior Seau's Brain Had CTE*, ESPN (Jan 11, 2013), http://www.espn.com/espn/otl/story/_/id/8830344/study-junior-seau-brain-shows-chronic-brain-damage-found-other-nfl-football-players. (Junior's brain later tested positive for CTE. Dr. David Chao, the former San Diego Chargers team doctor, has been placed on probation for four years as a result of Junior Seau's death and a finding by the California State Medical Board that Chao "failed to exercise proper caution in the extended use of Ambien with a patient showing signs of depression and suicidal thought." As part of the settlement, Chao will not be allowed to prescribe the drug Ambien during his probationary period). Paul Solotaroff, *Dave Duerson: The Ferocious Life and Tragic Death*, MEN'S JOURNAL, http://www.mensjournal.com/magazine/dave-duerson-the-ferocious-life-and-tragic-death-of-a-super-bowl-star-20121002 (last visited Feb. 16, 2017). (David Duerson, a former Chicago Bear and a Pro Bowl safety, committed suicide in 2011 with a gunshot to the chest. Doctors later announced he was suffering from a "moderately advanced" case of CTE). Alan Schwarz, *Expert Ties Ex-Player's Suicide to Brain Damage*, THE NEW YORK TIMES (Jan. 18, 2007), http://www.nytimes.com/2007/01/18/sports/football/18waters.html. (Former Philadelphia Eagles defensive back Andre Waters committed suicide in 2006, with a gunshot wound to the head. A neuropathologist tied Walter's depression and death on the brain damage he sustained while playing football). Alan Schwarz, *Lineman Dead at 36 Exposes Brain Injury*, THE NEW YORK TIMES (Jun. 15, 2007), http://www.nytimes.com/2007/06/15/sports/football/15brain.html. (Justin Strzelczyk, a former offensive tackle with the Pittsburgh Steelers, died in a violent crash in 2004, at the age of thirty-six. Strzelezyk was apparently experiencing a meltdown when he became involved in a high-speed chase with police in central New York. His truck collided with a tractor-trailor, killing him instantly. Strzelczyk's brain showed early signs of brain damage that experts believe to be a result of the persistent head trauma experienced by most football players. At the time, Strzelczyk was the fourth ex-NFL player "to have been found post-mortem to have had a condition similar to that generally found only in boxers with dementia or people in their [eighties].").

career.[61] He stood in line on game days for injections of the anti-inflammatory Toradol, calling it the "T Train."[62] He also had a ten-year prescription for the anti-inflammatory Celebrex.[63] The Celebrex caused Monroe gastric distress, so he had another prescription for that; another prescription to deal with the migraines caused by his various concussions; more prescriptions for Vicodin and Oxycontin to deal with the pain; and another prescription for Ambien.[64]

Monroe remembers going home with a prescription for Vicodin after having shoulder surgery, and how the pills made him feel groggy and listless.[65] "*Those drugs, they stone you.* They have psychoactive components," he explained, "they cause drowsiness, fatigue; they cause lethargy."[66] And in the aftermath of a concussion, Monroe could not put up with it anymore. "I was sitting there practically drooling," he admitted.[67]

Everything changed for Monroe after watching a documentary on CNN called *Weed*. *Weed* was presented by Dr. Sanjay Gupta, an American neurosurgeon, and followed families braving opposition in order to use marijuana to treat their children's intractable illnesses.[68] Monroe saw himself in the film because, as a professional football player, he felt he had an intractable illness as well.[69] Monroe began to speak out about marijuana as an alternative to addictive opioids—an alternative to "something that led to enslavement and overdoses and lives thrown away."[70]

Eugene Monroe is the only active player to publicly support removing marijuana from the League's banned

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[61] *See* Junod, *supra* note 31.

[62] Eugene Monroe, *Getting Off the T Train*, THE PLAYERS TRIBUNE (May 23, 2016), http://www.theplayerstribune.com/2016-5-23-eugene-monroe-ravens-marijuana-opioids-toradol-nfl/.

[63] *See* Junod, *supra* note 31.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

substance list, advocating for a drug he did not use at the time.[71] On June 15, 2016, three months after giving his first interview about marijuana and a day before he planned on submitting an application for the NFL to provide a "therapeutic use exemption"[72] for marijuana, Monroe was cut from the Baltimore Ravens.[73] A month later, the free-agent announced his retirement in an essay titled "Leaving the Game I Love."[74] Eugene Monroe now uses marijuana to "heal[] the hurt from a lifetime playing the game."[75]

C. "C'MON MAN!"

The NFL's drug policy is almost identical to the DEA's classification of drugs—it is archaic and contradictory:

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[71] *Eugene Monroe Announces Retirement*, ESPN (July 22, 2016), http://www.espn.com/nfl/story/_/id/17117984/eugene-monroe-plans-retire-seven-year-career.

[72] A therapeutic use exemption would allow athletes who require the use of a prohibited substance to treat a diagnosed medical problem to request an exemption from the league's policy. This is the same exemption to the prohibition on banned substances that allows players with ADHD to use Adderall. NFL PLAYERS ASS'N, NAT'L FOOTBALL LEAGUE POL'Y AND PROGRAM ON SUBSTANCES OF ABUSE, 34–36 (2016), https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/2016SOAPolicy_v2.pdf.

[73] Junod, *supra* note 31. Eugene Monroe made headlines during the 2016 offseason for his pro marijuana publicity. Soon after Monroe's media rounds, the Ravens released him (they claim it had nothing to do with his active stance though). Teams including the Giants, Seahawks, 49ers, and Vikings came looking for Monroe, but the twenty-nine-year-old was not interested. "I'm only [twenty-nine] and I still have the physical ability to play at a very high level, so my decision to retire may be puzzling . . . But I am thinking of my family first right now—and my health and my future," Monroe wrote. Zach Links, *Monroe Not Interested in Vikings*, PRO FOOTBALL RUMORS (Nov. 16, 2016, 10:11 AM), https://www.profootballrumors.com/eugene-monroe.

[74] Junod, *supra* note 31.

[75] *Id.*

> No one would argue that Benzoylecognine (cocaine), amphetamine and its analogues, opiates (total morphine and codeine), opioids (e.g., hydrocodone, oxycodone), Phencyclidine (PCP), and Methylenedioxymethamphetamine ("MDMA") should be taken off the banned substance list. However, one could argue that the aforementioned drugs are all viewed as *less* harmful than cannabis in the eyes of the law.[76]

We know that these drugs cause high rates of death and addiction.[77] "And we have cannabis, which is far healthier, far less addictive and, quite frankly, can be better in managing pain," former offensive lineman Eugene Monroe said.[78] Monroe expresses disappointment that NFL commissioner Roger Goodell would tell fans that there is no medical versus recreational use distinction when it comes to marijuana.[79]

Many people have said that the NFL is in bed with the pharmaceutical companies.[80] "They want you taking their pills," former Chicago Bears quarterback Jim McMahon told *Sports Illustrated Now*.[81] "I think they're in cahoots with big pharma," said McMahon.[82] "My whole career they were pushing pills on me. For whatever aliment you had, they had a pill for it and that's the reason they're demonizing this plant the way they are," he concluded.[83]

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[76] Alec Banks, *Is the NFL's Marijuana Policy Racist & Short-Sighted?*, HIGHSNOBEITY (Nov. 18, 2016), http://www.highsnobiety.com/2016/11/18/nfl-drug-policy-weed/.

[77] *Id.*

[78] *Id.*

[79] Jeff Zrebiec, *Ravens' Eugene Monroe Criticizes Commissioner Roger Goodell's Stance*, THE BALTIMORE SUN (Mar. 15, 2016, 8:56 AM), http://www.baltimoresun.com/sports/ravens/ravens-insider/bal-ravens-eugene-monroe-criticizes-commissioner-roger-goodells-stance-on-medical-marijuana-20160315-story.html.

[80] Banks, *supra* note 76.

[81] *Id.*

[82] *Id.*

[83] *Id.*

There are allegations of an affair between the NFL and the alcohol industry.[84] *Forbes* reported that Bud Light, the NFL's official beer since 2011, paid $1.4 billion dollars to renew its sponsorship through 2022.[85] Some studies have suggested that drinking alcohol is more harmful than smoking marijuana.[86]

The League's endeavor to supplement the criminal justice system, and its policy of punishing players for what is now considered legal in many states, does the NFL a disservice.[87] It deprives the sport of valuable players who could make the game more compelling, competitive, and exciting for viewers.[88] Imagine the impact the National Football League could have in pointing out the federal government's hypocrisy when it comes to marijuana.

The main argument against allowing marijuana usage in the NFL is that it is a privilege to play—the League has a right to hold its players to a higher standard.[89] The NFL is not only in the business of promoting a winning product, but a wholesome one.[90] But players are not asking the NFL to come out in *favor* of marijuana though, just to soften their stance against it.[91]

Would it hurt the NFL to implement a marijuana policy like the World Anti-Doping Agency's (WADA), allowing

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[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] Mike Florio, *Ditching Marijuana Ban Would Be Good Business for NFL*, NBC SPORTS (Sept. 30, 2016, 11:44 AM), http://profootballtalk.nbcsports.com/2016/09/30/ditching-marijuana-ban-would-be-good-business-for-nfl/. Some argue that the racial demographics of the NFL, seventy percent of players being African American, suggests that the leagues marijuana policy is racially charged as well. Banks, *supra* note 78. "Calls of racism are not a new phenomenon for the NFL as it relates to their drug policy." *Id.* In the 1990's, Dr. Forest Tennant, who directed the league's testing program at the time, made charges that black players were unfairly being targeted. *Id.* Of the thirty players suspended for drug use at the time, just four were white. *Id.* Dr. Tennant charged that three white players, star quarterbacks, had tested positive for high levels of cocaine yet received no counseling or treatment. *Id.*

[88] Florio, *supra* note 87.

[89] Banks, *supra* note 76.

[90] *Id.*

[91] *Id.*

players to use marijuana in their personal lives similar to the way alcohol use is permitted? Who is benefiting from the NFL's policy as it stands?

Nothing in the NFL's drug policy stopped Williams from smoking marijuana when he wanted to. It addressed neither what the League deemed substance abuse, *nor* "Williams's belief that sporadic marijuana use did not constitute substance abuse at all."[92] Former offensive lineman Kyle Turley says that all the league's policy did was turn Williams into a target.[93] "The NFL took it upon itself to try and ruin someone," says Turley. "I can't imagine the career Ricky would have had if these idiots had left him alone and just let him play football."[94]

Those experiencing chronic pain are needlessly hit with a double whammy—pain and punishment—in a system where the science supports remedies that are still punished on archaic data points.[95] Attorney Roger Groves points out that this scenario sounds awfully similar to when the NFL used to renounce the relationship between concussions and brain disease, generally known as chronic traumatic encephalopathy (CTE).[96] Groves suggests the NFL resort to the education model and rely on top industry experts if they want to be on the right side of player care.[97] This is something the NFL did not do with the concussion dilemma, where the League acted primarily from fear and came out on the wrong side of a $1 billion settlement.[98] The NFL may fear loosening the marijuana policy would cause players to become potheads, hurting the league's reputation and resulting in

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[92] Greg Bishop, *Ricky Williams Takes the High Road*, SPORTS ILLUSTRATED, http://www.si.com/longform/2016/ricky-williams-weed/ (last visited Feb. 16, 2017).

[93] *Id.*

[94] *Id.*

[95] Roger Groves, *The Science That Justifies Marijuana in the NFL and NBA*, FORBES (Dec. 6, 2016, 12:40 PM), http://www.forbes.com/sites/rogergroves/2016/12/06/the-scientific-secret-that-justifies-marijuana-in-the-nfl-and-nba/#337b71c5719b.

[96] *Id.*

[97] *Id.*

[98] Jimmy Golen, *Supreme Court leaves $1B NFL concussion settlement in place*, AP NEWS (Dec. 13, 2016), https://www.apnews.com/249f93a0ce544de79a73cc71bda5ef69. The NFL's prior primary "expert" did not specialize in brain trauma. *Id.*

lower revenue.[99] But if the NFL "[is] not too blinded by the public relations mythology, they should be relieved to hear of the scientific studies separating the pothead buzz from the positive pain relief."[100]

Many NFL players believe that a therapeutic use exemption for marijuana use would reduce the use of pharmaceutical painkillers.[101] In one study that surveyed 226 of nearly 3,000 active NFL players, researchers found that sixty-percent of players were worried about the long-term effects of pharmaceutical painkillers, and forty-two percent believed one or more teammates were addicted to them.[102] Sixty-one percent of players agreed that players would take fewer injections of Toradol if they could legally resort to marijuana.[103]

II. THE GOVERNMENT'S OBJECTIONS

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people . . . We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin. And then criminalizing both heavily, we could disrupt those communities . . . Did we know we were lying about the drugs? Of course we did.

–John Ehrlichman, White House Domestic Affairs Advisor (1969- 1973)[104]

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[99] *Id.*

[100] *Id.*

[101] Bay Area News Group, *Majority of NFL Players Say Medicinal Marijuana Would Reduce Use of Chemical Painkillers*, MERCURY NEWS (Nov. 2, 2016, 8:47 AM), http://www.mercurynews.com/2016/11/02/majority-of-nfl-players-say-medicinal-marijuana-would-reduce-use-of-chemical-painkillers/.

[102] *Id.* The survey was conducted by ESPN The Magazine. Results also showed that sixty-four percent of respondents had taken an injection of Toradol or another painkiller, many of which have strong side effects (i.e. intestinal bleeding) when administered over a long period of time. *Id.*

[103] *Id.*

[104] Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted* Blacks, CNN POLITICS (Mar. 24, 2016, 3:14 PM),

The NFL is not completely to blame for its willful blindness to the potential benefits of marijuana use because federal law has set the stage. Though the NFL could help rein in a controversial medication,[105] the League's current marijuana policy essentially mimics federal law.

A. A BRIEF HISTORY

Marijuana has been used as an intoxicant in this country for over a century.[106] From the beginning it was hard to distinguish between the medicinal use and the recreational use of the drug "whose purpose is to make you feel good."[107] An 1862 issue of *Vanity Fair*, for example, included an advertisement for hashish candy, describing it as a wonderful medical agent for the cure of nervousness, weakness, melancholy, and confusion of thoughts.[108] The ad explained that, under the influence of the pleasurable and harmless stimulant, "all classes seem to gather new inspiration and energy."[109] Though hashish use became a fad to some extent during the nineteenth century,[110] strictly recreational use of hashish or other preparations of the marijuana plant remained neither widely known nor accepted.[111]

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http://www.cnn.com/2016/03/23/politics/john-ehrlichman-richard-nixon-drug-war-blacks-hippie/.

[105] Louis Bien, *Comfortably Numb: The NFL Fell in Love with a Pain Killer It Barely Knew*, SB NATION (Aug. 3, 2016), http://www.sbnation.com/2016/8/3/12310124/comfortably-numb-the-nfl-fell-in-love-with-a-painkiller-it-barely-knew.

[106] THE NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING, at 6 (Mar. 1972).

[107] Stephen Siff, *The Illegalization of Marijuana: A Brief History*, ORIGINS (May 2014), http://origins.osu.edu/article/illegalization-marijuana-brief-history.

[108] *Hasheesh Candy*, THE ANTIQUE CANNABIS BOOK, http://antiquecannabisbook.com/chap15/QCandy.htm (last visited Feb. 16, 2017).

[109] *Id.*

[110] FRONTLINE, *Marijuana Timeline*, ARIZONA PBS, http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html. (last visited Feb. 16, 2017).

[111] Siff, *supra* note 107.

During the "nineteenth century, marijuana became a popular ingredient in many medicinal products and was openly sold in public pharmacies."[112] It was not until the 1906 Pure Food and Drug Act that the federal government first attempted to regulate marijuana.[113] The Act, largely a "truth in labeling" law, worked to reduce drug addiction in the new century.[114] Nineteenth century addiction was largely accidental, caused in part by careless prescription practices and secret distribution of "narcotic" drugs—opium, morphine, heroin, and cocaine—in patent medicines.[115] Among other things, the 1906 Act created a list of ten ingredients that had to be labeled at all times; the list included marijuana (along with alcohol, cocaine, and morphine.[116] Even so, marijuana continued to be legally available without a prescription as long as it was labeled.

By the early twentieth century, law enforcement offices and medical communities began focusing on recreational or "street" use of drugs by inner-city, ethnic minorities.[117] The response was criminal legislation, banning the non-medical production, distribution, or consumption of narcotics.[118] In 1914, the federal government passed the Harrison Narcotics Act as a sort of record-keeping law.[119] Though it only provided for the

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[112] FRONTLINE, *supra* note 110.

[113] *Id.*

[114] *The Pure Food and Drug Act*, U. OF MO. LIBR.: FOOD REVOLUTIONS (June 2012), https://library.missouri.edu/exhibits/food/purefood.html.

[115] THE NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, *supra* note 106.

[116] *Regulatory Information: Federal Food and Drugs Act of 1906*, U.S. FOOD & DRUG ADMINISTRATION, https://www.fda.gov/regulatoryinformation/lawsenforcedbyfda/ucm148690.htm (last updated May 20, 2009).

[117] THE NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, *supra* note 106, at 12-13.

[118] *Id.* at 14. Scientific literature and statutory provisions even began to incorrectly classify marijuana as a "narcotic" drug. The drug was assumed to render the user psychologically dependent, to provoke violent crime, and to cause insanity. *Id.*

[119] Edward M. Brecher, *The Consumers Union Report on Licit and Illicit Drugs*, SCHAFFER LIBRARY OF DRUG POLICY, http://www.druglibrary.org/schaffer/library/studies/cu/cu8.html (last visited Feb. 16, 2017).

imposition of a special tax on and registration of those involved in the production or manufacture of narcotics, the Act quickly became a de facto prohibition.[120] There was no debate as to the immorality of non-medical use of narcotics—"the non-medical use of narcotics was a cancer which had to be removed entirely from the social organism."[121]

The practice of smoking marijuana recreationally was largely unknown in the United States until the years following the Harrison Narcotics Act.[122] Some historians believe Mexican immigrants introduced the habit,[123] and as the immigrants spread to the cities, marijuana use became commonplace within the same urban communities identified with opiate abuse.[124]

By 1931, twenty-nine states passed legislation criminalizing the improper possession or use of marijuana.[125] And despite there being no comprehensive scientific study on marijuana or its effects, the National Conference of Commissioners on Uniform State Laws added an optional marijuana clause in the Uniform Narcotics Act in 1932.[126] Five years later, "every state had enacted some form of legislation related to marijuana".[127] The drug was thrown into the category of narcotics and was assumed to render the user psychologically dependent, provoke violent crime, and cause insanity.[128]

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[120] *Id.*

[121] THE NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, *supra* note 108, at 12.

[122] *Id.*

[123] FRONTLINE, *supra* note 112; Siff, *supra* note 109.[124] THE NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, *supra* note 108, at 12.

[124] THE NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, *supra* note 108, at 12.

[125] Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge*, SCHAFFER LIBRARY OF DRUG POLICY, http://www.druglibrary.org/schaffer/library/studies/vlr/vlr3.htm (last visited Feb. 16, 2017).

[126] *Id.*

[127] *Id.*

[128] THE NAT'L COMM'N ON MARIHUANA AND DRUG ABUSE, *supra* note 106, at 13.

Following the States' lead, Congress passed the Marihuana Tax Act in 1937.[129] The purpose and effect of the bill was to restrict marijuana use so heavily that its use essentially was prevented altogether.[130] The only person to speak against the bill was Dr. William Woodward, who spoke on behalf of the American Medical Association (AMA).[131] The AMA opposed the bill on grounds that there was no evidence that the medical use of marijuana had caused or was causing marijuana addiction:

> Since the medical use of cannabis has not caused and is not causing addiction, the prevention of the use of the drug for medicinal purposes can accomplish no good end whatsoever. How far it may serve to deprive the public of the benefits of a drug that on further research may prove to be of substantial value, it is impossible to foresee.[132]

Dr. William Woodward, legislative counsel of the AMA, pointed out that professional marijuana use could be controlled as effectively as professional uses of opium and coca leaves were, if further legislation was in fact needed.[133] Nevertheless, the Marijuana Tax Act passed, effectively outlawing the possession or sale of marijuana. More severe measures followed in 1952, with the Boggs Act providing mandatory sentences for offenses involving marijuana among other drugs.[134]

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[129] *Id.*

[130] Wm. C. Woodward, *American Medical Association Opposes the Marijuana Tax Act of 1937*, PORTLAND NORML (JULY 10, 1937), http://www.marijuanalibrary.org/AMA_opposes_1937.html.

[131] Siff, *supra* note 107; Woodward, *supra* note 130.

[132] Woodward, *supra* note 130.

[133] *Id.*

[134] Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (Apr. 20, 2016), http://time.com/4298038/marijuana-history-in-america/.

1. THE ANTI-NARCOTICS MOVEMENT VERSUS THE TEMPERANCE MOVEMENT

> *"Just why the alcoholic is tolerated as a sick man while the opiate addict is persecuted as a criminal is hard to understand."*
>
> *–Dr. Robert S. de Ropp, Biochemist"*[135]

It is important to note the major differences between the anti-narcotics and temperance movements. We have a highly organized nationwide lobby to thank for temperance legislation; anti-narcotics legislation was essentially *ad* hoc.[136] The temperance movement was the subject of intense public debate; the anti-narcotics movement was not.[137] Temperance legislation dealt with known problems associated with alcohol abuse; anti-narcotics legislation was anticipatory.[138] Last, anti-narcotics legislation outlawed all drug-related behavior; temperance legislation almost never restricted private activity.[139] These conflicting policy patterns evidence the distinction in American minds between alcohol and tobacco, and "narcotics."[140]

Unlike alcohol and tobacco use, which were a part of indigenous American practices, recreational use of "narcotics" was alien.[141] These drug users were either immigrants or marginal members of society.[142] Not surprisingly, the immediate response to marijuana mirrored the narcotics prohibition pattern as opposed to the alcohol or tobacco temperance.[143]

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[135] Brecher, *supra* note 119.

[136] THE NAT'L COMM'N ON MARIJUANA AND DRUG ABUSE, *supra* note 106, at 12.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

2. A FOUNDATION BUILT ON A LIE

The sprawled body of a young girl lay crushed on the sidewalk the other day after a plunge from the fifth story of a Chicago apartment house. Everyone called it a suicide but actually it was murder. The killer was a narcotic known to America as marijuana, and history as hashish. It is a narcotic used in the form of cigarettes, comparatively new to the United States and as dangerous as a coiled rattlesnake.

-Harry Anslinger, 1st Commissioner of the U.S. Treasury Department's Federal Bureau of Narcotics (1930-1962)[144]

This was the typical "bureau educational campaign" describing marijuana, its recognition, and its evil effects.[145] The mid-1960s marijuana explosion played out in the context of thirty-years of fear instilled by the US government.[146]

For decades, marijuana use was primarily confined to low-class urban communities and some insulated social groups, like artists and jazz musicians.[147] This all changed in the mid-1960's. By 1965, the college campus drug epidemic occupied newspaper headlines nationwide. Public confusion and fear over this development became obvious.[148] The sudden interest by the public in marijuana stimulated new scientific and medical interest in the drug and for the first time, marijuana became the subject of intense medical and scientific scrutiny.[149]

Unfortunately, the research took place in this spotlight of controversy.[150] The press automatically relayed isolated and incomplete findings to the public, with little effort to analyze the

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[144] *Marijuana – The First Twelve Thousand Years*, SCHAFFER LIBRARY OF DRUG POLICY. http://www.druglibrary.org/Schaffer/hemp/history/first12000/13.htm (last visited Feb. 16, 2016).

[145] *Id.*

[146] THE NAT'L COMM'N ON MARIJUANA AND DRUG ABUSE, *supra* note 106, at 12.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

meaning of those findings.[151] Marijuana use's visibility to groups previously unfamiliar with the drug, extreme public scrutiny, and fishbowl research gave root to the marijuana problem today.[152]

a. The Controlled Substances Act

In 1970 Congress enacted the Comprehensive Drug Abuse Prevention and Control Act.[153] Title II, known as the Controlled Substances Act (CSA), placed individual drugs into one of four "Schedules" depending on perceived medical value and potential for abuse.[154] The most restrictive schedule, Schedule I, covers drugs the federal government deems to have no medical value and a high potential for abuse.[155] As part of President Richard Nixon's war on drugs, the Act classified marijuana as a Schedule I drug—more due to Nixon's animosity toward the counterculture and his association of the counterculture with marijuana than to any medical, scientific, or legal opinion.[156]

Dr. Leo Hollister—an employee of the Veterans Administration Hospital, a member of the Scientific Advisory Board of the Bureau of Narcotics and Dangerous Drugs, and a member of the National Academy of Science-National Research Council (NAS-NRC)—spoke at the 1970 hearing on the proposed Controlled Substance Act.[157] He described the proposed method of scheduling drugs and the penalty structure as greatly disturbing to the scientific community.[158]

Dr. Hollister made three personal recommendations to deal with the problem: (1) base drug schedules on the danger to the individual and the danger the drug use may cause for society, also referred to as the liability of abuse; (2) use a multidisciplinary expert committee to decide drug scheduling;

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[151] *Id.*

[152] *Id.*

[153] Martin, *supra* note 134.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Leo Hollister on the Controlled Substances Act (1970)*, DRUGSCIENCE.ORG, https://www.drugscience.org/lib/Holl70.html (last visited Sept. 12, 2017).

[158] *Id.*

and (3) base penalties for drug use on moral grounds instead of punishing someone for personal drug use.[159]

The second half of Dr. Hollister's statement to Congress explained why the proposed legislation would "become a laughing stock" if passed.[160] Primarily, he was concerned with his inability to identify any scientific colleague consulted about the proposed legislation or anyone who found the scheduling logical.[161] According to Dr. Hollister, the scheduling reinforces the delusion that such diverse drugs as LSD, heroin, and marijuana are equal in pharmacological effects or in the degree of danger they pose to individuals and society at large.[162] Dr. Hollister pointed to the low scheduling of highly addictive amphetamines, reiterating his first recommendation that medical use criteria be abandoned in favor of liability of abuse criteria.[163]

Dr. Hollister concluded his statement with the fact that criminal legislation had not appreciably discouraged drug users, a group of individuals that sound medical and legal opinion consider foolish or sick or both.[164] He described a policy that punishes the only possible victim as an unsound policy.[165] "If our hearts were in the right place," he said, "we'd put no penalty on users."[166] Such a proposal was said to be politically unrealistic, to which Dr. Hollister responded, "if this is the case, and to be politically realistic, we must injure our fellows, then politics be damned!"[167]

In 1972, two years after the enactment of the Controlled Substances Act, the National Commission on Marijuana and Drug Abuse recommended that the possession of marijuana for personal use no longer be an offense.[168] The Commission, which Congress created and filled with members appointed by

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[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] Paul Armentano, *35 Years of Prohibition*, NORML, http://norml.org/component/zoo/category/celebrating-35-years-of-failed-pot-policies (last visited Sept. 26, 2017).

President Nixon, explained that the potential harm of marijuana use "is not great enough to justify intrusion by the criminal law into private behavior."[169] Nixon shelved the report.[170] And for decades, the United States has ignored the experts and followed the path of Nixon's prejudice.[171]

Since 1972 parties have petitioned the federal government to remove or reschedule marijuana.[172] National Organization for the Reform of Marijuana Laws (NORML), a nonprofit organization working to legalize marijuana, launched the first petition in 1972.[173] The petition to reschedule marijuana from Schedule I to II and allow physicians to legally prescribe the drug was denied after twenty-two years of court challenges.[174] Notwithstanding the Drug Enforcement Agency's (DEA) classification, Administrative Law Judge Francis Young's conclusion that "[m]arijuana . . . is one of the safest therapeutically active substances" and, in medical terms, "marijuana is far safer than many foods we commonly consume."[175]

The DEA has denied every petition it has ruled on to reschedule the drug, in some cases overriding the advice of federal judges.[176] Marijuana remains in the most tightly restricted category of drugs, a category of drugs deemed to have no

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[169] *Id.*

[170] *Id.*

[171] Kevin Zeese, *Once-Secret "Nixon Tapes" Show Why the U.S. Outlawed Pot*, ALTERNET (Mar. 20, 2002, 11:00 PM), http://www.alternet.org/story/12666/once-secret_%22nixon_tapes%22_show_why_the_u.s._outlawed_pot.

[172] *Marijuana Law Reform* Timeline, NORML, http://norml.org/shop/item/marijuana-law-reform-timeline (last visited Feb. 16, 2017).

[173] *Id.*

[174] *Id.*

[175] Francis L. Young, *Marijuana Rescheduling Petition*, U.S. DEP'T OF JUSTICE DRUG ENF'T ADMIN. (Sept. 6, 1988), http://www.ccguide.org/young88.php.

[176] Christopher Ingraham, *The Government is Stifling Medical Marijuana Research*, WASH. POST (Oct. 20, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/20/the-federal-government-is-stifling-medical-research-major-think-tank-declares/?utm_term=.d9936bb9e4dd.

accepted medical value, a lack of accepted safety for use, and a high potential for abuse.[177]

As a Schedule I drug, marijuana is considered to have no currently accepted medical use, despite the thousands of personal testimonials to the contrary.[178] Schedule I drugs may not be prescribed, administered, or dispensed for medical use.[179] But drugs listed under Schedules II through V have some accepted medical use and may be prescribed for medical use within limitations.[180] Classifying marijuana as medically useless has restricted research access and ensured that marijuana would not follow the normal path through medical, scientific, and pharmaceutical standards.[181]

The most recent petition to reschedule marijuana was denied in 2016, five years after it was filed.[182] Governors Lincoln Chafee of Rhode Island and Christine Gregoire of Washington petitioned the DEA to repeal the regulations that categorize marijuana as a Schedule I drug.[183] The petition claimed: cannabis has an accepted medical use in the United States; cannabis is safe for use under medical supervision; and medical cannabis has a relatively low potential for abuse, especially when compared to other Schedule II drugs.[184]

In a substantive science-based report, the Governors laid out non-smoking methods, and describe how recent scientific developments support the pharmacy model.[185] The petition

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[177] Letter from Chuck Rosenberg, Acting Adm'r, U.S. Dep't of Justice Drug Enf't Admin., to the Hon. Gina M. Raimodo, Governor of R.I, and the Hon. Jay R. Inslee, Governor of Wash., at 3 (Aug. 11, 2016) (on file with the U.S. Dep't of Justice Drug Enf't Admin.).

[178] Press Release, Office of the Governor, *Governors Lincoln Chafee and Chris Gregoire File Petition to Reclassify Marijuana*, RI.GOV (Nov. 30, 2011), http://www.ri.gov/press/view/15325.

[179] *Id.*

[180] *Id.*

[181] Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (Apr. 20, 2016), http://time.com/4298038/marijuana-history-in-america/.

[182] Rosenberg, *supra* note 177, at 1.

[183] *Schedule of Controlled Substances: Maintaining Marijuana in Schedule 1 of the Controlled Substances Act*, U.S. DEP'T OF JUSTICE DRUG ENF'T ADMIN. at 2 (July 2016).

[184] *Id.*

[185] Press Release, supra note 178.

explained how modern DNA analysis had made it easy to determine the plant's beneficial compounds and how easy it would be for a compounding pharmacist to then use the appropriate cannabis blend to create a customized medicine.[186]

Per protocol, the DEA submitted the petition to the United States Department of Health and Human Services (HHS), requesting that HHS provide a scientific and medical evaluation and scheduling recommendation for marijuana.[187] HHS recommended that marijuana remain a Schedule I drug, pointing to the drug's high potential for abuse, unknown chemistry, and the fact that there are no adequate studies and scientific evidence is not widely available.[188]

In a report filled with contradictions and self-serving information, the DEA attempted to justify its decision to keep marijuana in Schedule I of the Controlled Substances Act.[189] At one point in the report, the DEA points to a 2005 study reporting that exposure of immunodeficient mice infected with HIV to THC enhanced HIV replication.[190] Interestingly, the DEA chose to rely on animal studies when real life figures show that almost one in three HIV/AIDS patients turn to cannabis to counteract pain, nausea, appetite loss, cachexia, and depression.[191]

Furthermore, HHS (the same department that recommended marijuana remain classified as a Schedule I drug with no medicinal value) owns a patent for a medical use for marijuana.[192] The same department that owns a patent titled "Cannabinoids as Antioxidants and Neuroprotectants" refuses to acknowledge that the drug has any medical value.

III. CBD: A NON-PSYCHOACTIVE CANNABINOID

Marijuana is a Schedule I controlled substance because it contains tetrahydrocannabinol (THC), a psychoactive

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[186] *Id.*

[187] *See Schedule of Controlled Substances*, *supra* note 183, at 2.

[188] *Id.* at 2–3.

[189] *See id.* at 35–39.

[190] *Id.* at 30.

[191] Bailey Rahn, *Cannabis and HIV/AIDS*, LEAFLY, (Sept. 18, 2014), https://www.leafly.com/news/health/cannabis-and-hivaids.

[192] U.S. Patent No. 6,630,507 (filed Apr. 21, 1999).

ingredient.[193] Cannabidiol (CBD) contains less than one percent of THC and has virtually no psychoactive effects.[194]

A. U.S. PATENT NO. 6,630,507: CANNABINOIDS AS ANTIOXIDANTS AND NEUROPROTECTANTS

Marijuana refers to all parts of the *Cannabis sativa* plant—the seeds; the resin; and "every compound, manufacture, salt, derivative, mixture, or preparation" of the plant, its seeds, or its resin.[195] The Cannabis plant contains over 400 chemicals, seventy to a hundred of which are unique to the plant and known as cannabinoids.[196] THC and CBD are the two main cannabinoids found in marijuana.[197] Unlike THC, the psychoactive element that produces a "high" feeling, CBD has no psychoactive effects.[198] Marijuana is a Schedule I controlled substance due to the presence of THC.[199] CBD contains less than one percent THC and has shown potential medical value, though it remains a Schedule I controlled substance under the Controlled Substance Act.[200]

U.S. Patent No. 6,630,507, granted to the HHS in 2003, claims the rights to several non-psychoactive cannabinoids, including CBD.[201] The patent claims cannabinoids can act as antioxidants and neuroprotectants that are useful for treating ischemic, age-related inflammatory, and autoimmune diseases; Alzheimer's disease; Parkinson's disease; HIV; and dementia.[202]

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[193] *DEA Eases Requirements for FDA-Approved Clinical Trials on Cannabidiol*, U.S. DRUG ENFORCEMENT ADMINISTRATION (Dec. 23, 2015), https://www.dea.gov/divisions/hq/2015/hq122315.shtml.

[194] *Id.*; *see also* Delilah Butterfield, *CBD: Everything You Need to Know About Cannabidiol*, HERB (July 26, 2016), http://herb.co/2016/07/26/everything-you-need-to-know-about-cbd/.

[195] 21 U.S.C. § 802(d) (2012).

[196] *What Chemicals Are in Marijuana and Its Byproducts*, PROCON (July 8, 2009, 6:11 PM), https://medicalmarijuana.procon.org/view.answers.php?questionID=000636.

[197] Butterfield, *supra* note 194.

[198] *Id.*

[199] *DEA Eases Requirements*, *supra* note 193.

[200] *Id.*

[201] U.S. Patent No. 6,630,507, *supra* note 192.

[202] *Id.*

The patent allows for companies to apply for licenses to further research cannabinoid compounds to develop drugs.[203]

Does this patent contradict the federal classification of marijuana as a Schedule I drug with no medical value? I would say so, and I believe others would too. But the federal government maintains that it does not—instead, the patent acknowledges only the potential medical value in cannabinoids, not any proven medical value.[204] The patent also only covers specific compounds of marijuana.[205] "[T]he patent is for the use of cannabinoid compounds similar to and including those that naturally occur in marijuana, but not for the whole marijuana plant," and thus, according to the government, does not contradict the blanket schedule for marijuana.[206]

B. Why Fight the Science?

CBD first made headlines not long ago. The "miracle compound" has helped to treat seizures in children, calm psychotic patients, and relieve those with chronic pain.[207] CBD is the compound identified in US Patent No. 6,630,507 as having significant antioxidant and neuroprotective properties, suggesting the compound may be an alternative treatment for neurological disorders.[208] The therapeutic potential of CBD is promising due to the lack of psychoactive side effects and the ability to execute "higher doses than with psychotropic" compounds.[209]

Though CBD has not been FDA approved for any condition, scientific and medical research highlights CBD's

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[203] Alicia Wallace, *Patent No. 6,630,507: Why the U.S. Government Holds a Patent on Cannabis Plant Compounds*, THE CANNABIST (Aug. 22, 2016), http://www.thecannabist.co/2016/08/22/marijuana-patents-6630507-research-dea-nih-fda-kannalife/61255/. (rule 16.3)

[204] German Lopez, *Marijuana's Medical Use Is Illegal Under Federal Law. It's also Patented by the Feds*, VOX (Mar. 18, 2015), http://www.vox.com/2014/10/8/6932997/medical-marijuana-patent-CBD-HHS-federal-government. (rule 16.3)

[205] *Id.*

[206] *Id.*

[207] Butterfield, *supra* note 194**.**

[208] *See* U.S. Patent No. 6,630,507, *supra* note 192.

[209] *Id.*

potential as a treatment for a wide variety of conditions and a number of institutions are pushing for more research.[210] Relying on anecdotal evidence, numerous people have resorted to CBD to treat a variety of medical conditions.

Dr. Dustin Sulak, a licensed osteopathic physician in Maine, speaks of the therapeutic effects of marijuana:

> In one day I might see cancer, Crohn's disease, epilepsy, chronic pain, multiple sclerosis, insomnia, Tourette's syndrome and eczema…. The patients are old and young. Some are undergoing conventional therapy. Others are on a decidedly alternative path. Yet despite their differences, almost all of my patients would agree on one point: cannabis helps their condition.[211]

Though one should be wary of a medicine that claims to act as a cure-all, the therapeutic potential of marijuana has not disappointed.[212] Figuring out how one plant can help with so many conditions led scientists to the discovery of the endocannabinoid system, "named after the plant that led to its discovery," and "perhaps the most important physiologic system" involved in health and healing.[213]

The endocannabinoid system is a chemical signaling system and described as the "bridge between body and mind."[214] Humans naturally synthesize endocannabinoids, chemical compounds that activate the same receptors as THC, the psychoactive component of marijuana.[215] Endocannabinoids and endocannabinoid receptors are spread throughout the body, the

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[210] *What is Cannabidiol?*, MEDICAL MARIJUANA INC. (Oct. 11, 2016), http://www.medicalmarijuanainc.com/what-is-cannabidiol/; *What is CBD?*, PROJECT CBD, https://www.projectcbd.org/what-cbd (last visited Feb. 16, 2017).

[211] Dustin Sulak, *Introduction to the Endocannabinoid System*, NORML, http://norml.org/library/item/introduction-to-the-endocannabinoid-system (last visited Feb. 16, 2017).

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *Id.*

brain, organs, tissue, and glands.[216] The cannabinoid system performs different tasks in different parts of the body, "but the goal is always the same: homeostasis," or the maintenance of a stable internal environment in spite of variations in the external environment.[217]

Endocannabinoids are found at the intersection of the body's nervous and immune systems as well.[218] They facilitate cell-to-cell communication and "coordination between different cell types."[219] Take for instance an injury site. Cannabinoids can be found working to decrease the "release of activators and sensitizers" from the damaged tissue; "stabilizing the nerve cell" to avoid excess firing; and "calming nearby immune cells" to block the "release of pro-inflammatory substances."[220] And all for a single purpose, to minimize pain and damage resulting from the injury.[221]

The endocannabinoid system, and its complex role in the body, shows how different states of consciousness may "promote health or disease."[222] Cannabinoids not only regulate homeostasis, they also influence an individual's "relationship with the external environment."[223] "[T]he administration of cannabinoids" often promotes human behaviors such as "sharing, humor, and creativity."[224] By mediating neurogenesis, the active production of new neurons, cannabinoids may directly foster an individual's open-mindedness and their ability to move past "limiting patterns of thought and behavior."[225] Being able to reformat these old habits is a critical part of health in our ever changing environment.[226] "It certainly would be odd to rely on science when it suits us and disregard it otherwise."[227] Ironically that insight comes from the letter written by Chuck Rosenberg,

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[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] Rosenberg, *supra* note 177, at 1

the Acting Administrator of the DEA, denying the most recent petition to reschedule marijuana. Not that the rest of the letter is any better, but Rosenberg *had* to be laughing when he concluded it with that. Then again, according to Rosenberg smoking marijuana as medicine is a joke.[228] If only the former prosecutor could have provided the source of the information that lead him to that conclusion.[229]

Marijuana's Schedule I designation continues to make research on the plant and its compounds difficult. Contradictory federal policy is "interfering with the relationship between doctor and patient" every day.[230] In states where medical marijuana is legal, doctors and patients still find themselves in a bind between state and federal laws.

The majority of the current research corroborates the federal government's claim that CBD and other cannabinoids exhibit therapeutic and neuroprotective capabilities. In 2000, Colorado voters approved Amendment 20, authorizing the medical use of marijuana for those suffering from a "debilitating medical condition."[231] The definition of "debilitating medical condition" explicitly included eight conditions: cancer, glaucoma, HIV/AIDS, cachexia (or wasting syndrome), persistent muscle spasms, severe pain, severe nausea, and seizures.[232] The Amendment established an affirmative defense for patients and care-givers using medicinal marijuana, creating

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[228] Paula Reid & Stephanie Condon, *DEA Chief Says Smoking Marijuana as Medicine "is a Joke"*, CBS NEWS (Nov. 4, 2015, 3:10 PM), http://www.cbsnews.com/news/dea-chief-says-smoking-marijuana-as-medicine-is-a-joke/. *See generally* Eliana Dockterman, *People Want DEA Chief to Resign After He Called Medical Marijuana 'a Joke'*, TIME (Nov. 10, 2015), http://time.com/4107603/dea-medical-marijuana-joke-2/ (after agency head Chuck Rosenberg called medical marijuana "a joke" during a Q&A with reporters last week, over 10,000 people have signed a petition demanding his resignation). (rule 16.3) This is the third cite that had a titled that was shorted. I couldn't find a rule that lets you shorten a title or how to decide what part of a title is important so I just added the full titles passed on what they said online.

[229] *Id.*

[230] Ingraham, *supra* note 176.

[231] *Colorado Amendment 20*, NATIONAL FAMILIES IN ACTION (Mar. 1, 2012), http://www.nationalfamilies.org/guide/colorado20-full.html.

[232] *Id.*

an identification card system for those covered by the bill.[233] All but six states have followed suit, developing some sort of medicinal marijuana law.[234]

In December of 2015, the DEA decided to ease regulatory requirements for those conducting clinical trials on CBD.[235] Previously, the Controlled Substances Act required CBD researchers who modified the scope of their studies and who needed more CBD than originally approved to provide a written request to adjust their DEA research registrations—an approval process, involving the DEA and the Food and Drug Administration, which significantly delayed research.[236] The changes allow previously registered researchers conducting CBD-based clinical trials to receive a waiver, allowing them to tweak their process and continue research smoothly.[237] This modification is a minor attempt to streamline the CBD research process and facilitate more scientific studies.[238]

If the federal government believes marijuana has *any* medical value, it should reschedule the drug. A lower schedule would give state governments an opportunity to relax marijuana laws without the fear of federal interference. Countless patients, medical professionals, and elected officials have sought to place marijuana in a lower schedule, a schedule that would reflect the drugs accepted medical value, relative safety, and low abuse potential.[239]

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[233] *Id.*

[234] NORML: STATE LAWS, http://norml.org/laws (last visited Oct. 26,2017).

[235] *DEA Eases Requirements for FDA Approved Clinical Trials on Cannabidiol*, U.S. DRUG ENFORCEMENT ADMINISTRATION (Dec. 23, 2015), https://www.dea.gov/divisions/hq/2015/hq122315.shtml.

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] DRUG POLICY ALLIANCE (May 2013) http://www.drugpolicy.org/sites/default/files/DPA_Fact%20sheet_Marijuana%20Reclassification_May%202013.pdf.

IV. MARIJUANA: WORTHY OF A CHANCE

Matt and Paige Figi can personally attest to marijuana's medical potential. Their daughter Charlotte experienced her first seizure when she was three months old.[240] In the following months, their daughter had frequent seizures lasting two to four hours and was hospitalized often.[241]

One of Charlotte's doctors eventually found a possible diagnosis: Dravet Syndrome.[242] Dravet Syndrome is a rare form of severe epilepsy—a neurological disorder characterized by sudden recurring seizures, and associated with abnormal electrical activity in the brain.[243] It is a lifelong disease that begins in the first year of infancy.[244]

When Charlotte turned two, her condition declined.[245] The Figis took her to see a Dravet specialist, who put her on the ketogenic diet.[246] The ketogenic diet is a low-carb, high-fat diet frequently used to treat epilepsy.[247] However, two years into the diet, Charlotte's seizures returned.[248] The five-year-old was experiencing 300 seizures a week.[249] She eventually lost the ability to eat, talk, and walk.[250] The Figis were running out of options. Doctors suggested the family try an anti-seizure drug being tested on dogs before suggesting the young girl simply be

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[240] Saundra Young, *Marijuana Stops Child's Severe Seizures*, CNN (Aug. 7, 2013, 4:51 PM), http://www.cnn.com/2013/08/07/health/charlotte-child-medical-marijuana/.

[241] *Id.*

[242] *Id.*

[243] *Dravet Syndrome*, EPILEPSY FOUNDATION, http://www.epilepsy.com/learn/types-epilepsy-syndromes/dravet-syndrome (last visited Feb. 16, 2017).

[244] *Id.*

[245] Young, *supra* note 240.

[246] *Id. See also* DR. MARGARET GEDDE, http://geddewholehealth.com/naturalhormonebalance/index.htm (last visited Oct. 26, 2017).

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.*

put in a medically induced coma.[251] Evidently there was nothing more the hospital could do for Charlotte.

The Figis finally decided to give marijuana a try after finding an online video of a California boy using marijuana to treat his Dravet.[252] But finding two doctors to sign off on a medical marijuana card for the youngest patient in Colorado to ever apply took some time.[253] Mrs. Figi eventually reached Dr. Margaret Gedde, a Stanford educated MD PhD pathologist and award-winning researcher, who agreed to sign on.[254] Childhood is a delicate time in brain development and the long-term effects marijuana use may have on children is still not fully understood.[255] But when Dr. Gedde put the risks of marijuana in context with Charlotte's multiple near-death experiences and the extent of the child's brain damage from seizures (and likely pharmaceuticals), the decision was easy.[256] Dr. Alan Shackelford, a Harvard educated physician with a number of medical marijuana patients, provided the second signature.[257] Though Dr. Shackelford did not have experience with Dravet, he understood that the family had exhausted all of their options.[258] They had tried everything already—everything except marijuana.

With signatures from Dr. Gedde and Dr. Shackelford, the Figis were set. Mrs. Figi visited a Denver dispensary, purchasing two ounces of a high CBD low THC marijuana.[259] She had a friend extract the oil for Charlotte and the results were stunning.[260] Charlotte went from 300 seizures a week to not having a single one in her first seven days of treatment.[261] When the Figis supply got low, they contacted the Stanley brothers.[262] One of Colorado's largest marijuana growers, the

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[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] *Id.*

group of six brothers had developed a crossbreed between industrial hemp and a particular strain of marijuana low in THC and high in CBD.[263] The breed of marijuana that Charlotte and dozens of others now use to ease the symptoms of diseases ranging from cancer to epilepsy has been named Charlotte's Web after the young girl.[264] The oil created by the Stanley Brothers maintains a thirty to one ratio of CBD to THC.[265] Doctors found three to four milligrams of oil per pound of Charlotte's body weight stopped the seizures completely.[266] Charlotte receives a dose of the cannabis oil twice daily with food, and today she is thriving.[267]

Though Charlotte's Web was originally developed to treat seizures, football players took notice of the extraordinary medicine, its neuroprotective capabilities, and its potential as a treatment for symptoms of chronic traumatic encephalopathy (CTE), the degenerative brain disease found in forty percent of retired NFL players.[268]

A. CTE AND THE NFL: A HISTORY OF DENIAL

In 2013, UCLA researchers notified ex-Super Bowl champion Leonard Marshall that he exhibited signs of chronic traumatic encephalopathy.[269] *Encephalopathy* derives from the Ancient Greek words *kephale* meaning "head" and *patheia*

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[263] *Id.*

[264] *Id.*

[265] *Charlotte Figi's Ongoing Story with Medical Marijuana*, HEALTHY HEMP OIL https://healthyhempoil.com/charlotte-figi-2/ (last visited Feb. 16, 2016).

[266] Young, *supra* note 240.

[267] *Id.*

[268] Jason M. Breslow, *87 Deceased NFL Players Test Positive for Brain Disease*, PBS (Sept. 18, 2015), http://www.pbs.org/wgbh/frontline/article/new-87-deceased-nfl-players-test-positive-for-brain-disease/.

[269] Doug Farrar, *Leonard Marshall on CTE, Concussion, and the NFL Then and Now*, SPORTS ILLUSTRATED (Sept. 1, 2015), http://www.si.com/nfl/2015/09/02/leonard-marshall-nfl-concussion-movie-cte.

meaning "suffering."[270] CTE is a progressive degenerative brain disease caused by repetitive head trauma.[271] CTE was previously thought to exist primarily among boxers, but is now known to be common among ex-football players.[272]

The disease persists over a period of years and gradually deteriorates the brain.[273] Deposits of proteins and changes in white matter occur in the brain in response to the disease, adversely affecting cell-to-cell communication.[274] The symptoms of CTE, which do not become noticeable until approximately eight to ten years after the repetitive trauma, can be debilitating.[275] The most common symptoms include memory loss, erratic behavior, aggression, depression, and a gradual onset of dementia.[276] Many of the CTE symptoms are similar to those of Alzheimer's or Parkinson's disease so people often dismiss the signs as an undesirable, yet normal part of aging.[277]

Although some of the effects of CTE are apparent with brain imaging, a diagnosis of the disease can only be made after death.[278] Today, there is no cure for CTE.[279] The best way to limit the risk is simply to prevent head trauma.[280] CTE has been diagnosed in several high-profile cases, including the 2012 suicide of former NFL linebacker Junior Seau.[281] After years of

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[270] *What is CTE?*, BRAIN INJURY RESEARCH INSTITUTE, http://www.protectthebrain.org/Brain-Injury-Research/What-is-CTE-.aspx (last visited Sept. 15, 2017).

[271] *Id.* A concussion is a traumatic brain injury caused by a sudden blow to the head or other injury that shakes the brain causing bruising, blood vessel damage, and nerve injury. *Chronic Traumatic Encephalopathy – Medical Marijuana Research Overview*, MEDICAL MARIJUANA, INC. (Jan. 5, 2016), http://www.medicalmarijuanainc.com/chronic-traumatic-encephalopathy-overview/.

[272] BRAIN INJURY RESEARCH INSTITUTE, *supra* note 270.

[273] *Id.*

[274] MEDICAL MARIJUANA, INC., *supra* note 271.

[275] *Id.*

[276] *Id.*

[277] BRAIN INJURY RESEARCH INSTITUTE, *supra* note 270.

[278] MEDICAL MARIJUANA, INC., *supra* note 271.

[279] *Id.*

[280] *Id.*

[281] Martin Pengelly, *Junior Seau 'Oral History' Details NFL Culture of Silence on Head Injuries*, THE GUARDIAN (Aug. 19, 2013),

erratic behavior and depression, Junior took his life with a gunshot wound to the chest.[282] He was forty-three years old.[283]

The hall of famer known for his aggressive tackles often kept concussions, among other injuries, private.[284] Not once in his twenty years in the NFL was Junior diagnosed with a concussion, but his family claims he had many.[285] Like many players, Junior did not recognize the harm he was doing to his body: "[i]f I could feel some dizziness, I know that guy's feeling double of what I feel. [T]he hitting that I put on somebody else is always going to be judged on how I feel going back to the bench."[286]

After his death, Junior's family donated his brain tissue to the National Institute of Neurological Disorders and Stroke, part of the National Institutes of Health (NIH).[287] The NIH concluded that his brain showed definitive signs of CTE.[288]

Junior Seau's suicide is reminiscent of that of former NFL safety Dave Duerson. Duerson took his life in 2011 at the age of fifty.[289] He left a suicide note asking that his family donate his brain to Boston University School of Medicine to be studied for brain trauma.[290] Neurologists at the University confirmed that Duerson suffered from a neurodegenerative disease tied to concussions.[291]

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https://www.theguardian.com/sport/2013/aug/19/junior-seau-brain-concussion-gq.

[282] NPR, *supra* note 1. Martin Pengelly, *supra* note 281.

[283] *Id.*

[284] NPR, *supra* note 1.

[285] *Id.*

[286] *Id.*

[287] Mary Pilon & Ken Belson, *Seau Suffered From Brain Disease*, N.Y. TIMES (Jan. 10, 2013), http://www.nytimes.com/2013/01/11/sports/football/junior-seau-suffered-from-brain-disease.html.

[288] Sam Farmer, *Junior Seau Had Brain Disease When He Committed Suicide*, LOS ANGELES TIMES (Jan. 10, 2013), http://articles.latimes.com/2013/jan/10/sports/la-sp-sn-junior-seau-brain-20130110.

[289] *Id.*

[290] *Id.*

[291] Tony Perry & Sam Farmer, *Junior Seau Sent Texts to Ex-Wife, Kids Before Killing Himself*, LA TIMES (May 3, 2012, 7:21 AM),

A study by Boston University and the Department of Veterans Affairs autopsied former players and found CTE in ninety-six percent of the NFL players examined and in seventy-nine percent of football players at various other levels of play.[292] The study found CTE in 131 of 165 deceased former football players, who played the sport in high school, college, or professionally.[293]

In the most recent study presented to the American Academy of Neurology, researchers found that more than forty percent of retired NFL players have signs of traumatic brain injury.[294] Researchers examined the brains of forty participants who had played an average of seven years in the league and reported an average of 8.1 concussions.[295] Most of the participants had been retired for less than five years.[296]

Researchers took brain scans of the retired NFL players while giving them memory and concentration tests.[297] The scans measured the amount of damage to the brain's white matter, the part of the brain that connects its various regions.[298] Forty-three percent of the players had levels of movement 2.5 standard deviations below that of healthy individuals at the same age.[299] This is considered evidence of traumatic brain injury, having less than a one percent error rate.[300] Thirty percent of the tested athletes showed evidence of injury to the brain resulting from damage to nerve axons, the part of the brain that allows cells to transfer information.[301] Testing of athletes' thinking skills

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http://latimesblogs.latimes.com/lanow/2012/05/junior-seau-sent-texts-to-wife-kids-before-killing-himself.html.

[292] Travis M. Andrews, *40 Percent of Former NFL Players Suffer From Brain Injuries, New Study Shows*, WASHINGTON POST (Apr. 12, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/04/12/40-percent-of-former-nfl-players-suffer-from-brain-damage-new-study-shows/?utm_term=.090da24c010f.

[293] *Id.*

[294] *Id.*

[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.*

showed fifty percent had major problems on executive function, forty-five percent on memory, forty-two percent on concentration, and twenty-four percent on spatial reasoning.[302]

The study came months after the NFL's 2015 injury report, showing a thirty-two percent jump in instances of head trauma from the previous year.[303] Instances of head trauma rose from 206 in 2014 to 271 reported concussions in 2015.[304] The NFL's concussion problem has come under national fire in recent years and CTE is becoming an increasing threat to players and football organizations nationwide.

At Kannalife Sciences, in Doylestown, Pennsylvania, researchers are working with Temple University to explore CBD as a treatment for CTE.[305] The company has taken a more biopharmaceutical approach than others. They want to synthesize CBD and distribute it in pill form to increase the drug's effectiveness and the rate at which it is absorbed into the bloodstream.[306] Ricky Williams hopes "[c]annabis research is going to be the new wave of medicine this century," especially for football players.[307]

> The NFL empties your tank. I look at Junior Seau. I played with Junior. He literally gave everything he had, and when I heard about his suicide, I understood. We have to teach these guys that everything's connected: the body and the mind, all the trauma. With all the damage we've suffered, we're one group of people with an amazing capacity to heal. We just need the tools.[308]

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[302] *Id.*

[303] *Id.*

[304] *Id.*

[305] Greg Bishop, *Ricky Williams Takes the High Road*, SPORTS ILLUSTRATED, http://www.si.com/longform/2016/ricky-williams-weed/ (last visited Sept. 17, 2017).

[306] *Id.*

[307] *Id.*

[308] *Id.*

B. THE BEST OF BOTH WORLDS

While the NFL has dedicated large amounts of money to fund research to limit the traumatic brain injuries that cause CTE, that research has much to do with innovative equipment and little to do with a known neuro-protectant.[309] The League has attempted to protect players by adjusting playing rules and developing better helmets.[310] The NFL implemented two logical policy changes: bans on intentional head-to-head contact, and the striking of a defenseless player.[311] But efforts to create a helmet capable of protecting players from head injury seem futile, at least in relation to concussions. A helmet may be able to cushion the skull, but concussions involve movement of the brain within the skull—no helmet can prevent that.[312] What the NFL's CTE strategy should incorporate is marijuana.

Leonard Marshall, one of the former players involved in the billion-dollar NFL concussion settlement and a key player in the medical marijuana world, resorts to marijuana to relieve his symptoms of CTE.[313] In 2014, Marshall participated in the first study that attempted to diagnose signs of CTE in living people and tested positive.[314] Marshall says that CBD products have worked to relieve his headaches, depression, and mood swings

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[309] *See* Josh Keefe, *Can Weed Protect Your Brain (and Save Football)?*, OBSERVER (June 27, 2016, 1:26 PM), http://observer.com/2016/06/can-weed-protect-your-brain-and-save-football/.

[310] *New NFL Rules Designed to Limit Head Injuries*, NFL (July 26, 2012, 8:40 PM), http://www.nfl.com/news/story/09000d5d81990bdf/article/new-nfl-rules-designed-to-limit-head-injuries; Alexander Aciman, *The NFL's New Helmet is Supposed to Make Players Safer from Brain Injuries. It'll Almost Certainly do the Opposite,* QUARTZ (Sep. 22, 2017), https://qz.com/1084348/the-nfls-new-helmet-is-supposed-to-make-players-safer-from-brain-injuries-itll-almost-certainly-do-the-opposite/

[311] *Id.*

[312] *See* Aciman, *supra* note 310.

[313] *Id.*

[314] Kalyn Kahler, *Leonard Marshall: A Giant in the World of Medicinal Marijuana*, THE MMBQ (June 24, 2016) http://mmqb.si.com/mmqb/2016/06/24/nfl-leonard-marshall-marijuana-hemp.

better than anything else.[315] The fifty-five year-old takes four droplets of a CBD-based hemp oil in the morning and four droplets at night and maintains that his quality of life has improved thanks to CBD.[316] Leonard Marshall joins former offensive tackle Eugene Monroe in the campaign to petition the NFL to reconsider its stance on marijuana and support medical research, especially related to CTE.

Marijuana offers two major medical benefits of interest to the NFL: brain protection and pain relief. CBD promises multiple benefits to the human body, providing potent therapeutic effects without the "high" produced by high THC variations. CBD addresses many intractable conditions, and works especially well in treating neuropathic pain.[317] A growing body of research is identifying CBD as a valuable asset for former and current NFL players.

1. AN ALTERNATIVE PAIN RELIEVER

The first major benefit of marijuana is its ability to act as a pain reliever. A non-addictive pain reliever, with a primary side effect of euphoria, should spark the interest of a League currently being sued by former players for the negligent and harmful distribution of opioids.[318]

A study conducted by researchers at Washington University in St. Louis found that the rate of retired NFL players misusing opioid painkillers is more than four times the rate of the general population.[319] Furthermore, evidence suggests this is

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[315] *Id.*

[316] *Id.*

[317] *Cannabinoids*, CHRONIC RELIEF, http://mychronicrelief.com/cannabis-science/cannabinoids/ (last visited Sept. 17, 2017).

[318] Nadia Kounang, *Lawsuit Alleges that NFL Teams Gave Painkillers Recklessly* CNN (Mar. 13, 2017), http://www.cnn.com/2017/03/12/health/nfl-painkiller-lawsuit/index.html.

[319] John Barr, *Study: Players Misuse Painkillers*, ESPN: OUTSIDE THE LINES, http://www.espn.com/espn/eticket/story?page=110128/PainkillersNews (last visited Feb. 16, 2017). Fifty-two percent of the retired players surveyed said they used prescription painkillers during their NFL

"because players misused painkillers during their NFL careers."[320] Former NFL defensive tackle Sam Rayburn was arrested in 2009 for stealing and forging prescriptions from a doctor's office. Rayburn later admitted to consuming one hundred Percocet pills a day to control his chronic pain.[321] "'I think if I would have given it another two or three months, it probably would have killed me,' Rayburn said of his addiction."[322] "I don't have any doubts whatsoever that it would have turned into a death situation, because I didn't see any way of slowing down."[323] The NFL, an organization that is in the pain business, has forced the black market to deal with the after-effects of playing.[324]

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careers. *Id.* Of those, seventy-one percent admitted to misusing the drugs then. *Id.* Retired players who misused prescription painkillers during their NFL careers were three times more likely to misuse the drugs today. *Id.*

[320] *Id.*

[321] John Barr, *Painkiller Use in Today's NFL*, ESPN: PAINKILLER MISUSE NUMBS NFL PAIN, http://www.espn.com/espn/eticket/story?page=110128/PainkillersCurrentUse (last visited Feb. 16, 2017). Percocet is a combination of oxycodone and acetaminophen, making it an opiod/non-opiod combination, and is used to relieve moderate to severe pain. The drug's label includes a black box warning, the "strictest warning put in the labeling of prescription drugs" and FDA drug products "when there is reasonable evidence of an association of a serious hazard with the drug." *Black Box Warnings*, WALGREENS, https://www.walgreens.com/topic/faq/questionandanswer.jsp?questionTierId=900002&faqId=5400004 (last visited Feb. 16, 2017). The label warns of risk of addiction, abuse, and misuse, which may lead to overdose and death. It also notes that life-threatening or fatal cases may occur even when using Percocet as recommended. *Percocet*, EPOCRATES, https://online.epocrates.com/u/10b2298/Percocet/Black+Box+Warnings (last visited Feb. 16, 2017).

[322] Alec Banks, *Is the NFL's Marijuana Policy Racist & Short-Sighted?*, HIGHSNOBEITY (Nov. 18, 2016), http://www.highsnobiety.com/2016/11/18/nfl-drug-policy-weed/.

[323] *Id.*

[324] *Id.*

2. A KNOWN NEURO-PROTECTANT

The second major benefit of marijuana is its unique neuro-protective qualities, and its ability to protect the brain from injury. Research on CTE and CBD shows that marijuana can prevent the protein build up in the brain commonly associated with head injury.[325] Researchers believe this accumulation of protein causes the death of neurons seen in CTE.[326] The studies on CBD's neuro-protective capabilities are promising.[327]

If you ask former NFL offensive lineman Kyle Turley, marijuana saved his life.[328] During his ten-year NFL career, Turley relied on pain killers prescribed to him by NFL medical staff.[329] According to Turley, doctors handed out medications without any consideration of addiction.[330] It is commonplace for NFL players to numb their injuries with prescription painkillers under pressure to perform on Sundays, Turley explained.[331] But after his career ended in 2007, his reliance on pain killers persisted.[332] Turley was addicted, and he believes this contributed to his struggle with depression, anxiety, rage, and chronic headaches.[333]

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[325] *Tau Proteins, CTE and CBD*, PANACEA HEMP OIL (Nov. 9, 2016), https://www.ophempoil.com/blogs/news/tau-proteins-cte-and-cbd.

[326] *Id.*

[327] *See id.*

[328] SI WIRE, *Former NFL Player Kyle Turley: Marijuana Saved My Life*, SPORTS ILLUSTRATED (Jul. 13, 2016), http://www.si.com/nfl/2016/07/13/kyle-turley-ricky-williams-marijuana-saved-my-life.

[329] *See id.*

[330] Rod O'Connor, *Ex-Lineman Kyle Turley on NFL Cannabis Ban*, LEAFLY (Feb. 3, 2016), https://www.leafly.com/news/pop-culture/ex-lineman-kyle-turley-on-nfl-cannabis-ban-this-whole-thing-has-t.

[331] *See id.*

[332] *Id.*

[333] SI WIRE, *supra* note 328 (Turley—who says he suffered two documented concussions and over 100 undocumented ones—details how messed up his brain is, and how various drugs he has taken messed it up even further); Stefanie Loh, *Is it time to legalize marijuana in sports?*, SAN DIEGO TRIBUNE (Aug. 1, 2015, 6:00 AM),

For Turley, it was the neurological issues, a result of the numerous concussions he suffered throughout his NFL career, that posed the biggest threat to him and his family.[334] Though he first experienced bouts of vertigo during his rookie season, it was only after he retired that Turley received his first MRI.[335] By this time his vertigo had worsened, as did his episodes of rage and depression.[336] The real trouble for Turley began after doctors prescribed him a series of psychiatric drugs, including Wellbutrin and Depakote.[337] Suicidal and homicidal tendencies became part of his daily living.[338] "I couldn't be around a knife in the kitchen without having an urge to stab someone, including my wife and kids," Turley admits.[339] He points out that the drugs may have worked for people with psychological issues alone, but giving these drugs to someone whose brain is damaged is lethal.[340]

In 2014, Turley swore off all prescription drugs in favor of marijuana.[341] Turley and his family moved to California where medicinal marijuana is legal and he has since identified the strains that best fit his needs.[342] One of Turley's lifesavers is Jack Herer, a 55% sativa hybrid that works to eliminate his light sensitivity, anxiety, and depression.[343] "I've got all these issues," said Turley, "and I've found strains of cannabis that have resolved these issues like no synthetic drug I've ever been given by a normal doctor."[344]

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http://www.sandiegouniontribune.com/sports/aztecs/sdut-marijuana-sports-opioids-arguments-kyle-turley-2015aug01-story.html.

[334] O'Connor, *supra* note 330.

[335] *Id.*

[336] *Id.*

[337] *Id.*

[338] Greg Bishop, *Ricky Williams Takes the High Road*, SPORTS ILLUSTRATED (2016), http://www.si.com/longform/2016/ricky-williams-weed/.

[339] *Id.*

[340] O'Connor, *supra* note 330.

[341] *Id.*

[342] *Id.*

[343] *Id.*; *Jack Herer*, LEAFLY, https://www.leafly.com/sativa/jack-herer (last visited Oct. 5, 2017).

[344] O'Connor, *supra* note 330.

CONCLUSION: A MODEST PROPOSAL

Imagine a medicine that's side effect is euphoria. And people actually take it for nothing, just the side effect. We need to get rid of the insane prohibition mindset that feeling euphoria is a bad thing. It's okay if your medicine feels good.[345]

The NFL's stance on marijuana threatens the livelihood of its players and it makes the League look bad.[346] This is the exact opposite of what the League should want for its players, the ones who put their bodies on the line every day. For some reason, marijuana has become less of a problem for everyone except for those in charge of the rulemaking.[347]

The gap between the NFL's current drug policy, which bans any marijuana use, and public opinion continues to grow, and increasing acceptance of medicinal marijuana suggests the NFL should reconsider its stance. The NFL's marijuana policy not only hurts players, it hurts the League—"[p]ut simply, if a guy doesn't get arrested and can continue to perform at a satisfactory level regardless of whether he uses marijuana, he should be allowed to keep playing — and the league should want to do all it can to help him keep playing."[348]

Ricky Williams, Sam Rayburn, and countless other NFL players have seen their livelihoods threatened by the league's policy. In an open letter to the NFL, Doctors and Players for NFL Cannabis Reform (DCFR) urged the NFL to remove marijuana from its banned substance list.[349] The letter

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[345] Joshua Kellem, *Should the NFL Legalize Marijuana?*, HYPEFRESH (June 21, 2017), https://hypefreshmag.com/culture/should-the-nfl-legalize-marijuana.

[346] *See* Mike Florio, *Ditching Marijuana Ban Would Be Good Business for NFL*, NBC SPORTS, http://profootballtalk.nbcsports.com/2016/09/30/ditching-marijuana-ban-would-be-good-business-for-nfl/.

[347] *See* Banks, *supra* note 7.

[348] Florio, *supra* note 346.

[349] Hunter Atkins, *Former NFL Players, Physicians Gather in Houston to Erase the Sticky Stigma of Marijuana*, HOUS. CHRON. (Feb. 2, 2017, 1:16 AM), http://www.houstonchronicle.com/sports/texans/article/Former-NFL-players-physicians-discuss-marijuana-10902221.php.

recommends: (1) that no player be punished for using cannabis, medicinally or recreationally; (2) that the NFL treat marijuana like alcohol, focusing on misuse rather than mere use, and offering substance abuse intervention; and (3) that the NFL provide opioid addiction education.[350]

The NFL needs to better align itself with contemporary science and modern societal views by relaxing its marijuana policy. This would not only satisfy players, but it would also lessen the odds of another embarrassing moment of fans ridiculing the League for handing receiver Josh Gordon a season long suspension for multiple failed marijuana tests, while former running back Ray Rice received a two-game suspension "for coldcocking" his fiancé in an elevator.[351]

Federal restrictions on marijuana and other Schedule I drugs, including an exhausting registration and application process, makes legitimate research almost impossible. Federal marijuana policy is a circular policy that hinders scientific research.[352] Medical marijuana research is limited by the drug's Schedule I designation, a designation given to the plant due to the lack of research into its medical applications. If the federal government believes marijuana has any medical value—and one may reasonably assume it does in light of U.S. Patent No. 6,630,507—then marijuana should be rescheduled to a less restrictive category of drugs.

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[350] *Id.*

[351] Patrick Hruby, *The NFL'S Hazy Logic on Marijuana*, THE ATLANTIC (Sept. 17, 2014), https://www.theatlantic.com/entertainment/archive/2014/09/the-nfl-embraces-marijuana-finally/380246/. Ray Rice was suspended for the first two games of the 2014 season for "violating the NFL's personal conduct policy" after an offseason arrest for domestic violence. The Baltimore Raven's running back was fined an additional regular-season game paycheck, but was eligible to participate in training camp and all of the team's preseason games. Adam Schefter et al., *Ray Rice Suspended 2 Games*, ESPN (Jul. 25, 2014), http://www.espn.com/nfl/story/_/id/11257692/ray-rice-baltimore-ravens-suspended-2-games.

[352] *See* Mike Tanier, *Jake Plummer's Pot Crusade*, BLEACHER REP. (Sept. 2, 2016) http://thelab.bleacherreport.com/jake-plummer-s-pot-crusade/.

Marijuana deserves serious attention as an alternative pain treatment and a potential neuro-protectant. Though there is much more to discover about CBD, and marijuana generally, its future is promising. CBD could help millions who suffer brain injuries every year and the federal government seems to know that. CBD could do wonders for those suffering from chronic pain and symptoms of CTE. Former Denver Bronco Jake Plummer spoke of CBD: "I've had friends, guys I played alongside, whose mood changed from night to day. I know others who've replaced hellacious amounts of pain killers with CBD."[353] Plummer continued, "The bigger the number, the better the chance we have to get in front of (NFL [C]ommissioner) Roger Goodell and say, '[y]ou need to fund this.' Not just for football players, but for the millions of others it could help."[354]

The conversation on player safety in the NFL is not new. Interested parties have discussed it for over a century.[355] And in a League drowning in opioids, the NFL should give players freedom to choose a medicine that meets their needs; a medicine whose side effects fail to include death. Nearly three-quarters of NFL players believe marijuana use should be legal.[356] A little open-mindedness could go a long way for the League.
The NFL's policy views CBD usage—"[w]e're talking about something with a safety profile that looks like vitamin C"—as the same thing as smoking marijuana.[357] It is understandable that the NFL wants to avoid creating a "pot-head" association. But with CBD, a non-psychoactive compound, that issue is almost moot. And in relation to marijuana's psychoactive propensities,

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[353] Jim Litke, *Leaders Off the Field: Former QBs Push Medical Research Funding on CBD*, THE CANNABIST (Mar. 18, 2016, 8:41 PM), http://www.thecannabist.co/2016/03/18/former-nfl-players-jake-plummer-jim-mcmahon-cannabidiol-cbd-research/49790/.

[354] *Id.*

[355] In 1905, President Roosevelt summoned Harvard, Princeton, and Yale athletic advisers to the White House to talk about "reducing the element of brutality in play." Andrews, *supra* note 292.

[356] Bay Area News Group, *Majority of NFL Players Say Medicinal Marijuana Would Reduce Use of Chemical Painkillers*, THE MERCURY NEWS (Nov. 2, 2016, 8:47 AM), http://www.mercurynews.com/2016/11/02/majority-of-nfl-players-say-medicinal-marijuana-would-reduce-use-of-chemical-painkillers/.

[357] Banks, *supra* note 7.

"[i]t's not that [players are] choosing to get high. It's that they already are."[358]

[358] Junod, *supra* note 31.

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