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EXPANDING CYBERBULLYING LIABILITY FOR AI DEEPFAKES

ELIZABETH M. JAFFE* AND J. DOUGLAS BALDRIDGE**

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ABSTRACT

The flurry surrounding the World Wide Web has set the scene for innovation and interconnectivity among individuals in a way never imagined before. The new wave of technology and creativity online brings forth both trouble and trauma. Reports have shown that 4,000 celebrities have become victims of deep-fake pornography.[1] *With the increasing number of child social media entrepreneurs, this issue is unlikely to disappear and will continue to affect a wide range of entrepreneurs and celebrities. As the historical liability protections for platforms remain in place, it is critical to expand legislative protections for individuals online. And while celebrities do subject themselves to the public eye, no one*

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[1] Nadeem Badshah, *Nearly 4,000 celebrities found to be victims of deepfake pornography*, THE GUARDIAN (Mar. 21, 2024), https://www.theguardian.com/ [https://perma.cc/Z3JD-G9DZ].

deserves to be exploited. This article looks at recent deep fake examples and considers potential legal remedies to combat this prevalent form of cyberbullying.

INTRODUCTION

The advancements of today's digital era are rich in nuance and creativity.[2] The way people conceptualize privacy and individual legal harms has changed dramatically.[3] As a result, celebrities affected by Artificial Intelligence (hereinafter referred to as "AI") deepfake content must rely on current common legal avenues to remedy any harm.[4]

Because traditional notions of cyberbullying have expanded on the Internet, cyber-entrepreneurs and celebrities alike are enduring new forms of harassment. At the heart of this transformation lies AI, which presents a double-edged sword of opportunities and challenges.[5] AI deepfake content has caused an ever-increasing rise in individuals facing reputational, financial, and mental damages. AI enables anonymous users to falsify pictures and videos, often depicting sexually explicit images or suggestive scenarios, without the individual's consent.[6]

This phenomenon disproportionately affects women, particularly those in the public eye: female actors, celebrities, and social media influencers, or rather, a person who built an online presence by engaging in content like Instagram videos.[7] These individuals are increasingly targeted in today's digital era, which has welcomed nonconsensual pornography.[8] As such, AI deepfakes are difficult to redress, given the lack of privacy laws and intellectual property statutes that specifically address AI harms.[9] Additionally, legislators, under the protection of Section 230 of the

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[2] Alex Palmer, *The Digital Revolution: Impacts on the Legal Profession*, LAW CROSSING (May 15, 2023), https://www.lawcrossing.com/ [https://perma.cc/XF47-KHR9].

[3] *Id.*

[4] *Id.*

[5] Jingchen Zhao & Beatriz Gómez Fariñas, *Artificial Intelligence and Sustainable Decisions*, 24 EUR. BUS. ORG. L. REV. 1 (2022).

[6] *See* U.S. DEP'T OF HOMELAND SEC., INCREASING THREATS OF DEEPFAKE IDENTITIES (2022).

[7] *Influencer*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/ [https://perma.cc/AU8Y-Q53F].

[8] U.S. DEP'T OF HOMELAND SEC., *supra* note 6.

[9] Kavyasri Nagumotu, *Deepfakes are Taking Over Social Media: Can the Law Keep Up?*, 62 IDEA: L. REV. FRANKLIN PIERCE CTR FOR INTELL. PROP. 102, 126–28 (2022).

Communications Decency Act, suggest liability for any harm resulting lies with those individual distributors hiding behind the screen, and not the social media platforms.[10]

Many celebrities have been victims of AI created deepfakes.[11] In 2024, a deepfake pornographic image of Taylor Swift "went viral."[12] The images surfaced on popular platforms like X (formerly Twitter). Actress Jenna Ortega, who started her career as a child and rose to fame in the CW series *Jane the Virgin* and the Netflix show *Wednesday*, has likewise been the victim of deepfake AI abuse.[13] Her experience highlights the troubling re-emergence of a form of cyberbullying from a young actress to adulthood.[14] This suggests a broader pattern whereby women are objectified in new ways, regardless of their public work.[15] The harassment does not improve with age: as women shift into adult stardom, the harassment continues and the opportunities for legal recourse are still lacking.[16] These incidents reveal a larger pattern of objectifying and dehumanizing women in new ways.[17]

This troubling issue is not limited to traditional celebrities[18] In 2023, QTCinderella, a Twitch user known for her family-friendly content, became the center of similar AI deepfake pornography that appeared during another user's livestream.[19] As a result, users began to associate QTCinderella with pornography, rather than her intentionally curated content as a female internet entrepreneur and family-friendly influencer, undermining her professionalism and hard work.[20] The viral spread of QTCinderella pornographic content compromised her livelihood as it directly damaged her digital

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[10] *See* VALERIE C. BRANNON & ERIC N. HOLMES, SECTION 230: AN OVERVIEW (2024).

[11] Brian Contreras, *Tougher AI Policies Could Protect Taylor Swift—And Everyone Else—From Deepfakes*, SCI. AM. (Feb. 8, 2024), https://www.scientificamerican.com/ [https://perma.cc/G3CP-HQ6H].

[12] *Id.*

[13] Zack Sharf, *Jenna Ortega Says 'I Was an Unhappy Person' After 'Wednesday' Fame and 'There's Something Very Patronizing' About Being 'Dressed in the Schoolgirl Costume',* VARIETY (May 28, 2025, at 11:37 PT), https://variety.com/ [https://perma.cc/G47T-2EKH].

[14] *Id.*

[15] Sharf, *supra* note 13.

[16] *See id.*

[17] Sharf, *supra* note 13.

[18] Jenna Ryu, *She discovered a naked video of herself online, but it wasn't her: The trauma of deepfake porn,* USA TODAY (Mar. 1, 2023, at 10:15 ET), https://www.usatoday.com/ [https://perma.cc/4CP4-TW55].

[19] *Id.*

[20] *Id.*

brand.[21] Deepfakes have started to undermine creators' entire careers, especially those with brands built on trust and wholesome content. Creators who intentionally frame their brand to avoid inappropriate content should not be entangled with adult material.[22] As such, AI is reshaping the scope of reputational harm and the legal landscape.[23]

The query now becomes: how can the legal world properly respond to the vastness that is AI?[24] Now that there is unfettered access to the internet and innovative technologies, individuals, specifically women, fear becoming victims of sexually explicit content without proper legal recourse.[25] Currently, legal approaches only focus on holding the platform liable for copyright issues.[26] In fact, civil tort claims could be used to fill the gaps in liability. Despite many legitimate legal complications including potential evidence destruction and anonymity challenges, laws can expand to hold individuals liable for these serious harms.[27]

I. OVERCOMING OBSTACLES WITH LEGAL RECOURSE

The Internet has always presented several legal issues and challenges for federal and state law enforcement, but the rapid rise in AI-generated deepfake content has only further complicated the situation.[28] Perpetrators, often hiding behind anonymity, exploit VPNs, communications that are encrypted intentionally, and anonymous platforms to weaponize and send harmful content.[29] These individuals hide behind the platform with their brand name for all to see and harm anonymously.[30] If the individual is known, the challenge becomes proving proper intent and probable cause for

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[21] *Id.*

[22] *See id.*

[23] Ryu, *supra* note 18.

[24] Marjorie Richter, *How AI is transforming the legal profession*, THOMSON REUTERS (Aug. 18, 2025), https://legal.thomsonreuters.com/ [https://perma.cc/86FQ-VYLA].

[25] Press Release, Rep. Norma J. Torres Salazar, Congresswoman Salazar Introduces NO FAKES Act (Mar. 18, 2025) (on file with author).

[26] *Id.*

[27] See Julia Sturges, Taylor Swift, Deepfakes, and the First Amendment: Changing the Legal Landscape for Victims of Non-Consensual Artificial Pornography, 25 GEO. J. GENDER & L. (2024).

[28] Emanuel Maiberg, *Microsoft Closes Loophole That Created AI Porn of Taylor Swift*, 404 MEDIA (Jan. 29, 2024, at 09:36 MT), https://www.404media.co/ [https://perma.cc/Y7CE-ABW8].

[29] *Id.*

[30] *Id.*

criminal or civil liability.[31] Often, destruction of digital evidence is a common barrier to relief, as well.[32]

Investigative efforts by traditional means are insufficient to tackle the rapid and disappearing nature of AI-generated content. The speedy manner by which individuals can remove or edit content, or even remain fully anonymous, creates additional challenges for law enforcement amidst the already present delay in tracking individuals.[33] The speed of "reposting" and "sharing" content on personal accounts ensures the content is already saved or has gone "viral." This poses more risks to individuals and legislators trying to update laws regulating such content. To aptly address this issue, law enforcement agencies at both the state and federal level may require more cyber security barriers, which may prove effective for future forensic checks. Additionally, the potential for legislators and lobbyists to push for funding to invest in AI tracking could be beneficial to hold individuals liable.

II. CIVIL OR CRIMINAL LIABILITY

In *Elonis v. United States*, the Supreme Court outlined the requisite intent the State must prove to prosecute online harassment.[34] The Court concluded mens rea was required to prove the commission of a crime under 18 U.S.C. Section 875 (c) and held the absence of the language "intent to extort" was because that subsection was intended to have a broader scope than threats relating to extortion.[35] This precedent adds another level of complexity to hold individual deepfake creators liable, absent clear and convincing evidence of ill-will or malicious intent to cause harm. Defense counsel for deepfake creators (cyberbullies) could simply argue and persuade peers their intent is not to cause harm or cause bodily injury. As a result, perpetrators may escape prosecution.

Civil liability remedies provide an alternative avenue for awarding damages if an individual can be identified. As noted in the Tulane Journal of Technology and Intellectual Property, existing legal frameworks fail to adequately address all the harm caused by this deepfake pornography, though, leaving victims with limited

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[31] *Id.*

[32] *Id.*

[33] EUROPOL INNOVATION LAB, FACING REALITY? LAW ENFORCEMENT AND THE CHALLENGE OF DEEPFAKES 12 (2022).

[34] Elonis v. United States, 575 U.S. 723, 741 (2015).

[35] *Id.* at 733.

options.[36] Defamation requires plaintiffs to prove the content's falsity and actual harm or damages. Notably, in cases involving public figures, proof of actual malice is required.[37] Furthermore, courts have previously been reluctant to quantify harm to victims facing reputational damages and mental anguish, even given the inherent severity of deepfake content.[38] This again repels a meaningful recourse for victims.[39] However, courts and legal scholars have also been supportive and suggested analogizing this new age of cyberbullying with old torts.[40] For example, in *Vosburg v. Putney*, the Court suggested that Internet harm, even absent proximity to physical harm, may allow liability under modern torts.[41] Courts have had some difficulty applying modern tort doctrine to the newly emerging and rapidly evolving digital age.[42] In fact, the United States Copyright Office's July 2024 report discussed challenges posed by AI-generated replicas, highlighting the need for a structured legal framework to address such pitfalls.[43]

III. CURRENT LIMITATIONS

State law reform governing the use of deepfake content shows a developing realm of legal implications. California, known for its high population of celebrities and social media entrepreneurs, has enacted several statutes to protect these individuals. At present, there may be implications for public policy on the lack of coverage for individuals who are not deemed to be celebrities. Even with these valiant strides of progress, privacy laws have been slower to evolve with AI deepfake dangers driving near-hate campaigns online. AI is forcing creators to face identity theft in a new way.

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[36] Sydney Tshimbalanga, *A Not-So-Sexy Side of Porn: Examining the Legal Void for Victims of Deepfake Pornography*, 26 TUL. J. TECH. & INTELL. PROP. 135, 157 (2024).

[37] New York Times v. Sullivan, 376 U.S. 254, 280 (1964).

[38] *See* Emine Saner, *Inside the Taylor Swift deepfake scandal: 'It's men telling a powerful woman to get back in her box'*, THE GUARDIAN (Jan. 31, 2024, at 12:00 EST), https://www.theguardian.com/ [https://perma.cc/AC4M-NY3P].

[39] *See* Sturges, *supra* note 27.

[40] *See* Alice Preminger & Matthew B. Kugler, *The Right of Publicity Can Save Actors from Deepfake Armageddon*, 39 BERKELEY TECH. L.J. 782 (2024).

[41] Elizabeth M. Jaffe, *Cyberbullies Beware: Reconsidering Vosburg v. Putney in the Internet Age*, 5 CHARLESTON L. REV. 379, 394 (2011).

[42] *See id.* at 397.

[43] *See* U.S. Copyright Office, Copyright and Artificial Intelligence, Part 1: Digital Replicas (July 2024).

In 2024, Tennessee enacted groundbreaking legislation by enacting the Ensuring Likeness Voice and Image Security (ELVIS) Act.[44] This Act "update[ed] Tennessee's Protection of Personal Rights law [by] includ[ing] protections [f]or songwriters, performers, and music industry professionals' voice from the misuse of Artificial Intelligence (AI)."[45] This new Act added the protection of the performer's voice to the already existing regulation protecting name, image, and likeness.[46]

Recently, the Georgia House of Representatives introduced legislation to make AI-generated content featuring children a felony.[47] However, requiring standing and actual harm or damages as requisite elements to these existing doctrines presents obstacles.[48] Instead, victims are forced to prove with clear and convincing evidence that direct, traceable, and measurable harm exists.[49]

Courts are reluctant to award excessive amounts of recovery for emotional harm, which may not seem cognizable without meaningful and direct proof.[50] This harm must be traced to the actual dissemination of the content and cannot be mere speculation, proving difficulties to celebrities who also expose themselves to the public eye and already require heightened proof for modern torts.[51]

The prevailing solution, amongst the public and courts, is to just shut the computer down, or to simply back away from the content, which may even be removed.[52] Scholars note that this approach ignores the prevalence of the issue and the persistent harm caused by deep-fake content.[53] The impacts on a person, regardless of their decision to remain in public light, are vast and directly impact the

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[44] *PHOTOS: Gov. Lee Signs ELVIS Act Into Law*, Tenn. Off. of the Governor (Mar. 21, 2024, at 15:08), https://www.tn.gov/ [https://perma.cc/BTU6-K9QT].

[45] *Id.*

[46] *Id.*

[47] Richard Elliot, *New GA House bill would make it a felony to create AI-generated child porn material*, WSB-TV (Feb. 26, 2025, at 18:46 EST), https://www.wsbtv.com/ [https://perma.cc/ZT4E-BHS2].

[48] *Cf.* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

[49] *Id.*

[50] *Id.* at 566, 575, 579.

[51] *See id.* at 561, 567.

[52] *See generally* JAMES X. DEMPSEY & JOHN P. CARLIN, CYBERSECURITY LAW FUNDAMENTALS, 91-122 (2nd ed. 2024) (illustrating the challenges of a plaintiff establishing standing in data breach litigation where plaintiffs cannot show concrete and particularized harm).

[53] *See id.* at 95–96, 100.

mental and psychological aspects of both a person and the public at large.[54]

Jurisdictional limitations and federal procedure barriers further compound the damages problem.[55] Deepfake content creators, potentially living all over the globe, operate on a large scale or anonymously. This makes it even more difficult for authorities to regulate.[56]

IV. A TORT PROPOSAL

To address the widening gaps in enforcement, perhaps the solution is the recognition of an expansion of tort liability, creating intentional cyberbullying through AI. Expanding on a tort at common law that highlights the intentional nature of posting AI-generated deepfake content depicting celebrities or other individuals in explicit ways without consent will be beneficial for several reasons. The tort would focus on holding the individual liable for the purposeful creation and dissemination of images with the intent to cause severe harm, either emotional or reputational, but could extend to financial damages as well, given the severity.

To establish liability under the expanded proposed common law civil tort, for AI cyberbullying specifically, a plaintiff would need to prove the following elements: harm, intent, and damages. A plaintiff would then have the burden of proof to show the defendant knowingly or with reckless disregard published the AI image of the plaintiff without their consent.[57] The non-consensual nature and unlawful dissemination of the AI image would permit the plaintiff to have a potential remedy without having copyrighted the AI created image.[58] This expansion of common law tort doctrine should also require proof that the shared AI image caused some harm consistent with existing law including, but not limited to, harm to the plaintiff's reputation, emotions, and even personal injury or physical harm.[59] A plaintiff would need to establish a causal link whereby the plaintiff would not have been injured but for the sharing of the AI-created deepfake content.[60] Potential remedies could include statutory remedies like traditional monetary damages,

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[54] *See id.* at 108.

[55] *See* U.S. DEP'T OF HOMELAND SEC., *supra* note 6.

[56] *See id.*

[57] Becca Branum, *NDII Victims Deserve Help. Let's Build an Effective Takedown System.*, CTR. FOR DEMOCRACY & TECH. (Nov. 12, 2024), https://cdt.org/ [https://perma.cc/B8B6-T9D8].

[58] *Id.*

[59] *Id.*

[60] *See id.*

emotional distress damages, or equitable relief whereby an individual is compelled to cease further publication of the deepfake.[61]

The potential defendant may have several affirmative defenses available stemming from First Amendment protections.[62] Notably, the cybercriminals largely take comfort in claiming their content is free speech.[63] Additionally, defendants could attempt to claim the content is a parody or the images were essentially consented to.[64]

A presumed intent will not alter prior precedent or legislation outlining standards for potential torts.[65] Focusing on the online context and the foreseeability that posting deepfake content will create lasting harm allows it to be properly redressed.[66] After all, the lasting impacts extend off the screen, too.

These elements would emphasize how digital media content creates long-term and severe harm to a person, while still allowing the defendant to have potential defenses to liability.[67] Such defenses would include consent or lack of intent to cause harm. Narrowly tailored defenses, like constitutionally-protected speech, for example, still allow for a person to have their right to privacy and reputation protected meaningfully online.[68] A defendant may be able to successfully claim that the deepfake image was satirical or constitutionally protected as a parody, implicating the First Amendment addressed hereafter.[69] Scholars have suggested courts ensure speech-based constitutional affirmative defenses do not absorb the tort claims where reputational and legitimate privacy interests are at stake.[70]

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[61] *Id.*

[62] *Id.*

[63] Tshimbalanga, *supra* note 36, at 146.

[64] *Id.* at 137.

[65] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 39–41 (5th ed. 1984).

[66] *See* RESTATEMENT (SECOND) OF TORTS § 435 (AM. L. INST. 1965) (defining foreseeability).

[67] MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION, 112–13 (Stanford Univ. Press 2019).

[68] New York Times v. Sullivan, 376 U.S. 254, 279–80 (1964).

[69] Hustler Mag., v. Falwell, 485 U.S. 46, 56–57 (1988).

[70] Lyrissa Lidsky, *Defamation Law and the Crumbling Legitimacy of the Fourth Estate*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (July 11, 2024), https://knightcolumbia.org/ [https://perma.cc/C673-XKJW].

V. POLICY AND CONSTITUTIONAL CONSIDERATIONS

Addressing cyberbullying on this scale requires grappling with potential Constitutional challenges.[71] Complying with the boundaries of the First Amendment will ensure protection for these deepfake harms, especially for public figures.[72] The traditionally conceived right to privacy, rather–publicity, needs to be expanded to better protect individuals from AI-generated content that is misused to harm.[73]

The U.S. Supreme Court has long held the Constitution protects this type of speech, even when offensive or harmful. But these new developments require reconsidering this traditional view. The Court has consistently outlined that when specific categories of speech are proven, such as true threats, incitement, obscenity, and defamation, they are outside the scope of federal protection. This opens the door for liability.[74] Revenge or non-consensual pornography, particularly when generated by AI, depicts individuals in such a meaningful and realistic way that it causes nuanced but severe harm.[75] When deepfake content depicts a celebrity in a sexual manner, specifically in a sexual act, without consent, it arguably lacks social and artistic value. Such content is comparable to speech not protected by the First Amendment, where no true value is derived.[76]

While courts have traditionally applied a strict scrutiny standard of review, there has been a slow moving increase in support for applying intermediate scrutiny where plaintiffs are implicating

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[71] Matthew B. Lawrence & Avraham R. Sholkoff, *Addictive Design and Social Media: Legal Opinions and Research Roundup*, PETRIE-FLOM CENTER (Oct. 14, 2024), https://petrieflom.law.harvard.edu/ [https://perma.cc/B9HY-T6LR].

[72] *See* FCC v. Pacifica Found., 438 U.S. 726 (1978); United States v. O'Brien, 391 U.S. 367 (1968).

[73] *See* Alexa Spitz, "*It Wasn't Me": Rethinking the Right of Publicity in the Context of AI-Generated Content*, 2024 B.C. INTELL. PROP. & TECH. F. 1, 1–16 (2024).

[74] Virginia v. Black, 538 U.S. 343, 359 (2003) (Court outlined true threats are statements where a speaker communicates a serious threat or communication that intentionally threatens acts of violence); Miller v. California, 413 U.S. 15, 24 (1973) (Court recognized obscenity is not protected by the First Amendment and further defined obscenity focusing on whether the material, taken as a whole, appeals to the prurient interest, is patently offensive, and lacks serious literary, artistic, political, or scientific value).

[75] *Id.*

[76] *Id.*

privacy interests.[77] Additionally, where competing government interests such as the protection of minors, personal dignity, and welfare are involved, intermediate scrutiny may be endorsed.[78] As a result, to properly defend serving a compelling government interest, a defendant would need to prove that protecting the speech would promote social or otherwise significant value.[79]

Other countries, such as those in the European Union, have certain protections that differ from the non-regulated nature of AI technology capabilities.[80] For example, South Korea criminalizes the dissemination of AI. This can be beneficial given the regulation of non-consensual content.[81]

VI. REFORM

Courts must interpret current tort doctrines (defamation, false light, and intentional infliction of emotional distress (IIED)), to include the damage caused by AI deepfake content.[82] Legislators and lobbyists can advocate for statutory regulation of such harm, but the efforts may not focus on holding the individuals liable.[83] Lobbyists can also push for increased funding and employment policies that strengthen cybersecurity training for law enforcement. Additionally, funding technology to ensure sufficient monitoring of conduct is crucial. Failure to do so could turn into a Caremark case for gross negligence.

Platforms could also identify users who post inappropriate or false content and place them on a watchlist.[84] Individuals could have

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[77] Christopher T. Zirpoli, *Artificial Intelligence Prompts Renewed Consideration of a Federal Right of Publicity*, CONG. RSCH. SERV. (Jan. 29, 2024), https://crsreports.congress.gov/ [perma.cc/NU27-LYC9].

[78] *See* United States v. O'Brien, 391 U.S. 367 (1968); FCC v. Pacifica Found., 438 U.S. 726 (1978).

[79] *Id.*

[80] Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 586 (2014).

[81] *See* Imran Rahman-Jones, *Taylor Swift deepfakes spark calls in Congress for new legislation*, BBC NEWS (Jan. 27, 2024), https://www.bbc.com/ [https://perma.cc/TFF4-QQNB].

[82] This position is explored in depth in this Comment. *See* Moncarol Y. Wang, *Don't Believe Your Eyes: Fighting Deepfaked Nonconsensual Pornography with Tort Law*, 2022 UNIV. CHIC. LEGAL F. 415–45 (2022).

[83] *Id.*

[84] A watchlist has not been supported by scholars yet, but academics have recommended more administrative state governance. A recent Guardian article covered the idea. See Miranda Bryant, Denmark to tackle deepfakes by giving people copyright to their own features, THE GUARDIAN (June 27,

to engage in a certain vetting for access to platforms as another means of liability coverage.[85] State legislators may regulate at the local level with reforms to laws about cybercrime and cyberbullying.[86] Treating this stark increase in fake content as cyberbullying is an effort to prevent deepfake abuse against public figures.[87] Countries that already have regulations in place could act as a model for U.S. reform. The U.S. and these countries could potentially enter into agreements with efforts to combat this cyberbullying across borders.[88] This will potentially further align jurisdictional differences.[89]

VII. DEEPFAKES AND SOCIAL MEDIA: LOOKING FORWARD

There has been an alarming rise in individuals weaponizing social media platforms as mechanisms to abuse, misinform, and cause reputational harm.[90] These advanced technological developments have enriched the world but also greatly strained the limits of tort law.[91] Furthermore, AI deepfakes are potential evidence of the inadequacy in relief for torts like defamation, the gaps in privacy law, and the lack of tort specifically regarding this cyberbullying.[92] Legal scholars recognize there is a heightened need for a shift in the liability doctrines relied upon.[93] This requires the development of mechanisms to adapt to the technologically advancing world around us.[94]

Proposing and advocating for an expanded common law doctrine aligns with the new frontier of legal development.[95] Articulating a civil cause of action reflects the severity of damages faced by celebrities targeted with deepfake content.[96] This tort would be a built-in gap filler for the framework to address this

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2025, at 00:00 EDT), https://www.theguardian.com/ [https://perma.cc/PTZ4-MMMV].

[85] *See id.*

[86] *See* Bryant, *supra* note 84.

[87] *See id.*

[88] *See* Bryant, *supra* note 84.

[89] U.S. DEP'T OF HOMELAND SEC., *supra* note 6.

[90] *See* Elizabeth M. Jaffe, *Looking for Liability For Harmful Social Media Content And Cyberbullying After Gonzalez v. Google, LLC*, 28 MARQ. INTELL. PROP. & INNOVATION L. REV. 17 (2024).

[91] *Id.*

[92] *See id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] Tshimbalanga, *supra* note 36.

nuanced jurisprudence, changing daily.[97] This policy acknowledges that AI has extended its effects far-reaching, legally speaking, and creates a pathway forward to relief with traditional common law avenues.[98] Through tort reform, individual accountability, and clear legislation, the law can recognize the digital media portfolio previously developing without legal protection.[99]

Moreover, with President Trump's signing of the innovative Take It Down Act (also known as the Tools to Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks Act) on May 19, 2025, individuals are now prohibited from knowingly publishing intimate visual depictions of identifiable adults when specific conditions are met, including computer-generated or digitally forged depictions.[100] These conditions include: (1) the image was captured or created in circumstances where the person depicted had a reasonable expectation of privacy; (2) the content was not voluntarily exposed in a public or commercial contest; (3) it is not a matter of public concern; and (4) the publication either causes or is intended to cause psychological, financial, or reputational harm.[101] The law states that an individual's consent to the creation or private sharing of an image does not constitute consent to its public dissemination.[102]

Platforms are required to take action to remove this content within 48 hours and immunity is conditioned on their good faith implementation of takedown and filtering protocols.[103] Individuals whose likeness is misused in AI generated explicit content may pursue civil claims against the creator and the distributing platform, including statutory damages and injunctive relief.[104] Celebrities and minors are granted heightened protections and are entitled to expedited takedown procedures. The Take It Down Act is the first federal law specifically created to address liability for harm from AI generated images. This acknowledgment shows the critical need for legal recourse in the ever-evolving computer-generated frontier.

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[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Darlene Superville, *WATCH: Trump signs Take It Down Act, bill combating nonconsensual deepfakes and revenge porn*, PBS NEWS (May 19, 2025, at 16:39 EST), https://www.pbs.org/ [https://perma.cc/4TJB-6BY7].

[101] *Id.*

[102] *Id.*

[103] *Id.*; TAKE IT DOWN Act, Pub. L. No. 119–12, 139 Stat. 55 (2025).

[104] Superville, *supra* note 100.

VIII. CONCLUSION

AI has become a part of our daily lives. Scrolling on Facebook or Instagram, one can imagine seeing their mother has shared two new fake videos of celebrities wishing them a happy holiday or surfing in the Pacific. While comedic, AI poses many harms. Significantly, celebrities and women in business roles are the center of falsified content promoting explicit content with little legal recourse against the actual individual creating and distributing the images or videos.

Despite the reputation of celebrities being harmed daily, the existing legal framework does not yet properly address these implications. The proposed tort to specifically highlight the AI cyberbullying taking place would be a revolutionary gap filler. This enriches longstanding tort principles, reinforces case precedence, and continues the evolution with the ability to hold individuals accountable, thereby deterring others.

As AI continues to grow with sophistication and accessibility, the legal system has no other option but to catch up to protect the substantial number of daily victims. AI abuse is not new, but there is still time to ensure proper regulation moving forward. Shifting the focus to hold the individual who intentionally created and disseminated such deepfake content liable will develop gap fillers where justice can prevail. Just as there is support for nation-wide tort reform, there should be a similar form of reform for digital harms, as well.

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COMBATING FRAUD IN THE MAJOR LEAGUE BASEBALL INTERNATIONAL AMATEUR MARKET THROUGH AN INTERNATIONAL DRAFT

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CONTENTS

ABSTRACT

This article examines the pervasive fraud within Major League Baseball's (MLB's) international amateur market, where MLB teams sign teenage prospects—primarily from Latin America—for thousands or millions of dollars. All major parties—players, trainers, and teams—engage in some form of fraud to exploit the market. Players frequently falsify ages to secure larger bonuses, trainers often exploit their influence through unethical practices, and teams routinely violate league rules through premature handshake agreements with ineligible players. This piece argues the most effective reform would be to adopt an international draft, modeled after the domestic MLB Draft. Such a system would eliminate early agreements and enhance transparency and accountability for all parties. While an international draft would reduce player autonomy, this article contends the draft could be structured to protect player earning power, and the tradeoff is justified to curb fraud and protect innocent parties in the market.

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INTRODUCTION

The thought of a billion-dollar organization in the United States entering into a multi-million-dollar employment contract with an uneducated 16-year-old from a foreign country would be inconceivable in most business settings. However, this exact situation occurs dozens of times each January when MLB teams sign amateur baseball players, predominantly from Latin America, to join their organizations.[1] The International Signing Period can be a joyous occasion for young players who have prepared throughout their childhood for the chance to play professional baseball.[2] The players receive signing bonuses ranging from thousands to millions of dollars, which can significantly impact their own lives and their families' standard of living.[3] Additionally, the players have the opportunity to receive an education while participating in high-level baseball training.[4] If a player continues to improve, he will one day play professional baseball in the United States to the delight of the team and its fans.[5]

While the international amateur market promises the ideal of a better life to young players through professional baseball, there is a darker side to the market. The amount of money at stake in the market is massive. Teams invest millions of dollars every year in scouting and signing players.[6] The top players have the opportunity to sign seven-figure contracts, while lower-end players may still receive around $10,000 to sign.[7] Additionally, trainers who have coached and developed these players since they were children are compensated for their investment through a share of the player's signing bonus.[8] The amount of money involved, combined with the

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[1] Maria Torres, *MLB international signing period: What is it? When is it? Why is it important?*, THE ATHLETIC (Jan. 12, 2023), https://www.nytimes.com/ [https://perma.cc/5GR6-ZL5Q].

[2] Maria Torres & Ken Rosenthal, *'A failed system': A corrupt process exploits Dominican baseball prospects. Is an international draft really the answer?*, THE ATHLETIC (Jan. 2, 2023), https://www.nytimes.com/ [https://perma.cc/EEB3-SJ3Z].

[3] Logan Stanley, *Baseball has huge on- and off-the-field impact in the Dominican Republic*, CRONKITE NEWS (Sep. 5, 2023), https://cronkitenews.azpbs.org/ [https://perma.cc/4WZN-UZGQ].

[4] ERIC LONGENHAGEN & KILEY MCDANIEL, FUTURE VALUE: THE BATTLE FOR BASEBALL'S SOUL AND HOW TEAMS WILL FIND THE NEXT SUPERSTAR 76 (2020).

[5] Torres & Rosenthal, *supra* note 2.

[6] LONGENHAGEN & MCDANIEL, *supra* note 4, at 72–73.

[7] *Id.* at 66.

[8] Torres & Rosenthal, *supra* note 2.

market operating predominantly in the Dominican Republic, has created many opportunities for fraud and abuse.[9]

Each major party operating in the international amateur market—players, trainers, and teams—has engaged in some level of fraud. Players commonly commit age fraud and claim to be younger than they are because a younger player is more valuable to teams.[10] Trainers have created schemes to steal from their players and MLB teams.[11] They may also push players to take performance-enhancing drugs (PEDs) to increase the player's potential signing bonus, and thus the trainer's own cut.[12] MLB teams regularly violate their own rules when they agree to contracts with players well before they are old enough to sign with a team, sometimes with players as young as 12.[13] Teams will then back out of these agreements if the agreements no longer suit the team.[14] When this happens, players are left with no recourse and see their earning potential from other teams severely diminished.[15]

Given that fraud runs rampant in the international amateur market, all the parties agree changes are needed to protect the system from abuse.[16] While some argue MLB should simply create stronger enforcement mechanisms for its current rules,[17] the better option is to implement an international amateur draft, modeled after the domestic MLB Draft. The draft would eliminate early agreements with young players, provide transparency and certainty for players regarding their contracts and payment, and limit the ability of trainers and teams to manipulate the system for their financial benefit. Although players would lose the freedom to choose their employer, the reduction of widespread market fraud would make an international draft a net benefit for all parties involved.

This paper examines the pervasive fraud that occurs within MLB's international amateur market and proposes the adoption of an international draft to eliminate many common fraudulent

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[9] *Id.*

[10] Evan Drellich & Ken Rosenthal, *Age fraud on the rise in Dominican Republic, sowing chaos for MLB teams, young players*, THE ATHLETIC (Jan. 27, 2024), https://www.nytimes.com/ [https://perma.cc/X84J-JF7V].

[11] LONGENHAGEN & MCDANIEL, *supra* note 4, at 113.

[12] Torres & Rosenthal, *supra* note 2.

[13] Drellich & Rosenthal, *supra* note 10.

[14] *Id.*

[15] Torres & Rosenthal, *supra* note 2.

[16] *Id.*

[17] *Id.*

activities. Part I explains the current rules governing the international amateur market and the process through which teams sign international players. Part II examines why players commit age fraud and the challenges teams face in verifying a player's age. Part III discusses the fraudulent schemes trainers have engaged in to steal money from both players and teams by leveraging their influence over players. Part IV covers the variety of ways in which MLB teams skirt their organization's rules, with a particular emphasis on the harm caused when teams enter into handshake agreements with players before they are eligible to sign. Part V proposes an international draft structure that would greatly reduce fraud in the international amateur market and protect player earnings at the cost of eliminating the players' freedom to choose their employer.

I. HOW THE INTERNATIONAL AMATEUR MARKET WORKS

MLB teams acquire new talent for their minor league systems through two primary methods: the MLB Draft and the international amateur market. The MLB Draft occurs annually in June or July, and it is a heavily promoted event on the MLB calendar.[18] The draft has 20 rounds, and teams generally have a pick in each round.[19] The team with the worst record in the previous MLB season gets the first pick, and the draft continues in reverse order of how the teams finished.[20] Draft-eligible players include all players from the United States, Canada, and Puerto Rico who (1) graduated from high school the year of the draft; (2) completed at least one year of junior college; (3) completed their junior year at a four-year college; or (4) are 21 years old.[21]

When players are drafted, they receive a signing bonus that can range from a few thousand dollars to millions of dollars.[22] However, teams are not free to hand out as much money as they please in the Draft.[23] MLB assigns each team a "pool" of money that functions

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[18] *Rule 4 Draft*, MLB, https://www.mlb.com/ [https://perma.cc/5ECK-D77D].

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Jim Callis, *Here's every team's 2024 Draft bonus pool and all pick values*, MLB (July 13, 2024), https://www.mlb.com/ [https://perma.cc/Y8YH-BG7G].

[23] Todd M. Adams, *Biggest MLB signing bonuses of all time for high school draft picks*, YAHOO! SPORTS (Feb. 27, 2025), https://sports.yahoo.com/ [https://perma.cc/X6TZ-XM9K].

as the team's budget to use across its 20 picks.[24] Additionally, MLB has a "slot" system in which every pick is assigned a dollar amount that MLB recommends as a bonus for the player drafted by that pick.[25] While teams and players can negotiate the signing bonus amount each player will receive, many bonuses stay close to the slot amount because teams are penalized for exceeding their draft pool.[26] A player must sign with the team that drafted them if they want to play professional baseball.[27] If a player does not sign, they may return to college (assuming the player still has eligibility), but no other MLB team can sign the player that year.[28] Therefore, players who enter professional baseball through the MLB draft have effectively no control over which organization they will join.[29] The MLB Draft provides a highly structured and organized process for bringing new talent into professional baseball at the cost of removing nearly all the bargaining power players have regarding their pay or employer.

In contrast to the MLB Draft's organized system, the international amateur market pushes a free labor market to its extremes. The international amateur market is the primary method through which MLB teams acquire international talent not eligible for the MLB Draft.[30] Each year, the International Signing Period begins on January 15, at which point teams can sign newly eligible players.[31] Players are eligible to sign during the period if (1) they are at least 16 years old at the start of the period; (2) reside outside of the United States, Canada, and Puerto Rico; and (3) have not attended high school in an MLB Draft-eligible country within the past calendar year.[32] A majority of the players signed through this system come from Latin America, primarily the Dominican Republic or Venezuela.[33] Players from these countries account for

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[24] Dayn Perry, *2024 MLB Draft slotting system explained: How format, bonus pools work and who has the most money to spend*, CBS SPORTS (July 14, 2024, at 13:52 ET), https://www.cbssports.com/ [https://perma.cc/SKN7-7TFL].

[25] *Id.*

[26] *Id.*

[27] *Sports Law Advice for Amateurs*, FOX ROTHSCHILD, https://www.foxrothschild.com/ [https://perma.cc/9BGD-NQ55].

[28] *Id.*

[29] Perry, *supra* note 24.

[30] Torres, *supra* note 1.

[31] *Id.*

[32] *Id.*

[33] LONGENHAGEN & MCDANIEL, *supra* note 4, at 69.

73 percent of the players signed as international amateurs.[34] Players sometimes sign from other parts of the world, such as Australia, Europe, or Africa, although such signings are rare.[35]

Similar to the MLB Draft, players who sign during the International Signing Period receive bonuses that can range from $1,000 to seven figures.[36] The International Signing Period also has a pool system similar to that of the MLB Draft. In 2025, MLB set the size of each team's initial pool between $5.15 million and $7.55 million, with each team's pool size dependent on the amount of revenue the team generates.[37] The money comes from each team's budget, but MLB determines the amount each team can spend.[38] Teams with less revenue get a larger pool as a means of creating "competitive balance" with the richer teams.[39] MLB penalizes teams that exceed their signing pool by reducing the amount of money the team can spend on players in the next International Signing Period.[40] However, unlike the MLB Draft, teams have options for increasing their international player pool. Teams are free to trade their pool money with each other.[41] For example, a team that wants to give an additional $1.5 million in signing bonuses in a year could trade one of its players to another team in return for an additional $1.5 million in the other team's unused pool money.[42]

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[34] *Id.*

[35] *Id.* at 8–9. From 2010 to 2014, players who signed from Australia, Europe, or Africa accounted for less than 2.5% of all international signees in those five years. Id. at 69.

[36] Steve Adams, *Notable International Signings: 1/15/25*, MLB TRADE RUMORS (Jan. 15, 2025, at 10:50 CDT), https://www.mlbtraderumors.com/ [https://perma.cc/B5NR-7AJX].

[37] Mark Polishuk, *Bonus Pools For 2025 International Signing Period*, MLB TRADE RUMORS (Apr. 6, 2024, at 13:31 CDT), https://www.mlbtraderumors.com/ [https://perma.cc/8Q3E-RETV].

[38] *International Amateur Free Agency & Bonus Pool Money*, MLB, https://www.mlb.com/ [https://perma.cc/B2RF-9BZP].

[39] *Id.*

[40] *Id.*

[41] Jesse Borek, *International signing period is open! Here's where top prospects are going*, MLB (Jan. 24, 2025), https://www.mlb.com/ [https://perma.cc/7G7K-CA6G].

[42] In 2025, the Blue Jays traded one of their players to acquire $2 million in international bonus pool money. *Blue Jays get $2M in pool space in trade with Guardians*, ESPN (Jan. 17, 2025, at 15:07 ET), https://www.espn.com/ [https://perma.cc/8V84-SCNY].

Teams can increase their total pool amount by up to 60 percent, so the maximum allowable pool in 2025 was $12.6 million.[43]

A key difference between the MLB Draft and International Signing Period is international amateurs are free to sign with any team they want—players are essentially free agents.[44] Teams cannot draft a player and gain exclusive rights to negotiate with that player. Instead, every player is free to negotiate with any of the 30 teams interested in paying for his services.[45] Additionally, a team can allocate its pool money as it sees fit among players. A team may commit its entire pool to one player or spread bonuses among a dozen or more players.[46] While money is generally the dominant factor in which team signs a player, it is not uncommon for a player to choose to sign with a team based on other factors, such as the team's success at developing players or a relationship of trust between the player and team employees.[47] Players in the Draft do not have the freedom afforded to international amateurs to choose a team. This freedom gives international amateurs leverage in negotiations and a chance to control where their careers will begin.[48]

International amateurs also differ from their Draft counterparts in age and education. Players in the MLB Draft are never younger than 17 because they must first graduate high school.[49] In 2023, 72 percent of the players drafted were college players who had finished at least three years of school.[50] In contrast, the vast majority of international amateurs are signed at 16 or 17 years old, and teams frequently agree to handshake deals to sign players as young as 12 years old.[51] Highly regarded international players rarely sign after they are 17 years old, and players decrease significantly in value as they age.[52]

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[43] *International Amateur Free Agency & Bonus Pool Money*, *supra* note 38.

[44] Mike Axisa, *MLB international free agency: Top non-Roki Sasaki players, bonus pools, more as Mets land $5M IFA prospect*, CBS SPORTS (Jan. 15, 2025, at 13:17 ET), https://www.cbssports.com/ [https://perma.cc/H735-SNXJ].

[45] *Id.*

[46] *Id.*

[47] LONGENHANGEN & MCDANIEL, *supra* note 4, at 83.

[48] Axisa, *supra* note 44.

[49] *Rule 4 Draft*, *supra* note 18.

[50] *Baseball: Probability of competing beyond high school*, NCAA (Apr. 1, 2024), https://www.ncaa.org/ [https://perma.cc/YH3U-WXFP].

[51] Drellich & Rosenthal, *supra* note 10.

[52] *Id.*

It is common for top international players to drop out of school by the time they are 10 years old to begin training for a baseball career.[53] A player will sign with a trainer at this time to prepare to be scouted by MLB teams.[54] The trainers are referred to as "buscones."[55] The trainers often run unofficial baseball academies that provide the players with housing and regular training until they are old enough to sign with a team.[56] In exchange for providing the players with years of housing and baseball training, the players agree to pay the trainers a percentage—sometimes as high as 50 percent—of their eventual signing bonus.[57]

Once a player turns 16 and signs with an MLB team, he will enter that MLB team's official academy.[58] Every MLB team has an academy in the Dominican Republic.[59] An academy functions as a combination of a boarding school and a professional baseball team.[60] The players receive lodging and three meals a day.[61] The academies have several baseball fields, a weight room, and other training facilities.[62] After completing baseball activities during the day, players will take classes in the evening because many have received little formal education.[63] Teams will provide English classes to prepare players for the transition to playing baseball in the United States.[64] Responsible teams will also provide classes on other subjects to give players a well-rounded education and teach them basic life skills such as money management.[65]

While living at the academies, players will hone their baseball skills and play in the Dominican Summer League, where academy

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[53] Torres & Rosenthal, *supra* note 2.

[54] *Id.*

[55] Thomas McKenna, *The Path to the Sugar Mill or the Path to Millions: MLB Baseball Academies' Effect on the Dominican Republic*, SOC'Y FOR AM. BASEBALL RSCH., https://sabr.org/ [https://perma.cc/W2NY-P557].

[56] Torres & Rosenthal, *supra* note 2.

[57] *Id.*

[58] LONGENHANGEN & MCDANIEL, *supra* note 4, at 75.

[59] Jen McCaffrey, *A behind-the-scenes tour of the Red Sox Dominican Republic Academy*, THE ATHLETIC (Mar. 14, 2024), https://www.nytimes.com/ [https://perma.cc/8A26-5NEM].

[60] LONGENHANGEN & MCDANIEL, *supra* note 4, at 75–76.

[61] *Id.* at 72.

[62] *Id.*

[63] *Id.* at 76.

[64] McCaffrey, *supra* note 59.

[65] *Id.*

teams play games against each other.[66] Once a player has developed sufficiently in the eyes of the team, he will be promoted to the minor leagues in the United States and continue his journey in professional baseball.[67] Most players are either promoted to the United States or released from the academy between the ages of 18 and 22.[68] Successful international players are a crucial part of building an MLB roster, as international players accounted for 27.8 percent of players on Opening Day MLB rosters in 2025.[69]

A system that allows MLB teams valued in the billions to sign multi-million-dollar contracts with teenagers from poor Latin American countries creates a variety of opportunities for fraud and abuse. Players, trainers, and teams have all been caught in schemes that can cause millions of dollars in harm.[70] These abuses have raised concerns about the fairness and viability of the international amateur system and whether reform is needed.

II. FRAUD COMMITTED BY PLAYERS

A team's decision to guarantee millions of dollars to a teenager in the international amateur market is risky because the average age of a rookie in MLB is 24 years old.[71] Therefore, the teenage players are unlikely to play in the major leagues until approximately eight years after signing. It is extremely rare for a player to play in an MLB game before turning 21, so a 16-year-old signed during the Signing Period is a minimum of four years away from playing in

[66] *About the Dominican Summer League*, MiLB, https://www.milb.com/ [https://perma.cc/Y3XD-C3KD].

[67] Jesse Sanchez, *A look inside the Dominican Summer League*, MLB (Aug. 23, 2018), https://www.mlb.com/ [https://perma.cc/A5FW-6R38].

[68] *Id.*

[69] Press Release, MLB, Opening Day Rosters Feature 265 Internationally Born Players (Mar. 28, 2025), https://www.mlb.com/ [https://perma.cc/H72X-YZZP].

[70] Torres & Rosenthal, *supra* note 2.

[71] Connor Hinchliffe, *The Makeup of a Pitcher Debuting in the Major Leagues*, DRIVELINE BASEBALL (Sep. 26, 2021), https://www.drivelinebaseball.com/ [https://perma.cc/72WC-7PEB].

MLB.[72] Only 6 percent of international players who are signed appear in an MLB game.[73]

Despite these minuscule odds, MLB teams are eager to offer teenagers massive signing bonuses because of the value a player presents. If an MLB team signs a player for $5 million who then turns into one of the best players in baseball over his first six seasons in the major leagues (the period where he is guaranteed to remain under contract with his signing team), he will provide the team with well over $100 million in value on the field before he reaches free agency.[74] Teams stand to make a franchise-altering return on investment by signing good international players.[75]

Because teams are signing players with an eye toward what their talent level will be in four to eight years, the bonus a player receives is based more on how they are projected to develop as a player rather than their current skill level.[76] If a team is evaluating a 16-year-old and a 19-year-old with the same above-average skill level, the 16-year-old would likely receive a seven-figure bonus while the 19-year-old would likely receive no more than $10,000.[77] Teams reason that a 19-year-old has probably finished growing and is closer to maxing out his body's athletic potential.[78] In contrast, a 16-year-old may still be experiencing puberty and has greater potential to develop both his physical body and his technical baseball skills.[79] Therefore, the talent ceiling of a 16-year-old is much higher than that of a 19-year-old with approximately equal skill.[80]

The disparity in bonuses paid to players of different ages has led to a massive increase in age fraud by players. Players often lie about their age to receive a larger signing bonus.[81] The most high-profile example of age fraud occurred in 2006 when the Washington

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[72] *See* J.J. Cooper, *The 30 Youngest, Oldest MLB Players To Start 2024*, BASEBALL AM. (Mar. 29, 2024), https://www.baseballamerica.com/ [https://perma.cc/5JDH-F9BM].

[73] Ronald Blum & David Brandt, *Some in baseball think an international draft could address corruption. Creating one isn't that easy*, AP NEWS (Feb. 21, 2025, at 05:48 MST), https://apnews.com/ [https://perma.cc/9FJ4-58L9].

[74] LONGENHANGEN & MCDANIEL, *supra* note 4, at 85, 89.

[75] *Id.* at 85, 97.

[76] *Id.* at 88; Anthony Castrovince, *International Draft proposal would allow players time to develop*, MLB (Mar. 7, 2022), https://www.mlb.com/ [https://perma.cc/82XQ-NW67].

[77] Drellich & Rosenthal, *supra* note 10.

[78] *See id.*

[79] *See id.*

[80] *See id.*

[81] *Id.*

Nationals signed Esmailyn Gonzales, who the team believed was 16, for $1.4 million.[82] The Nationals discovered three years later that his real name was Carlos Alvarez, and he was four years older than he claimed.[83] Despite the publicity Alvarez's story gave to age fraud, it has continued to play a major role in the international amateur market. In 2024, more than 50 players had their deals with teams nullified because they were not who they said they were.[84] Teams might discover age fraud before an agreement is reached, but sometimes years pass before a player's true age is discovered.[85]

The root cause behind a player committing age fraud can vary depending on the player. Often, a player decides to lie about his age alone or with the support of his family.[86] Certain trainers in the Dominican Republic are believed to pressure players to commit age fraud and are considered more likely to represent a player who is lying about his age.[87] Alternatively, age fraud may sometimes be a byproduct of immigrating to the Dominican Republic.[88] Players may obtain false paperwork for the sake of immigration rather than with the intention of deceiving an MLB team.[89]

MLB has attempted to combat age fraud by conducting background checks on international amateur players across all countries through its Age and Identity Investigation Department.[90] Many teams hire their own private investigators to conduct background checks on players as well.[91] However, age fraud has continued to rise in recent years, with many members of the baseball industry arguing MLB's actual oversight is negligible.[92] Additionally, MLB teams regularly agree to handshake deals with

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[82] Peter Gammons, *Lots of money, mystery in international signings*, ESPN (July 9, 2009, at 09:43 ET), https://www.espn.com/ [https://perma.cc/7666-J9QM].

[83] Jack Baer, *MLB reportedly finds Dominican prospect with $4 million Padres deal is 19 years old, not 14*, YAHOO! SPORTS (Nov. 3, 2024), https://sports.yahoo.com/ [https://perma.cc/Y7P6-6TTX].

[84] Drelich & Rosenthal, *supra* note 10.

[85] Dánica Coto & Martín Adames Alcántara, *For Dominican baseball hopefuls, age fraud cases and a curveball from Japan reflect a broken system*, ASSOCIATED PRESS (Feb. 21, 2025, at 08:55 MST), https://apnews.com/ [https://perma.cc/AE3B-J8JT].

[86] *Id.*

[87] Drelich & Rosenthal, *supra* note 10.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

players well before they are eligible to sign, and investigators tend to focus their background checks on players who are eligible for the current International Signing Period.[93]

One proposed solution to combat age fraud is to allow teams to subject players to DNA testing before signing.[94] While DNA testing does not conclusively prove a player's age, it does allow the team to verify the player's parentage and determine whether the player is lying about his identity.[95] If a player is lying about his identity, the team will likely conclude the player is also lying about his age.[96] While MLB rarely uses DNA testing, teams have occasionally used DNA test results to void deals with international players.[97] When a team cannot verify a player's age, they may take the risk and sign the player anyway.[98]

III. FRAUD COMMITTED BY TRAINERS

International trainers play a significant but less publicized role in the international amateur market. These trainers—generally located in the Dominican Republic—find and train talented baseball players.[99] They also cultivate relationships with MLB teams to give their players the best chances of getting scouted and signed.[100] Beyond acting as a coach for the player, trainers can also function as the player's manager or agent.[101] Because the player is only a teenager and his family is likely unfamiliar with navigating the process of signing with an MLB team, trainers hold significant power over their players.[102] Additionally, players pay their trainer a percentage of their signing bonus, so trainers with the best players stand to make millions during a single International Signing Period.[103] While many trainers have built reputable baseball academies and provide meaningful guidance and baseball

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[93] Drelich & Rosenthal, *supra* note 10.

[94] Michael S. Schmidt & Alan Schwarz, *Baseball's Use of DNA Raises Questions*, N.Y. TIMES (July 21, 2009), https://www.nytimes.com/ [https://perma.cc/4ZR9-TVZC].

[95] *Id.*

[96] *See* Laurie C. Frey, *They Aren't Who We Thought They Were: The Importance of Genetic Testing in Major League Baseball to Prevent the Falsification of Players' Ages*, 21 MARQ. SPORTS L. REV. 425, 430 (2010).

[97] *Id.* at 431.

[98] Drelich & Rosenthal, *supra* note 10.

[99] Torres & Rosenthal, *supra* note 2.

[100] LONGENHANGEN & MCDANIEL, *supra* note 4, at 74, 95.

[101] Stanley, *supra* note 3.

[102] *Id.*; LONGENHANGEN & MCDANIEL, *supra* note 4, at 75, 83.

[103] Stanley, *supra* note 3.

instruction to their players, abuses by trainers remain a prevalent part of the international amateur market.[104]

Trainers may try to maximize their players' signing bonuses by administering PEDs.[105] MLB prohibits the use of PEDs and suspends any player caught using PEDs.[106] However, it remains well-known in the international market that certain trainers will give PEDs to unsigned, older players in an effort to increase their value.[107] Trainers rationalize this approach because a player's value drops dramatically as they age, so the only way for a player to regain value is to put on an unexpected amount of size and muscle.[108] PED usage is not limited to older players; even a player who is still too young to sign a contract may be administered PEDs by his trainer to improve the player's earning potential once he is eligible to sign.[109]

MLB tried to limit the use of PEDs in the international amateur market by establishing a partnership program in 2018 with independent amateur trainers in the Dominican Republic, Colombia, Panama, and Venezuela.[110] The program introduced random testing of registered players for PEDs and encouraged trainers to act ethically in the international market.[111] While the goal of the program is to hold trainers accountable, the program remains voluntary.[112] Additionally, industry members believe certain trainers who are part of the program will administer PEDs to their players for a period of time before they are eligible to register for the program.[113] The trainer will stop administering the PEDs to the player just before they must register for the program, thus giving the appearance that the player is clean of PEDs.[114]

Trainers may also collude with team employees to steal money from the teams that are signing their players. One practice that

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[104] Rob Ruck, *The Tropic of Baseball: Dominican Talent and the MLB*, AUSTL. INST. OF INT'L AFFS.: AUSTL. OUTLOOK (Feb. 27, 2020), https://www.internationalaffairs.org.au/ [https://perma.cc/4MEX-DDVT].

[105] Torres & Rosenthal, *supra* note 2.

[106] MLB, *Major League Baseball's Joint Drug Prevention and Treatment Program*, https://img.mlbstatic.com/ [https://perma.cc/M2NE-ZHJ4].

[107] Torres & Rosenthal, *supra* note 2.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] Torres & Rosenthal, *supra* note 2.

[114] *Id.*

trainers and teams may engage in is known as "skimming."[115] In a skimming scheme, the team's scout provides inflated evaluations of a trainer's player to their team.[116] These evaluations convince the team it should pay the player more than he is worth.[117] The trainer then lies to the player, telling him the team has offered less money than it has actually committed to pay.[118] The team employee and the trainer then split the difference between what the team paid and what the player actually received.[119]

Trainers engage in other schemes that leverage their power over players to improve their own financial position. If a team is interested in a trainer's player who is eligible to sign in two years, the trainer may demand the team overpay for some of his players who are currently eligible.[120] In exchange, the trainer promises to steer the younger player to sign with the team once he reaches eligibility.[121] A trainer may also accept a bribe from a team to essentially hide a player from the rest of the market.[122] If a team is the first to discover a 14-year-old who the team believes will be in high demand once he turns 16, the trainer will offer to prohibit the player from attending scouting showcases where other teams could see him play.[123] The team pays a large fee to the trainer, and in return, the team avoids needing to engage in a bidding war for the player's services.[124]

While MLB teams believe they are generally aware of which trainers are the most reputable, policing the entire trainer industry is impossible.[125] More than 1,000 trainers operate in the Dominican Republic alone.[126] MLB has no official partnership with these trainers, so the only action that can be taken against these trainers must be done by the countries where they operate.[127] MLB believes the trainer system in the Dominican Republic is so entrenched that

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[115] LONGENHANGEN & MCDANIEL, *supra* note 4, at 113.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] Torres & Rosenthal, *supra* note 2.
[121] *Id.*
[122] *Id.*; LONGENHANGEN & MCDANIEL, *supra* note 4, at 92.
[123] LONGENHANGEN & MCDANIEL, *supra* note 4, at 92.
[124] Torres & Rosenthal, *supra* note 2.
[125] *Id.*
[126] Ruck, *supra* note 104.
[127] Stanley, *supra* note 3.

it would be impossible to remove it from the international amateur market.[128]

IV. FRAUD COMMITTED BY TEAMS

MLB teams are often the most frequent violators of the International Signing Period rules despite belonging to the organization that sets these rules.[129] Any agreement reached in the international amateur market involves two parties. The first party is the player. Players are usually minors from impoverished countries, many of whom have not even completed elementary school.[130] The other is the MLB team, a sophisticated organization worth billions of dollars that has hundreds of well-educated employees.[131] The power imbalance between the players and teams is massive and presents opportunities for abuse by teams.

Under MLB's current international amateur market rules, a team cannot agree to a deal with an international amateur until he is at least 16 years old.[132] However, it is widely known that MLB never enforces this rule.[133] Some team employees have even claimed MLB officials have told them MLB will not enforce this rule.[134] While teams do not have the players sign formal contracts before they turn 16, every team has handshake agreements with players long before that age.[135] It has become the norm in the industry for players to commit to signing with a team by the time they are 14 years old.[136] In some cases, teams have reportedly pledged contracts worth millions of dollars to players as young as 12.[137] Almost every player who receives more than a $1 million bonus agrees to the deal at least 12 to 18 months before they are

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[128] Ruck, *supra* note 104.

[129] *Id.*; Torres & Rosenthal, *supra* note 2.

[130] Jeff Passan, *13 years old*, *with an MLB deal: Why some are ready for change*, ESPN (May 9, 2019, at 20:30 ET) https://www.espn.com/ [https://perma.cc/VAA2-TK9G].

[131] Justin Teitelbaum & Brett Knight, *Baseball's Most Valuable Teams 2025*, FORBES (June 10, 2025, at 16:26 EDT) https://www.forbes.com/lists/ [https://perma.cc/DQU9-2P2L].

[132] *International Amateur Free Agency & Bonus Pool Money*, *supra* note 38.

[133] Passan, *supra* note 130.

[134] LONGENHAGEN & MCDANIEL, *supra* note 4, at 9.

[135] Passan, *supra* note 130.

[136] Torres & Rosenthal, *supra* note 2.

[137] *Id.*

eligible to sign.[138] Trainers will bring players to their academies, and teams will start scouting players when they are only 10 or 11 years old.[139]

Besides the already questionable ethics of a billion-dollar business entering into handshake agreements with minors in foreign countries, problems arise for players when teams no longer want to honor their agreements. Because of the imbalance of power, teams fully expect players and their trainers to honor a handshake agreement.[140] Trainers who allow a player to break a handshake agreement may be blackballed, and other teams may be loath to negotiate with the player.[141] In contrast, teams regularly back out of their agreements with players.[142] Teams have a variety of reasons why they might break an agreement. For instance, the player may have regressed in his development between the agreement and the time he turns 16.[143] Alternatively, the team might want to offer more money to a different player, so they need to reduce the amount promised to someone else.[144] Because teams are capped in terms of how much they can spend on international amateurs each year, there is only so much money that can be divided among all the players a team wants to sign.[145] However, teams have the habit of overpromising money to players early in the signing process.[146] For example, a team might promise signing bonuses two years in advance of an International Signing Period that cumulatively exceed the cap for that year by $2 million. When the actual International Signing Period arrives, the team will then give some of its players the option of taking a pay cut or losing the contract altogether.[147] These players are often left with no alternatives because by the time the International Signing Period opens, the other teams already have their own preexisting deals to honor and may have maxed out their spending limits.[148] Any player forced back into the market in this

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[138] LONGENHAGEN & MCDANIEL, *supra* note 4, at 10.

[139] Torres & Rosenthal, *supra* note 2.

[140] *Id.*

[141] *Id.*; LONGENHAGEN & MCDANIEL, *supra* note 4, at 9.

[142] Torres & Rosenthal, *supra* note 2.

[143] Eric Longenhagen, *Board Update: 2023 International Amateur Prospects*, FANGRAPHS (Dec. 16, 2022), https://blogs.fangraphs.com/ [https://perma.cc/3CCA-DN9V].

[144] *Id.*

[145] Axisa, *supra* note 44.

[146] Torres & Rosenthal, *supra* note 2.

[147] *Id.*

[148] *Id.*

manner will almost certainly see his value reduced.[149] In 2022, two players filed a lawsuit in the Dominican Republic against the Los Angeles Angels because the team refused to honor handshake agreements made when the players were 14 years old.[150] Despite the potentially massive consequences of the lawsuit, there have been no reported developments since it was filed.

The pitfalls associated with handshake deals were displayed in December 2024 when Roki Sasaki announced he would be entering the international amateur market and signing in the January 2025 Signing Period.[151] Sasaki was very different from the 16-year-old players from Latin American countries who typically sign in the international amateur market. Sasaki was a 23-year-old Japanese pitcher who played professionally in Japan's Nippon Professional Baseball for the previous five years.[152] During that time, he was one of the best pitchers in the entire league.[153] Despite spending five years as a dominant pitcher in the second-best professional baseball league in the world, Sasaki had to sign as an international amateur, rather than a traditional free agent, because he was a foreign player under the age of 25.[154] Given Sasaki's established success as a player and the international amateur rules that prevented him from being paid more than $12.6 million[155]—if Sasaki were a standard

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[149] *Id.*

[150] Jeff Passan, *Prospects Willy Fañas, Keiderson Pavon suing Los Angeles Angels, alleging agreements pulled back by team*, ESPN (Sep. 8, 2022, at 11:51 ET), https://www.espn.com/ [https://perma.cc/6KYC-FPM9].

[151] Sean Leahy et al., *Roki Sasaki, Japanese pitching star, posted during MLB Winter Meetings*, YAHOO! SPORTS (Dec. 9, 2024), https://sports.yahoo.com/ [https://perma.cc/BS5S-K3VL].

[152] Jack Baer, *Who is Roki Sasaki? Here's everything you need to know about the MLB offseason's biggest variable*, YAHOO! SPORTS (Nov. 6, 2024), https://sports.yahoo.com/ [https://perma.cc/ND56-3HFW].

[153] *Id.*

[154] Jordan Shusterman, *Roki Sasaki's free agency: What you need to know as the Japanese star nears an MLB decision*, YAHOO! SPORTS (Jan. 14, 2025), https://sports.yahoo.com/ [https://perma.cc/MJP4-9SUP].

[155] This number is the maximum Sasaki could be paid because the highest team pool in 2025 was $7.55 million, and a team can trade for an extra 60% of their allotted pool space. *See* Polishuk, *supra* note 37; *International Amateur Free Agency & Bonus Pool Money*, *supra* note 38.

free agent, he likely would have received a contract worth at least $300 million[156]—every MLB team was desperate to sign him.[157]

However, Sasaki created a problem for teams when he announced his decision to come to MLB only a month before the January 2025 Signing Period opened.[158] Every team had entered into handshake agreements using most, if not all, their pool space at least two years earlier.[159] Any team that wanted to offer Sasaki more than its remaining unallocated pool money—likely no more than a few hundred thousand dollars—was going to have to rework the terms of the handshake agreements they made with their teenage prospects.[160] Ultimately, Sasaki opted to sign with the Los Angeles Dodgers for $6.5 million.[161] Because of the pool limitations, the Dodgers terminated handshake agreements with four planned signees, enabling them to sign with other teams.[162] Reports indicated one former signee received a pay increase of $150,000 to sign with the Chicago White Sox. However, it is impossible to know the true financial impact on the players because the official terms of the Dodgers' handshake deals are not public.[163] Additionally, while the player who signed with the White Sox may not have been financially harmed, he lost the opportunity to sign with the reigning World Series champions and instead joined the organization that had the worst season in MLB history in 2024.[164] The drama surrounding Sasaki's signing shows players are at the teams' mercy. Teams can terminate a handshake agreement at any time, costing a player large sums of money while also leaving the player with no recourse.

One reason teams and their employees flout the rules so boldly is because the last time MLB punished a team for violating any of

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[156] Jim Callis, *Is Roki Sasaki the best pitching prospect ever? Here's what execs said*, MLB (Jan. 29, 2025), https://www.mlb.com/ [https://perma.cc/89NW-HETK].

[157] Schusterman, *supra* note 154.

[158] Jake Mintz, *How Roki Sasaki's arrival to MLB could upend the entire 2025 Latin American signing class*, YAHOO! SPORTS (Jan. 14, 2025), https://sports.yahoo.com/ [https://perma.cc/B24W-7QYV].

[159] *Id.*

[160] *Id.*

[161] Dan Freedman, *Who The Dodgers Lost In Order To Win The Roki Sasaki Sweepstakes*, FORBES (Jan. 20, 2025, at 17:10 EST), https://www.forbes.com/ [https://perma.cc/M3KS-TVHP].

[162] *Id.*

[163] *Id*.

[164] *Id.*; Buster Olney & Jesse Rogers, *Inside the 2024 White Sox's road to MLB's all-time worst record*, ESPN (Sep. 25, 2024, at 11:33 ET), https://www.espn.com/ [https://perma.cc/U78M-FSUW].

its international amateur rules was in 2017.[165] MLB discovered the Atlanta Braves were skirting limits on the amount of money they could spend on international players.[166] From 2015 to 2017, the Braves frequently reported they had signed players for far less than they actually paid to keep the team from surpassing their pool cap.[167] The Braves also engaged in a process called "packaging," where the team would pay inflated bonuses to a trainer's lesser prospects.[168] The extra bonus money was then funneled to the trainer in return for the trainer convincing their more highly regarded prospects to sign with the Braves.[169]

MLB imposed severe punishments on the Braves for these violations. John Coppolella, the Braves general manager, received a lifetime ban from baseball.[170] Additionally, MLB declared 12 players the Braves had signed in 2016 and 2017 would immediately become free agents eligible to sign with another MLB team.[171] The money the Braves were permitted to spend on international amateurs was reduced for four years, with the Braves limited to spending $10,000 per player for two years and $300,000 per player for two years.[172]

While the sanctions imposed by MLB hampered the amount of international talent the Braves could sign, it had little impact on the team's success on the field. The Braves made the playoffs every year between 2018 and 2024 and won the World Series in 2021.[173] Even the employee who orchestrated the scheme did not face lasting consequences. MLB lifted its ban on Coppolella in 2023, just over five years after he was banned from baseball for life.[174] MLB

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[165] Bill Shaikin, *MLB strips Atlanta Braves of 12 prospects, bans former GM for life,* L.A. TIMES (Nov. 21, 2017, at 13:55 PT), https://www.latimes.com/ [https://perma.cc/P4FY-Q752].

[166] *Id.*

[167] *Id.*

[168] LONGENHAGEN & MCDANIEL, *supra* note 4, at 113–14.

[169] *Id.* at 114.

[170] Jeff Passan, *MLB punishes Atlanta Braves, declares 12 minor league players free agents*, YAHOO! SPORTS (Nov. 21, 2017), https://sports.yahoo.com/ [https://perma.cc/46MU-5VEA].

[171] *Id.*

[172] *Id.*

[173] *Atlanta Braves Team History & Encyclopedia*, BASEBALL REF., https://www.baseball-reference.com/ [https://perma.cc/VTF9-6ZW2].

[174] Buster Olney, *Ex-Braves GM John Coppolella has lifetime ban lifted by MLB*, ESPN (Jan. 9, 2023, at 10:24 ET), https://www.espn.com/ [https://perma.cc/Y3ZB-ELAS].

justified lifting the ban by noting Coppolella had shown contrition for his actions.[175]

V. THE INTERNATIONAL DRAFT – A POSSIBLE SOLUTION?

The international amateur market provides significant value for all parties involved. Many players receive life-changing money, trainers build successful businesses and see a return on their investment, and MLB teams have a chance to sign future stars.[176] However, the system is loosely regulated, and penalties for abusing the system or committing fraud are rarely enforced.[177] The current consensus within the industry is changes are needed to the system, although the severity of the required changes is debated.[178] One side argues the system, while flawed, simply needs MLB to take stronger steps to enforce its regulations.[179] Specifically, MLB could begin to enforce its restrictions on handshake agreements with international players in the pre-signing phase and impose a registration system for trainers similar to what MLB requires of players' agents in the United States.[180] A second and more radical proposal is to overhaul the international amateur market completely and impose an international draft similar to the domestic MLB Draft.[181]

While an international draft would dramatically impact the fortunes of international players and trainers, these parties would be excluded from the bargaining table. Instead, an international draft would be negotiated between MLB and the Major League Baseball Players Association (MLBPA).[182] The MLBPA is the union that represents MLB players and players who are part of the North American minor leagues.[183] Antitrust law requires MLB and the MLBPA to mutually agree on an international draft as part of their Collective Bargaining Agreement (CBA).[184] Even though

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[175] *Id.*

[176] Axisa, *supra* note 44; *see also* Stanley, *supra* note 3.

[177] LONGENHAGEN & MCDANIEL, *supra* note 4, at 9. See discussion *supra* Part IV regarding John Coppolella and his brief lifetime ban.

[178] Torres & Rosenthal, *supra* note 2.

[179] *Id.*

[180] *Id.*; *FAQ*, MLBPA, https://www.mlbplayers.com/ [https://perma.cc/5S5S-DXSU].

[181] Torres & Rosenthal, *supra* note 2.

[182] Anthony Castrovince, *Where things stand on the International Draft negotiations*, MLB (July 22, 2022), https://www.mlb.com/ [https://perma.cc/7S3E-GVSZ].

[183] *FAQ*, *supra* note 180.

[184] Blum & Brandt, *supra* note 73.

international players are not represented by the MLBPA, the MLBPA is given authority to agree on the rules for how players can enter MLB.[185] This authority extends to bargaining for the creation of an international draft.[186]

The MLBPA has consistently maintained its opposition to the creation of an international draft.[187] The union argues MLB could root out corruption if it actually enforced the restrictions currently in place.[188] Additionally, the union has expressed concern a draft would allow MLB teams to decrease signing bonuses for international players and restrict the freedom international players currently have to choose their employer.[189] Despite the union's stated opposition to an international draft, both sides shared proposals for the structure of an international draft during the 2022 CBA negotiations before the parties ultimately agreed to table the issue.[190] The current CBA is set to expire in December 2026, and the parties could potentially negotiate to implement an international draft in the next CBA.[191] Given that the MLBPA represents players who have already been drafted or signed by MLB teams, these players may be willing to compromise on an international draft to secure other objectives benefiting current MLB players.[192]

Should the parties agree to implement an international draft, it could be structured to combat much of the fraud currently seen in the international amateur market. The creation of the draft itself would eliminate the unenforceable handshake agreements currently dominating the market.[193] Teams would only be allowed to sign the players they draft.[194] Thus, teams would no longer have a reason to negotiate with players before they are eligible, which would prevent

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[185] *Cf.* Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 960 (2d Cir. 1987); Clarett v. Nat'l Football League, 369 F.3d 124, 139–140 (2d Cir. 2004) (upholding the validity of drafts in the NFL and NBA because the drafts were collectively bargained by the leagues and the players' unions).

[186] Castrovince, *supra* note 182.

[187] Blum & Brandt, *supra* note 73.

[188] Torres & Rosenthal, *supra* note 2.

[189] *See* Blum & Brandt, *supra* note 73.

[190] *Id.*

[191] *Id.*

[192] *See id.*

[193] Alden Gonzalez & Marly Rivera, *'Something needs to be done': Why an MLB international draft is such a big deal*, ESPN (Mar. 10, 2022, at 16:23 ET), https://www.espn.com/ [https://perma.cc/YDR4-R35S].

[194] *Id.*

teams from entering into agreements with players as young as 12.[195] The draft structure would also prevent trainers from pushing their players to sign with a particular team. However, a trainer could theoretically continue to hide players in exchange for bribes, so only one team knows a particular player is good enough to draft.

The international draft could also reduce the fraud committed when it comes to paying players. The international draft could be modeled after the MLB Draft, where each team is given a pool of money it can spend on all its drafted players.[196] However, international amateurs will have far less bargaining power to negotiate with teams because they lack the alternative that players in the MLB Draft have—playing in college if they do not sign. Therefore, MLB should impose a fixed slot value on each pick, where the team is required to pay the player a specific amount based on where he is drafted. Neither the team nor the player would be able to negotiate for a different signing bonus; it would remain fixed. The National Football League and National Basketball Association drafts already employ this type of system.[197] To prevent a decrease in earnings for international players, MLB could set the total pool value across all 30 teams at a value equivalent to the amount teams are currently spending during the International Signing Period. In 2025, teams spent a combined $199 million on international players, so the total draft pool should be at or above that number.[198] The total pool amount could then have a scheduled increase each year to provide a consistent increase in player earnings.

A draft pool with a fixed slot value for each pick would prevent teams from promising players more money than the team can spend during the International Signing Period. Players will know exactly how much they will be paid based on their draft position. Players will no longer face the risk that a team will cancel an agreement if the team later discovers a different player they like more. Additionally, a fixed slot value would limit the ability of team employees and trainers to engage in skimming or packaging schemes. Trainers would not be able to demand that teams pay certain players above market value to get a later player to sign with

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[195] Castrovince, *supra* note 76.

[196] Perry, *supra* note 24.

[197] Kurt Badenhausen, *NFL Rookie Signing Bonuses Up 4% for Biggest Gain Since 2020,* SPORTICO (Apr. 26, 2024, at 11:00 MT), https://www.sportico.com/ [https://perma.cc/68K8-738N]; 2025 *NBA Rookie Scale*, SPOTRAC, https://www.spotrac.com/ [https://perma.cc/3YFV-N5WA].

[198] Blum & Brandt, *supra* note 73.

the team. Team employees could no longer exaggerate how much a player is worth so they can steal money from the team. All parties involved would have transparency about how much money the player will receive based on his draft position.

MLB could impose stricter regulations regarding drug use and age verification as part of the requirements for entering the draft. To cut down on PED use, MLB could subject all players to mandatory drug testing a year before the draft. While such testing would not eliminate all PED use, it would prevent PED use among 15- and 16-year-olds. Older players would no longer be able to use PEDs and suddenly obtain a signing bonus. They would have to be clean the year before getting drafted. Additionally, trainers would no longer have an incentive to push players to use PEDs before they are draft-eligible because teams could not enter into handshake agreements with players when they are only 14 or 15 years old.[199] Thus, players would have an opportunity to give their bodies time to develop until they are draft-eligible without needing to resort to PED usage at a young age.[200]

MLB will face a more difficult challenge in creating acceptable regulations for age verification. MLB could impose a DNA testing requirement on players, but such testing would be expensive and would not conclusively verify a player's age.[201] Instead, MLB could require players who want to be draft-eligible to consent to DNA testing at the request of any team. MLB could also mandate players to provide documented proof of their age. However, this requirement would likely exclude some truthful players who lack documentation because it was lost, never existed, or the player emigrated from another country.[202] In any case, imposing a draft would allow MLB and teams to focus their investigations of players' ages on players in that draft year because they would not have to worry about signing younger players.

Finally, MLB could create greater accountability among the trainers for international players. MLB could adopt a rule that a trainer's players are draft-eligible only if the trainer completes MLB training and registration requirements. MLB and the MLBPA already require agents representing current MLB players to pass a test covering the ethical and legal rules of representation.[203] An

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[199] Castrovince, *supra* note 76.

[200] *Id.*

[201] Schmidt & Schwarz, *supra* note 94.

[202] Drellich & Rosenthal, *supra* note 10.

[203] *MLBPA Agent Certification*, MLBPA, https://registrationz.mlbpa.org/ [https://perma.cc/89QK-CZ2A].

agent who violates these rules can be banned from baseball and prevented from representing players in negotiations with any MLB team.[204] MLB could impose similar ethical requirements on trainers and prohibit trainers from representing draft-eligible players if they steal from players or engage in other fraudulent behavior, like PED use.

MLB could structure an international draft to target the most serious types of fraud in the international amateur market. An international draft would eliminate handshake agreements with young teenagers and prevent teams from reneging on the bonuses they promised to players. The international draft would provide transparency to all parties involved and limit financial fraud. While an international draft is unlikely to completely root out other types of fraud, such as unethical trainer behavior, age fraud, and drug use, MLB and the MLBPA could collectively bargain to impose stricter requirements on players and trainers. Of course, MLB will have to enforce these requirements if it wants to effectively reduce fraud.

International players will face a tradeoff: they will lose their power to negotiate with multiple teams and choose their own employer in exchange for greater transparency and protection. They will no longer choose where to start their careers and will instead play for whatever team drafts them. While an international draft could negatively impact players, its ability to decrease fraud likely outweighs these negative impacts. This is especially true because players often suffer the most when trainers and teams engage in fraudulent behavior. Provided that the international draft pool matches or exceeds the amount of money international players currently receive, an international draft should provide increased benefits and protection to the players without a loss in earnings. Similarly, teams and trainers who act ethically should have no issues following the increased regulations. Reputable trainers will still be able to train players and receive a return on their investment. Teams will be able to cut down on employee fraud and reduce the risk the team will give millions of dollars to a player lying about his identity. Therefore, MLB and the MLBPA should implement an international draft in the 2026 CBA.

[204] Michael McCann, *MLBPA Asks Court to Confirm Sanctions Against Player Agents*, SPORTICO (Nov. 18, 2024, at 05:55 MT), https://www.sportico.com/ [https://perma.cc/WL64-JCRF].

CONCLUSION

The MLB international amateur market offers life-changing opportunities for young players, but it is also rife with fraud and exploitation. Players, trainers, and teams all engage in deceptive practices, ranging from age fraud to financial skimming and unethical handshake agreements. While MLB has attempted to regulate the system, enforcement has been inconsistent, allowing corruption to persist. An international draft would provide much-needed transparency by eliminating handshake agreements with underage players, creating transparency for player payments, and reducing opportunities for fraud. Though players would lose some control over their careers, the long-term benefits of a structured system outweigh these concerns. By ensuring fair compensation, protecting young athletes, and restoring integrity to the process, an international draft presents the best path forward for the future of MLB's international amateur market.

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SPORTS LEAGUES OFFERING FANS ONLY MULTI-TEAM OUT-OF-MARKET PACKAGES: A GAME PLAN FOR ANTITRUST LIABILITY

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CONTENTS

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INTRODUCTION

This author is a fan of the Detroit Lions and resides in Phoenix, Arizona. To watch her favorite team play against (and hopefully defeat) the Chicago Bears when the game is not nationally broadcast, she must pay a steep $480 cost to purchase NFL Sunday Ticket.[1] This author is not alone as over 120 million National Football League (NFL) fans reside outside their favorite team's market and can only access games through Sunday Ticket.[2] Similarly, National Hockey League (NHL) and Major League Soccer (MLS) fans who live outside their favorite team's market must pay a premium to access out-of-market games through ESPN+ and MLS Season Pass, respectively. All three of these packages provide fans with league-wide access to out-of-market games, but none of the leagues offer single-team out-of-market packages. The NFL, NHL, and MLS's practice of only providing league-wide out-of-market packages violates antitrust law because the leagues have created unlawful monopolies over their out-of-market games that harms consumers. By not providing single-team out-of-market packages in addition to their league-wide packages, all three leagues force fans to pay exorbitant costs for games they do not want to watch. These high costs dissuade fans within the relevant market from purchasing out-of-market packages and watching their favorite team. Instead, fans are forced to watch games at sports bars and incur extra costs for food, drinks, tips, and possibly transportation as opposed to watching a game in the comfort of their home.

This argument is further buttressed by the National Basketball Association (NBA) and Major League Baseball (MLB) providing fans with single-team plans and league-wide packages for out-of-market games. The NBA's and MLB's provision of single-team out-of-market packages allows fans to access only their favorite team's

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[1] Taylor Kujawa, *NFL Sunday Ticket Review: Is It Worth It for the 2025 Season?*, CABLETV.COM (Sep. 5, 2025), https://www.cabletv.com/ [https://perma.cc/9S4M-8FDR].

[2] Wayne S. DeSarbo, Ashley Stadler Blank, & Sunghoon Kim, *Sports diaspora: A national survey of NFL fan dispersion*, SPORTS BUS. J. (Oct. 2, 2017), https://www.sportsbusinessjournal.com/ [https://perma.cc/G26Z-ZRYZ]; *Who are NFL fans and how can brands engage them?*, GENIUS SPORTS (Dec. 12, 2023), https://www.geniussports.com/ [https://perma.cc/E82X-W86L].

games without incurring high costs. The NBA's and MLB's practices also prove single-team out-of-market packages are feasible for the NFL, NHL, and MLS to provide. MLB serves as an especially persuasive example because the league does not have to provide a single-team out-of-market plan because it is protected by the antitrust exemption established in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[3] Since MLB does not have a legal obligation to provide fans with single-team out-of-market packages, the league must find that single-team packages generate more revenue and allow the league to reach more out-of-market fans than league-wide packages alone.

An antitrust lawsuit against the NFL, NHL, or MLS will be examined under the rule of reason standard as established by the Supreme Court in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*.[4] This standard requires a plaintiff to show that the alleged practice unreasonably restrains or monopolizes trade in the relevant market.[5] Once a plaintiff makes that showing, the defendant must proffer procompetitive benefits of the alleged practice.[6] If the defendant carries its burden, the plaintiff must demonstrate that the procompetitive benefits of the challenged practice could be reasonably achieved through less restrictive means.[7]

This author argues that under the rule of reason, the NFL, NHL, and MLS violate antitrust law by providing fans with only one package to watch out-of-market games that contains all of the respective league's games. This author discusses a possible solution to the antitrust problem: leagues offering single-team packages in addition to league-wide plans. Part I discusses the antitrust history of the NFL. Part II explains the business practices and broadcasting structures of the NFL, NHL, and MLS. Part III discusses how each of the above-mentioned leagues' broadcasting structures subject them to antitrust liability. Part IV discusses the antitrust analysis applied to the leagues who offer only league-wide out-of-market packages. Part V discusses MLB's and the NBA's broadcasting structures and how their practices comply with antitrust laws and should serve as models for the NFL, NHL, and MLS. Finally, the

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[3] Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Base Ball Clubs, 259 U.S. 200 (1922).

[4] *See* Section III.C, *infra*.

[5] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 103 (1984).

[6] Ohio v. Am. Express Co., 585 U.S. 529, 541 (2018).

[7] *Id.*

author will recommend that the NFL, NHL, and MLS should follow the practices of MLB and the NBA and proactively adopt single-team plans to avoid future antitrust liability.

I. NFL, NHL, AND MLS OUT-OF-MARKET BROADCASTING PRACTICES

A. NFL

The first NFL game broadcast took place in 1939 with a TV audience of approximately 1,000 people.[8] NFL games were not regularly broadcast until almost a decade later in the 1948 season.[9] Although the first few years following 1948 did not yield much success, NFL owners saw the increase in TV set sales as an opportunity to reach more fans and create another revenue stream.[10] Teams initially sold their broadcasting rights separately.[11] To protect its teams' ticket sales, the NFL created "blackout" rules in 1951. One blackout rule prohibited teams from broadcasting within a 75-mile radius of another team's stadium when the team was playing at home.[12] Another blackout rule prohibited teams from broadcasting in another team's territory even if the team was away but the team was still broadcasting the away game to its home territory.[13] The U.S. Department of Justice (U.S. DOJ) sued the NFL alleging the NFL's blackout rules violated the Sherman Act by acting as an unreasonable restraint of trade.[14] U.S. District Court Judge Allan Grim held the blackout rule related to teams' inability to broadcast in another team's territory during a home game *was not* an unreasonable restraint of trade.[15] The court reasoned that the teams needed to work together to ensure a viable league and protect the ticket sales of their fellow teams.[16] However, the court held the blackout rule prohibiting teams from broadcasting games in another team's territory when the team was away but still broadcasting to

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[8] Jake Kobrick, *NFL Television Broadcasting and the Federal Courts*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/ [https://perma.cc/4GF2-4FTJ] (last visited Nov. 11, 2024).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Kobrick, *supra* note 8.

[15] United States v. Nat'l Football League, 116 F. Supp. 319, 326 (E.D. Pa. 1953).

[16] *Id.*

the home territory violated the Sherman Act.[17] Unlike the first blackout rule, this rule did not protect ticket sales and accordingly the court found it to be an unreasonable restraint on competition.[18] While the blackout rule that prevented teams from telecasting into a team's territory while the team was away and the rule that prohibited teams from radio broadcasting their games into another team's territory were held illegal under the Sherman Act,[19] the NFL was able to maintain the core blackout rule that still applies today.

In 1961, NFL owners decided to centralize the broadcasting process by pooling their rights and dividing the revenue equally among the teams.[20] When the NFL sold its broadcasting rights to CBS, the league again faced a U.S. DOJ antitrust challenge to its to business practices.[21] The NFL sought a ruling from the district court that its contract with CBS did not violate Judge Grim's earlier ruling.[22] Judge Grim held the agreement with CBS took away the NFL teams' ability to determine which games would be televised, constituting a clear violation of his previous ruling.[23] To avoid future application of Judge Grim's decisions, the NFL successfully lobbied Congress to enact the Sports Broadcasting Act of 1961 (SBA).[24] The SBA stated antitrust laws would not apply to joint agreements where professional sports leagues pooled and sold their teams' rights to telecast games.[25] Agreements prohibiting televising games in certain areas, apart from the NFL's blackout rule, were still subject to antitrust laws.[26] The NFL was able to complete its deal with CBS once the SBA took effect.[27] Subsequent deals with CBS helped broadcast revenues exceed ticket revenues for the first time in league history.[28]

Until 1994, the NFL relied on cable channels to broadcast its games. If a fan lived outside their favorite team's market, they had to hope that their team would play a nationally televised game to watch it. If their favorite team's game was broadcast locally only,

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[17] *Id.* at 327.
[18] *Id.* at 326.
[19] *Id.* at 326–27.
[20] Kobrick, *supra* note 8.
[21] United States v. Nat'l Football League, 196 F. Supp. 445 (E.D. Pa. 1961).
[22] *Id.* at 446.
[23] *Id.* at 447.
[24] Kobrick, *supra* note 8.
[25] 15 U.S.C. § 1291.
[26] Kobrick, *supra* note 8.
[27] *Id.*
[28] *Id.*

the fan was out of luck. To solve this problem, the NFL created Sunday Ticket. To supplement nationally broadcast games on cable, fans could purchase Sunday Ticket to watch every other out-of-market NFL game. However, fans needed DirecTV to access the package.[29] MLB and the NBA created similar services in 1996 with Extra Innings and League Pass, respectively, but those products were available on cable.[30] Sunday Ticket was exclusive to DirecTV so the NFL could ensure consistent viewership on cable to protect its relationship with CBS, NBC, and FOX.[31] With the NFL and DirecTV benefitting from Sunday Ticket, the parties extended their agreement by five years in 2002.[32] During the 2000s, the NFL expanded its experience offerings for fans by implementing the Red Zone channel, integrating more on-demand scores and statistics, and adding a feature directed at fantasy players.[33] In 2014, DirecTV paid $1.5 billion annually to the NFL to retain Sunday Ticket through 2022.[34] AT&T acquired DirecTV in 2014 on the condition that Sunday Ticket was part of the acquisition. AT&T then began working with the NFL to develop a streaming option for Sunday Ticket.[35] In 2018, Sunday Ticket was behind the curve on some advantageous features compared to NBA League Pass and MLB Extra Innings.[36] NBA League Pass provided customers with per-game pricing, simultaneous stream support, and special mobile view options, while MLB provided a highlight feature called Catch Up.[37] DirecTV was struggling to compete with the rise of streaming, prompting the NFL to change providers.

YouTube became NFL Sunday Ticket's official carrier in 2022, paying the NFL over $2 billion per year for a seven-year deal.[38] While most Sunday Ticket features remained the same, YouTube added the multi-view feature that allows fans to watch multiple games on the same screen.[39] Sunday Ticket also includes live polls

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[29] Jacob Feldman, *Can DIRECTV Innovate NFL Sunday Ticket Enough to Survive?*, SPORTS ILLUSTRATED (Sep. 7, 2018), https://www.si.com/ [https://perma.cc/RKP9-58XM].

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Feldman, *supra* note 29.

[36] *Id.*

[37] *Id.*

[38] Joe Reedy, *'NFL Sunday Ticket' is coming to YouTube. This is what you'll be able to stream*, AP NEWS (Sep. 6, 2023, at 10:52 MST), https://apnews.com/ [https://perma.cc/69HJ-56SB].

[39] *Id.*

and chats for fans to interact with each other while watching games.[40] Although Sunday Ticket provides fans access to out-of-market games, fans cannot access in-market games without a YouTube TV subscription or cable. Sunday Ticket also fails to provide fans access to Thursday Night Football as it's exclusive to Prime Video.[41] Monday Night Football (MNF) and Sunday Night Football (SNF) are also unavailable on Sunday Ticket because MNF is exclusive to ESPN and SNF is exclusive to NBC and Peacock.[42] A current Sunday Ticket plan costs $480 without YouTube TV and an additional $42 to add NFL Red Zone to the package.[43] With a YouTube TV subscription, fans still pay an additional $378 for Sunday Ticket and $10.50 per month to add NFL Red Zone.[44] Sunday Ticket cost $294 when DirecTV was the carrier.[45] The significantly higher price for YouTube's Sunday Ticket package can be attributed to YouTube passing the cost of its deal with the NFL onto consumers.[46] With only one option for a Sunday Ticket package, fans who live outside their favorite team's territory are forced to pay a high price for every NFL game even though they likely want to watch only their favorite team's games.

B. NHL

The first telecast of an NHL game took place in 1940 with an audience of about 300 people.[47] Since then, the NHL has been able to make millions of dollars from its broadcasting rights. Most recently, the NHL entered into a seven-year deal with ESPN that grants the network the right to stream all NHL out-of-market games on ESPN+.[48]

Prior to its current offering of out-of-market games through ESPN+, the NHL had two different offerings for out-of-market

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[40] *Id.*

[41] *Ways to Watch the NFL: TNF, SNF & MNF*, NFL, https://www.nfl.com/ [https://perma.cc/R22U-RW9F] (last visited Nov. 11, 2024).

[42] *Id.*

[43] Kujawa, *supra* note 1.

[44] *Id.*

[45] Jared Newman, *NFL Sunday Ticket on YouTube: Choose your plan wisely*, TECH HIVE (Sep. 3, 2024, at 03:00 PDT), https://www.techhive.com/ [https://perma.cc/6X8P-XUP8].

[46] *Id.*

[47] *NHL game televised in US for first time*, HISTORY (May 27, 2025), https://www.history.com/ [https://perma.cc/A2YE-ZQ62].

[48] *Id.*

games: NHL Center Ice and NHL Game Center Live.[49] NHL Center Ice was the cable package offered to hockey fans who wanted to watch out-of-market games.[50] The plan allowed fans to watch games with either the home or away broadcast. Center Ice also had a recording feature so fans could watch games from the beginning.[51] Center Ice's largest drawback was that even in 2018, some channels were not broadcast in HD.[52] NHL Game Center Live was the streaming option for fans to watch out-of-market games.[53] NHL Game Center Live offered several features for fans. Features included full DVR controls, a slow motion feature, and timelines that showed key events like goals and penalties so fans could rewatch crucial parts of the game.[54] Game Center Live rebranded as NHL.TV in 2016.[55] NHL.TV offered fans a single-team plan and a full-league package.[56] After the ESPN deal in 2021, ESPN+ absorbed NHL.TV as an offering provided to fans who purchase an ESPN+ subscription.[57] Under the new model, fans pay for ESPN+ and gain access to the league's full slate of out-of-market games.[58] There is no longer a single-team option to stream out-of-market NHL games.[59] If fans want to watch out-of-market games through

[49] Travis Hughes, *NHL Center Ice vs. NHL GameCenter Live: Which service is superior?*, SB NATION (Oct. 20, 2011, at 09:00 MST), https://www.sbnation.com/ [https://perma.cc/KJ7A-2QDQ].

[50] Darren Brown, *The Great Debate – NHL Center Ice versus NHL.tv*, NHL TO SEATTLE (Oct. 12, 2018), https://nhltoseattle.com/ [https://perma.cc/XL3U-FRX6].

[51] *Id.*

[52] *Id.*

[53] Hughes, *supra* note 49.

[54] *Id.*

[55] Greg Wyshynski, *NHL.tv explains what happened in disastrous launch*, YAHOO! SPORTS (Feb. 3, 2016), https://sports.yahoo.com/ [https://perma.cc/Z724-SV96].

[56] The single-team plan was offered as part of the settlement in *Laumann v. National Hockey League*. Laumann v. Nat'l Hockey League, 105 F. Supp. 3d 384 (S.D.N.Y. 2015).

[57] *From NHL GameCenter To NHL.TV: A Look At MLBAM's Relaunch Of NHL Digital Properties*, SPORTS BUS. J. (Feb. 25, 2016), https://www.sportsbusinessjournal.com/ [https://perma.cc/B4JD-GZ86]; *NHL back on ESPN with 7-year multiplatform deal*, ESPN (Mar. 10, 2021, at 13:57 ET), https://www.espn.com/ [https://perma.cc/V7GM-VXRR].

[58] *What is the new ESPN DTC service? Plans, costs, key facts*, ESPN (Sep. 1, 2025, at 01:34 ET), https://www.espn.com/ [https://perma.cc/Z9MU-DH5T].

[59] *Id.*

ESPN+, they must pay either $11.99 per month or $119.99 per year.[60]

C. MLS

MLS's first broadcast deals were with ESPN and ABC, but initial ratings were not favorable to the U.S.'s newest league.[61] MLS's most recent deal occurred in 2023 when Apple and MLS entered into a ten-year deal worth $2.5 billion. Apple received the domestic rights to all MLS matches in the deal.[62] Fans can access every MLS games with no black-outs on Apple TV+ MLS Season Pass.[63] The package also includes coverage of the MLS Cup Playoffs, Leagues Cup, Campeones Cup, and MLS All-Star Game.[64] MLS Season Pass costs $14.99 per month or $99 for the full season for fans who do not have an Apple TV+ subscription.[65] Apple provides a discount for Apple TV+ subscribers, charging them $12.99 per month or $79 for the season.[66] This package fails to offer a single-team plan for fans.

II. NBA AND MLB BROADCASTING PRACTICES

A. NBA

The NBA did not appear on television until its eighth season in 1953.[67] Beginning in 2012, the NBA provided NBA League Pass to fans so they could watch the full slate of out-of-market games. League Pass initially cost $179.[68] After the league perceived that

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[60] *Id.*

[61] Gareth, *The Evolution of MLS Broadcast Deals and their Impact on the League*, MLS FOOTBALL (Aug. 5, 2023), https://www.mlsfootball.com/ [https://perma.cc/4WBU-49JD].

[62] Chris Morris, *Apple TV cuts price of MLS Season Pass in half for remainder of season*, FORTUNE (July 1, 2024, at 12:11 EDT), https://fortune.com/ [http://perma.cc/6WT2-P89J]; Gareth, *A Complete Guide to Watching Major League Soccer in 2024*, MLS FOOTBALL (May 8, 2024), https://www.mlsfootball.com/ [https://perma.cc/Y3XV-4JP3].

[63] Gareth, *supra* note 61.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Andrew Fischer, *History of the NBA on Television*, GIVEMESPORT (June 25, 2024), https://www.givemesport.com/ [https://perma.cc/6JPM-87TV].

[68] *NBA LEAGUE PASS tips off 19th season with free trial beginning Oct. 30*, NBA COMMUNICATIONS (Oct. 29, 2012), https://pr.nba.com/ [https://perma.cc/6BM2-UBBB].

fans found the price of League Pass was too high, the NBA released two cheaper options in 2015.[69] The NBA offered fans the option to watch individual out-of-market games for $6.99 per game through its NBA Single Game plan.[70] The league also created Team Pass, allowing fans to watch one team's out-of-market games for $119.[71] Considering the cost of League Pass in 2015 was $199,[72] Team Pass provided consumers with significant savings. While NBA Single Game is only available on the NBA's mobile apps,[73] fans still have access to NBA Team Pass. The subscription numbers of NBA League Pass and Team Pass have never been disclosed, but the out-of-market offerings were growing as of 2023 when the NBA announced that League Pass had grown by more than 50 percent while viewership on cable was up only 48 percent.[74]

While League Pass and Team Pass present effective ways for out-of-market fans to watch NBA games, the NBA's out-of-market package structure is subject to change with the NBA's new media deals beginning in the 2025-26 season.[75] The NBA signed new media rights deals with Disney through ABC and ESPN, NBC through Peacock, and Amazon through Prime Video.[76] All three deals amount to $77 billion,[77] and the media deals run through the 2035-36 season.[78] Fans still have access to NBA League Pass and Team Pass through NBA.com, and fans now have the option to link their League Pass subscription to their Prime Video account and watch games through that platform.[79] Under this new structure,

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[69] Chris Welch, *NBA will let fans watch individual out-of-market games for $6.99*, THE VERGE (July 22, 2015, at 11:06 MST), https://www.theverge.com/ [https://perma.cc/6QUC-DPXK].

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *NBA Single Game*, NBA HELP CTR., https://support.watch.nba.com/ [https://perma.cc/H8FC-7DSA] (last visited Mar. 9, 2025).

[74] Alex Schiffer, *What Does NBA-Amazon Deal Mean for League Pass?*, FRONT OFF. SPORTS (July 26, 2024, at 15:10), https://frontofficesports.com/ [https://perma.cc/WE3Z-MJ58].

[75] *Id.*

[76] *NBA signs new 11-year media agreements with the Walt Disney Company, NBCUniversal and Amazon Prime Video through 2035-36 season*, NBA (July 24, 2024, at 13.45), https://www.nba.com/ [https://perma.cc/5WSR-9XSB].

[77] Schiffer, *supra* note 74.

[78] *NBA signs new 11-year media agreements with the Walt Disney Company, NBCUniversal and Amazon Prime Video through 2035-36 season*, *supra* note 76.

[79] *League Pass*, NBA, https://www.nba.com/ [https://perma.cc/28PS-78UX] (last visited Nov. 10, 2025).

Team Pass is still available for fans to purchase at a price of $13.99 per month.[80]

B. MLB

MLB was first televised in 1939, and the first broadcast was a double-header between the Cincinnati Reds and the Brooklyn Dodgers.[81] In 1953, ABC sought to broadcast regular season MLB games nationally on Saturdays.[82] However, the Philadelphia Athletics, the Cleveland Indians, and the Chicago White Sox were the only teams interested.[83] The deal was further hindered by MLB restricting the broadcasts from airing within 50 miles of any city that had a major league baseball team.[84] The Atlanta Braves were broadcast nationwide to cable households starting in the 1977 season through Ted Turner's network WTBS.[85] The Chicago Cubs were also able to broadcast their games outside its market with WGN America in the 1980s.[86]

Regarding out-of-market packages, MLB first introduced MLB.TV to provide fans with access to out-of-market game broadcasts in 2002.[87] In 2016, MLB added to its out-of-market offerings with the MLB.TV Single Team package, which cost $84.99.[88] Compared to MLB.TV Premium, the league-wide out-of-market package, the MLB.TV Single Team package saved consumers $25.[89] MLB.TV currently provides MLB.TV All Teams and MLB.TV Single Team as out-of-market packages to fans.[90] The savings consumers receive by choosing the Single Team package

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[80] *Id.*

[81] John J. Swol, *MLB radio and TV history*, TWINS TRIVIA (Dec. 26, 2024), https://twinstrivia.com/ [https://perma.cc/F3MH-NYBQ].

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] Al Yellon, *Today in Cubs history: The very first WGN-TV baseball telecast*, BLEED CUBBIE BLUE (Apr. 16, 2023, at 9:30 MST), https://www.bleedcubbieblue.com/ [https://perma.cc/VHG9-ACRE].

[87] David Adler, *How MLB.TV became the gold standard for sports streaming*, MLB (May 24, 2023), https://www.mlb.com/ [https://perma.cc/TZN2-J4LE].

[88] Mark Newman, *MLB.TV gives you all access, all season*, MLB (Apr. 11, 2016), https://www.mlb.com/ [https://perma.cc/CVJ9-QFVP].

[89] *Id.*

[90] Chad Jennings, *How to watch MLB games in 2025: Streaming options, TV channels and subscription info*, THE ATHLETIC (Mar. 27, 2025), https://www.nytimes.com/ [https://perma.cc/JFY6-68GY].

over the All Teams package has shrunk to $20,[91] but consumers still receive a choice between multiple packages. MLB has continued to provide a single-team package over a ten-year period.[92] Additionally, the league has not indicated any intentions to change its out-of-market streaming structure in the near future.

III. NFL, NHL, AND MLS'S OUT-OF-MARKET GAME BROADCASTING PRACTICES SUBJECT THE LEAGUES TO ANTITRUST LIABILITY

A. OVERVIEW

The NFL, NHL, and MLS face potential antitrust liability for failing to offer single-team out-of-market plans to consumers. Within the relevant market of out-of-market game broadcasts for each league, the leagues offer only one product to consumers. By offering a single product within the relevant market, each league can engage in unlawful monopolistic pricing that harms consumers. Such monopolistic pricing likely discourages consumers from purchasing the packages, further demonstrating anticompetitive harm in the relevant market.[93] Additionally, all three leagues fail to reflect consumer desires for single-team out-of-market plans.[94] While some consumers are likely interested in paying for access to every team's out-of-market games, fans residing outside their favorite team's market likely want to access only their favorite team's games. Instead of responding to consumer demand, all three leagues require out-of-market fans to purchase league-wide plans at a premium when they will only use the package to watch their favorite team's games. Such harmful and anticompetitive effects on the relevant market will likely be held to violate antitrust law.

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[91] *Id.*

[92] MLB was legally obligated to provide the MLB.TV Single Team package as part of its settlement with plaintiffs in *Laumann v. National Hockey League*. Langer, Grogan & Diver P.C., *Proposed Settlement Reached in Major League Baseball Broadcasting Class Action*, PR NEWSWIRE (Jan. 19, 2016, at 02:10ET), https://www.prnewswire.com/ [https://perma.cc/N8SQ-MPUA]. The settlement agreement required MLB to provide a single-team out-of-market package for a period of five years following the settlement, so the league's obligation to offer a single-team package would have ended in 2021. However, MLB has continued to provide the Single Team package to fans through the upcoming season.

[93] u/xodevo, REDDIT (r/cordcutters), *nfl streaming package for just one team?* (2024), https://www.reddit.com/ [https://perma.cc/RK2Q-CYBN].

[94] Danny Stone, *Will NFL Sunday Ticket ever allow a Rams only option?*, TURF SHOW TIMES (Aug. 23, 2024, at 15:00 MST), https://www.turfshowtimes.com/ [https://perma.cc/NQ58-JS78].

Without providing a single-team out-of-market plan to consumers, all three leagues are likely subject to billions of dollars in damages in an antitrust lawsuit.

B. ANTITRUST PRINCIPLES

Passed in 1890, the Sherman Antitrust Act aims to prevent monopolies and restraints of trade.[95] Courts have elaborated that the Sherman Act prohibits only "unreasonable" restraints of trade because every contract between companies acts as a restraint of trade.[96] The goal of antitrust law is to prevent restrictions on competition so consumers can enjoy multiple choices for products and lower prices.[97]

Section 1 of the Sherman Act prohibits any activities that constitute an unreasonable restraint on competition or interstate commerce.[98] To prevail on a Section 1 claim, a plaintiff must prove four elements: (1) there was a contract, combination, or conspiracy among two or more persons or business entities; (2) the agreement unreasonably restrained trade; (3) the restraint affected interstate commerce; and, (4) the plaintiff is a proper party to bring the antitrust action because they were harmed by the defendant's contract, combination, or conspiracy, and they suffered harm because of the anticompetitive aspect of the defendant's conduct.[99]

Section 2 of the Sherman Act prohibits attempts at monopolization or actual monopolization of interstate trade or commerce.[100] To prove a Section 2 claim for an attempt to monopolize, a plaintiff must show: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the combination or conspiracy; (3) specific intent to monopolize; and, (4) causal antitrust injury.[101] To prove a claim of monopolization under Section 2, a plaintiff must show: (1) the defendant's possession of monopoly power in the relevant market;

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[95] *See* 15 U.S.C. § 1.

[96] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 98 (1984).

[97] *The Antitrust Laws*, ANTITRUST DIV. U.S. DEP'T JUST., https://www.justice.gov/ [https://perma.cc/S5GE-MDBM] (last visited Mar. 9, 2025).

[98] *Id.*

[99] Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012).

[100] 15 U.S.C. § 2.

[101] Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1158 (9th Cir. 2003).

(2) the defendant's willful acquisition or maintenance of that power; and, (3) causal antitrust injury.[102]

When a plaintiff brings an antitrust claim, they must first define the relevant market affected by the challenged practice. To determine the relevant market, the plaintiff must consider the actual product offered within the market, the types of consumers that purchase the product, and the geographic area within which the product is sold.[103] The relevant market acts as a reference point for a plaintiff to show the impact of the defendant's challenged practice on the relevant market. A plaintiff proves the challenged practice's anticompetitive harm by showing how the relevant market would operate without the challenged practice in place.

Courts perform one of two types of analyses for antitrust cases: the *per se* rule or the rule of reason.[104] Under the *per se* rule, the challenged practice is a violation of antitrust law on its face. *Per se* violations do not require inquiry into the practice's actual effect on the relevant market. Under *per se* analysis, defendants have no available defenses or justifications for the challenged practice.[105] Practices that fall under the *per se* rule include price-fixing agreements, agreements to divide markets, and agreements to rig bids.[106]

Under the rule of reason, courts apply a three-step burden-shifting framework.[107] First, the plaintiff must prove the challenged practice has a substantial anticompetitive effect that harms consumers in the relevant market.[108] Second, after the plaintiff carries their burden, the defendant must show a procompetitive reason for the challenged practice.[109] Third, if the defendant makes a showing for the procompetitive effect, the plaintiff must demonstrate that the procompetitive aspects of the challenged

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[102] *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., No. ML 15-02668 PSG (SK), 2024 WL 168298, at *3 (C.D. Cal. Jan. 11, 2024).

[103] *Competition And Monopoly: Single-Firm Conduct Under Section 2 Of The Sherman Act: Chapter 2*, U.S. DEP'T JUST., https://www.justice.gov/ [https://perma.cc/SUU9-NPVG] (last visited Mar. 3, 2025).

[104] *antitrust laws*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/ [https://perma.cc/X4SQ-TB6J] (last visited Nov. 10, 2024).

[105] *The Antitrust Laws*, FTC, https://www.ftc.gov/ [https://perma.cc/8YKD-THED] (last visited Nov. 10, 2024).

[106] *Id.*

[107] Ohio v. Am. Express Co., 585 U.S. 529, 541 (2018).

[108] *Id.*

[109] *Id.*

practice could be reasonably achieved through less anticompetitive means.[110]

C. ANTITRUST APPLIED TO SPORTS LEAGUES

While most industries are subject to antitrust analysis under both the *per se* rule and the rule of reason, sports leagues receive special treatment given their unique nature. To put a successful product on the field, sports teams must collude with each other to create uniformity in their product. For example, teams must collude to create certain rules regarding the length of a game, field dimensions, and roster limits to define their product.

In *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, the Supreme Court held that the NCAA's television plan, a practice typically classified as horizontal price fixing, should be examined under the rule of reason analysis.[111] Horizontal price fixing is usually considered illegal *per se* under antitrust laws because "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."[112] However, the Court reasoned that the NCAA's product is competition itself given the institutions compete against each other, and the product would be ineffective without defined rules.[113] Although these rules restrain the way the NCAA member schools compete, mutual agreement upon competition rules protects the quality of the product.[114] Further, the Court reasoned that teams' ability to form leagues and create rules to define their competition provides consumers with more choices in the sports market, which is a procompetitive justification for the practice.[115] Given the necessity of competitive restraints for the NCAA to provide a product and expand consumer options, the Court held the horizontal price fixing agreement should be reviewed under the rule of reason.[116]

The Court's holding in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma* regarding the rule of reason's application to the NCAA has been applied to

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[110] *Id.*

[111] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 103 (1984).

[112] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19 (1979).

[113] Nat'l Collegiate Athletic Ass'n, 468 U.S. at 101.

[114] *Id.* at 102.

[115] *Id.*

[116] *Id.* at 103.

professional sports leagues as well.[117] Therefore, when consumers challenge any practice of a professional sports league under antitrust laws, the case will be analyzed under the rule of reason. With this expectation, consumers must be prepared to show that the anticompetitive effects of a league's challenged practice outweigh the procompetitive justifications proffered by a league to succeed on their claim.

Some antitrust cases involving sports leagues have been analyzed under the "quick look" rule. The quick look rule is applied to cases where the challenged practice occurs "in markets or contexts that are new, unusual, or unfamiliar to traditional antitrust analysis."[118] Quick look analysis has been applied to the markets for collegiate and professional sports.[119] Within the sports context, quick look analysis is generally applied to practices that aim to maintain competitive balance among the teams or practices that are key to the league's product of competition.[120] Under quick look analysis, courts incorporate aspects of the *per se* rule and the rule of reason by allowing defendants to offer procompetitive justifications for practices that would be facially anticompetitive and illegal under the *per se* rule.[121] Once a defendant proffers a procompetitive justification, the court balances the anticompetitive harm against the procompetitive justification.[122] Quick look analysis does not provide plaintiffs an opportunity to show that the procompetitive ends of the challenged practice could be achieved through using less restrictive means.[123] So, defendants gain an advantage with quick look analysis because the plaintiffs do not get a chance to demonstrate the challenged practice could be done in a less restrictive way.

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[117] *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 202–03 (2010) ("The fact that the NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate to produce games, provides a perfectly sensible justification for making a host of collective decisions. Because some of these restraints on competition are necessary to produce the NFL's product, the Rule of Reason generally should apply, and teams' cooperation is likely to be permissible.").

[118] Max R. Schulman, *The Quick Look Rule of Reason: Retreat from Binary Antitrust Analysis*, 2 SEDONA CONF. J. 89 (2001), https://thesedonaconference.org/ [https://perma.cc/8A9Y-6SNG].

[119] *Id.*

[120] Am. Needle, Inc., 560 U.S. at 203–04.

[121] *Id.*

[122] *See* Nat'l Collegiate Athletic Ass'n v. Bd. Of Regents of Univ. of Oklahoma, 468 U.S. 85, 113 (1984); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1019 (10th Cir. 1998).

[123] *Id.* at 120.

Quick look analysis may be an option for a lawsuit challenging a league's out-of-market broadcasting practices. However, a court would likely find the question of whether the NFL, NHL, and MLS's practice of providing one out-of-market package to consumers violates antitrust law cannot be resolved "in the twinkling of an eye"[124] and should be examined under a full rule of reason analysis.[125] In *National Collegiate Athletic Association v. Alston*, the Supreme Court explained that while agreements related to creating and maintaining a sports league's product of competition may be resolved with quick look analysis, agreements relating to a sports league's business decisions can still be subject to rule of reason analysis.[126] Since each league's broadcasting practices are not necessary to the league's product of competition but mere business decisions, a court would need to understand the relevant market and potential less restrictive alternative means of achieving the league's procompetitive ends to determine whether the league's broadcasting practice violates antitrust law.[127]

D. RULE OF REASON APPLIED TO THE NFL, NHL, AND MLS

1. *DEFINING THE RELEVANT MARKET*

The relevant market must be defined before analyzing the first step in rule of reason analysis. When challenging either the NFL, NHL, or MLS's out-of-market package structure, the relevant market would be defined as the market for each respective league's out-of-market game streams. The relevant market's consumers are fans of each respective league who live outside their favorite team's designated geographical territory but still want to watch their favorite team's games. These out-of-market fans include current out-of-market package subscribers, fans who watch their favorite team's games at sports bars to avoid paying for the league's out-of-market package, and fans who watch their favorite team only on nationally-televised games because they refuse to pay for the out-of-market package. With the relevant market defined, the rule of reason analysis may proceed.

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[124] Am. Needle, Inc., 560 U.S. at 203.

[125] *Id.*

[126] Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 90 (2021) ("While a quick look will often be enough to approve the restraints 'necessary to produce a game,' a fuller review may be appropriate for others.") (internal citations omitted).

[127] *See supra* notes 107–110 and accompanying text.

2. *STEP ONE: ANTICOMPETITIVE HARM*

To satisfy the first step in the rule of reason, the league's out-of-market package must be shown to have an anticompetitive harm on the relevant market.[128] This first step can be satisfied step by demonstrating the defendant "had market power and that their actions had an adverse effect on price, output, or quality."[129]

The anticompetitive harm of each league only offering one out-of-market package can be shown through the high price of each package. In the NFL's case, it charges consumers a shocking $480 for its Sunday Ticket package for the 2025 season.[130] That price dwarfs the prices of NBA League Pass and the MLB.TV All Teams package which cost $109.99[131] and $149.99,[132] respectively. The price of Sunday Ticket is so high it likely discourages some consumers in the relevant market from purchasing Sunday Ticket. Anticompetitive harm can also be shown by demonstrating what prices for packages would look like if the respective league added single-team packages. For MLB, the MLB.TV Single Team package costs $129.99[133] for the 2025 season, a cost savings of around 13 percent compared to the All Teams package. For the NBA, Team Pass costs $89.99[134] for the 2025 season, approximately 18 percent lower than the cost of League Pass. Using the percentages referenced above and applying them to the $480 cost of Sunday Ticket, consumers could realize savings of ranging from $63 to $86 if the NFL offered single-team packages. With cost savings like these for single-team packages, more out-of-market fans would be incentivized to purchase a Sunday Ticket single-team package.

The high price of the respective league's league-wide plan deters consumers in the relevant market from purchasing the plan.[135]

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[128] *See* Ohio v. Am. Express Co., 585 U.S. 529, 541 (2018).

[129] Laumann v. Nat'l Hockey League, 56 F. Supp. 3d 280, 291 (S.D.N.Y. 2014).

[130] Kujawa, *supra* note 1.

[131] Taylor Kujawa, *NBA League Pass Review 2025*, CABLETV.COM (Sep. 9, 2025), https://www.cabletv.com/ [https://perma.cc/74E2-9ZQN].

[132] Jennings, *supra* note 90.

[133] *Id.*

[134] Kujawa, *supra* note 131.

[135] Ben Koo, *NFL Sunday Ticket is absurdly overpriced, illogically packaged, and pushes fans away from the league*, AWFUL ANNOUNCING (Sep. 13, 2018), https://awfulannouncing.com/ [https://perma.cc/9Z4K-NTD9]. The author discusses the impact that a $400 cost of Sunday Ticket has on out-of-market fans. Many out-of-market fan testimonials indicated that they refused to renew their Sunday Ticket package due to the high price. As a result of non-renewal, some out-of-market fans generally lost interest in following the NFL and indicated their children are not interested

In the NFL's case, some fans who live outside their favorite team's market have expressed an unwillingness to continue paying for Sunday Ticket due to the high price, and other NFL fans have expressed a desire for single-team packages.[136] These out-of-market fans choose to watch their teams at sports bars that provide Sunday Ticket instead.[137] Considering a single person household spends an average of $222 per month, or $2,664 per year, eating out, fans could realize a significant cost savings from reducing their trips to sports bars if a cheaper single-team out-of-market package was made available to them.[138] Other out-of-market fans lose their fandom and only watch nationally-televised games their favorite team plays in.[139]

Further, each league's plan fails to consider consumer demand by not offering single-team plans because a high percentage of out-of-market fans comprise each league's total fans. In the NFL's case, a study conducted on NFL fans revealed teams with the largest out-of-region fan bases have higher media profiles and more successful histories.[140] The Kansas City Chiefs, for example, are the most popular NFL team, garnering support from 16 percent of total NFL viewers.[141] The study also indicated the Kansas City Chiefs have the largest out-of-region following with 73 percent of the team's fans living outside its region.[142] Following the study's conclusions, the NFL teams with the largest fan bases also have the most out-of-region fans. Since out-of-market fans comprise a large number of

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either. If the NFL experiences a decline in out-of-market fans because younger generations fail to develop a fandom resulting from their parents refusing to pay for Sunday Ticket and lose interest in their team, this may spur change by the NFL to make Sunday Ticket cheaper and more accessible through adding a single-team package.

[136] *Id.*; Stone, *supra* note 94.

[137] *See Sports bars continue to win, as the NFL season gets into full swing*, CGA (Oct. 13, 2022), https://cgastrategy.com/ [https://perma.cc/2UBZ-4RMW]. This article states that "NFL is a clear favorite with the typical sports bar visitor, with 66% of this consumer segment watching it in this type of venue." This type of data shows that a significant number of NFL fans opt to watch games at sports bars instead of paying for a Sunday Ticket package.

[138] How Much to Budget for Eating Out, RAMSEY SOLUTIONS (Mar. 27, 2025), https://www.ramseysolutions.com/ [https://perma.cc/2BPX-M3MZ].

[139] Koo, *supra* note 135.

[140] Keith Nissen, *NFL football fans profiled*, S&P GLOB. (Dec. 17, 2024), https://www.spglobal.com/ [https://perma.cc/NV58-L3KQ].

[141] *Id.*

[142] *Id.*

the NFL's total fans, the NFL would logically be inclined to provide single-team packages.

However, the NFL's conduct indicates it wants to restrict its offerings to increase the price of its out-of-market package. Indeed, the NFL knowingly disregarded consumer preference when picking a provider for Sunday Ticket. ESPN offered to charge fans $70 for Sunday Ticket subscriptions to reach as many consumers as possible, but the NFL rejected its offer.[143] ESPN's proposal also included an option for fans to purchase single-team out-of-market packages at a lower price than the $70 league-wide subscription.[144] Instead of catering to consumer demand by offering inexpensive plans and single-team packages, New England Patriots owner Robert Kraft testified that the NFL is not "looking to get lots of people. [The NFL] want[s] to keep [Sunday Ticket] as a premium offering."[145] If the NFL's business strategy for Sunday Ticket knowingly ignores consumer preference by maintaining an unnecessarily high price and one offering, the NFL's practice clearly harms consumers in the relevant market.

Each league could likely capture a new section of the out-of-market fan market if it offered a single-team package with a lower price, thus demonstrating that the current league-wide package has an anticompetitive effect on the relevant market.[146] Since each league could reach a new market segment by adding a single-team package to its out-of-market offerings, the leagues should be incentivized to add single-team packages to receive higher revenues.

Each league's actions have also adversely affected the offerings of out-of-market packages. Each league offers a single out-of-market package through one carrier.[147] The leagues could choose to offer single-team packages in addition to their current offering which doubles the current offerings for out-of-market packages. Consumers would also have a meaningful choice between products. The NHL, unlike the NFL and MLS, did offer a single-team package for fans from 2016-2021, so its current offering with ESPN+ decreased from two out-of-market packages to one.[148] By choosing to offer one out-of-market package, each league is monopolizing its out-of-market package offering to the detriment of consumers.

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[143] James Dator, *The NFL rejected an amazing Sunday Ticket plan because they hate you*, SB NATION (Aug. 22, 2024, at 08:54 MST), https://www.sbnation.com/ [https://perma.cc/7EQN-ZVS2].

[144] *Id.*

[145] *Id.*

[146] Koo, *supra* note 135.

[147] *See* discussion *supra* Section I.A-C.

[148] *See supra* notes 56–59 and accompanying text.

The anticompetitive harm of a league's out-of-market broadcasting practices can also be shown by analyzing each league's market power. In the case of all three leagues, they control the broadcasting rights to every team's out-of-market games.[149] In the case of the NFL and MLS, the leagues own the rights to every team's in-market and out-of-market broadcasts. The NHL operates under a slightly different model where its teams can sell the rights to their in-market broadcasts to regional sports networks. However, the NHL still retains the rights creating packages to distribute each team's out-of-market broadcasts. To cater to the relevant market, each league has chosen to distribute its simultaneous out-of-market game streams through one provider that offers only one package for out-of-market games.[150] This system allows each league to work with its respective provider to control the price of its out-of-market package. All three leagues have complete market power over the relevant market.

Since the high prices of each league's out-of-market package create a deterrent effect on a segment of the relevant market, each league's limitation of output of out-of-market packages harms consumers, and each league has total market power, the rule of reason analysis will proceed to the second step of procompetitive justifications.

3. *STEP TWO: PROCOMPETITIVE JUSTIFICATIONS*

For defendant leagues to prevail on step two of rule of reason analysis, they must proffer procompetitive justifications[151] for offering one out-of-market package to consumers in the relevant market.

Each league would likely argue its out-of-market offering is procompetitive because it increased its overall offerings and consumption for out-of-market game streams by partnering with a carrier to create an out-of-market package. Prior to Sunday Ticket, NHL.TV on ESPN+, and MLS Season Pass, fans who lived outside their favorite team's market could watch their team only if it was playing in a nationally televised game.[152] With the advent of out-of-market packages, fans in the relevant market can watch all of their favorite team's games live instead of being limited to nationally televised games or replays via the NFL app. However, this argument would likely be unsuccessful because the leagues placed a cap on

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[149] *See* discussion *supra* Section I.A-C.
[150] *See id.*
[151] Ohio v. Am. Express Co., 585 U.S. 529, 541 (2018).
[152] *See* discussion *supra* Section I.A-C.

the offerings within the relevant market. Limiting consumer choice to one high-priced package decreases consumption in the relevant market.[153] The defendant leagues may have created a way for fans to watch out-of-market games, but they offer consumers one option to watch those games. Each league minimized the offerings of out-of-market games to one package within the relevant market without considering consumer preference, so the argument would likely not prevail.[154]

The leagues could also argue that by allowing only one carrier and one package for out-of-market games, they are ensuring a high-quality product for consumers. However, the quality of the out-of-market streams would not suffer if the leagues added a single-team package produced by the same carrier. Even if the quality of out-of-market packages would be higher without adding a single-team package, sections of consumers within the relevant market are unwilling to pay the high price for that quality.[155] Having multiple offerings for out-of-market games would likely create greater consumer satisfaction with out-of-market packages.[156]

Another argument the leagues could offer is providing consumers access to every team's games promotes competitive balance within the league. Competitive balance is key to each league providing a quality product to fans.[157] If single-team packages were offered, the leagues could argue that teams with larger out-of-market fanbases would have more single-team packages purchased than teams with smaller out-of-market fanbases, creating an imbalance among the teams. However, all three leagues engage in revenue sharing for broadcasting deals,[158] so they would share the

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[153] *See*, *e.g.*, United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (each league's limitation of offering one league-wide out-of-market package harm consumers similar to Microsoft's monopolistic pricing over its web browser and operating system package which was held to violate the Sherman Act).

[154] *See In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1155 (9th Cir. 2019) (reasoning that setting a uniform quantity of telecasts of football games is anticompetitive because it does not take consumer demand into account); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 114 (1984) (discussing that output limitations must produce procompetitive efficiencies such as reduced price for the product to be justified under antitrust law).

[155] *See supra* note 135 and accompanying text.

[156] *See* Laumann v. Nat'l Hockey League, 56 F. Supp. 3d 280, 299 (S.D.N.Y. 2014).

[157] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 204 (2010).

[158] Kurt Badenhausen, *NFL 2023 National Revenue Hit $13 Billion, $400 Million-Plus Per Team*, SPORTICO (July 8, 2024, at 05:55 MT), https://www.sportico.com/ [https://perma.cc/9GN8-PV7F]; Gordon E. R.

total revenue from single-team packages equally among the teams. These single-team packages would be produced as a generic package by the league, and consumers would then select their preferred team to access only their favorite team's games. Thus, the leagues would not experience financial disparities among the teams by adding a single-team package to their out-of-market offerings.

If the NFL, NHL, or MLS attempt to use any of the procompetitive justifications mentioned above, it would likely not meet its burden under the second step of the rule of reason analysis. Although the suggested procompetitive justifications are rebuttable, the third step of the rule of reason will still be addressed.

4. *STEP THREE: LESS RESTRICTIVE ALTERNATIVES*

Under the third step in rule of reason analysis, a plaintiff can still succeed if they can show the defendant's legitimate objectives could be achieved through substantially less restrictive means or that the challenged practice is not reasonably necessary to achieve the defendant's legitimate objectives.[159]

The first scenario addressed is if a court found the argument that the out-of-market package provides increased offerings and consumption in the relevant market was a valid procompetitive justification. If a court held the increased offering of out-of-market game broadcasts was procompetitive, the league could still increase consumption within the relevant market further by offering single-team packages. While each league increased its offerings of out-of-market games from zero to one, it restricted that increase to one package for consumers. By providing one package, each league can charge a premium price for its product because it need not worry about competition or consumer preference. The addition of a single-team package would allow the leagues to achieve the procompetitive benefit of increasing the offerings of out-of-market streaming packages and increasing consumption within the relevant market. Other procompetitive benefits, such as consumer choice and lower prices could be achieved with single-team packages.

The second scenario discussed is if a court found the argument that league-wide out-of-market packages are necessary to promote

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Kallio, *Navigating the Financial Landscape of the NHL: Revenue Sharing and Financial Health*, LINKEDIN (Jan. 5, 2024), https://www.linkedin.com/ [https://perma.cc/QV87-3AKW]; Gareth, *The Business Side of MLS: Financial Aspects of the League*, MLS FOOTBALL (June 1, 2023), https://www.mlsfootball.com/ [https://perma.cc/B78Q-CUSA].

[159] Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1019 (10th Cir. 1998).

competitive balance within a league was a valid procompetitive justification. While competitive balance is valuable for professional sports leagues to produce a quality product, adding single-team packages would aid the development of all teams. Although some teams may have a larger out-of-market fanbase than others, all teams would benefit so long as the revenue from single-team packages is distributed evenly among the teams. Further, single-team packages may improve league revenues as fans who were discouraged to pay the high price for a league-wide out-of-market package would be able to purchase single-team out-of-market packages. With the potential for higher revenues through the addition of a single-team package, teams could spend more money on high-quality players and improve the level of competition. The addition of single-team packages to the leagues' out-of-market offerings would only further the goal of promoting competitive balance within each league.

The procompetitive objectives of the NFL, NHL, and MLS providing one out-of-market package can be achieved through adding single-team packages. As such, an antitrust suit would likely succeed against each of the respective leagues.

IV. NFL, NHL, AND MLS ANTITRUST HISTORY

A. NFL

For nearly seven decades, the National Football League (NFL) has been embroiled in various antitrust lawsuits. Five antitrust lawsuits were filed against the NFL between 1957 and 2015.[160] The first lawsuit was brought by a former Detroit Lions player to challenge the NFL's monopoly over the professional football market after the league blacklisted him from working in professional football.[161] The next antitrust suit was brought by the Raiders who

[160] Radovich v. Nat'l Football League, 352 U.S. 445, 448 (1957); Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381 (9th Cir. 1984); U.S. Football League v. Nat'l Football League, 644 F. Supp. 1040 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988); Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010); In re Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d 1136, 1148 (9th Cir. 2019).

[161] Radovich, 352 U.S. at 448. Mr. Radovich was a former Detroit Lions guard who broke his player contract to play for a team in the All-America Conference. After his time in the All-America Conference, a team in the Pacific Coast League offered Mr. Radovich a player-coach position. However, the National League, the Detroit Lions' conference, advised the team that Radovich was blacklisted and any team who employed him would suffer severe penalties. Mr. Radovich subsequently sued the NFL

sought to challenge the league's franchise relocation rules because they prevented competition within each team's territory.[162] A rival professional football league brought the third antitrust suit against the NFL alleging the league had an unlawful monopoly over the professional football market.[163] American Needle, Inc., a former apparel manufacturing partner of the NFL, also brought an antitrust action against the league. The company filed the suit to halt the league's unlawful collusion through its use of a single entity to license every team's intellectual property.[164]

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for monopolizing the market for professional football in the United States. The NFL argued that it should receive the same antitrust exemption as professional baseball because professional football utilizes contracts and sanctions similar to professional baseball. The Supreme Court held that the NFL was subject to antitrust laws because professional baseball's antitrust exemption was limited to baseball.

[162] L.A. Mem'l Coliseum Comm'n, 726 F.2d at 1381. The Raiders sought to move from Oakland Coliseum to the L.A. Coliseum in 1979. When the Raiders wanted to move, owner Al Davis needed approval from three-quarters of NFL team owners according to Rule 4.3 in the NFL Constitution and Bylaws. Davis presented the move to the NFL team owners and they voted 22-0 against the move. Displeased with the vote's outcome, the Raiders and the L.A. Coliseum sued the NFL for violating the Sherman Act. The plaintiffs alleged that Rule 4.3 acted as an agreement among the teams to control and prevent competition within each team's territory. The Ninth Circuit held that the NFL was liable for violating antitrust law.

[163] U.S. Football League, 644 F. Supp. at 1040. The United States Football League (USFL) originally scheduled its games during the spring while the NFL was in its offseason. When the USFL tried to compete directly with the NFL by moving its games to the fall, the USFL ran out of money. The USFL's financial troubles occurred in part because it could not obtain a broadcasting agreement since the NFL already had contracts with the three major television networks (ABC, CBS, and NBC). The USFL filed an antitrust lawsuit alleging that the NFL monopolized the professional football market which prevented the USFL from receiving a broadcasting deal. The NFL was found to have violated § 1 of the Sherman Act, but the USFL only received $1.00 in nominal damages, which trebled plus interest resulted in $3.76.

[164] Am. Needle, Inc., 560 U.S. at 183. Clothing manufacturer American Needle, Inc. sued the NFL alleging antitrust violations under §§ 1 and 2 of the Sherman Act when the league granted an exclusive licensing agreement to Reebok, ending its agreement with American Needle, Inc. American Needle, Inc. argued the NFL teams were engaged in a conspiracy to restrain trade by forming National Football League Properties ("NFLP") to create a one-stop shop for NFL intellectual property licenses. The teams argued they formed the NFLP to function as a single entity to make unitary

The first antitrust suit brought by private consumers against the NFL was in *In re National Football League's "Sunday Ticket" Antitrust Litigation*.[165] Filed in 2015, the plaintiffs in "*Sunday Ticket" Antitrust Litigation* alleged the NFL and DirecTV violated Sections 1 and 2 of the Sherman Antitrust Act through their agreement granting DirecTV the exclusive right to broadcast out-of-market NFL games.[166] Plaintiffs argued DirecTV and the NFL monopolized the market for out-of-market NFL game broadcasts.[167] This agreement allowed DirecTV to offer one out-of-market package—NFL Sunday Ticket—to fans and charge them a costly $251.94 to watch every out-of-market NFL game.[168] Plaintiffs alleged each NFL team should sell its broadcasting rights independently to create a competitive market for out-of-market NFL game broadcasts. If Plaintiffs had succeeded, the NFL would have been subject to $14.1 billion in treble damages.[169] However, the NFL emerged victorious after the U.S. District Court Judge granted its Motion for Judgment as a Matter of Law and conditionally granted its Motion for a New Trial.[170] This case is not over as Plaintiffs have appealed this case to the Ninth Circuit.[171]

Although the NFL was not liable in the "*Sunday Ticket" Antitrust Litigation*, this author believes the NFL's business model of offering only one package that includes all NFL out-of-market games violates antitrust law. The plaintiffs made the wrong argument in the *"Sunday Ticket" Antitrust Litigation* because they

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decisions regarding their intellectual property. However, the Supreme Court reasoned that the teams are independently owned and independently managed by each owner, so the owners are motivated to act in their own best interest instead of the league's. Accordingly, the Court held that the NFL is subject to liability under § 1 of the Sherman Act.

[165] Second Consolidated Amended Complaint for Damages and Declaratory and Injunctive Relief at ¶ 1, *In re* Nat'l Football League Sunday Ticket Antitrust Litig. (C.D. Cal. Mar. 23, 2022) (No. 2:15-ml-02668), https://www.courthousenews.com/ [https://perma.cc/EKD8-3ZJM].

[166] *Id.* ¶ 156–161.

[167] *Id.* ¶ 160.

[168] *In re* Nat'l Football League's Sunday Ticket Antitrust Litig., 933 F.3d at 1149.

[169] Judgment at *4, *In re* National Football League's "Sunday Ticket" Antitrust Litig., (C.D. Cal. Aug. 20, 2024) (No. 2:15-ml-02668), https://www.courtlistener.com/ [https://perma.cc/B3WT-3SAP].

[170] *Id.*

[171] Kaleigh McCormick, *Sunday Ticket Subscribers Punt Their NFL Lawsuit Back to the Ninth Circuit*, THE COLUM. J. L. & ARTS (Nov. 8, 2024), https://journals.library.columbia.edu/ [https://perma.cc/5G5Z-XA7S].

failed to acknowledge the procompetitive benefits associated with the NFL bundling its teams' broadcast rights and selling the bundle to broadcasting companies. NFL teams can pool their broadcasting rights so long as the overall effect on the market benefits consumers. Forcing teams to sell their broadcasting rights independently may result in effects that harm consumers in the relevant market. For example, a team may not be able to find distributors willing to purchase its out-of-market games if the team is located in a small market. If a team could not provide out-of-market games to consumers, then fans outside the team's market would lose access to those game broadcasts entirely. The NFL's decision to pool every team's broadcasting rights has a procompetitive effect by comparison because every team's out-of-market games are provided to a wider range of consumers. Further, allowing the NFL to negotiate a broadcast deal for all its member teams encourages parity because every team receives an equal share in the revenue from broadcast deals. If each team has similar revenue, the league will have greater competitive balance which provides fans greater hope that their team can win it all. The NFL's current model for bundling its teams' broadcast rights gives fans greater access to watch NFL games and allows teams to put a better product on the field. Instead, the Plaintiffs should have argued the NFL's current model forces fans who live outside their favorite team's market to pay a premium price for every team's out-of-market games even though fans only want to watch their favorite team's games.

B. NHL

The NHL's antitrust history is not as robust as the NFL's, but the league has faced antitrust challenges to some of its business practices. In 2009, the NHL's authority to restrict franchise sales and relocation was challenged during the bankruptcy of the Phoenix Coyotes.[172] Consumers successfully challenged the NHL's out-of-market broadcasting structure in *Laumann v. National Hockey League*.[173] In *Laumann*, Plaintiffs alleged that fans who lived

[172] *In re* Dewey Ranch Hockey, LLC, 406 B.R. 30 (Bankr. D. Ariz. 2009). When the Phoenix Coyotes underwent bankruptcy proceedings, PSE Sports & Entertainment LP sought to purchase the franchise with the intent of moving it to Ontario, Canada. The NHL opposed the bid because it did not want the new ownership entity to relocate the team. The court held that the NHL's interest in determining where its franchises were located did not violate antitrust law, and the NHL even ended up purchasing the Coyotes franchise during bidding.

[173] Laumann v. Nat'l Hockey League, 105 F. Supp. 3d 384 (S.D.N.Y. 2015).

outside their favorite team's territory were unable to purchase a package that allowed them to stream only their favorite team's games.[174] By forcing fans to purchase a plan for every team's out-of-market game even though fans only wanted access to their favorite team's games, the NHL successfully restricted competition and charged monopoly prices to fans. Plaintiffs argued the NHL should have offered fans a full out-of-market game package in addition to an al a carte plan where fans could purchase packages from the individual teams or the regional sports networks.[175] However, the NHL had an agreement with the teams and regional sports networks that imposed "territorial exclusivity" which prevented teams and regional sports networks from offering their content to fans separately.[176] The NHL argued a world where it offered single-team plans through the regional sports networks would result in higher prices for the league-wide out-of-market package or the out-of-market offering would disappear altogether because it would no longer be profitable.[177] However, the case survived the NHL's Motion to Dismiss, and Plaintiffs' Motion to Certify Class Action Status was granted.[178] With a loss looking likely, the NHL began settlement talks with Plaintiffs. The final settlement included the NHL offering an unbundled version of both Center Ice and Game Center Live that allowed fans to purchase single-team packages for out-of-market games.[179] The settlement stated that the NHL would offer the single-team package for the next five years, beginning with the 2015-2016 season, at a price at least 20 percent below the cost of bundled packages.[180] However, as noted above, the NHL promptly returned to its restricted out-of-market offering in its deal with ESPN the same year the settlement terms expired. The league now appears to be flouting the antitrust law it was nearly held liable for violating in *Laumann*.

C. MLS

As the newest of the five major sports leagues, MLS has seen the smallest number of antitrust challenges to its practices. The league has only received challenges to its league structure and monopoly over professional soccer, but both challenges were

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[174] *Id.* at 388–89.
[175] *Id.*
[176] *Id.* at 390
[177] *Id.* at 399.
[178] *Id.* at 413.
[179] Jonathan Stempel, *NHL, broadcasters settle lawsuit over TV blackouts*, REUTERS (June 11, 2015), https://www.reuters.com/ [https://perma.cc/B3UE-HHNL].
[180] *Id.*

unsuccessful. In *Fraser v. Major League Soccer, L.L.C.*, professional soccer players alleged MLS teams unlawfully colluded by contracting for players centrally through MLS because competition would take place if each team could bid for and sign players directly.[181] MLS was able to raise a successful single entity defense to this claim because the league is structured such that there are no owners of MLS franchises, only MLS investors that can receive Operating Agreements from MLS which grant them rights to operate an MLS team.[182] Since the only entity that exists is MLS, the court held it could not conspire with itself and could not be held liable under Section 1 of the Sherman Act.[183] Recently, MLS survived an antitrust challenge to its monopoly over men's professional soccer in *North American Soccer League, LLC v. United States Soccer Federation, Inc*.[184] The North American Soccer League (NASL) sued both the United States Soccer Federation (USSF) and MLS alleging the leagues participated in a conspiracy to restrain trade in the market for the highest level of professional men's soccer.[185] Unfortunately for the NASL, the jury found that the NASL had not even proved the existence of a relevant market, let alone that the USSF and MLS unlawfully colluded.[186] Consumers have not brought any antitrust actions regarding MLS's broadcasting practices.

V. NFL, NHL, AND MLS SHOULD STRUCTURE OUT-OF-MARKET PACKAGES SIMILAR TO MLB AND THE NBA

Based on the antitrust analysis described above, the NBA and MLB would likely withstand antitrust scrutiny regarding their out-of-market broadcasting practices. NBA League Pass and Team Pass provide out-of-market fans with multiple options to watch out-of-market games and different prices to choose from. The addition of Team Pass in 2015 demonstrates that the NBA was responsive to consumer demand in the relevant market.

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[181] Fraser v. Major League Soccer, L.L.C., 97 F. Supp. 2d 130, 131 (D. Mass. 2000).

[182] *Id.* at 132.

[183] *Id.* at 142.

[184] North American Soccer League, LLC v. U.S. Soccer Federation, Inc., 2025 WL 606721 (E.D.N.Y. 2025).

[185] *Id.*

[186] *Id.*

Even though MLB is exempt from antitrust laws,[187] it still made a procompetitive change to its out-of-market streaming structure that provides fans a meaningful choice when selecting an out-of-market package to purchase. If MLB chose to offer only the All Teams package to consumers, it could do so without the threat of antitrust liability.[188] However, MLB continues to offer the Single Team package to fans. MLB's practices lead to the conclusion that the Single Team package must be financially beneficial to MLB. MLB gross revenues have risen continuously (excluding the pandemic years 2020 and 2021) from 2012 through 2024.[189] While sponsorships and attendance play a large role in the league's increasing revenues,[190] MLB.TV Single Team packages likely contribute to MLB's financial growth.

Since the NBA and MLB out-of-market structures likely withstand antitrust scrutiny, the NFL, NHL, and MLS should adopt similar structures. All three leagues can keep their league-wide out-of-market packages, but they need to provide single-team packages as well. The NFL, NHL, and MLS could seek to use regional sports networks for their single-team packages similar to the NBA. The leagues could also produce single-team packages on their own like MLB does for some of its teams. If all three leagues create single-team out-of-market packages that are cheaper than the league-wide package, they will likely be sheltered from antitrust liability.

VI. CONCLUSION

The NFL, NHL, and MLS are violating antitrust law through their current out-of-market broadcasting structures. Based on the analysis above, all three leagues would likely be held liable for violating antitrust laws through their practice of providing one out-of-market broadcasting package to fans. The aforementioned leagues would not be able to offer any compelling procompetitive benefits that justify each league limiting the output of out-of-market streams to one package. Consumers within the relevant market are harmed by each league's complete control over the price of each package, and the high price of each league's out-of-market package has isolated some consumers.

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[187] *See* Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Base Ball Clubs, 259 U.S. 200 (1922).

[188] *Id.*

[189] Maury Brown, *MLB Revenues Hit Record $12.1 Billion In 2024*, FORBES (Jan. 27, 2025, at 16:31 EST), https://www.forbes.com/ [https://perma.cc/5D6T-LJT5].

[190] *Id.*

The NBA is likely protected from antitrust liability because its current out-of-market broadcasting structure with League Pass and Team Pass provides fans with multiple options to watch out-of-market games. MLB, although protected by its antitrust exemption, provides both MLB.TV Single Team and MLB.TV All Team packages to fans. This practice shows the league is responsive to consumer demand, and it financially benefits from offering the MLB.TV Single Team package. If they offer single-team packages, the NFL, NHL, and MLS may receive the benefits of reaching a previously unavailable market segment and the corresponding increase in each league's revenues.

The NFL, NHL, and MLS must take a proactive step to avoid the time and cost of antitrust litigation by adding single-team packages to their out-of-market streaming offerings.

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CURTAIN CALL FOR CLARITY: ADDRESSING WORKERS' COMPENSATION COVERAGE FOR ARIZONA'S PERFORMING ARTISTS

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CONTENTS

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GRAND OVERTURE: INTRODUCTION

Arizona's performing artists navigate a precarious landscape when it comes to workers' compensation coverage. Unlike professions explicitly covered under state statutes, performers operate in a legal gray area where eligibility for such protections remains uncertain. The ambiguity in Arizona's workers' compensation laws poses significant challenges to an industry inherently prone to physical risks, such as on-stage injuries or rehearsal mishaps. The lack of statutory clarity not only denies performers critical safety nets but also perpetuates inconsistencies in how the law is applied to creative professionals compared to other workers.

Creativity, collaboration, and unpredictability are inherent to the performing arts industry. While states like California and New York have taken legislative steps to ensure performers are eligible for workers' compensation coverage, Arizona's silence leaves its theater performers vulnerable to financial and physical hardship. These omissions disproportionately affect non-union performers, who often lack the protections afforded by collective bargaining agreements, further widening the gap in worker rights and protections. The need for legislative reform or interpretive clarity is urgent in Arizona, a state that has historically sought to balance pro-business policies with worker protection.

This Comment argues that Arizona's workers' compensation laws should explicitly include performing artists, whether through statutory interpretation or legislative amendment. Section II examines the unique employment challenges facing performing artists, including their treatment under state and federal labor frameworks. Section III A provides a historical overview of workers' compensation laws and the purpose they serve in the workforce. Section III B explains what workers' compensation covers and the benefits employees can receive. Section III C lays out the variety of workers' compensation statutory frameworks that vary state-by-state and how the laws address different types of employment. Section IV more specifically addresses the history and present treatment of performing artists under workers' compensation law. Section V analyzes Arizona's statutory framework, applying the state's right-to-control test to theater performers to demonstrate their classification as employees in many cases. Finally, Section VI explores potential solutions, including

statutory amendments and judicial interpretations, to extend workers' compensation coverage to this vital and underserved segment of the workforce.

I. ACT ONE: PERFORMING ARTISTS AND EMPLOYMENT LAW

Considering the nature of the work, actors, musicians, and other artists have historically been treated differently than other workers under employment law. Performers occupy an uncommon position in the workforce. They not only work in specialized, gig-based positions but also ones that require creative expression, thus presenting a rare combination of conditions unlike those of more traditional professions. This unique quality has led to different legal treatment in areas like hiring, wages, and union rights. Employment law and its broad application do not always align well with the unique character of the performing arts industry, resulting in specialized rules and carve-outs as well as the ongoing debate about the status of performers within the employment law framework.

Employment law treats performing artists differently with respect to hiring practices. Title VII of the Civil Rights Act of 1964, more commonly referred to as Title VII, prohibits discrimination in all facets of employment practices based on characteristics like race, sex, religion, and national origin.[1] However, the law recognizes certain exceptions in the form of "bona fide occupational qualifications" (BFOQs).[2] This allows for legally permissible discrimination when characteristics are reasonably necessary for business operations.[3] It is important to note that race is never considered a BFOQ exception.[4]

For certain performing arts roles, casting actors with a certain characteristic is essential to the authenticity of the performance. Thus, depending on the project's constraints, it may be lawful to cast a performer of a specific gender, age, or ethnicity if these characteristics are integral to the character's identity.[5]

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[1] 42 U.S.C. §§ 2000e–2000e-17 (2022).

[2] *Bona Fide Occupational Qualification (BFOQ)*, MANAGRY (Sep. 10, 2025), https://managry.com/ [https://perma.cc/L3AG-DBEL].

[3] *Id.*

[4] *Id.*; *see also bona fide occupational qualification (BFOQ)*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE (Dec. 2021), https://www.law.cornell.edu/ [https://perma.cc/6D8V-NRZC].

[5] Stefanie M. Renaud, *Are Casting Calls for Actors of Certain Races or National Origins Illegal?*, SKOLER ABBOTT (Sep. 28, 2016), https://www.skoler-abbott.com/ [https://perma.cc/L6XP-4GXL].

Discriminating on the basis of race is illegal, but casting directors have found some loopholes based on the unique, creative nature of the profession.[6] Some courts have found that the First Amendment protection of free speech justifies casting "preferences" based on race for creative works.[7] Other times, while explicit racial discrimination is not allowed, selecting someone for their "appearance" or "physical characteristics" is acceptable.[8] BFOQs in performing arts support creative freedom, but they also create a unique environment where traditional anti-discrimination principles are more flexible, sparking debate about the balance between artistic integrity and inclusivity.

Wage and hour laws also differ for performing artists. The Fair Labor Standards Act (FLSA) requires employees in the United States to be paid at least the federal minimum wage for all hours worked.[9] The law requires employers to give employees overtime pay for all hours worked over 40 hours in a workweek.[10] However, Section 13(a)(1) exempts employees including "professional" employees.[11] Under this umbrella lies the "creative employee" exemption for employees whose primary duty is "the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor."[12]

Actors generally fall under this category, and thus the law does not require employers to pay them minimum wage or overtime for their efforts.[13] While practitioners in other professions like law and medicine also fall under the professional employee exemption, performers are often compensated on a project basis rather than on salary.[14] This results in wide income disparities, as many performers work long hours, including nights and weekends, without extra pay. Consequently, many performers rely on their unions to negotiate fair working hours, minimum compensation rates, and overtime protections that acknowledge the unique demands of performance-

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LABOR (Sep. 2019), https://www.dol.gov/ [https://perma.cc/U5DN-9YVD].

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LABOR (Aug. 2024), https://www.dol.gov/ [https://perma.cc/K87U-RCXT].

[14] *Id.*

based work.[15] However, as many actors forego union membership to gain more employment opportunities, their wages are often below union standards.[16]

Union representation is another area in which performers are uniquely situated. Industry-specific unions like the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) and Actor's Equity not only negotiate collective bargaining agreements but also set industry-wide standards on issues specific to performers.[17] These issues include working conditions, residual payments for reruns and royalties, and workplace safety measures for stunts and vocal strain.[18] Unlike other industries where union activity is tied to long-term employment, these performing arts unions cover performers generally and protect them on short-term projects to ensure protections across various employers.[19]

While these unions strive to address industry-specific concerns, they create distinct challenges as performers rely on union-negotiated terms and protections instead of standardized employment agreements. Additionally, while joining a union means receiving employment protections, it also presents downsides as actors are only allowed to participate in union productions.[20] This reduces employment opportunities, forcing professionals to choose between job protections and job availability.[21]

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[15] *Why Join Equity?*, ACTORS' EQUITY ASS'N, https://www.actorsequity.org/ [https://perma.cc/3E47-UAPX].

[16] Shelley Attadgie, *Combating the Actor's Sacrifice: How to Amend Federal Labor Law to Influence the Labor Practices of Theaters and Incentivize Actors to Fight for Their Rights*, 40 CARDOZO L. REV. 1045, 1050–52 (2019).

[17] *Mission Statement*, SAG-AFTRA, https://www.sagaftra.org/ [https://perma.cc/PH4L-3FH8]; Why Join Equity?, supra note 15.

[18] Mission Statement, *supra* note 17.

[19] *Membership Advantages*, SAG-AFTRA, https://www.sagaftra.org/ [https://perma.cc/5C8H-REG7].

[20] Maggie Bera, *Important Pros and Cons of Joining Actors' Equity Association*, ACTOR AESTHETIC (July 21, 2021), https://www.actoraesthetic.com/ [https://perma.cc/RA8N-VBYB].

[21] *When Should You Join the Actors Unions*, ACTING STUDIO CHICAGO, https://www.actingstudiochicago.com/ [https://perma.cc/5X9Q-LAXX].

II. ACT TWO: AN OVERVIEW OF WORKERS' COMPENSATION

A. HISTORY AND POLICY OF WORKERS' COMPENSATION

Workers' compensation, as a whole, is a relatively new field of law, arising out of Industrial Revolution-era policies promoting worker safety and well-being.[22] Prior to its adoption, English Common Law principles prevailed.[23] Under the prior regime, it was almost impossible for employees to collect for a workplace injury.[24] Three key principles, aptly nicknamed the "unholy trinity of defenses," highly favored employers.[25] If the employee or another fellow worker were in any way responsible for the accident, the employee was barred from recovery.[26] There was also a far-reaching assumption of risk factor. By accepting the employment, the employee automatically assumed the risk of any and all possible injuries that could occur through their position.[27] Employees could only hope to recover through the tort law system.[28] However, this route was costly and inaccessible to most working-class individuals injured on the job.[29]

At the dawn of the Industrial Revolution, several European countries began adopting employee accident insurance policies to reroute civil cases aimed at employer liability.[30] The principle was simple: industrial accidents were a natural consequence of industrialization, and the industry (and ultimately the consumers) should bear the cost of injury, not the workers themselves.[31] Workers' compensation legislation developed more slowly in the United States. Because of its more individualistic approach to labor practices, the U.S. relied on common law principles that placed the burden on the injured worker for much longer than most other industrialized nations.[32] As public opinion shifted toward progressive labor policies, workers' compensation laws soon

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[22] Gregory P. Guyton, *A Brief History of Workers' Compensation*, 19 IOWA ORTHOPAEDIC J. 106, 106 (1999).
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] Guyton, *supra* note 22, at 107.
[29] *Id.*
[30] *Id.*
[31] John S. Haller Jr., *Industrial Accidents—Worker Compensation Laws and the Medical Response*, 148 W. J. MED. 341, 341 (1988).
[32] *Id.*

followed. The prior common law remedies had come to be seen as "ineffective and inequitable under modern industrial conditions."[33]

The current workers' compensation scheme serves to balance benefits between employers and employees. Legislation varies state-by-state, but the central principle is "no-fault" insurance.[34] Employers are exempt from tort action against them while employees are compensated for their injuries.[35] Many state acts dictate that employer participation is "optional."[36] However, most employers choose to participate because of the benefits the system provides to them and their employees.[37] Without employer-provided workers' compensation coverage, employees can sue their employers for workplace injuries and illnesses to help cover their medical expenses and lost wages.[38] Providing workers' compensation benefits prevents expensive and lengthy litigation.[39] Thus, the workers' compensation system benefits both employers and employees.

B. WORKERS' COMPENSATION COVERAGE AND BENEFITS

Employees qualify for workers' compensation coverage for work-related injuries, illnesses, or repetitive stress injuries.[40] An injury or illness is deemed "work-related" if an event or exposure in the workplace either caused or contributed to the condition or significantly worsened a pre-existing one.[41] Unless an exception specifically applies, an injury or illness is presumably work-related if it occurs within the work environment.[42] According to the Occupational Safety and Health Administration (OSHA), the workplace encompasses any location where employees are required

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[33] *Id.* at 343.

[34] Guyton, *supra* note 22, at 108.

[35] *Id.* at 108–09.

[36] *Id.* at 109.

[37] *Id.*

[38] *Id.*

[39] Kimberly Foppe, *What Is the Average Personal Injury Settlement Amount?*, BROWN & CROUPPEN L. FIRM (Nov. 18, 2024), https://www.brownandcrouppen.com/ [https://perma.cc/7X9H-WEGF]. The average personal injury settlement amount as of November 2024 was $55,056.08.

[40] *What Does Workers' Compensation Cover?*, THE HARTFORD, (Dec. 20, 2024), https://www.thehartford.com/ [https://perma.cc/7LUU-CM2Z].

[41] *OSHA definition of work-relatedness*, UNIV. OF WIS., https://www.wisconsin.edu/ [https://perma.cc/CLA7-UUKP].

[42] *See id.* for list of exceptions.

to be or perform their duties. [43] It includes both the physical setting, and the equipment or materials employees use in carrying out their work. [44]

Workers' compensation insurance typically covers a number of benefits.[45] The system most commonly provides relief in the form of medical expenses and lost wages resulting from work-related injury or illness..[46] Temporary and permanent disability benefits are available to cover these needs for longer-term recovery.[47] In severe cases, the system offers vocational training to help insured employees change careers.[48] Death benefits are also available.[49]

C. STATE-BY-STATE FRAMEWORKS FOR DETERMINING EMPLOYEE STATUS

Like other elements of employment law, workers' compensation is entirely statutory, and thus coverage varies from state to state. Legislation concerns worker classification, i.e. separating employees from independent contractors. Many states apply specific tests to determine worker classification. Some states including California use the ABC test.[50] This three-pronged test begins with the presumption that a worker is an employee unless all the following three conditions are met:

1. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
2. The worker performs work that is outside the usual course of the hiring entity's business; and
3. The worker is customarily engaged in an independently established trade, occupation, or

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[43] *Id.*

[44] *Id.*

[45] *Workers' compensation*, USAGOV (Mar. 21, 2025), https://www.usa.gov/ [https://perma.cc/ZS3H-ALY7].

[46] *Id.*

[47] *Id.*

[48] *Does Workers' Comp Pay for Vocational Training?*, BLUESTEIN ATT'YS (Feb. 16, 2021), https://bluesteinattorneys.com/ [https://perma.cc/5NZ8-C6HE].

[49] *Workers' compensation*, *supra* note 45.

[50] *ABC Test*, CAL. LAB. & WORKFORCE DEV. AGENCY, https://www.labor.ca.gov/ [https://perma.cc/K2BG-XTY8].

> business of the same nature as that involved in the work performed.[51]

The ABC test tends to favor finding that a worker is an employee.[52] Courts have determined companies do not need to exercise precise control over the details and manner of the work to have employer-level control over a worker.[53] Workers who have some level of independence within their tasks are not automatically given independent contractor status, which voids them from workers' compensation coverage. Additionally, a worker is not unquestionably considered an independent contractor simply because the hiring entity designates them as such.[54] While straightforward, the ABC test allows for more workers to be protected under workers' compensation laws.

Other states, like Arizona, abide by the right-to-control test framework when determining whether a worker is an employee.[55] While the ABC test requires all three prongs to be fulfilled to satisfy an independent contractor finding, the right-to-control test is a balancing test that involves an analysis of several factors.[56] The key element is how much control the hiring entity has over the possible employee. The more control the entity possesses, the more likely a worker is to be considered an employee and thus require workers' compensation coverage. Several factors include the duration of employment, the method of payment, who provides materials and equipment for the job, the right to fire and discipline, and control over the details of the work to name a few.[57]

While some states leave their statutory coverage requirements broad, some have carved out specific industries to either single them out as specifically requiring or exempting them from worker's compensation. New York workers' compensation coverage is extensive. Its statutory framework provides a comprehensive list of

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[51] *Id.*

[52] *Employee or Contractor? The ABC Test for Classifying Workers*, WRAPBOOK (Aug. 26, 2024), https://www.wrapbook.com/ [https://perma.cc/9UHU-F2LQ].

[53] *ABC Test*, supra note 50.

[54] *Id.*

[55] *Workers' Comp for Independent Contractors in Arizona*, MATT FENDON L. GRP., https://www.fendonlaw.net/ [https://perma.cc/ZLP4-WHR6].

[56] Todd Lebowitz, *What are Right to Control Tests?*, WHO IS MY EMPLOYEE? (Dec. 29, 2016), https://whoismyemployee.com/ [https://perma.cc/3M2F-8CUZ].

[57] *Id.*

hazardous employments, including canning fish, elevator installation, and even manufacturing canoes are considered "employees" and thus require workers' compensation coverage.[58] However, New York does have statutory exemptions, including babysitters and minors under fourteen years of age engaging in casual household chores.[59] Likewise, the Alaska Workers' Compensation Act also contains a section that explicitly excludes workers including part-time babysitters, commercial fishermen, and sports officials at amateur sports events.[60]

III. SETTING THE STAGE: A NEED FOR COVERAGE

Performing artists often face unique challenges that underscore the necessity of workers' compensation coverage. Unlike a number of traditional employees, actors and other performers frequently work in physically demanding roles under unpredictable conditions, making injuries a common occupational hazard.[61] From falls on stage to repetitive strain injuries during rehearsals, the risk of harm is inherent in the performing arts.[62] Despite these dangers, many performers are left without essential protections, creating a precarious environment for those who dedicate their careers to creative expression.

One of the most glaring issues is the lack of health insurance among performers.[63] Many performing artists are employed on a gig or project basis, which often disqualifies them from receiving employer-provided health insurance.[64] The absence of consistent coverage means even minor injuries can result in significant medical debt.[65] More severe incidents, such as broken bones or vocal strain, can lead to prolonged financial instability.[66] Performers who are a part of Actor's Equity often take jobs explicitly to earn enough weeks to qualify for health insurance coverage through the

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[58] N.Y. WORKERS' COMP. LAW § 3 (McKinney 2025).

[59] *Id.* § 2.

[60] ALASKA STAT. § 23.30.230 (2024).

[61] SW_Webmaster, *Safety and the Entertainment Industry – Theatrical / Studio / Stage*, DARCOR (Sep. 20, 2016), https://darcor.com/ [https://perma.cc/D9KX-8G3N].

[62] *Id.*

[63] Dave McNary, *Many actors lack health insurance*, VARIETY (Sep. 16, 2002, at 19:24 PT), https://variety.com/ [https://perma.cc/9VJJ-YL39].

[64] *Id.*

[65] Allison Considine, *(Don't) Break a Leg*, AM. THEATRE (Aug. 27, 2019), https://www.americantheatre.org/ [https://perma.cc/4RMC-BZMN].

[66] *Id.*

union.[67] However, as many remain unemployed for portions of the year or do not join the union, they are forced to rely on their limited resources or seek out personal insurance, which may be prohibitively expensive given their irregular income.[68] Additionally, Comprehensive General Liability (CGL) policies, often held by venues or employers, frequently contain exceptions that preclude coverage for injuries arising directly from a performance.[69] For example, if a musician is injured while playing an instrument during a show, the CGL policy may not provide coverage, leaving the musician without recourse.[70]

The decision not to join a union further complicates this issue for many performers. Unions such as the SAG-AFTRA and Actors' Equity provide vital protections, including access to health insurance and negotiated safety standards, membership often comes with significant trade-offs.[71] Union members are typically restricted to working on union-approved projects, which can limit their employment opportunities.[72] For those just starting their careers or working in smaller markets, this restriction can be suffocating. As a result, many performers choose to remain non-union, sacrificing the safety net of union benefits, including access to health insurance and collective bargaining agreements that might otherwise address workplace safety and injury coverage.[73]

This combination of occupational risk, lack of health insurance, and the limitations of union membership creates an urgent need for broader protections for performing artists. Workers' compensation coverage offers a solution that bridges these gaps, providing a safety net for all performers, regardless of their union status or access to private health insurance. By ensuring injured performers can receive medical care and wage replacement benefits, workers' compensation would mitigate the financial and professional instability that so often accompanies workplace injuries in the

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[67] Michael Paulson, *Unemployed Stage Actors to Face New Health Insurance Hurdle*, N.Y. TIMES (Mar. 19, 2021), https://www.nytimes.com/ [https://perma.cc/MG5K-9HEA].

[68] *Id.*

[69] *See* Workers Comp Matters, *Workers' Compensation for Performing Artists*, LEGAL TALK NETWORK (Sep. 29, 2017), https://legaltalknetwork.com/ [https://perma.cc/LE94-QJ3J].

[70] *Id.*

[71] Robert Peterpaul, *Union or No Union? The Pros + Cons You Should Consider*, BACKSTAGE (Dec. 10, 2019), https://www.backstage.com/ [https://perma.cc/V26Q-2VWA].

[72] *Id.*

[73] *When Should You Join the Actors Unions*, *supra* note 21.

performing arts. Without such protections, performers are left to navigate a system failing to adequately recognize the value of their contributions or the unique challenges of their profession.

IV. A DYNAMIC DUO: PERFORMING ARTISTS AND WORKERS' COMPENSATION

As performing artists are treated differently under almost every other facet of employment law, it is no surprise the waters are muddy when it comes to how workers' compensation laws apply to the field as well. Workers' compensation laws and methods for determining who is covered vary by state. Thus, as performance as a career does not fit squarely in the category of "employee" or "independent contractor" on its face, coverage requirements for performing artists also vary by state. Workers' compensation, at its core, protects both employers and employees.

A. LEGISLATIVE AND JUDICIAL HISTORY

1. *LEGISLATIVE HISTORY*

In assessing the need for and importance of workers' compensation coverage for performers, it is helpful to look at prior legislative and judicial history. California and New York are particularly helpful as they are home to a large portion of performing artists because of their uniquely large entertainment industries. These states not only set the stage for industry-wide labor policies but also influence national trends in employment classification and workplace protections. Their legal precedents often serve as guiding frameworks for other jurisdictions with growing entertainment sectors. As legislative and judicial trendsetters, these states provide valuable insight into how legal systems adapt to the entertainment industry's evolving nature. This ensures performers receive the protections they need in an industry historically fraught with labor vulnerabilities.[74]

Historically, performing artists in New York were classified as independent contractors rather than employees, effectively excluding them from workers' compensation protections.[75] Prior to

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[74] Tre'Vaughn Howard & Chris Marr, *New York, California Take Lead to Shape Workplace Violence Laws*, BLOOMBERG L. (Sep. 11, 2024, at 02:00 MST), https://news.bloomberglaw.com/ [https://perma.cc/93GF-WVUW] (explaining that New York and California lead the way for laws combatting workplace violence, demonstrating their legal focus on employment protections and their positions as legal leaders in this field).

[75] Harvey S. Mars, *Performing Artists' Entitlement to Compensation Under the N.Y. WCL*, N.Y. ST. B. ASS'N J., June 2017, at 28, 29.

1986, the prevailing legal framework placed the burden on performers to secure private insurance or rely on alternative coverage mechanisms, such as CGL policies, which often contained exceptions leaving musicians and performers without coverage when injuries arose out of their performances.[76]

Recognizing this gap, there was a concentrated legislative push in the mid-1980s to extend workers' compensation coverage to performing artists.[77] This lobbying effort culminated in the New York Legislature amending the workers' compensation laws in 1986.[78] The primary motivation behind these amendments was to protect the average working performer, who typically lacked the financial resources and social connections to negotiate favorable contracts or retain high-caliber legal representation.[79] In contrast, star performers—those with significant resources and influence—were generally considered capable of securing adequate protections without legislative intervention.[80]

2. *JUDICIAL INTERPRETATIONS AND KEY CASE LAW*

In addition to legislative amendments, courts have played a critical role in defining the scope of workers' compensation coverage for performers. Several key cases illustrate how courts have approached the employer-employee relationship in the performing arts industry.

In *Cal. Emp. Stabilization Comm'n v. Matcovich*, the court examined the relationship between dancers and the bar they worked at.[81] The employer wished to classify the dancers as independent contractors, but the court focused on the amount of control the business had over them.[82] While not explicitly a workers' compensation case, this case provided a foundation for classifying workers hired as performers as employees instead of as independent contractors for the sake of general employment law practices.

A particularly influential case, *Russell v. Torch Club*, further clarified the applicability of workers' compensation laws to performing artists.[83] Ms. Russell, a nightclub singer, pursued a workers' compensation claim and was ultimately found to be an

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[76] Workers Comp Matters, *supra* note 69.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] Cal. Emp. Stabilization Comm'n v. Matcovich, 168 P.2d 702, 704 (Cal. Ct. App. 1946).

[82] *Id.*

[83] Russell v. Torch Club, 97 A.2d 196, 197 (N.J. Cnty. Ct. 1953).

employee rather than an independent contractor.[84] The court's reasoning centered on the substantial level of control exercised over her work: She was directed on when and how to perform, demonstrating the dominance of the employer's authority over her professional activities.[85] As a result, she was entitled to workers' compensation benefits, reinforcing the broader trend of extending such protections to performers.[86]

In a more recent case, *Fouchecourt v. Metropolitan Opera Ass'n*, the court found an opera performer was considered an employee and therefore covered by workers' compensation.[87] This case referenced other cases to show courts have had the tendency to consider performing artists "employees" for the purposes of workers' compensation laws.[88] The court also provided the purpose of the 1986 amendment was to eliminate the fact-intensive inquiries that often accompanied these types of cases.[89]

The evolution of workers' compensation coverage for performing artists in New York reflects a significant shift from the independent contractor framework to a more employee-centric model. Legislative amendments, combined with judicial rulings emphasizing employer control, have helped secure protections for working performers who lack the financial and legal resources of their more prominent counterparts.

B. STATE-BY-STATE STATUTORY PROVISIONS FOR PERFORMERS

The application of workers' compensation laws to performing artists varies significantly across the United States, reflecting different legislative priorities and economic considerations. Some states have explicitly included performers within the scope of their workers' compensation statutes, while others have intentionally excluded them, leaving artists with little to no recourse in the event of workplace injuries. This patchwork approach highlights the need for clarity and uniformity in addressing the unique risks faced by performing artists.

In Alaska, performers are specifically exempt from workers' compensation coverage under state law.[90] This exclusion reflects a broader trend of categorizing performers as independent contractors

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[84] *Id.*

[85] *Id.* at 199.

[86] *Id.* at 200.

[87] Fouchecourt v. Metro. Opera Ass'n, 537 F. Supp. 2d 629, 633 (S.D.N.Y. 2008).

[88] *Id.* at 634.

[89] *Id.*

[90] ALASKA STAT. § 23.30.230 (2024).

rather than employees, effectively barring them from the protections afforded to other workers. While this approach reduces employer liability and aligns with the state's pro-business policies, it leaves performers vulnerable to significant financial and physical risks. The exclusion also creates a disincentive for performers to work in Alaska, potentially impacting the vibrancy of the state's arts and entertainment industry.

In contrast, California and New York have taken proactive steps to ensure performers are covered under workers' compensation laws. In California, performing artists are generally included as employees under the state's broad workers' compensation framework.[91] The ABC test in California strongly favors employee classification, ensuring that performers, who often work on short-term or project-based engagements, are protected.[92] This inclusion reflects California's recognition of the physical demands and risks associated with the performing arts, as well as the importance of fostering a thriving entertainment industry.

Similarly, New York has long included performers under its workers' compensation statutes.[93] The state made significant strides in 1986 following legislative advocacy highlighting the unique vulnerabilities of this workforce when it amended its laws to cover performing artists explicitly.[94] The inclusion of performers in New York's workers' compensation framework ensures that even gig-based artists receive necessary protections, aligning the state's policies with the needs of one of the world's largest entertainment hubs.

Florida occupies an unusual position in the landscape of workers' compensation laws. Despite being a prominent hub for performers, particularly in industries such as theater, film, and live entertainment, Florida does not require workers' compensation

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[91] Assembly Bill 5, ch. 296, Cal. Stat. (2019) (amending Section 3351 of, and to add Section 2750.3 to, the Labor Code). Also known as the "Gig Economy" bill, this piece of legislation primarily sought to protect gig workers like Uber drivers, but performing artists have largely been swept into the classification. An amendment to AB-5 passed to consider musicians under the *Borello* test in order to give them more creative independence. Musicians generally have different contracts than stage performers and they tend to fall more under the independent contractor classification because of their transience. *See* ECT, *Some Musicians to Get Relief from California "Gig Economy" Bill*, E. CNTY. TODAY (Apr. 20, 2020), https://eastcountytoday.net/ [https://perma.cc/UL6T-JM4C].

[92] *Id.*

[93] N.Y. WORKERS' COMP., *supra* note 58, § 2.

[94] *See* Workers Comp Matters, *supra* note 69.

coverage for performers.[95] This omission reflects the state's generally pro-business approach, which prioritizes minimizing employer costs over extending protections to gig-based workers.[96] While this may appeal to production companies and other businesses seeking to operate with fewer regulatory burdens, it leaves Florida's performers at a significant disadvantage. The absence of workers' compensation protections forces many performers to bear the full financial burden of workplace injuries, creating an inequitable environment that only affects non-union artists and those without private insurance.

1. *IMPLICATIONS OF VARIED APPROACHES*

The differences in how states approach workers' compensation for performers reveal a broader tension between fostering economic growth and protecting vulnerable workers. States like California and New York demonstrate that it is possible to balance these interests by providing clear protections for performers while maintaining robust entertainment industries. On the other hand, states like Alaska and Florida risk alienating artists and exposing them to unnecessary risks by failing to extend similar protections. These variations highlight the need for states like Arizona to critically assess their workers' compensation frameworks to ensure performers are not left behind in the evolving landscape of employment law.

C. THE CURRENT IMPACT OF WC LAWS

The impact of workers' compensation laws on performers varies significantly across states, influencing both job stability and financial security. California has a robust entertainment and performing arts sector and as such, they have some of the most extensive entertainment employment laws in the country.[97] These legal protections allow performers to access workers' compensation benefits, providing some financial stability in the event of an injury.[98] In states like California, where performers are more likely to be classified as employees rather than independent contractors,

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[95] Jeffrey Johnson, *Workers' Compensation Laws By State (2025 Guide)*, FORBES (Nov. 21, 2022, at 06:03 AM), https://www.forbes.com/ [https://perma.cc/4996-KSDC].

[96] *Business Climate*, SELECTFLORIDA, https://selectflorida.org/ [https://perma.cc/467S-6WKR].

[97] *Protections for California's Entertainment Workers*, COLE, FISHER, COLE, O'KEEFE + MAHONEY (Aug. 8, 2023), https://colefisher.com/ [https://perma.cc/V6RC-EK73].

[98] *Id.*

job consistency tends to be higher.[99] The classification of performers as employees also facilitates access to other benefits, such as unemployment insurance, creating a more predictable and secure work environment.[100]

Conversely, in states where performers are frequently classified as independent contractors, they face greater economic uncertainty.[101] Without the safety net of employment law protections like workers' compensation, many performers must take on multiple jobs to sustain themselves.[102] The unpredictable nature of the entertainment industry exacerbates this issue. As employment opportunities are often contingent on auditions and casting decisions, performers are often left with limited control over their own job security.

Unlike traditional independent contractors who can create their own business opportunities, performers depend on casting directors, producers, and theater companies for employment.[103] A significant portion of a performer's career is spent auditioning—essentially applying for work—rather than actively working.[104] This structure places performers in a vulnerable position, where employment is entirely at the discretion of others. Without strong workers' compensation protections, injured performers may find themselves unable to work and without financial support, further highlighting the need for consistent legal protections across states.

1. *UNION VS. NON-UNION CONCERNS*

Unions exist throughout a variety of industries and membership provides a number of benefits to the worker depending on the type of work and the strength of the union.[105] While membership is preferable in some industries, Arizona is a right-to-work state and

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[99] *Number of jobs in the arts and cultural production industry in the United States in 2021, by state*, STATISTA (Mar. 2023), https://www.statista.com/ [https://perma.cc/96LE-LAFK].

[100] *Id.*

[101] Megan Brown, *Seattle's Working Musicians*, MUSICIANS' ASS'N OF SEATTLE (2015), https://www.afm.org/ [https://perma.cc/4UHB-3PY7].

[102] *Id.*

[103] Benjamin Lindsay, *How to Become an Actor*, BACKSTAGE (May 15, 2025), https://www.backstage.com/ [https://perma.cc/HRK6-WZ8Q].

[104] ThriveAdmin, *Everything You Need to Know About Acting Auditions from TBell Acting Coach: April Hartman*, TBELL ACTORS STUDIO (Jan. 12, 2021), https://tbellactorsstudio.com/ [https://perma.cc/E9EQ-V4FR].

[105] *What is a Union?*, UNION PLUS, https://www.unionplus.org/ [https://perma.cc/U8KR-P3SN].

does not require employees to join a union.[106] This has led to Arizona having the fifth lowest rate of union membership in the country as of 2023.[107] Despite this lack of union representation, Arizona workers' compensation law requires employers to provide coverage.[108] The statute does not discriminate against those who do not belong to a union.[109] This is true across industries and across most right-to-work states.

Unlike most other industries, where workers' compensation laws apply universally to all employees regardless of union membership, the entertainment industry often ties workers' compensation eligibility to union affiliation.[110] Performers who are members of major entertainment unions, such as SAG-AFTRA or Actors' Equity Association, generally receive workers' compensation benefits through collective bargaining agreements.[111] However, non-union performers, who may be doing the exact same jobs, are frequently left without these protections.

This discrepancy creates significant inequities in the industry. A non-union performer working on a production might suffer the same workplace injury as a union member but not be able to access medical benefits, wage replacement, or other essential workers' compensation protections. Given that union membership is often contingent on securing a certain number of qualifying jobs, many early-career and independent performers are left without coverage, despite facing the same occupational risks as their unionized peers.

Excluding non-union performers from workers' compensation protections does not align with broader employment laws, which typically extend workers' compensation coverage to all employees within a given field. As the entertainment industry continues to evolve, ensuring that all professional performers receive equal workers' compensation protections regardless of union affiliation will be crucial in creating a fair and sustainable working environment.

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[106] ARIZ. CONST. art. XXV.

[107] Jeremy Duda & Nathan Bomey, *Arizona's low union membership rate takes another dive*, AXIOS PHOENIX (Feb. 13, 2024), https://www.axios.com/ [https://perma.cc/CVV4-VZPD].

[108] ARIZ. REV. STAT. ANN. § 23-902 (2025).

[109] *Id.*

[110] *Why Join Equity?*, *supra* note 15.

[111] *Id.*; *Member Benefits*, SAG-AFTRA, https://www.sagaftra.org/ [https://perma.cc/4TGB-NC2W].

V. THE ARIZONA PERFORMER PROBLEM

Arizona Revised Statutes (A.R.S.) Section 23 Chapter 6 delineates the framework for Arizona's workers' compensation system.[112] Like a number of other states, the Arizona system differentiates between employers who retain regularly employed workers, for whom workers' compensation is mandatory, and those who hire independent contractors, for whom workers' compensation is optional.[113] Central to this statutory scheme is the application of a "right-to-control" style test, which employs a multifactor analysis to determine whether a worker is classified as an employee or an independent contractor.[114]

Although flexible, the test is difficult to apply to the performing arts. Unlike some other states, Arizona does not provide a specific category neither including nor excluding performing artists from workers' compensation requirements.[115] Instead, it is left to the employer's discretion about what classification the performers should be given.[116] As this type of work often straddles the boundaries of employment and independent contracting, it can be difficult to determine how workers in this field should be classified conclusively. However, in analyzing the factors as they apply to theater performers in Arizona, it is clear theaters should be required to provide workers' compensation coverage in certain circumstances ensuring that the actors they employ are not unfairly excluded from vital workplace protections.

VI. SPOTLIGHT ON A SOLUTION

A. STATUTORY ANALYSIS IN FAVOR OF PERFORMERS

This section examines three critical aspects of the statute in favor of finding that performing artists are often employees entitled to workers' compensation coverage. First, the "regularly employed" standard is analyzed, which considers whether institutions that hire performers meet the criteria of employers subject to the workers' compensation statute. This analysis highlights how the nature and frequency of performing arts work can satisfy the statutory requirement for regular employment. Second, the independent contractor framework is explored, focusing on Arizona's right-to-

[112] ARIZ. REV. STAT. ANN. §§ 23-901–23-1105 (2025).
[113] ARIZ. REV. STAT. ANN. § 23-902 (2025).
[114] *Id.*
[115] *Id.*
[116] *Id.*

control test and how the multi-factor analysis application often leans in favor of employee classification for performers. Lastly, the written agreement factor is considered, delving into whether contracts used in the industry genuinely reflect independent contractor status or serve as a mechanism to circumvent workers' compensation requirements. Together, these subsections demonstrate how, under a proper interpretation of the statute, many performing artists meet the criteria for employee classification and should therefore be covered by workers' compensation insurance.

1. *"REGULARLY EMPLOYED"*

To accurately assess the need for clarification of the statute, one must look at the various aspects of A.R.S. § 23-902 and how it applies to performing artists. This Section lays out the description of employers that are required to maintain workers' compensation insurance coverage.[117] Part A defines employers to include corporations and anyone employing "workers or operatives regularly employed in the same business."[118] Importantly for this discussion, "regularly employed" does not only include full-time, year-round employment.[119] Instead, it applies to all employments that may only be for a portion of the year so long as they are "in the usual trade, business, profession, or occupation of an employer."[120] This caveat is significant in that it does not automatically exclude performers who may be contracted for a show that only performs for a smaller segment of the year. Also, notably, the part A provision calls attention to the importance of the workers being involved in the same business as the employer given it is needed to qualify for workers' compensation insurance.[121] Performing arts institutions and organizations that expressly exist to put on theatrical performances are engaged in the business of theater. Thespians hired to perform in those productions are therefore engaged in the same business, which weighs in favor of theater companies needing to provide workers' compensation insurance for their performers.

2. *INDEPENDENT CONTRACTORS*

A.R.S. § 23-902, like many states' workers' compensation statutes, excludes those who employ independent contractors from

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[117] *Id.*
[118] *Id.*
[119] ARIZ. REV. STAT. ANN. § 23-902 (2025).
[120] *Id.*
[121] *Id.*

needing to provide coverage.[122] Part C describes an independent contractor for the sake of the statute as follows:

> A person engaged in work for a business, and who while so engaged is independent of that business in the execution of the work and not subject to the rule or control of the business for which the work is done, but is engaged only in the performance of a definite job or piece of work, and is subordinate to that business only in effecting a result in accordance with that business design, is an independent contractor.[123]

Independent contractors are workers who are not employed by a business, but are instead hired as a third party, like electricians, florists, or accountants.[124] There are layers to how this applies. An electrician, for example, might be employed in a crew of electricians that are sent out to perform various electrical jobs. The company that they work for would tell them where and when jobs were, would likely provide tools to complete the job, and would itself be in the business of doing electrical work. The electrician in this group would thus not be considered an independent contractor and therefore the company would be required to provide workers' compensation insurance coverage for their electrician employees.[125]

However, the various companies and electrician employers are hiring them as third parties. One hires an electrician solely to fix an electrical issue, with responsibility limited to completing the repair. In this instance, the employer has hired an independent contractor as defined by A.R.S. § 23-902(C) and would not be required to obtain workers' compensation coverage for them.[126]

3. *WRITTEN AGREEMENT FACTORS*

A.R.S. § 23-902 D provides that for a worker to be considered an independent contractor, and therefore exempt from workers' compensation coverage, they must sign a written agreement

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[122] *Id.*

[123] *Id.*

[124] Indeed Editorial Team, *Independent Contractor: Definition and Examples*, INDEED (July 26, 2025), https://www.indeed.com/ [https://perma.cc/8T67-AYJX].

[125] *See* Danny Lipford, *How To Find and Hire an Electrician*, THIS OLD HOUSE (Oct. 4, 2024), https://www.thisoldhouse.com/ [https://perma.cc/FN53-AJS8].

[126] ARIZ. REV. STAT. ANN. § 23-902 (2025).

outlining their status as an independent contractor.[127] This written agreement must state the employer meets eight different factors that constitute a right-to-control test.[128] While performing artists are often contracted as independent contractors, an analysis of these eight factors will demonstrate that their employers do exercise a sufficient amount of control over them. This could constitute employee status and therefore require workers' compensation coverage.

1. "Does not require the independent contractor to perform work exclusively for the business."[129]

As the factor itself implies, exclusivity does not automatically imply employee status. However, working exclusively for a business can lean in favor of the worker being considered an employee. The focus is on how much control a business has over a worker–the more control, the more likely they are to be an employee. If a company requires exclusivity, it can be a sign of higher levels of control.

Semi-professional and professional theater companies traditionally hire actors for a particular role in a show that will run for a number of weeks or a number of months. The rehearsal process takes place over a period prior to the show's opening, usually several nights a week and sometimes during weekends.[130] During rehearsal and the run of the show, actors are required to exercise exclusivity. Unless a prior conflict has been approved, performers must be in attendance or risk their contract being terminated. Some actors also fill understudy, swing, and standby roles.[131] These require learning other parts and being available to cover another actor, sometimes on very short notice.[132] These roles require exclusive availability in case something happens that prevents the original cast member from going on.[133] Therefore, while actors may be entitled to sign on to other projects at the same time as they are involved in one production, they may only do so if the schedules do

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[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] Zachary Pincus-Roth, *ASK PLAYBILL.COM: Rehearsal Schedule*, PLAYBILL (Dec. 28, 2007), https://playbill.com/ [https://perma.cc/G8P4-TDU6]. This references professional Broadway rehearsals; smaller regional theaters will have less rigorous, but similar schedules.

[131] Backstage Staff, *Swing, Standby, Understudy: What You Need to Know*, BACKSTAGE (Mar. 24, 2022), https://www.backstage.com/ [https://perma.cc/27U5-X3UZ].

[132] *Id.*

[133] *Id.*

not conflict. This implies a level of required exclusivity that weighs in favor of finding that performers are employees.

2. "Does not provide the independent contractor with any business registrations or licenses required to perform the specific services set forth in the contract."[134]

This point does not typically apply to performing artists because they generally do not require formal business registrations or licenses to provide their services. Unlike professions such as contractors, real estate agents, or cosmetologists, who must obtain specific licenses or certifications to legally operate, performers are usually hired based on their talent, experience, and artistic abilities. Because of this, the lack of a business registration or professional license does not meaningfully distinguish performing artists from traditional employees, making it an inadequate basis for classifying them as independent contractors. As a result, this factor should not weigh heavily in determining whether performers should receive workers' compensation coverage.

3. "Does not pay the independent contractor a salary or hourly rate instead of an amount fixed by contract."[135]

The method of compensating stage performers varies widely depending on the company, union status, and production scale. Large professional theaters, particularly those affiliated with unions, such as Actors' Equity Association, often pay performers a weekly salary, much like traditional employees.[136] Regional and smaller theaters, on the other hand, may compensate performers on a per-performance basis.[137] While this payment structure may seem different from a traditional hourly wage or salary, it still operates within a structured framework that resembles employee compensation. Additionally, when performances are added to a production's run, performers receive additional pay, demonstrating that their compensation is not strictly fixed by contract but instead adjusts based on the work performed.[138] This flexible but structured pay system challenges the argument that performers should be classified as independent contractors solely because they are sometimes paid per performance rather than an hourly or salaried rate.

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[134] ARIZ. REV. STAT. ANN. § 23-902 (2025).

[135] *Id.*

[136] Diep Tran, *How Much Do Actors Make? A Guide to Getting Paid to Perform*, BACKSTAGE (July 31, 2024), https://www.backstage.com/ [https://perma.cc/4A84-TMN5].

[137] Telephone Interview with Arizona regional theater performer (Mar. 1, 2025).

[138] *Id.*

4. "Will not terminate the independent contractor before the expiration of the contract period, unless the independent contractor breaches the contract or violates the laws of this state."[139]

Stage performers, particularly those working under union agreements or formal contracts, typically have employment arrangements that resemble traditional at-will employment more than independent contractor relationships. While independent contractors are generally protected from early termination unless they breach the contract or violate state laws, performers can often be dismissed for reasons beyond these limited grounds. Directors and producers may replace performers because of artistic differences, creative changes, or even budgetary constraints, demonstrating their employment is not always guaranteed for the full contract period.[140] Additionally, performers are often subject to workplace rules and expectations similar to those imposed on employees, such as mandatory rehearsals, performance standards, and conduct policies.[141] These factors suggest that performers function more like employees than independent contractors, further supporting the argument for including them under workers' compensation protections.

5. "Does not provide tools to the independent contractor."[142]

One of the key distinctions between employees and independent contractors is whether the worker is provided with the tools necessary to perform their job. This factor is particularly relevant in the case of stage performers, as theaters and production companies supply nearly all essential materials, including costumes, wigs, sets, lighting, microphones, and other technical equipment.[143] Performers do not bring their own staging elements or production resources but instead rely on what the theater provides to carry out their roles.[144] This level of employer-provided support contrasts with traditional independent contractors, who are typically responsible for supplying their own tools and materials.[145] Because theaters furnish these necessary items, performers function more

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[139] ARIZ. REV. STAT. ANN. § 23-902 (2025).

[140] *What happens if an actor is fired from a job?*, HOLLYWOOD CONNECTIONS CTR. (Oct. 7, 2025), https://myhollywoodpage.com/ [https://perma.cc/H4X8-2YGX].

[141] Telephone Interview, *supra* note 137.

[142] ARIZ. REV. STAT. ANN. § 23-902 (2025).

[143] *Guide to Technical Theater*, CAPTITLES, (Sep. 4, 2024), https://www.captitles.com/ [https://perma.cc/GUS8-AVVX].

[144] *Id.*

[145] *IRS 20-point checklist for independent contractors*, https://ascintranet.osu.edu/ [https://perma.cc/TJW4-C38Y].

like employees who rely on an employer's infrastructure rather than independent contractors operating with their own resources.

Beyond physical tools, theaters also provide performers with scripts, choreography, and direction, further reinforcing the structured nature of their work.[146] Actors do not simply show up and perform as they wish; they follow specific artistic guidelines set by directors, choreographers, and playwrights.[147] This level of creative control indicates that performers are not independent in the way that contractors typically are but are instead integrated into the production as essential contributors following detailed instructions. Since workers' compensation laws often consider the degree of employer control in determining employment status, performers being given both the tools and direction needed for their work strengthens the argument they should be classified as employees and entitled to workers' compensation protections.

6. "Does not dictate the time of performance."[148]

Another important distinction between employees and independent contractors is the level of control an employer has over their schedule. This, like the previous factor, is especially pertinent to determining the level of control a company has over a performer. Unlike true independent contractors, who can generally set their own hours, stage performers must adhere to strict schedules dictated by the theater company.[149] From the outset of a production, performers are required to attend scheduled rehearsals, music and dance training sessions, costume fittings, and technical rehearsals.[150] These commitments are not flexible or left to the discretion of the performer but are instead mandatory components of the job. Missing or arriving late to these scheduled obligations can result in disciplinary action or even termination, reinforcing the structured nature of their work.[151]

Additionally, performers have no control over when productions take place, as show dates and times are determined by the theater company based on audience demand, venue availability, and contractual obligations. Unlike independent contractors who can often negotiate deadlines or choose when to complete their work, actors must be present for every scheduled performance at the

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[146] Telephone Interview, *supra* note 137.
[147] *Id.*
[148] ARIZ. REV. STAT. ANN. § 23-902 (2025).
[149] Pincus-Roth, *supra* note 130; Telephone Interview, *supra* note 137.
[150] Telephone Interview, *supra* note 137.
[151] Pincus-Roth, *supra* note 130.

designated time.[152] This expectation extends beyond rehearsals and performances to include promotional events and cast meetings, all of which are coordinated by the employer. The rigid scheduling requirements imposed on performers strongly resemble those of traditional employees, further supporting the argument that they should be covered under workers' compensation laws.

7. Pays the independent contractor in the name appearing on the written agreement.[153]

The method of payment is often used as a factor in determining whether a worker is an independent contractor or an employee. Independent contractors are typically paid via a 1099 tax form and can be paid under a business name or the name specified in their contract, reflecting their status as separate business entities.[154] Stage performers are often paid via 1099 under their legal names, like traditional employees.[155] While some performers with personal business entities like an LLC may arrange for payment through a company name, the vast majority of actors, dancers, and musicians receive payment as individuals.[156] This aligns more closely with standard employment practices rather than independent contracting.

8. "Will not combine business operations with the person performing the services rather than maintaining these operations separately."[157]

Independent contractors are typically hired to perform services that are unrelated to a business's regular operations.[158] For example, an ice cream parlor might hire a painter to paint a mural on the wall or hire a plumber to fix an issue with their restroom–these services are separate from the core business of selling ice cream. The purpose of an independent contractor is to conduct business that is separate from the main company that hires them. Classifying performing artists hired to perform by companies whose primary business is selling the performance as independent contractors goes against the core purpose of independent contractor relationships. They are directly involved in the main product the company seeks to sell.

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[152] *Id.*

[153] ARIZ. REV. STAT. ANN. § 23-902 (2025).

[154] *1099 vs. W-2 Tax Form Guide: What Employers Need To Know*, PAYCHEX (Oct. 31, 2024), https://www.paychex.com/ [https://perma.cc/QH26-CZ9V].

[155] Telephone Interview, *supra* note 137.

[156] *1099 vs. W2W-2 Tax Form Guide: What Employers Need to Know*, *supra* note 154; Telephone Interview, *supra* note 137.

[157] Ariz. Rev. Stat. Ann. § 23-902 (2025).

[158] *IRS 20-point checklist for independent contractors*, *supra* note 145.

There may be exceptions in instances where performers are hired for smaller events where they add to the atmosphere of the event but are not the focus. This aligns with the idea that independent contractors are separate from the primary business operations. But for theater companies that principally sell tickets to stage performances, in which actors are required to perform, this is directly combining business operations. As a result, this factor should weigh heavily in favor of finding that performing artists should be included as employees under the workers' compensation statute. They are controlled by theater companies in several ways, similar to other types of employees and should receive the requisite employment benefits employees are entitled to.

B. MODIFICATION OF THE STATUTE

Another plausible solution lies in amending the statute to explicitly include performers. New York and California lead the way implementing legislation to protect performing artists. Following their examples could provide a clearer path for businesses and performers. In response to concerns about the status of performers under the existing statutory framework, the New York legislature amended the statutes in 1986 to include provisions explicitly including performing artists under the definition of "employee."[159] This leaves little room for confusion and allows companies and the performers they employ to have a more concrete understanding of their responsibilities and the benefits they are owed, respectively.

California more recently passed legislation aimed at protecting the employment rights of "gig workers."[160] This group often includes performing artists, who walk a fine line between traditional employee and independent contractor. The legislation, known as Assembly Bill 5, primarily clarified the existing labor laws following a court decision.[161] The bill aimed to curb companies from misclassifying employees as independent contractors to avoid providing protections like workers' compensation.[162] In doing so, unless an employer proves that a performing artist falls under all three prongs of the independent contractor test, they are presumed

[159] Workers Comp Matters, *supra* note 69.

[160] Assemb. B. 5, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (amending Section 3351 of, and to add Section 2750.3 to, the Labor Code).

[161] *Id.*

[162] *Id.*

to be an employee and are entitled to employment protections like workers' compensation.[163]

Given both the trendsetting nature of New York's legislature regarding its performing arts history and Arizona's tendency to look to California's legislative and judicial trends, amending the state's workers' compensation statute to explicitly include performing artists as covered employees would align with established precedents. A comparable statutory amendment in Arizona would provide much-needed clarity and consistency in determining coverage for performers. Although the current statute should be interpreted to include many performers, without explicit inclusion, there is room for employers to intentionally misclassify performing artists as independent contractors, leaving them without access to essential workplace protections. A legislative revision could establish clear guidelines for determining employment status, ensuring that performers in theater productions, film, and live entertainment are afforded the same protections as other high-risk workers. Moreover, such an amendment would enhance workplace safety standards and prevent the burden of medical expenses from falling solely on injured artists, who often lack alternative health coverage.

By following California and New York's lead, Arizona can modernize its workers' compensation framework to reflect the realities of the entertainment industry. An amendment would not only provide greater security for performers but also create a more predictable regulatory environment for employers. This amendment would reduce the ambiguity and litigation risks associated with classifying performers under the current system

VII. COUNTER ARGUMENTS

A. COST AND PRO-BUSINESS CULTURE

The primary argument against requiring workers' compensation coverage for performers is the financial burden it places on employers. Workers' compensation premiums are calculated based on industry risk, and given the physically demanding nature of performing arts, these costs can be more substantial than other

[163] CAL. LAB. CODE § 2775(b)(1) (establishing a three-part test classifying a worker as an employee unless the following: "the hiring entity proves the worker is free from its control, performs work beyond the scope of its usual course of the hiring entity's business, and the person is customarily engaged in an independently operates a similar business).

fields.[164] For smaller production companies, independent theater groups, and freelance artists, the additional expense of mandatory workers' compensation coverage may be difficult to absorb. Unlike larger corporations with robust budgets, many smaller entities in the entertainment industry operate with limited financial resources, making it challenging to afford higher insurance premiums. This concern is particularly relevant in cases where performers work on a project-to-project basis, as the fluctuating nature of employment can complicate insurance calculations. Additionally, imposing workers' compensation requirements could stifle innovation and limit opportunities for emerging artists by increasing overhead costs, potentially reducing the number of performances and productions available in the industry.[165]

Another argument against requiring workers' compensation coverage for performing artists in Arizona is that Arizona boasts a particularly business-friendly culture.[166] Although Arizona mandates workers' compensation for most industries, requiring it for certain performing arts companies could discourage them from setting up business in the state. Smaller theaters also face other economic challenges, and adding a workers' compensation requirement might negatively impact these small businesses. Some potential issues these companies may face with the added need for workers' compensation insurance coverage include increased premiums, a greater administrative burden, and potential fraudulent claims.

If the company experiences a high number of claims, which could be the case in such an injury-prone industry, the workers' compensation premiums may rise. This could present financial issues for a company that may not already be incredibly profitable. This might also deter employees from reporting injuries. Requiring workers' compensation coverage would likely increase the administrative burden on smaller theater companies. Managing claims and dealing with insurance providers could cause companies issues if they lack the administrative personnel to handle them. Additionally, although less common, some employees might try to file fraudulent claims. This, too, may create a culture of discouraging employees from reporting injuries for fear of not being

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[164] *Workers' Compensation in the Entertainment Industry*, AMAXX, https://reduceyourworkerscomp.com/ [https://perma.cc/6664-2YTU].

[165] *See id.*

[166] Nicole Garcia, *Studies Rank Arizona as Among the Best States for Entrepreneurs to Start a Business*, ARIZ. CORP. COMM'N (Jan. 30, 2025, at 19:08 MST), https://www.azcc.gov/ [https://perma.cc/EB5G-JKVL].

believed by management, who may be trying to keep costs down. All of these are reasonable concerns about requiring performing artists to be covered by workers' compensation insurance. The pros, however, likely outweigh the cons.

1. *REBUTTAL*

One of the primary benefits of extending workers' compensation insurance to performing artists is the limitation of employer liability. As previously discussed, workers' compensation functions as an exclusive remedy for workplace injuries, meaning that covered employees generally cannot sue their employers for damages arising from job-related injuries.[167] This protection significantly reduces the risk of costly litigation for entertainment companies, venues, and production firms. Given the inherent risks involved in performance-related work, such as stage falls, pyrotechnic accidents, or repetitive stress injuries, the potential for personal injury claims is substantial. Without workers' compensation coverage, injured artists may file personal injury lawsuits, exposing employers to high legal costs, uncertain jury awards, and reputational damage. By ensuring that performers are covered, businesses can avoid protracted legal disputes while ensuring injured workers receive the necessary medical care and wage replacement benefits.

Another major advantage of providing workers' compensation insurance for performing artists is the predictability it brings to business finances. Premiums for workers' compensation policies are calculated based on industry risk factors and historical claims data, allowing companies to anticipate and budget for potential claims.[168] In contrast, litigation costs arising from workplace injuries are unpredictable and can create significant financial burdens. By paying regular, actuarially determined premiums, employers can maintain financial stability and avoid the sudden financial strain that could result from an adverse personal injury judgment. Furthermore, this cost predictability is particularly beneficial in the entertainment industry, where budgets are often tight, and profit margins can be volatile.

Providing workers' compensation coverage can also serve as a valuable tool for improving employee morale and retention within the performing arts sector. Many performing artists operate in precarious employment arrangements, frequently working without

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[167] *What Does Workers' Compensation Cover?*, *supra* note 40.

[168] Jason Metz, *Workers' Compensation Insurance Cost*, FORBES (Feb. 6, 2025, at 09:06 MST), https://www.forbes.com/ [https://perma.cc/AK8G-CHDB].

access to traditional employment benefits.[169] When companies offer workers' compensation coverage, it signals a commitment to workplace safety and employee well-being, fostering loyalty and job satisfaction. In an industry where performers are often exposed to physical strain and hazardous working conditions, the assurance that they will be financially supported in the event of an injury can provide peace of mind. This, in turn, can lead to a more dedicated and engaged workforce, ultimately benefiting both the artists and the businesses that employ them.

Workers' compensation insurance not only provides financial protection but also incentivizes employers to maintain safer working conditions. Insurers often adjust premium rates based on an employer's claims history, meaning that companies with fewer workplace injuries can benefit from lower insurance costs.[170] As a result, businesses have a direct financial incentive to implement robust safety measures, such as mandatory warm-up routines, better stage equipment, and improved hazard assessments. In the performing arts, where injuries can be a common result of physically demanding performances, adopting proactive safety measures can significantly reduce the risk of accidents, thereby benefiting both employers and employees. Lower injury rates translate to lower claims, reduced premium costs, and a healthier workforce.

Covering performing artists under workers' compensation insurance presents numerous advantages for both employers and employees and is a positive addition for businesses. By limiting liability, providing predictable costs, improving employee morale, and incentivizing workplace safety, workers' compensation ensures that both the financial and physical well-being of performing artists are protected. As the entertainment industry continues to evolve, adopting comprehensive workers' compensation policies for performers can contribute to a safer and more sustainable working environment, benefiting all stakeholders involved and thus contributing to Arizona's pro-business atmosphere.

B. POSSIBLE PERFORMER BACKLASH

While those who argue against workers' compensation coverage for performing artists largely do so in favor of company profits at the expense of performer well-being, coverage requirements for artists can put them at a disadvantage in instances where the employer is at fault for the injury. As previously

[169] Considine, *supra* note 65.
[170] Metz, *supra* note 168.

explained, workers' compensation is a scheme in which employers provide insurance for employees in the case of a work-related injury or illness.[171] Being covered by workers' compensation bars employees from filing any other suit against the employer, even if the injuries are extensive or in the case that they are a direct result of employer negligence.[172] As a result, those who are severely injured may only be entitled to select workers' compensation benefits and are left without further remedy, despite possible monetary resources to file a suit against their employer.[173]

This issue was argued in *White v. Metropolitan Opera Association*.[174] Wendy White, a renowned opera singer, filed a suit against the defendant after she sustained injuries from a fall while performing at the defendant's venue, the Metropolitan Opera House (Met.).[175] The case took place in New York, which boasts more extensive workers' compensation legislation, including explicit coverage of performers.[176] Thus, the Metropolitan Opera Association invoked the statute barring further claims as they cited White's status as an employee covered by their workers' compensation policy.[177]

White's position as a star performer would have rendered her position much more valuable than the average employee. While a background performer might have been considered replaceable, the principal performer is often the reason audience members purchase tickets to a particular show. Their name and stage presence are not only valuable assets to the performers themselves but also to the venues that hire them. Therefore, in instances like White's, barring a major performer's ability to seek damages that would be much more valuable than workers' compensation benefits can be detrimental. White also had better financial means to pursue a suit than the average performer. Thus, her ability to seek care for her injuries would not be impacted by a lack of workers' compensation coverage.

White ultimately was able to overcome the workers' compensation assertion by the defendant.[178] White challenged the claim by indicating that she was not an employee of the Met., but

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[171] *Id.*

[172] *"Trouble Ahead, Trouble Behind"*, LEWIS BRISBOIS, https://lewisbrisbois.com/ [https://perma.cc/K4VH-5C92].

[173] *Id.*

[174] White v. Metro. Opera Ass'n, Inc., 102 N.Y.S.3d 390 (N.Y. Sup. Ct. 2019), *aff'd*, 113 N.Y.S.3d 544 (N.Y. App. Div. 2020).

[175] *See id.*

[176] *See id.*

[177] *See id.*

[178] *White*, 102 N.Y.S.3d at 399, *aff'd*, 113 N.Y.S.3d at 544.

of Wendy White, Inc., and was an independent contractor licensed to the Met. via her company.[179] According to the Standard Contractor's Agreement signed by the two parties of Wendy White, Inc. and the Met., White was contracted for the role of "Principal Solo Singer" and "agree[d] to furnish to The Met the services of [plaintiff], as singer on an Individual Performance Basis."[180] The Court agreed that she had overcome the presumption and should be allowed to file a suit against the defendant for damages outside the workers' compensation framework.[181]

This demonstrates a method for certain performers to exempt themselves from statutory inclusion of performing artists in workers' compensation requirements. Those who choose to remain outside of the coverage may sign an agreement explicitly absolving them from workers' compensation recourse. On its face, this appears similar to the current Arizona statutory framework that allows for independent contractors to be excluded from workers' compensation responsibility via a contract expressly acknowledging their independent contractor status.[182] The main difference between this interpretation and the previous one is the presumption should be the insurance covers performers unless they specifically opt out. This would allow for a balance between the interests of performers and employers. Performers who have the means and desire to excuse themselves from coverage can choose to do so, while most performers who would prefer the protection can still have the presumption of coverage.

VIII. FINAL BOWS: CONCLUSION

Arizona's performing artists operate in a legal limbo when it comes to workers' compensation coverage, leaving them vulnerable to financial and physical hardships in an industry fraught with inherent risks. While states like California and New York have recognized the unique needs of performers and explicitly extended workers' compensation protections to them, Arizona's silence on the issue creates inconsistency and inequity. The current ambiguity within A.R.S. § 23-902 disproportionately disadvantages performers, many of whom are misclassified as independent contractors despite meeting the legal criteria for employee status under the state's right-to-control test. This lack of protection is

[179] *White*, 102 N.Y.S.3d at 392, *aff'd*, 113 N.Y.S.3d at 544.
[180] *Id.*
[181] *White*, 102 N.Y.S.3d at 399, *aff'd*, 113 N.Y.S.3d at 544.
[182] ARIZ. REV. STAT. ANN. § 23-902 (2025).

particularly troubling given the performing arts' physical demands and occupational hazards, which make access to workers' compensation critical for this workforce.

By analyzing the statute's key factors—such as the "regularly employed" requirement, the independent contractor framework, and the role of written agreements—it becomes clear that many performing artists qualify as employees and should be entitled to workers' compensation coverage. However, without explicit statutory language or judicial interpretation to that effect, performers remain at the mercy of inconsistent applications of the law. This creates an uneven playing field in which unionized performers or those in more progressive states benefit from robust protections, while others are left to navigate their careers without a safety net.

To address this gap, Arizona should either amend its workers' compensation statute to explicitly include performing artists or issue interpretive guidance that clarifies their eligibility under existing laws. Such reforms would align Arizona with states that prioritize the well-being of entertainment professionals and provide a clear framework for both performers and employers. Moreover, extending workers' compensation protections to performers would reinforce the state's broader commitment to supporting its workforce, ensuring that no artist is forced to choose between their passion and their safety.

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WILL PICKLE-BALL BE GENERICIDE'S NEXT VICTIM?

SHANNON KAVANAGH *

CONTENTS

INTRODUCTION

Pickleball is not only the newest athletic craze, but it is also a topic in the middle of a trademark dispute regarding genericness. Although the sport may have seemed to only crop up recently, PICKLE-BALL has been a registered trademark of Pickleball Holdings LLC ("Pickleball Holdings") since the 1970s.[1] The company filed its trademark application to register PICKLE-BALL on the principal register in 1974.[2] It obtained registration on

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[1] PICKLE-BALL, Registration No. 999,043.

[2] *Id.*

November 26, 1974 and covers goods in Class 28, the sporting goods and toys class.[3] This mark specifically covers, "equipment including a net, paddles and balls sold as a unit for playing a court-type game and balls sold separately for such game."[4]

Pickleball Holdings has maintained its trademark rights over PICKLE-BALL for the last 50 years, but in August of 2024, three companies filed separate cancellations against PICKLE-BALL on the grounds that the mark has become generic.[5]

Trademarks can be deemed generic if the public begins using the mark as the generic name for the goods or services that it covers.[6] Once a mark has become generic, it loses its trademark protection, ending the holder's exclusive right to its use.[7] This can cause costly rebranding efforts and loss of profits.[8]

Genericide has impacted sports-related trademarks because creators of new sports, sports equipment, and workouts cannot effectively describe their brand without using the trademarked name. "Pilates" was once a registered trademark but because the term was widely used to describe any workout that had Pilates' elements, it was deemed generic.[9]

Beyond sports trademarks, some of the most common household names for everyday products were once registered trademarks, but their popularity also led to their demise at the United States Patent and Trademark Office (USPTO). Once-trademarked brand names like "thermos" and "aspirin" have fallen victim to the law of genericide.[10]

This paper will first focus on the law of genericide and how genericness is determined by federal courts and trademark examining attorneys at the USPTO. Then, this paper will walk through instances of sports-related trademarks that have been challenged on a basis of genericness. Finally, this paper will discuss the ongoing PICKLE-BALL dispute and analyze the potential outcomes if this dispute were to make its way into a courtroom.

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] John Dwight Ingram, *The Genericide of Trademarks*, 2 BUFF. INTELL. PROP. L.J. 154, 158 (2004).

[7] *Id.*

[8] Viktor Johansson, *The Ultimate Guide to Generic Trademarks*, DIGIP (Feb. 14, 2023), https://www.digip.com/ [https://perma.cc/JR8L-MFQV].

[9] Pilates, Inc. v. Current Concepts, Inc., 120 F.Supp.2d 286, 306 (S.D.N.Y. 2000).

[10] King-Seeley Thermos Co. v. Alladin Indus., Inc., 321 F.2d 577, 579 (2d Cir. 1963); Ingram, *supra* note 6.

I. THE LAW OF GENERICIDE

To register a trademark, the mark must meet two requirements: it must be in use in commerce and it must be distinctive.[11] Distinctiveness addresses a trademark's ability to identify particular goods as emanating from one producer or source.[12] Trademarks are divided into four categories of distinctiveness: arbitrary/fanciful, suggestive, descriptive, and generic.[13] Trademarks categorized as arbitrary, fanciful, or suggestive are determined to be inherently distinctive.[14] Descriptive marks must acquire secondary meaning to achieve distinctiveness.[15] And, generic marks are never eligible for trademark protection because they refer to a general class of goods or services rather than a unique source.[16]

When a trademark examining attorney is reviewing a trademark application, there must be sufficient evidence to support a reasonable basis for finding the mark generic.[17] Examining attorneys consider the term's primary significance to consumers, usage by consumers and competitors, and consumer surveys.[18] In cancellation proceedings, the party petitioning to cancel a registration on genericness grounds must prove its claim by a preponderance of the evidence.[19]

A mark can be deemed generic in one part of the United States but not another.[20] For instance, the term "yellow cab" is the generic term used for taxis in New York City.[21] The Ninth Circuit held that this information was not relevant in a dispute over "Yellow Cab" in Sacramento, California.[22]

Genericness can occur when a brand becomes so popular that people start referring to all similar products by using that brand's name. For instance, "thermos" was once a registered trademark

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[11] 15 U.S.C. § 1051 (1946).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] U.S. PAT. & TRADEMARK OFF., EXAMINATION GUIDE 1–22: CLARIFICATION OF EXAMINATION EVIDENTIARY STANDARD FOR MARKS REFUSED AS GENERIC 1 (2022) [hereinafter EXAMINATION GUIDE].
[18] *Id.*
[19] *Id.*
[20] J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:8.5 (5th ed. 2024).
[21] *Id.*
[22] *Id.*

used to sell King-Seeley Thermos Co.'s vacuum-insulated bottles.[23] However, because the product rose in popularity so quickly, and other companies began selling vacuum-insulated bottles, the public started referring to all vacuum-insulated bottles as thermoses.[24] The mark was soon deemed generic by the Second Circuit.[25]

However, using a trademark in a generic sense in casual conversation is not evidence of the trademark's genericness.[26] Instead, evidence of genericness comes from the use and understanding of the mark in the context of purchasing.[27] For example, someone may tell a friend that they took a Tylenol for their headache, even though they know they took a generic brand of acetaminophen.[28] In this case, the trademark user is fully aware that Tylenol is a specific brand of acetaminophen, but they are using the brand name out of convenience.[29]

Another way in which trademarks can become generic is when the product that the mark refers to has been patented.[30] When a product is patented, no other company can produce that product for 17 years.[31] So, oftentimes, the only way the general public knows how to refer to that specific invention is through its trademarked name.[32] Then, by the time the patent expires and other companies begin to create their own versions of the product, the public assumes the generic name for the product is the name of the patented product.[33] This is exactly what happened to Bayer, the creators of Aspirin.[34] During its patent's lifetime, Bayer did not attempt to come up with a generic name for Aspirin, and instead welcomed the public's use of "aspirin."[35] By the time the patent expired, the term "aspirin" was generic.[36]

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[23] King-Seeley Thermos Co. v. Alladin Indus., Inc., 321 F.2d 577, 578 (2d Cir. 1963).
[24] *Id.* at 579.
[25] *Id.*
[26] MCCARTHY, *supra* note 20, § 12:8.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Ingram, *supra* note 6, at 158.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 158–59.
[34] *Id.*
[35] *Id.* at 159.
[36] Ingram, *supra* note 6, at 159.

II. DETERMINING GENERICNESS IN COURT

Courts rely on various factors to determine whether a trademark has become generic. These include competitors' use, the plaintiff's use, dictionary definitions, media usage, testimony of persons in the trade, and consumer surveys.[37]

The main test to determine whether a trademark has become generic is the primary significance test.[38] This test is used both when a trademark is being challenged on grounds of genericness[39] and by trademark examining attorneys at the USPTO to determine whether an application for a trademark can move onto registration.[40] The Supreme Court stated the rule from the primary significance test as follows: For a seller to prove trademark validity in a challenge on genericness, they must show that the "primary significance of the term in the minds of the consuming public is not the product but the producer."[41]

The primary significance test was codified by Congress through the Lanham Act in 1984.[42] The codification followed the Ninth Circuit's use of a test coined the "purchaser motivation test" in a 1982 case regarding MONOPOLY.[43] The purchaser motivation test states that a term is generic unless a majority of customers are motivated to buy the product because they know the trade name of the company that produces the product.[44] Because the Lanham Act states that the primary significance test should be the only test used to determine genericness, the purchaser motivation test was effectively banned.[45]

The most widely used survey format to determine whether a mark has become generic is the Teflon survey.[46] The survey originated in 1973 during the case to determine if TEFLON was still a valid trademark.[47] The survey was conducted over the telephone with around 1000 participants who represented their age as over 18.[48]

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[37] MCCARTHY, *supra* note 20, § 12:13.
[38] *Id.* § 12:6.
[39] *Id.*
[40] EXAMINATION GUIDE, *supra* note 17.
[41] MCCARTHY, *supra* note 20, § 12:13.
[42] *Id.* § 12:7.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] MCCARTHY, *supra* note 20, § 12:16.
[47] *Id.*
[48] *Id.*

The phone calls began with a short lesson on generic names as opposed to trademarks.[49] The conductor would inform the participant of the instructions: they would hear eight names and the respondent would have to determine if it was a brand name or a common name.[50] The conductor would then describe what a brand name was, like Chevrolet, which is made by one company.[51] A common name is a word like automobile, a product made by many companies.[52] The conductor would then confirm that the participant understood the directions by asking if Chevrolet was a brand name or a common name.[53] If the participant understood, they would begin the survey.[54] During this survey, 68% of the participants answered that TEFLON was a brand name, while 31% answered that it was a common name.[55] When asked about ASPIRIN, 13% of the participants answered that ASPIRIN was a brand name, while 86% answered that it was a common name.[56] When asked about THERMOS, 51% of participants responded that THERMOS was a brand name, and 46% answered that it was a common name.[57]

The Trademark Board ("Board") determines the weight to give the Teflon survey based on the facts of each case.[58] For instance, in a case determining whether "hotels.com" was generic, the Board did not give much weight to the survey, stating that the survey was flawed in assuming respondents knew the difference between a domain name and a brand name.[59] The Board did, however, give weight to the survey when 85% of respondents answered that COUNTRY MUSIC ASSOCIATION was a brand name, as compared with the 74% who answered that Alumni Association was a common name.[60]

Another generally accepted survey style is the Thermos style survey, which was used to prove that the once-trademarked THERMOS was generic.[61] In this survey, the conductor describes the product, tells the respondent to imagine themselves walking into

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[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] MCCARTHY, *supra* note 20, § 12:16.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] MCCARTHY, *supra* note 20, § 12:16.
[59] *Id.*
[60] *Id.*
[61] MCCARTHY, *supra* note 20, § 12:15.

a store, and asks how the respondent would ask for the product.[62] For example, the conductor would ask, "Are you familiar with the type of container that is used to keep liquids, like soup, coffee, tea and lemonade, hot or cold for a period of time?"[63] They would then ask what type of store they would find this product at and what they would ask the clerk.[64] In answering the last question, 75% of the some 3,000 persons interviewed said "Thermos," and 11% said "Vacuum Bottle."[65] The court said these results supported the conclusion that THERMOS had become a generic name to a majority of the public.[66]

The determination of genericness has also been studied and described in the relevance of search terms. If one were to use a search engine to find a specific brand, they would likely search the generic term for the product that the specific brand sells. For example, if one were searching the term, "coffee," the outcome of that search could reveal non-generic marks such as STARBUCKS or TIM HORTONS.[67] Because Google's search algorithm that determines listings is based on the frequency with which users click on the top search results, it is generally able to predict the online content that consumers associate with a search term.[68] Therefore, evidence to determine the genericness of a mark is whether the mark functions as a search term that leads to a search satisfied by other marks.[69]

III. GENERICIDE IN THE SPORTS WORLD

Trademarks relating to sports, including games, equipment, and workouts, have also seen cancellations based on genericness. The trend of sports marks becoming generic may be caused by the inability of a creator of a specific type of sport or exercise to describe it in a generic way.

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[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] Cameron Shackell, *Is Genericness Still Adequately Defined? Internet Search Firms and the Economic Rationale for Trademarks*, 48 SCI., TECH., & HUM. VALUES 582, 595 (2023).
[68] MCCARTHY, *supra* note 20, §12:13.
[69] Shackell, *supra* note 67.

A. PILATES DIES TO GENERICIDE

For instance, Pilates, Inc. once owned two trademarks, both for the word PILATES in standard characters.[70] One of the marks covered goods in Class 28, specifically, exercise equipment, namely reformers, exercise chairs, trapeze tables, resistance exercise units and spring actuated exercise units.[71] The other, a service mark, covered exercise instruction services in Class 41.[72]

The court analyzed five factors in determining whether PILATES was generic.[73] They were: (1) dictionary definitions; (2) generic use of the term by competitors and other persons in the trade; (3) plaintiff's own generic use; (4) generic use in the media; and (5) consumer surveys.[74]

For dictionary definitions, the court looked at a Random House Webster's College Dictionary for a definition of "pilates."[75] It read, "*Trademark*. a system of physical conditioning involving low-impact exercises and stretches, performed on special equipment. Also called *Pila'tes meth'od*."[76] Because the definition states that pilates is a method of exercise, the court found that this weighed in favor of genericness.[77]

As for the second factor, the court found that generic use by competitors which the trademark holder has not challenged strongly supports a finding of genericness.[78] There were multiple people across the United States who taught pilates classes in their own studios, many of whom were not connected to the creator of pilates.[79] Multiple witnesses testified and stated they have no way to describe what they teach other than by using the word "pilates."[80] The court found that this factor also weighed in favor of genericness.[81]

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[70] Pilates, Inc. v. Current Concepts, Inc., 120 F.Supp.2d 286, 289–90 (S.D.N.Y. 2000); PILATES, Registration No. 1,907,477; PILATES, Registration No. 1,405,304.

[71] PILATES, Registration No. 1,907,477.

[72] PILATES, Registration No. 1,405,304.

[73] *Pilates, Inc.*, 120 F.Supp.2d at 297.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 298.

[79] *Pilates, Inc.*, 120 F.Supp.2d at 298.

[80] *Id.*

[81] *Id.* at 299.

Plaintiff's own generic use also weighed in favor of a finding of genericness.[82] The creators of pilates did not make an effort to prevent others from using their mark. [83]

The fourth factor discusses media usage.[84] The court analyzed this factor in three sections: newspapers and magazines, books, and broadcast and internet evidence.[85] For newspapers and magazines, Current Concepts, Inc. ("Current Concepts") introduced 775 articles into evidence that mentioned the word "pilates."[86] Around 60 percent of these articles mentioned a source other than Pilates, Inc. for the pilates equipment, instruction, and facilities.[87] The court cited two books that discussed pilates without mentioning the source.[88] Current Concepts also introduced footage from talk shows and on the internet, in which pilates was described as a form of exercise, not a source identifier.[89] The court found that this factor weighed in favor of genericness.[90]

The court found that the fifth factor, survey evidence, was flawed; therefore, it could not be used to determine whether the mark was generic.[91] Current Concepts used a survey similar to the Thermos survey,[92] in which the conductor asked 273 people, over the phone, how they would describe pilates in other words.[93] Of the 273 people in the survey, 177 responded that "pilates" is the only word they use to describe the type of exercise.[94] When asked about pilates equipment, 145 people reported that they have heard of it.[95] Of those 145 people, 25 answered that it was manufactured by one company, 41 answered that it was manufactured by more than one company, and 79 answered "don't know or don't have an opinion."[96]

Pilates, Inc. introduced a survey in which the conductor asked participants if pilates, karate, yoga, "Crunch," and Feldenkreis could be used without having to obtain permission from any

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[82] *Id.* at 300.
[83] *Id.* at 299.
[84] *Id.* at 300.
[85] *Pilates, Inc.*, 120 F.Supp.2d at 300–02.
[86] *Id.* at 300.
[87] *Id.*
[88] *Id.* at 301.
[89] *Id.* at 302.
[90] *Id.*
[91] *Pilates, Inc.*, 120 F.Supp.2d at 304.
[92] MCCARTHY, *supra* note 20.
[93] *Pilates, Inc.*, 120 F.Supp.2d at 302.
[94] *Id.*
[95] *Id.*
[96] *Id.*

companies.[97] Among participants who were aware of each type of exercise, 17% responded that pilates may be used without authorization; 66% said the same about karate; 74% said the same about yoga; 42% said the same about Crunch; and 17% said the same about Feldenkrais.[98] The conductor of this survey concluded that the response regarding pilates indicated that the mark was not generic because it was well below 50%.[99]

The court found that both surveys were flawed because they only included participants belonging to a trade association of health professionals.[100] The court stated that this could be a sufficient universe because health professionals purchase pilates equipment and receive some training in it.[101] However, an ideal survey universe would include all potential purchasers of pilates equipment or exercise instruction services.[102]

The court also found that the survey Pilates, Inc. introduced was based on a faulty premise.[103] According to the conductor, the survey was supposed to answer the question of whether pilates is a method of exercise and apparatus that is available for anyone to use or if it's someone's proprietary property that cannot be used and promoted without obtaining authorization.[104] The court found that this is faulty because a method of exercise cannot be trademarked.[105]

Given the weight of the first four factors toward genericness, the court found that both the service mark and the equipment mark were generic.[106]

B. WILL CROSSFIT SURVIVE GENERICNESS CLAIMS?

A similar mark to Pilates is the registered trademark, CROSSFIT, which covers services in Class 41, specifically fitness training.[107] CROSSFIT became a registered trademark in 2005 and is currently owned by CrossFit, Inc.[108] CROSSFIT has yet to receive any cancellation filings on the basis of genericness,[109] which is

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[97] *Id.* at 303.
[98] *Id.*
[99] *Pilates, Inc.*, 120 F.Supp.2d at 303.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 303–04.
[105] *Pilates, Inc.*, 120 F.Supp.2d at 304.
[106] *Id.* at 306.
[107] CROSSFIT, Registration No. 3,007,458.
[108] *Id.*
[109] *Id.*

likely because of its policing and efforts to license its trademark to affiliate gyms.[110]

CrossFit, Inc. licenses its trademark out to those who open their own affiliate gyms.[111] This allows CrossFit, Inc. to maintain control of its trademark while expanding. To apply to open an affiliate gym, an individual must get an L1 certification and pay a $1000 application fee.[112] To continue working as an affiliate gym, the owner must pay a $4,500 annual affiliation fee.[113]

CrossFit, Inc. polices its trademark use and relies on its members and affiliate gym owners to report suspected infringement on its intellectual property rights.[114] CrossFit, Inc. has a reporting form on its website that allows individuals to report instances of intellectual property infringement.[115] It asks reporters to include "substantive evidence in the form of photographs, Internet links, advertisements, pictures of signage, Facebook content, etc." in order to pursue the claim.[116]

C. FRISBEE SETTLES GENERICIDE DISPUTE

Similar to the Pilates case, Wham-O Holding, Ltd. has faced cancellation proceedings for their trademark, FRISBEE, on the basis of genericness. The mark covers goods in Class 28, specifically "toy flying saucers for toss games."[117] The mark has been a registered trademark since 1959 and has most recently been the subject of a cancellation proceeding when Shenzhen Huayi Internet Tech Co., Ltd. filed a petition for cancellation with the USPTO in 2022.[118] The petitioner argued that "frisbee" is the most appropriate and common generic designation to identify flying saucers.[119] However, after entering into a settlement agreement,

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[110] *Open a CrossFit Gym*, CROSSFIT, https://www.crossfit.com/ [https://perma.cc/2QQP-KVRR].

[111] *Id.*

[112] *Affiliate Application Details*, CROSSFIT, https://www.crossfit.com/ [https://perma.cc/868Q-W82W].

[113] *Id.*

[114] *IP Theft Form*, CROSSFIT, https://www.crossfit.com/ [https://perma.cc/E3X8-EDG3].

[115] *Id.*

[116] *Id.*

[117] FRISBEE, Registration No. 679,186.

[118] Petition for Cancellation, Shenzhen Huayi Internet Tech Co., Ltd. v. Wham-O Holding, Ltd., No. 92080310 (T.T.A.B. 2022).

[119] *Id.*

Shenzhen Huayi Internet Tech Co., Ltd. withdrew its petition for cancellation with prejudice.[120]

D. PELOTON CLAIMS "SPINNING" IS GENERIC

Another sports-related mark that has been under fire for cancellation proceedings on the grounds of genericness is Mad Dogg Athletics, Inc.'s ("Mad Dogg") trademark, SPINNING.[121] Mad Dogg's mark covers services in Class 41.[122] Specifically, it covers, "providing training and instruction to others by simulating an outdoor bicycle workout completed indoors on a stationary bicycle."[123] Mad Dogg has owned a registration for SPINNING since 1993.[124]

Peloton began the petition by stating that SPINNING and SPIN are generic words and Mad Dogg should be barred from enforcing their improper trademark rights across the spinning industry.[125] Peloton stated that they have received baseless cease and desist letters and threats of expensive litigation from Mad Dogg's lawyers.[126] Peloton also argued that Mad Dogg's founder, John Baudhuin, has admitted to spending hundreds of thousands of dollars per year policing its trademarks.[127] Peloton argued that various factors, like the ones used in the Pilates case, weigh in favor of genericness.[128]

Peloton cited multiple dictionary definitions in support of their argument of genericness. The Wikipedia definition states that "spinning" is "a form of exercise with classes . . . and involves using a special stationary exercise bicycle with a weighted flywheel in a classroom setting."[129] They also cited the Urban Dictionary definition for "spin class," which defines it as "[a] group exercise in which participants ride stationary… bicycles at varying speeds… and resistance… settings."[130]

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[120] Joint Motion to Withdraw Petition for Cancellation, Shenzhen Huayi Internet Tech Co., Ltd. v. Wham-O Holding, Ltd., No. 92080310 (T.T.A.B. 2023).

[121] Petition for Cancellation, Peloton Interactive Inc. v. Mad Dogg Athletics, Inc., No. 92076471 (T.T.A.B. 2021).

[122] SPINNING, Registration No. 1,780,650.

[123] *Id.*

[124] *Id.*

[125] Petition for Cancellation at 1, Peloton Interactive Inc. v. Mad Dogg Athletics, Inc., No. 92076471 (T.T.A.B. 2021).

[126] *Id.*

[127] *Id.*

[128] *Id.* at 2–12.

[129] *Id.* at 6.

[130] *Id.*

For the factor regarding generic use of the term by competitors and other persons in the trade, Peloton argued that Mad Dogg demanded that Peloton remove a YouTube video using the phrase, "Mocha Spin Docs."[131] Peloton stated that "spin/spin classes" and "spinning/spin biking" are used by a wide range of companies like Peloton, SoulCycle, Flywheel, NordicTrack and others.[132]

Peloton described Mad Dogg's choice to use the terms "spinning" and "spin" as the brand name of its bikes as "unfortunate."[133] The company stated Mad Dogg doubled down on this poor decision by expending money to register the terms as trademarks.[134] Peloton also argued Mad Dogg has spent years bullying others from using the terms they have every right to use.[135] Mad Dogg's enforcement of its trademark rights likely weighs this factor against genericness.

As for generic use in the media, Peloton stated that "five minutes of simple Google searching reveal that everyone in the world—other than Mad Dogg—understands that 'spin' and 'spinning' are generic terms to describe a type of exercise bike and associated in-studio class."[136] Further, the company cited a 2015 article about Mad Dogg's trademarks in which the journalist wrote, "'Much like other types of workout classes, nobody sees spinning as a source identifier…Nobody thinks of Mad Dogg Athletics. Hell, most people haven't even heard of MDA…The term spinning is generic. It just is.'"[137] Peloton also mentioned various media outlets that have covered the topic of spinning, like the New York Times, Bloomberg, the Washington Post, the Wall Street Journal, Huffington Post, CNET, Teen Vogue, TIME Magazine, and various blogs.[138] These articles used titles like, "I Hate Spinning. Then I Spun," "Welcome to Spin Class: You Won't Last," and "Spinning with my Shrink."[139]

In Mad Dogg's answer to the petition for cancellation, it stated generic terms could be used instead of its trademarked

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[131] Petition for Cancellation at 2, Peloton Interactive Inc. v. Mad Dogg Athletics, Inc., No. 92076471 (T.T.A.B. 2021).

[132] *Id.*

[133] *Id.* at 5.

[134] *Id.*

[135] *Id.* at 6.

[136] *Id.* at 2.

[137] Petition for Cancellation at 2, Peloton Interactive Inc. v. Mad Dogg Athletics, Inc., No. 92076471 (T.T.A.B. 2021).

[138] *Id.* at 6–9.

[139] *Id.* at 6–7.

SPINNING.[140] Mad Dogg argued the types of bikes it refers to as SPINNING bikes are generically known as "indoor bikes," "stationary bikes," "exercise bikes," and "group cycles."[141] Mad Dogg also denied Peloton's argument that Peloton has a need for the phrase, "Peloton's spinning classes."[142] Mad Dogg states that instead, Peloton refers to its classes as "online streaming classes."[143]

In October of 2023, the two parties agreed that Peloton would withdraw its petition for cancellation without prejudice.[144] The document does not state their reasoning for this agreement or any details of a settlement.[145]

IV. THE PICKLE-BALL DISPUTE

Pickleball Kingdom Holdings LLC, Pickleball Kingdom Productions LLC, and Universal Tennis, LLC filed cancellation proceedings against the registered trademark, PICKLE-BALL, in August of 2024.[146] Pickleball Kingdom LLC and Pickleball Kingdom Productions LLC are subsidiaries of the same parent company, Pickleball Kingdom National, LLC, an Arizona limited liability company.[147] In its 752-page complaints, the company argued that by claiming exclusive rights in PICKLE-BALL, Respondent is preventing Petitioner and other competitors from using the common term that identifies their goods and services.[148] They also argued that PICKLE-BALL is generic because its significance to the public is in reference to a specific sport.[149]

Universal Tennis, LLC also filed a 373-page petition for cancellation against Pickleball Holdings in the beginning of August of 2024.[150] It included a chart with its cancellation filing that identified 21 other trademarks that have used the term "pickleball"

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[140] Respondent's Answer at 5, Peloton Interactive Inc. v. Mad Dogg Athletics, Inc., No. 92076471(T.T.A.B. 2021).

[141] *Id.*

[142] *Id.*

[143] *Id.* at 5–6.

[144] Stipulated Dismissal of Petitions for Cancellation at 1, Peloton Interactive Inc. v. Mad Dogg Athletics, Inc., No. 92076471 (T.T.A.B. 2023).

[145] *Id.*

[146] PICKLE-BALL, Registration No. 999,043.

[147] Pickleball Kingdom Holdings, LLC, Entity ID 23313872, ARIZ. CORP. COMM'N.

[148] Petition for Cancellation at 5, Pickleball Kingdom Holdings LLC v. Pickleball Holdings LLC, No. 92086064 (T.T.A.B. 2024).

[149] *Id.*

[150] Petition for Cancellation, Universal Tennis, LLC v. Pickleball Holdings LLC, No. 92085910 (T.T.A.B. 2024).

in reference to the goods and services that their mark covers.[151] These registered trademarks show the use of "pickleball" in both the trademarks themselves and the relevant goods/services:[152]

Word Mark	**Reg. No.**	**Relevant Goods/Services**	**Owner**
MONSTER PLANET	6777266	IC 028: Game apparatus, namely, bases, bats, and balls for playing pickleball.	CPassion Industrial Co., Ltd
NEVER STOP PLAYING	5219960	IC 028: Equipment for playing the sport of pickleball, namely, paddles, balls, grips, and nets.	Ferrari Importing Company
USA PICKLEBALL	5789997	IC 035: Association services, namely, promoting public awareness of pickleball for growth and development the sport.	USA Pickleball Association
PICKLEBALL INDUSTRY ASSOCIATION	5802647	IC 035: Association services, namely, promoting public awareness of pickleball for growth and development of the sport.	USA Pickleball Association
SMASH PARK	5868968	IC 043: Restaurant and bar services offered in promotion of or in conjunction with rental of pickleball and/or game rentals and equipment.	Smash Park IP, LLC

The company also included website screenshots indicating the public's generic use of the term "pickleball."[153] These screenshots included Google results when searching the term "pickleball,"[154] the

[151] *Id.* at 5–7.
[152] *Id.* at 5–6.
[153] *Id.* at 210.
[154] *Id.* at 210–18.

definition of "pickleball" on Google,[155] and the definition of "pickleball" on various dictionary websites including Britannica,[156] Wiktionary,[157] and Merriam-Webster.[158]

In its responses to the three cancellation claims, Pickleball Holdings asserted the doctrine of laches defense.[159] Defendants rely on laches to argue that the claimant waited an unreasonable amount of time to file their claim, and therefore, the court can deny them relief.[160]

In December of 2024, Universal Tennis, LLC withdrew its petition for cancellation without prejudice.[161] The company did not cite its reasons for doing so.[162] The two identical petitions for cancellation filed by the Pickleball Kingdom National, LLC subsidiaries were suspended, pending settlement negotiations.[163] These petitions have since both been cancelled with prejudice following a settlement agreement.[164]

Since the withdrawals of the first three cancellation proceedings against this mark, two other companies have attempted to take down PICKLE-BALL. In July of 2025, CSD Venture LTD filed a cancellation petition against Pickleball Holdings, alleging the mark was generic, Pickleball Holdings failed to enforce its rights over its trademark, and the public used the word "pickleball" in a generic

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[155] *Id.* at 219.

[156] Petition for Cancellation at 231–38, Universal Tennis, LLC v. Pickleball Holdings LLC, No. 92085910 (T.T.A.B. 2024).

[157] *Id.* at 227.

[158] *Id.* at 228–30.

[159] Respondent's Answer to Petition for Cancellation, Pickleball Kingdom Holdings LLC v. Pickleball Holdings LLC, No. 92086064 (T.T.A.B. 2024).

[160] *laches*, L. INFO. INST., (June 2023), https://www.law.cornell.edu/ [https://perma.cc/NSP2-CFTH].

[161] Consented Motion to Withdraw Cancellation Without Prejudice, Universal Tennis, LLC v. Pickleball Holdings LLC, No. 92085910 (T.T.A.B. 2024).

[162] *Id.*

[163] Motion to Suspend Granted, Pickleball Kingdom Productions, LLC v. Pickleball Holdings LLC, No. 92086075 (T.T.A.B. 2025); Motion to Suspend Granted, Pickleball Kingdom Holdings LLC v. Pickleball Holdings LLC, No. 92086064 (T.T.A.B. 2025).

[164] Withdrawal of Petition for Cancellation, Pickleball Kingdom Productions, LLC v. Pickleball Holdings LLC, No. 92086075 (T.T.A.B. 2025); Withdrawal of Petition for Cancellation, Pickleball Kingdom Holdings LLC v. Pickleball Holdings LLC, No. 92086064 (T.T.A.B. 2025).

way.[165] CSD Venture LTD filed a design trademark application for BROOKLYN PICKLEBALL CO. in May of 2025, and it alleges Pickleball Holdings' ownership of PICKLE-BALL is harmful to its brand.[166] Less than a month later, Professional Pickleball Partners, a Kansas limited liability company, filed a cancellation petition against PICKLE-BALL.[167] The 71-page claim alleges genericness and that Pickleball Holdings failed to police or enforce their exclusive rights to PICKLE-BALL.[168] These actions are currently awaiting a response from Pickleball Holdings.[169]

V. WILL PICKLE-BALL FALL VICTIM TO GENERICIDE?

Like in the Pilates case,[170] a court may turn to the five factors to determine whether PICKLE-BALL has become generic: (1) dictionary definitions; (2) generic use of the term by competitors and other persons in the trade; (3) plaintiff's own generic use; (4) generic use in the media; and (5) consumer surveys.[171]

A. DICTIONARY DEFINITIONS

Dictionary definitions can be relevant and persuasive in determining public usage.172 Dictionary definitions "usually reflect the public's perception of a word's meaning and its contemporary usage."173

In its petition for cancellation with the USPTO, Universal Tennis, LLC included a screenshot of the definition of "pickleball" that appears when you search the term on Google.174 The definition reads, "a game resembling tennis in which players use paddles to

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[165] Petition for Cancellation, CSD Ventures LTD v. Pickleball Holdings LLC, No. 92088875 (T.T.A.B. 2025).

[166] *Id.*

[167] Petition for Cancellation, Professional Pickleball Partners v. Pickleball Holdings LLC, No. 92089126 (T.T.A.B. 2025).

[168] *Id.* at 3–4.

[169] Petition for Cancellation, CSD Ventures LTD v. Pickleball Holdings LLC, No. 92088875 (T.T.A.B. 2025); Petition for Cancellation, Professional Pickleball Partners v. Pickleball Holdings LLC, No. 92089126 (T.T.A.B. 2025).

[170] *Pilates, Inc.*, 120 F.Supp.2d at 297.

[171] *Id.*

[172] MCCARTHY, *supra* note 20, § 12:13.

[173] *Id.*

[174] Petition for Cancellation at 219, Universal Tennis, LLC v. Pickleball Holdings LLC, No. 92085910 (T.T.A.B. 2024).

hit a perforated ball over a net."175 It also included the Merriam-Webster dictionary in its petition for cancellation.176 This definition reads, "an indoor or outdoor game that is played on a level court with short-handled paddles and a perforated plastic ball volleyed over a low net by two players or pairs of players."177 Although this petition has since been withdrawn, if the case does go to court, it is likely the plaintiff will introduce evidence about the dictionary definitions of "pickleball."

The dictionary definitions describe the mark as a sport or game, which implies that "pickleball" is the generic word the public uses when referring to the game. Therefore, this factor would likely favor genericness.

B. GENERIC USE OF THE TERM BY COMPETITORS AND OTHER PERSONS IN THE TRADE

Generic use by competitors is relevant only if the mark's owner has not contested it.[178] When competitors do not use the contested mark as a generic name, then courts consider that evidence of non-genericness.[179]

Universal Tennis, LLC cited 21 trademarks that either used the term, "pickleball" in the trademark itself or in the covered goods.[180] The Pickleball Kingdom petitions noted that the USPTO allowed 151 trademark applicants to register marks containing the word "pickleball."[181] Further, Pickleball Kingdom stated that of those 151 registered marks, 128 of them disclaim the word "pickleball" as unregistrable matter.[182] This is likely because competitors view the term as a generic word used to describe the particular sport, which cannot be trademarked. Pickleball Kingdom also stated that there is no indication that Pickleball Holdings objected to any of those filings.[183]

Beyond the marks that have successfully registered with the USPTO, Pickleball Kingdom also noted that "there are literally thousands of references to companies and products on the Internet

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[175] *Id.*
[176] *Id.* at 228.
[177] *Id.*
[178] MCCARTHY, *supra* note 20, § 12:13.
[179] *Id.*
[180] Petition for Cancellation at 5–7, Universal Tennis, LLC v. Pickleball Holdings LLC, No. 92085910 (T.T.A.B. 2024).
[181] Petition for Cancellation at 4, Pickleball Kingdom Holdings LLC v. Pickleball Holdings LLC, No. 92086064 (T.T.A.B. 2024).
[182] *Id.*
[183] *Id.*

and elsewhere using the term "pickleball" in a generic manner to refer to the sport rather than Respondent's products."[184]

Pickleball Holdings responded to these allegations in its November 2024 answer to the petition for cancellation by affirming that the Petitioner and numerous others in the industry use the term "pickleball" to refer to the sport.[185]

If a court finds that Pickleball Holdings did not object to the filings of the 151 registered marks with "pickleball" in them, it is likely that this factor would favor genericness. The evidence of the use of "pickleball" by competitors outside of USPTO filings also favors genericness.

C. PLAINTIFF'S OWN GENERIC USE

A plaintiff's use of their own mark in a generic way is strong evidence that the mark is generic.[186] Further, trademark owners should never use their trademark as a verb or a noun because it implies the word is generic.[187]

Pickleball Kingdom argues in both of its petitions that Pickleball Holdings uses "pickleball" in a generic way to refer to its own goods and services; however, the petitioner does not provide any examples of this usage.[188]

Universal Tennis stated in its petition that Pickleball Holdings uses the term, "pickleball" generically to identify its goods.[189] It also argues that respondent uses the term generically on its website.[190] Universal Tennis attached examples of this usage.[191] The company included a website screenshot Pickleball Holdings used as a specimen in its 2014 trademark renewal filing.[192] The screenshot shows the mark on paddles,[193] which was likely the intended focal point for the renewal filing to prove Pickleball Holdings was still using the mark in connection with the covered goods. Just below

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[184] *Id.*

[185] Respondent's Answer to Petition for Cancellation at 2, Pickleball Kingdom Holdings LLC v. Pickleball Holdings LLC, No. 92086064 (T.T.A.B. 2024).

[186] MCCARTHY, *supra* note 20, § 12:13.

[187] Ingram, *supra* note 6, at 160.

[188] Petition for Cancellation at 4, Pickleball Kingdom Holdings LLC v. Pickleball Holdings LLC, No. 92086064 (T.T.A.B. 2024).

[189] Petition for Cancellation at 6-7, Universal Tennis, LLC v. Pickleball Holdings LLC, No. 92085910 (T.T.A.B. 2024).

[190] *Id.* at 7.

[191] *Id.* at 355.

[192] *Id.*

[193] *Id.*

the photo of the paddles, there is a clickable button that would bring you to a post titled "What is Pickle-Ball?"[194] This is likely the generic use Universal Tennis was arguing.

D. GENERIC USE IN THE MEDIA

Generic usage of a term can be evidenced by use in online media such as mainstream news websites, newspapers and magazines.[195] This type of use is a "strong indication of the general public's perception" the term is a generic name.[196]

Neither Universal Tennis nor Pickleball Kingdom referenced specific instances of the use of "pickleball" in media. However, they both noted the term is used generically across the internet.

Searching the term "pickleball" on various news sites garners hundreds of results. The New York Times had over 300 results,[197] Vogue had 44 results,[198] and the Washington Post had over 800 results.[199] These numbers could indicate the media's perception of the term "pickleball" is a generic word used to describe the sport. A court could find this factor weighs in favor of genericness.

E. CONSUMER SURVEYS

As of now, neither side in the PICKLE-BALL dispute has submitted evidence gathered through consumer surveys. However, introducing results from consumer surveys into evidence could be beneficial for the court to determine the public's view on the term.

Pickleball Holdings did refer to the general public in its answer to Pickleball Kingdom's petition for cancellation. Specifically, Pickleball Holdings stated they expressly deny the relevant purchasing public understands the term primarily as the common or class name for the goods in the registration.[200]

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[194] *Id.*

[195] MCCARTHY, *supra* note 20, § 12:13.

[196] *Id.*

[197] Search Query for "Pickleball," N.Y. TIMES, https://www.nytimes.com/ [https://perma.cc/6PTN-4MUX] (last visited Sep. 23, 2025).

[198] Search Query for "Pickleball," VOGUE, https://www.vogue.com/ [https://perma.cc/R4JX-RRUA] (last visited Sep. 23, 2025).

[199] Search Query for "Pickleball," WASH. POST, https://www.washingtonpost.com/ [https://perma.cc/79CS-CUV6] (last visited Sep. 23, 2025).

[200] Respondent's Answer to Petition for Cancellation at 2, Pickleball Kingdom Productions, LLC v. Pickleball Holdings LLC, No. 92086064 (T.T.A.B. 2024).

VI. CONSEQUENCES OF GENERICIDE FOR PICKLE-BALL

If Pickleball Kingdom succeeds in proving the mark has become generic, Pickleball Holdings LLC will lose its exclusive right to use the mark. However, if the cancellation proceedings are dismissed, it would be in Pickleball Holdings' best interest to begin policing use of its mark on competitors' goods.

If the former becomes true and Pickleball Holdings loses its exclusive rights to use its mark, the company will have to look into a potential rebranding of its products. This way, it will be able to stand out in a saturated market of goods bearing a pickleball-adjacent mark. The company can continue to sell its products with the original PICKLE-BALL mark, but it will no longer have the power to prevent other companies from doing the same.

Most names become generic because the public is not given any other word to apply to an unfamiliar product.[201] This could wind up being the case for the PICKLE-BALL mark as there is no other word used to describe the game.

The case could end up in a settlement agreement between Pickleball Kingdom and Pickleball Holdings before it even goes to trial. This was the case with both the SPINNING/SPIN[202] and the FRISBEE[203] debates.

Another outcome not involving trial for the PICKLE-BALL case is Pickleball Holdings may lose its trademark due to a failure to file its required renewal in time. A renewal filing is required every 10 years after registration.[204] This filing includes a Declaration of Use proving the owner is still using the registered trademark in commerce for the covered goods or services.[205] After the initial deadline to file a renewal, there is an automatic six-month grace period in which the owner can still file a renewal by paying an extra fee.[206]

The PICKLE-BALL mark was due for renewal on November 26, 2024, but Pickleball Holdings failed to file a renewal before

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[201] MCCARTHY, *supra* note 20, § 12:9.

[202] Stipulated Dismissal of Petitions for Cancellation, Peloton Interactive Inc. v. Mad Dogg Athletics, Inc., No. 92076471 (T.T.A.B. 2023).

[203] Joint Motion to Withdraw Petition for Cancellation, Shenzhen Huayi Internet Tech Co., Ltd. v. Wham-O Holding, Ltd, No. 92080310 (T.T.A.B. 2023).

[204] *Keeping your registration alive*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/ [https://perma.cc/H2WZ-QZGF].

[205] *Id.*

[206] *Id.*

then.[207] Therefore, the mark entered the automatic six-month grace period.[208] Pickleball Holdings managed to file its renewal a week before the final deadline.[209] In the future, if it fails to file its renewal at each 10-year deadline, Pickleball Holdings will lose its exclusive right to use PICKLE-BALL, and its competitors can begin to freely use the mark without fear of infringement.

VII. COMBATTING GENERICIDE AND BEST PRACTICES

The International Trademark Association published a list of tactics companies can use to prevent their trademarks from becoming generic.[210] One action is using the trademark next to a generic term.[211] For instance, if the registered mark is ROLLERBLADE the company should advertise the product as "Rollerblade in-line skates" instead of just "Rollerblades."[212] This way, it is obvious the trademark is a specific brand of the generic product. If the generic term is confusing or too long, the company can instead use the trademark next to "brand."[213] One way in which marks often become generic is when the company starts using it as a verb. To prevent genericness, owners should refer to their products with the trademark and a generic name.[214]

Trademark owners should be proactive in policing use of their mark by competitors or media outlets.[215] Owners should hire a search vendor to monitor other companies using the registered mark to describe their own products.[216] It is also important to have a written explanation that can be sent to companies misusing the registered mark.[217] The Coca-Cola Company has been notably aggressive in defending its trademark.[218] The company hires people to visit restaurants known to not serve Coca-Cola products.[219] These employees order a Coke, and if no comment is made by the

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[207] PICKLE-BALL, Registration No. 999,043.
[208] *Id.*
[209] *Id.*
[210] Anna Kim, Elizabeth Pearce & Lora Graentzdoerffer, *Best Practices to Avoid Genericide*, INT'L TRADEMARK ASS'N (May 1, 2019), https://www.inta.org/ [https://perma.cc/DJW8-WSAQ].
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] Johansson, *supra* note 8.
[215] Ingram, *supra* note 6, at 161.
[216] Kim et al., *supra* note 210.
[217] *Id.*
[218] Ingram, *supra* note 6, at 161.
[219] *Id.*

establishment on the beverage, the employees send the same to Coca-Cola's labs to determine if the beverage is actually Coke.[220] If not, Coca-Cola asks the establishment to stop the deceptive practice.[221] If the practice continues, it takes legal action through a trademark infringement suit.[222]

The prevalence of genericide among sports trademarks is due to a number of reasons, some of which are out of the control of the trademark owners. Often, the public will refer to the product or service by the trademark instead of a generic name. The longer this happens, the less likely it is the public will be able to determine the source of the mark. This was the case with Pilates. The general public, as well as competitors, began using the trademark to describe or identify their own studios, classes, and equipment.

Sports-related trademarks are especially at risk of genericide because they are often used as nouns, referring to the sport or type of workout. CROSSFIT and PICKLE-BALL refer to a type of workout and a sport. The key difference, as of now, between these two trademarks is the owners of CROSSFIT actively take steps to prevent others from using their mark in a generic way.

[220] *Id.* at 162.
[221] *Id.*
[222] *Id.*

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FOUL OFF THE PLAY: TRANSPARENCY AS DETERRENCE FOR MORALITY CLAUSE VIOLATIONS IN PROFESSIONAL SPORTS

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CONTENTS

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INTRODUCTION

Even for those uninitiated into the history of the National Basketball Association ("NBA"), the Malice at the Palace is one of the most infamous sporting events of all time. Early in the 2004-2005 NBA season, simmering tensions between the Indiana Pacers and Detroit Pistons stemming from the previous season exploded into violence at the Detroit arena, the Palace of Auburn Hills. With only seconds left in their first faceoff of the season, Pacers forward Ron Artest and Pistons center Ben Wallace initiated an on-court altercation.[1] As the referees laid down penalties on both players for their actions, a fan threw a beverage that hit Artest, who subsequently rushed the stands and began attacking a different spectator.[2] Three more Pacers players entered the melee and some exchanged blows with fans in the stands or on the court.[3] All four players were suspended for anywhere from five games (guard Anthony Johnson, who did not throw any punches) to the remainder of the season (Artest). All punishments were laid down by NBA Commissioner David Stern.[4]

In response, the NBA Players Association ("NBPA") filed a grievance claiming the Commissioner did not have the authority to lay down such suspensions and that a Grievance Arbitrator should have determined the punishments.[5] They argued the Commissioner only had the ability to punish "on-the-court" conduct, not a fight that occurred in the stands and away from the game.[6] The court found the Grievance Arbitrator had the right to make determinations about at least one player's conduct, as it was considered outside the scope of "on-the-court" conduct.[7]

Since that decision, the four major American men's sports leagues have rewritten their player conduct policies countless times, ensuring off-court player conduct can be punished as severely as on-court conduct. Athlete contracts include morality clauses that govern the acceptable social behavior of members of their sport, and leagues and teams lay down rules that every employee must follow. While individual morality clauses are built into individual contracts

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[1] Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n, No. 04 Civ. 9528, 2005 WL 22869, at *1 (S.D.N.Y. 2005).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.* at 2–3.

[6] *Id.* at 3.

[7] Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n, 2005 WL 22869, at *11.

and can include provisions relating to a specific athlete, codes of conduct are basic standards set for the entire league. Punishments attach to either type of violation, including fines, suspensions, and even contract termination or expulsion from the league. However, clarity behind these violations and the process of laying down punishment is often obscured to the public.

Has implementing these rules and policies successfully deterred bad conduct? The NBA's personal conduct policy in the league's Constitution did not stop the actions of the Pacers players. But theirs is an extreme case—Artest was physically struck by a fan, and the players started a fight with eyes (and cameras) everywhere. They knew the world would see their actions, but their fury overcame any fear of judgment. Off-court bad conduct typically happens away from the spotlight of the playing surface. Investigations into off-court incidents are often conducted behind closed doors with minimal information released to the public.

Whether these policies are successful in curbing bad conduct, leagues can deter such actions through two avenues: higher standards of punishment and transparency with the public. This note will first explain the use of morality clauses and conduct policies, followed by case studies of personal conduct violations, including major American men's sports leagues and the National Women's Soccer League ("NWSL"). Finally, it will examine the standard of punishment laid down, the use—or lack—of transparency, and the ways in which higher minimum punishments combined with transparency could deter such conduct from happening again.

I. LEGAL BACKGROUND

A. MORALITY CLAUSES, VIOLATIONS, AND PUNISHMENTS

The National Labor Relations Act enabled unions to be the exclusive representatives of employees for collective bargaining issues.[8] Employees may select representatives through a majority vote and those representatives shall negotiate "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."[9] In the context of sports, contract requirements and "other conditions of employment" would include anything in the league rules, such as codes of conduct, or any specified requirements of an individual's contract that could affect their pay.

[8] National Labor Relations Act, 29 U.S.C. § 159(a).
[9] *Id.*

Through this section, professional athletes could unionize.[10] The subsequently formed players associations ("PAs") for the four major men's sports leagues have similar mission statements, such as to "advocate[ ] on behalf of the best interest of all…players"[11] or to "allow[ ] players to stand together to protect their health, rights, and families."[12] They negotiate with the leagues to create standards under collective bargaining agreements, which govern the rules for players to follow.[13]

Among the negotiated standards are the provisions of player contracts called morality clauses, which vary in scope. At the league level, they are considered codes of conduct—rules that apply to all teams and all players. At the team level, an organization can implement provisions that their players must follow. For example, the New York Yankees have a well-known "no beard" policy that all players and coaches must follow to maintain a certain team standard.[14] Finally, individual contracts can include morality clauses regarding a player's behavior. Babe Ruth's 1922 contract with the Yankees required him to "abstain entirely from the use of intoxicating liquors and…not during the training and playing season in each year stay up later than 1 o'clock A.M."[15]

These personal conduct policies should not be confused with the rules of the game. Many sports have gametime violations that fall under "conduct" such as unsportsmanlike conduct penalties in the NFL, which often stem from taunting, excessively foul

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[10] *Overview & History*, NAT'L BASKETBALL PLAYERS ASS'N, https://nbpa.com/ [https://perma.cc/5K82-64F6] (NBPA forming in 1954); *1956: The Beginning*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, https://nflpa.com/ [https://perma.cc/83QF-Y9RA] (NFLPA forming in 1956); *History*, MAJOR LEAGUE BASEBALL PLAYERS ASS'N, https://www.mlbplayers.com/ [https://perma.cc/Q33F-W3MH] (MLBPA forming in 1965); *Frequently Asked Questions*, NAT'L HOCKEY PLAYERS ASS'N, https://www.nhlpa.com/ [https://perma.cc/AKP9-PBRH] (NHLPA forming in 1967).

[11] *Overview & History*, *supra* note 10.

[12] *How the NFLPA Works*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, https://nflpa.com/ [https://perma.cc/2A5G-DAU4].

[13] *Id.*

[14] Bryan Murphy, *Yankees hair policy, explained: Why New York players aren't allowed to sport beards, long hair*, THE SPORTING NEWS (Dec. 7, 2023, at 18:02), https://www.sportingnews.com/ [https://perma.cc/2UG9-X4GZ].

[15] *Lot #19090*, HERITAGE AUCTIONS (May 5, 2007), https://sports.ha.com/ [https://perma.cc/7F6G-6VNA].

language, or fighting during a game.[16] The latter two actions can also be violations of the off-court[17] personal conduct policy, such as a player using foul language toward a fan after a game or fighting with a teammate in the locker room. Here, the key is *when* the "conduct" occurs. On-court, athletes are governed by the rules of the game. Off-court, they are governed by contracts and the justice system.

The highest levels of morality clause violations are those that unquestionably break the law. These cases tend to be the clearest cut, with leagues having few, if any, decisions to make aside from suspending or expelling the player. Vehicular manslaughter, wire fraud conspiracy, and unauthorized access of a protected computer are all examples of criminal charges levied against major sports teams' players and staff members in the past decade. These punishments derived from the court system; therefore, they were public record. While the timeline of a trial and sentencing can be lengthy, leagues often have little to do with the decisions once the individual has been suspended or terminated from the league. Fans can access the crime and punishment through news sources, court records, and police reports as applicable.

Beneath violations handled by the justice system, are those created by leagues and teams. These are not necessarily criminal violations, but rather violations of league- or team-mandated policies.[18] The scope is broad and involves violations of any provisions in the league's code of conduct. These standards apply to all players, coaches, and staff members. They can vary from inappropriate statements to assault and abuse. Additionally, team-specific violations and punishments can take place. These violations tend to occur when an individual causes issues within the team and staff. This includes conflicts between and among players or coaching staff and violations of human resources standards within the team office. Finally, the most minor violations often involve non-criminal, potentially ambiguous situations that are not always directly defined by leagues or contracts. These can include instances of inappropriate language toward fans, outspoken political stances, or medical beliefs.

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[16] NFL Video Rulebook, *Non-Football Act Fouls*, NFL FOOTBALL OPERATIONS, https://operations.nfl.com/ [https://perma.cc/9HNW-C3GB].

[17] Note that "court" will be used in this note for purposes of consistency, but refers to any playing surface, including field, green, and ice.

[18] As will be shown throughout this note, some league and team codes of conduct include violations that are also crimes within the legal system.

When a player has committed or been accused of an action that could be a violation of a conduct policy, the league will typically launch an investigation into the matter.[19] Investigations that involve law enforcement are conducted separately.[20] These investigations can involve multiple witnesses, including teammates and the accused player.[21]

After the investigation, the appropriate party—usually the Commissioner's office or third-party arbitrator—will decide the player's status and appropriate punishment. Upon completion, the league will provide the player a report of the investigation and the specific violation they committed.[22] When determining the level of punishment, the league considers aggravating and mitigating factors, such as the athlete's prior history of violations.[23] In the NFL, certain actions, such as criminal assault or battery, domestic violence, child abuse, and sexual assault involving physical force all carry a minimum punishment of a six-game suspension.[24] Other leagues, such as Major League Baseball ("MLB"), have separate policies for domestic violence, sexual assault, and child abuse, but do not maintain a minimum punishment standard.[25]

Notably, the NFL personal conduct policy specifically states that in criminal investigations, a player that is not criminally charged or convicted may still be in violation of league policy and can be punished.[26] This is where transparency comes into play. No league requires any form of disclosure to the public about the results of an investigation. As a result, many fans may not realize the league is investigating at all, especially if the athlete has been cleared of wrongdoing by law enforcement. Leagues have yet to find a way to reconcile the standards of proof: how do you show the public that an acquittal at the criminal level can still provide enough evidence

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[19] *Personal Conduct Policy: League Policies for Players,* NFL (2022), https://nflpaweb.blob.core.windows.net/ [https://perma.cc/T7N7-TH4G]. A full comparison of all league personal conduct policies would be excessive. Many of the policies are similar and, as such, this article will rely on the NFL personal conduct policy for citations.

[20] *Id.*

[21] *Id.* at 3.

[22] *Id.* at 4.

[23] *Id.* at 5.

[24] *Id.*

[25] *Joint Domestic Violence, Sexual Assault and Child Abuse Policy*, MLB (effective Dec. 1, 2016), https://www.mlb.com/ [https://perma.cc/9HFB-LTX9].

[26] *Personal Conduct Policy: League Policies for Players*, *supra* note 19, at 1.

for punishment at the league level?[27] To avoid such a situation, leagues are incentivized to reduce bad conduct through various methods of deterrence.

B. FUNCTIONS OF MORALITY CLAUSES

Morality clauses function to deter bad actions.[28] In the sports context, this is the use of punishment standards for certain violations of the personal conduct policy or contractual morality clauses. The goal of such punishments is to prevent recidivism, the act of reoffending despite having been punished.[29] If the league thought punishment would not prevent a player from committing the same bad act again, the punishment would never be implemented because it ultimately harms the player's team and the league as a whole.

In most instances of off-court misconduct, players receive punishments in the form of suspensions or fines, both of which directly impact their salary and bonus eligibility.[30] An athlete on suspension for a violation does not receive their salary for the games missed. Depending on the league, a suspension may or may not be particularly impactful on the athlete. On the harsher end of the spectrum, NFL players only play 17 games during the regular season, so even a one-game suspension can decrease their yearly salary by 6 percent. On the lengthy end, MLB players tackle 162 games in their regular season, so only the longest suspension in the 2024 season (ten games for on-field conduct) would equal 6 percent of the player's salary.[31] Regardless of the league, such punishments

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[27] While the appeals process will not be part of this study, it should be noted players do have the ability to appeal their punishments. The appeals process varies by league, but most players initiate appeals through their respective PA. Coaches, general managers, owners, and other staff do not have an appeals process through a PA and must accept the punishment laid down by the office or go through the court system for recourse. *See Id*. at 5.

[28] *See Five Things About Deterrence*, NAT'L INST. JUST. (June 5, 2016), https://nij.ojp.gov/ [https://perma.cc/9XFW-R7HL].

[29] PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 7 (The Pew Charitable Trusts, 2011) (noting that recidivism is typically used in the criminal context).

[30] *Personal Conduct Policy: League Policies for Players*, *supra* note 19, at 4 ("[D]iscipline may be a fine, a suspension for a fixed or an indefinite period of time, a combination of the two, or banishment from the league with an opportunity to reapply.").

[31] *2024 MLB Fines and Suspensions*, SPOTRAC, https://www.spotrac.com/ [https://perma.cc/AZ55-PYNT].

can lower players' likelihood of obtaining sponsorship deals or jeopardize already existing deals.

In the NFL, a six-game punishment is heavy in a season of only 17games. Other leagues have no minimum standard, but MLB has suspended players for at least 20 games for domestic violence policy violations, and the NBA suspended a player as recently as 2023 for ten games for domestic violence.[32] The NFL adds further deterrence to its policy with escalated punishments for subsequent violations of the same kind. A second violation of the provisions detailed above (criminal assault or battery, domestic violence, sexual assault involving physical force, and the like) results in permanent banishment from the NFL with the ability to petition for reinstatement after one year.[33]

While the standard for fines as punishments in the NFL is currently unclear, the league donates collected fines to the Professional Athletes Foundation and the NFL Foundation, contributing approximately $4 million per year.[34] Divided amongst the number of players in the league—1,696 players, or a 53-man roster for each of the 32 NFL teams—the fines average out to $2,358 per player, a tiny amount for a league with a minimum salary of $795,000.[35] In 2024 alone, the NBA handed out $7 million in fines but only five fines were for off-court violations.[36] New Orleans Pelican Zion Williamson led the way with a $253,280 loss of salary for his one-game suspension for off-court conduct, about 1% of his approximate yearly salary.[37] MLB and NHL players were not penalized with any individual personal conduct fines this year—the only money lost came from games suspended or fines for on-

[32] Mark Bowman, *Ozuna receives retroactive suspension*, MLB (Nov. 29, 2021), https://www.mlb.com/ [https://perma.cc/PN54-ST85] (MLB season is 162 games); Steve Reed, *Hornets' Miles Bridges set to return after serving 10-game suspension*, NBA (Nov. 16, 2023, at 11:59 MST), https://www.nba.com/ [https://perma.cc/ADT6-R6TG] (NBA season is 82 games).

[33] *Personal Conduct Policy: League Policies for Players*, *supra* note 19, at 5.

[34] *Accountability: Fines & Appeals*, NFL FOOTBALL OPERATIONS, https://operations.nfl.com/ [https://perma.cc/8352-VVW8].

[35] *Minimum Salaries*, OVER THE CAP, https://overthecap.com/ [https://perma.cc/BC56-92S9].

[36] *2024 NBA Fines and Suspensions*, SPOTRAC, https://www.spotrac.com/ [https://perma.cc/RC5H-T336].

[37] *Id.*

field/ice actions.[38] These minimum fines are paltry when compared to the enormous amounts of money big-name players earn.[39]

For leagues and teams, using these types of punishments as deterrence protects their bottom lines. A player who does not feel the threat of punishment may not feel restricted to acceptable norms. Players receive thousands or millions of dollars in contracts, and organizations want to ensure those athletes do not commit bad acts that could result in injury to themselves or in criminal punishment that would keep them away from their sport.

Deterrence is usually conceptualized in two ways—increased certainty of punishment and increased severity of punishment.[40] Here, increased certainty is the implementation of minimum standards of punishment for all violations—if you get caught, you will be punished. On the other hand, increased severity without increased certainty would create heavier punishments but would not guarantee an athlete would have to serve such punishments, even if they were caught doing a bad act.

While suspensions and fines are the most used methods of deterrence in sports, athletes can be effectively deterred through social stigma that arises when their violations become known to the public. Compliance with rules can come from "normative social influence," or the idea that "people obey the law because they fear the disapproval of their social group if they violate the law."[41] In the case of an athlete or coach, their social sphere can include fellow players and staff members, league officials, sponsors, and fans. The opinion of those groups can directly impact the individual's successes within their sport—they have to work with their teammates and staff members, they want to keep league officials pleased with their work, they want to continue receiving money and contracts from sponsors, and they want fans to pay to see them play

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[38] *MLB Fines and Suspensions*, *supra* note 31; *2024 NHL Fines and Suspensions*, SPOTRAC, https://www.spotrac.com/ [https://perma.cc/B6Z3-ELC9].

[39] *See* Disheeta Maheshwari, *What Did LaMelo Ball Say? $100,000 Fine Explained*, COMINGSOON.NET (Nov. 18, 2024), https://www.comingsoon.net/ [https://perma.cc/LJ4Z-VMDP]; *LaMelo Ball*, SPOTRAC, https://www.spotrac.com/ [https://perma.cc/PT7B-GJS2] (illustrating that Ball's $100,000 fine for using a homophobic slur during a press conference was only 0.2% of his yearly salary).

[40] *See* Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 304 (1991).

[41] Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. UNIV. L. REV. 453, 468 (1997).

so they can earn more money. In the same way the increased threat of incarceration can reduce crime, a high normative social influence can reduce bad actions by the people who might commit them.[42] One way of using normative social influence to deter those bad actions is through transparency about the conduct that occurred.

C. TRANSPARENCY AS A FORM OF DETERRENCE

Transparency can directly contribute to deterrence by affecting normative social influence through exposure of decision-making processes.[43] It is a mode of protecting the public from being misled, while also ensuring that those doing the sentencing are not acting only in their own best interests.[44] Transparency allows the public to know about bad actions, which can invite public scrutiny.[45]

Similarly, in the criminal context, a report of a perpetrator's bad actions can be public record and—for particularly uncommon or heinous crimes—circulated in the media. The possibility of an individual's name being publicized alongside their wrongdoing may be enough for some people to refrain from committing the wrong. In this way, transparency is used as a method of deterrence.

If the results of an investigation were guaranteed to be released to the public on top of the punishment already laid out, the individual might be further deterred by this public transparency out of fear of negative publicity. The stain on their character could be permanent in a way that a fine or suspension may not. Additionally, transparency reflects upon the investigating party, as the public can scrutinize them for their actions throughout the investigation. Transparency therefore serves as a method of regulation for both the actors and the investigators.

While transparency can inherently exist for certain types of public, criminal actions committed by athletes, leagues have no obligation to release the reports of bad actions by their members. Athletes can violate morality clauses over and over and yet they may never receive public condemnation for what they did unless it is leaked to the public by the media or league insiders. This shielding effect ignores the usefulness of transparency in deterring the athlete even before they commit their first violation.

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[42] *Id.* at 468–69.

[43] *Detecting and Investigating Corruption*, U.N. OFF. ON DRUGS & CRIME, https://www.unodc.org/ [https://perma.cc/658J-DTKC].

[44] Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 917 (June 2006).

[45] *Detecting and Investigating Corruption*, *supra* note 43.

II. CASE STUDIES

There are three main types of transparency in the aftermath of an incident that requires investigation. First, there is transparency from the legal system or public when an athlete commits certain extreme actions that are unambiguous in their criminality. Second, transparency can come from teams or leagues in the aftermath of an investigation. Finally, and perhaps most commonly, there are instances of lack of transparency. Within this category, there are two main problems: unclear rules and punishments being imposed despite the athlete being cleared by the legal system. The following case studies will examine each of these violations of morality clauses and the subsequent punishments and methods of transparency—or lack thereof—in the wake of those violations.

A. HENRY RUGGS III, EX-WIDE RECEIVER, LAS VEGAS RAIDERS: TRANSPARENCY FROM THE LEGAL SYSTEM

On November 2, 2021, Henry Ruggs III, a wide receiver for the Las Vegas Raiders, hit another vehicle in a residential area, killing a young woman and her dog.[46] Ruggs was traveling at 127 miles per hour when the collision occurred, and his blood-alcohol level was 0.16percent, twice the legal limit.[47] He pled guilty to felony driving under the influence ("DUI") causing death.[48] He will serve three to ten years in state prison.[49]

The Raiders released Ruggs from the team while he was still in the hospital recovering from the crash.[50] While driving under the influence is not directly stated on the personal conduct policy, the prohibitions of "conduct that poses a genuine danger to the safety and well-being of another person" and "conduct that undermines or puts at risk the integrity of the NFL, NFL clubs, or NFL personnel" are included as a catch-all.[51] Ruggs's felony charge could fall under

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[46] Ken Ritter, *Ex-Raider Henry Ruggs pleads guilty to driving drunk at 156 mph, causing fatal crash*, AP NEWS (May 10, 2023, at 19:53 MST), https://apnews.com/ [https://perma.cc/9E57-MXX3].

[47] *Id.*

[48] *Id.*

[49] Zac Al-Khateeb, *Henry Ruggs III prison sentence: What to know about jail term for former Raiders receiver in fatal DUI crash*, THE SPORTING NEWS (Aug. 9, 2023, at 09:49 MST), https://www.sportingnews.com/ [https://perma.cc/82SJ-CU93].

[50] Ritter, *supra* note 46.

[51] *Personal Conduct Policy: League Policies for Players*, *supra* note 19, at 2.

both prohibitions, though the criminal nature of the charge did not require the NFL or the Raiders to make a determination of conduct through a league-sponsored investigation.

In this case, the league did not appear to conduct any investigations because law enforcement handled the aftermath of the crash. A few hours after the crash, a league spokesman stated they were gathering facts and monitoring the matter.[52] Eight hours later, the Raiders announced that they had released Ruggs.[53] Upon a player's release, the league can complete further investigation if the player files an appeal about the league's or team's decision.[54] In this case, because Ruggs pled guilty in court, the league and the Raiders did not have to do further investigation before releasing him.

Ruggs began serving his sentence at a minimum-security prison in Carson City, Nevada in September 2023.[55] The NFL and the Raiders have made no further statements about Ruggs or his tenure in the NFL since his release from the team.

The league did not release an investigative report or additional information that the police and public did not already have. The situation was immediately reported by sports writers and local news outlets in Las Vegas. The public reacted swiftly, with comments ranging from sympathy for the victim's family, condemnation of reckless driving, and promotion of educational opportunities for the Raiders organization through the non-profit Mothers Against Drunk Driving.[56] This is an example of a transparent situation in which the league did not have to do any extra work to notify the public of Ruggs's actions because they were already known through the criminal justice system and its investigation.

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[52] Tom Pelissero (@TomPelissero), X (Nov. 2, 2021, at 12:02 CST), https://x.com/ [https://perma.cc/4XME-H3TY].

[53] Las Vegas Raiders (@Raiders), X (Nov. 2, 2021, at 20:50 MST), https://x.com/ [https://perma.cc/K9AJ-LMH8].

[54] Sprewell v. Golden State Warriors, 266 F.3d 979 (9th Cir. 2001). The Golden State Warriors terminated Latrell Sprewell's contract and the NBA suspended him for one year after a physical altercation with his coach during practice. Sprewell appealed the decision, leading to a third-party investigation into the matter and an ultimate decision.

[55] David Charns, *Ex-Las Vegas Raider Henry Ruggs making $2.50 an hour at Nevada prison camp*, 8NEWSNOW (updated Jan. 31, 2024, at 11:51 PST), https://www.8newsnow.com/ [https://perma.cc/K3CZ-9B7K].

[56] Jen Cardone, *Former teammates, community react to Crimson Tide alum Henry Ruggs III DUI crash*, CBS 42 (updated Nov. 4, 2021, at 08:23 CDT), https://www.cbs42.com/ [https://perma.cc/9LRM-5AGM].

B. MULTIPLE COACHES AND TEAM PERSONNEL, NWSL: TRANSPARENCY FROM THE LEAGUE

In 2023, the NWSL permanently banned four coaches and punished eight other employees after a league investigation uncovered "widespread, systemic misconduct and abuse."[57] The investigation found instances of sexual misconduct, verbal and emotional abuse, racism, and sexist remarks.[58]

Starting in 2021, former NWSL players requested an investigation into then-North Carolina Courage Head Coach Paul Riley, alleging sexual misconduct they had reported to the league in years past.[59] That year alone, general managers or head coaches from six clubs were fired or resigned from their positions due to various types of misconduct.[60] After the public revelation of Riley's actions, the league launched an independent investigation into league-wide abuse through firm Covington & Burling LLP, while the NWSLPA hired firm Weil, Gotshal & Manges LLP to conduct a concurrent independent investigation.[61] The 128-page joint investigation "found that the underlying culture of the NWSL created fertile ground for misconduct to go unreported," forcing players to accept the abuse in exchange for their ability to be professional athletes.[62]

The investigation found Riley coerced one of his former players into having sexual intercourse on several occasions.[63] He also made inappropriate sexual comments toward other players, exposed himself to players in only his underwear, and attempted to persuade at least two other players to have sexual intercourse with him.[64] His other inappropriate actions included comments on players' sexual orientation, non-play-related weight, and injuries.[65] The Courage

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[57] Kaitlyn Radde, *4 former NWSL coaches are banned permanently following an abuse investigation*, NPR (Jan. 10, 2023, at 11:44 ET), https://www.npr.org/ [https://perma.cc/8NB2-FJG4].

[58] *Id.*

[59] Covington & Weil, Report of the NWSL and NWSLPA Joint Investigative Team 3 (2022).

[60] *Id.* at 1.

[61] *Id.*

[62] *Id.* at 2.

[63] *Id.* at 26.

[64] *Id.* at 100–01.

[65] Covington & Weil, *supra* note 59, at 101.

fired Riley in September 2021 amid the allegations.[66] Riley was banned from NWSL as a result of the investigation.[67]

Rory Dames, former head coach of the Chicago Red Stars, intentionally targeted certain players with harsh treatment and punishments.[68] His racist comments included telling a Black player she was a "thug," and his inappropriate conduct indicated he found certain players physically attractive.[69] His open favoritism with certain players caused issues within the team and his continuous contact with his players, even at late hours of the night, was seen as inappropriate.[70] Dames also engaged in retaliation, like when he communicated that he was waiving a player because she had raised a complaint against him.[71] Dames offered to resign after complaints arose, but the team owner declined to accept the resignation or to discipline the coach.[72] Dames instead resigned in November 2021, one day before a report of his abuse became public.[73] After the team conducted an investigation, he was banned from NWSL.[74]

Christy Holly, former head coach of Racing Louisville, repeatedly sexually assaulted and harassed one player, including touching her genitals and sending her nude pictures of himself without consent.[75] He made inappropriate sexual comments to other players and retaliated against those who resisted his advances, including demoting a starting player to the reserve squad when she raised a complaint to club leadership.[76] Racing Louisville fired Holly "for cause" on August 31, 2021.[77] Holly was banned from NWSL as a result of the investigation.[78]

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[66] *North Carolina Courage fire coach Paul Riley amid 'serious allegations of misconduct'*, ESPN (Sep. 30, 2021, at 16:23 ET), https://www.espn.com/ [https://perma.cc/LKP6-83PP].

[67] NWSL Editor, *Statement Regarding Corrective Action*, NWSL Soccer (Jan. 9, 2023), https://www.nwslsoccer.com/ [https://perma.cc/UF2E-GBZQ].

[68] Covington & Weil, *supra* note 59, at 101.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 102.

[72] Clare Brennan, *NWSL INVESTIGATION: RED STARS OWNER DISMISSED RORY DAMES COMPLAINTS*, JUST WOMEN'S SPORTS (Oct. 3, 2022), https://justwomenssports.com/ [https://perma.cc/6M2A-88FF].

[73] *Id.*

[74] NWSL Editor, *supra* note 67.

[75] COVINGTON & WEIL, *supra* note 59, at 102.

[76] *Id.*

[77] Racing Louisville FC (@RacingLouFC), X (Aug. 31, 2021, at 18:50), https://x.com/ [https://perma.cc/V36Q-YAU6].

[78] NWSL Editor, *supra* note 67.

Another head coach and a general manager were suspended until at least 2025. Their future capacity with NWSL is conditional on their acknowledgement of wrongdoing and efforts to correct their behavior.[79] The jobs of six other team personnel were made conditional on such acknowledgement of wrongdoing and corrective efforts as well.[80] Finally, six teams were fined between $50,000 and $1.5 million.[81]

The investigation found major gaps in the league policies that enabled the coaches and other personnel to consistently abuse players with no formal investigations conducted or punishments imposed.[82] The report listed recommendations to prevent such abuse in the future, including a revision to the anti-harassment policy, an addition of a non-fraternization policy, and a revision of Club policies to be consistent with the NWSL anti-harassment policy.[83] The current NWSL website includes an anti-harassment policy, non-fraternization policy, and separate coach code of conduct.[84]

Covington and Weil released the report in December 2022, revealing all the minute details of the investigation, outside of showing the entire transcript of the interviews and evidence gathered, including a link to the report on their firm websites.[85] The unusual act of publicly releasing such a report may have been part of the effort to be transparent with the league, fans, and players about the discipline imposed upon various parties. The NWSL took tremendous steps to admit wrongdoing and followed up with actions to correct the harm done.

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[79] *Id.*

[80] *Id.*

[81] *Id.* A further team, the Washington Spirit, forced the owner Steve Baldwin to sell the club. Because of the change in ownership and staff as a result of the sale, no further fines were imposed.

[82] COVINGTON & WEIL, *supra* note 59, at 12.

[83] *Id.* at 112.

[84] *NWSL RULES AND POLICIES*, NWSL, https://www.nwslsoccer.com/ [https://perma.cc/2FXB-ERTY].

[85] *Report of the NWSL and NWSLPA Joint Investigative Team Released*, COVINGTON (Dec. 14, 2022), https://www.cov.com/ [https://perma.cc/YY4M-KYYM].

C. SHANE PINTO, CENTER, OTTAWA SENATORS: LACK OF TRANSPARENCY ABOUT RULES

In October 2023, the NHL announced that Ottawa Senators center Shane Pinto violated league rules about sports wagering.[86] He received a forty-one game (half-season) suspension.[87] The Senators made a statement that they were aware of the league's investigation into Pinto's conduct and that they supported the league's rules on gambling.[88] Pinto apologized for his actions and took responsibility but made no further comment about what actions he took that violated league policy.[89]

The NHL collective bargaining agreement simply states that "gambling on any NHL Game is prohibited."[90] There are no further prohibitions on gambling listed in the agreement. However, the NHL's statement was clear: "The League's investigation found no evidence that Pinto made any wagers on NHL games."[91]

This left plenty of questions about the violation, as Pinto's actions clearly did not involve NHL games, yet the league punished him harshly. Following Pinto's suspension, the league shared information about permissible gambling conduct while also warning players against joking about odds or sharing gambling accounts with others.[92]

Despite the secrecy about the investigation, Pinto appeared on Empty Netters, a hockey podcast, on July 17, 2024 and stated that he engaged in proxy betting in the United States while he was playing in Canada for the Senators.[93] Proxy betting is the act of

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[86] NHL Public Relations, *NHL suspends Pinto 41 games for violating League's sports wagering rules*, NHL (Oct. 26, 2023), https://www.nhl.com/ [https://perma.cc/G6X2-BGCE].

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] National Hockey League and National Hockey League Players' Association, *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association* (2012), Exhibit 14 at 342, https://www.nhlpa.com/ [https://perma.cc/XG9E-T8XW] [hereinafter *Collective Bargaining Agreement*].

[91] NHL Public Relations, *supra* note 86.

[92] Stephen Whyno, *Shane Pinto's half-season suspension from the NHL shines a light on gambling education in hockey*, ASSOCIATED PRESS (updated Dec. 1, 2023, at 04:00 MST), https://apnews.com/ [https://perma.cc/R6LP-U7P2].

[93] EMPTY NETTERS, *Shane Pinto On His Suspension, The Ullmark Trade, And His New Deal | EP.118*, at 29:26, (YouTube, July 17, 2024), https://www.youtube.com/ [https://perma.cc/5DNP-H96W].

wagering on behalf of a third party and most sports betting companies and states have outlawed such actions.[94] In Pinto's case, he had friends in the United States place bets for him while he was playing in Canada, as he could not bet at a Canadian sportsbook.[95]

The Commissioner punished Pinto in accordance with the league, despite the fact that Pinto did not violate an explicitly stated rule. This is allowed under the collective bargaining agreement for any off-ice conduct that detriments the NHL.[96] Pinto did not appeal his punishment and has since returned to the Senators, playing in all remaining forty-one games after his suspension.[97]

The problem in this case was the severe lack of transparency in the league's announcement of Pinto's suspension. No one knew which action he actually committed given Pinto violated league gambling policy but did not violate the singular gambling rule in the policy. The public was left to speculate until Pinto announced his misconduct. This only happened after reporters called for the NHL to be more transparent in an effort to set boundaries for other players moving forward.[98]

D. TREVOR BAUER, PITCHER, FORMERLY MLB: LACK OF TRANSPARENCY ABOUT PUNISHMENT

In July 2021, Trevor Bauer, a pitcher for the Los Angeles Dodgers, was put on administrative leave by MLB after a woman made allegations of sexual assault and battery against him.[99] His leave was extended a total of 13 times across nine months before the league finally laid down a 324 game—or two full season—suspension for violation of the league's domestic violence and sexual assault conduct policy, the longest suspension ever imposed

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[94] *Can I place a bet for someone else or let someone use my account?*, FANDUEL, https://support.fanduel.com/ [https://perma.cc/6SL5-F5E2].

[95] EMPTY NETTERS, *supra* note 93. Pinto is a U.S. citizen. As a non-citizen of Canada, he cannot place bets at a Canadian sportsbook.

[96] *Collective Bargaining Agreement*, *supra* note 90.

[97] *Shane Pinto*, OTTAWA SENATORS, https://www.nhl.com/ [https://perma.cc/ZKQ3-NV4N].

[98] Sam Stockton, *From The Silky Mitten State: The Confusion of Shane Pinto's Suspension*, THE HOCKEY NEWS (Nov. 6, 2023), https://thehockeynews.com/ [https://perma.cc/U4YU-6Y28].

[99] Beth Harris, *Ex-MLB pitcher Trevor Bauer, woman who accused him of assault in 2021 settle legal dispute*, ASSOCIATED PRESS (updated Oct. 2, 2023, at 16:48 MST), https://apnews.com/ [https://perma.cc/JS5K-EDAA].

under that policy.[100] While Bauer claimed the sexual encounter was consensual and the District Attorney declined to file charges, MLB's investigation found enough evidence to suspend him anyway.[101] His suspension was later reduced to 194 games by an independent arbitrator.[102]

Between the initial investigation and the completion of Bauer's sentence, MLB made very few comments on his actions or his subsequent punishment. After the arbitrator reduced his sentence, MLB reaffirmed that the arbitrator found that Bauer violated league policy and that the sensitive nature of the arbitrator's review meant no further details could be released.[103] Days later, on January 6, 2023, the Dodgers announced that Bauer would no longer be part of the organization.[104] No MLB team has signed him since the announcement of that departure.

Since the revelation that Bauer was not going to be charged with sexual assault, fans have speculated about—and occasionally outright demanded—his return to the league. After he served his suspension, Dodgers Nation, a Dodgers-focused media company, posted a poll on social media platform X asking fans "What is your stance on Trevor Bauer pitching for the Dodgers?"[105] Around 67 percent of the 14,983 responses said "Let him pitch for LA," compared with around 33 percent stating that the Dodgers should "Release him immediately." Whenever a hole appears in an MLB team's starting rotation due to injury, comments about Bauer's possible return to the league seem to crop up. Bauer himself claims he has support from players and coaches alike on his return to MLB.[106] He is active on social media and YouTube, posting videos about his accusers, the investigation from MLB, criticisms of MLB

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[100] David Brandt, *Dodgers' Bauer suspended 2 seasons over alleged sex assault*, ASSOCIATED PRESS (Apr. 29, 2022, at 19:44 MST), https://www.apnews.com/ [https://perma.cc/NAM2-Z53R].

[101] *Id.*

[102] Harris, *supra* note 99.

[103] *Major League Baseball statement*, MLB (Dec. 22, 2022), https://www.mlb.com/ [https://perma.cc/JSA4-VMXA].

[104] *Dodgers' statement on Trevor Bauer*, MLB (Jan. 6, 2023), https://www.mlb.com/ [https://perma.cc/7GF5-HQX4].

[105] Dodgers Nation (@DodgersNation), X (Dec. 22, 2022, at 18:16), https://x.com/ [https://perma.cc/Q335-PRZC].

[106] Bill Shaikin, *Q&A: What might an MLB owner ask Trevor Bauer? Here's a transcript of what he had to say*, LOS ANGELES TIMES (Feb. 22, 2024, at 06:00 PT), https://www.latimes.com/ [https://perma.cc/N334-6NH9].

Commissioner Rob Manfred, and pitching videos.[107] He has signed league contracts in both Mexico and Japan in recent seasons.[108]

Fans find themselves confused by the Bauer situation because he was not charged criminally but received a shockingly severe punishment from MLB. Even fellow Dodger Mookie Betts, when talking about the allegations against Bauer said, "Obviously, nothing ever came from it," despite Bauer's suspension.[109] This case highlights the struggle of keeping fans informed when legal outcomes do not line up with league outcomes. If there was enough evidence to suspend Bauer for two years, how was there not enough evidence to charge him with a crime?

Bauer's polarizing personality made the speculation even worse. Shortly before signing with the Dodgers, Bauer's merchandise website went live with Mets gear, leading fans to assume he was signing with the Mets and angering those who felt he treated his signing as a media stunt.[110] In 2021, he posted on social media that MLB had "no integrity" during the controversial league policy cracking down on pitchers using substances on their hands to aid in spinning the ball.[111] He accused the Houston Astros pitchers of using similar substances during the 2018 season.[112] And, in an expletive-laden article, Tom Ley of Deadspin recounted numerous instances of Bauer's less-than-cordial social media antics and comments.[113]

The league did not release any information about the nature of the allegations against Bauer or the evidence uncovered during the investigation. As a result, some of the public wondered whether

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[107] TREVOR BAUER, *The Truth*, (YouTube, Feb. 8, 2022), https://www.youtube.com/ [https://perma.cc/HV2U-LC3F].

[108] Associated Press, *Trevor Bauer named pitcher of the year in Mexican Baseball League*, ESPN (Sep. 27, 2024, at 20:11 ET), https://www.espn.com/ [https://perma.cc/GZ33-GR8T].

[109] Mike Axisa, *Dodgers' Mookie Betts hopes Trevor Bauer makes MLB return, says ex-teammate is 'awesome guy'*, CBS SPORTS (Oct. 31, 2023, at 10:01 ET), https://www.cbssports.com/ [https://perma.cc/HUX7-P5DN].

[110] David Adler, *Bauer to Mets fans: 'I owe you an apology'*, MLB (Feb. 8, 2021), https://www.mlb.com/ [https://perma.cc/4QSG-X2P4].

[111] Trevor Bauer (@BauerOutage), X (June 15, 2021, at 14:56), https://x.com/ [https://perma.cc/XHL6-5X8S].

[112] Jordan Bastian, *Bauer clarifies tweets after spat with Astros*, MLB (May 2, 2018), https://www.mlb.com/ [https://perma.cc/3ZRQ-YUU6].

[113] Tom Ley, *ESPN Fawns Over The Intelligence Of Trevor Bauer, Who Is A Big Dumb Asshole*, DEADSPIN (Apr. 25, 2018, at 17:58), https://deadspin.com/ [https://perma.cc/354A-6X8J].

such a harsh suspension was truly the result of a fair and impartial investigation or if Bauer was being punished for his reputation as an outspoken, somewhat difficult-to-deal-with, player.

III. ANALYSIS

A. CERTAINTY OF PUNISHMENT AS A METHOD OF DETERRENCE

Society deals with morality clauses daily, even when they have not explicitly signed a contract containing such clauses. Students at colleges and universities accept that violations of rules about drinking, drug use, sexual misconduct, cheating, and hazing can result in suspension or expulsion. Employees must be wary of what they post on their public social media accounts, as scrutiny by their employer's human resources department could result in termination. Members of the military must not endorse any particularly inflammatory statements while in uniform as they are representatives of the United States government.[114] Most people who are subject to a morality clause may not think about its existence unless it is directly tied to a hefty punishment, such as expulsion from school or termination from work. Even then, such clauses may only successfully prevent the worst offenses, as people may try to bend the rules as much as possible without committing a violation with the highest level of punishment. An employee may not think twice about posting an inflammatory statement on social media, but they will likely think twice before they post the type of hate-speech that would guarantee termination.

In sports, morality clauses can be viewed similarly. While harsh penalties—like the NFL's repeat offender policy—may deter some, especially those who already have one strike against them, others may not be deterred at all because their instances of bad conduct do not fall within the very narrow scope of the league's worst punishments.

DUIs are a prime example of bad conduct without a mandatory league punishment standard. Since 2000, there have been 257 incidents of NFL players arrested for DUIs, the highest arrest category of NFL players by far.[115] While the majority of these

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[114] *Personal Social Media Use*, U.S. ARMY, https://www.army.mil/ [https://perma.cc/EN5W-JHWW].

[115] *The Database of NFL Arrest Statistics*, NFL ARREST (Apr. 21, 2022), https://nflarrest.net/ [https://perma.cc/X8D8-URJJ]. The next highest category of arrests relates to drug offenses (131), followed by domestic violence (129), assault and battery (120), and license and traffic violations (72).

arrests were made without incident, there have been occasions—such as with Henry Ruggs III—where players have injured or killed people because of their DUI. Donte Stallworth, a former wide receiver with the Cleveland Browns, was charged with manslaughter when he struck an individual while under the influence.[116] He only served 24 days of his sentence before being placed under house arrest.[117] He returned to the NFL the following year.[118]

While Stallworth was punished criminally, the league gave him only a one-season suspension. While it is doubtful Ruggs will ever return to the league (he is notably serving a longer jail time), the league is being more reactive than proactive.[119] Players are punished for DUIs that resulted in death, but players who are arrested for DUIs without victims attached to them receive lesser punishment. Demarcus Robinson of the Los Angeles Rams was charged with misdemeanor DUI in November 2024, but did not receive any suspension from the team, playing in every game for the remainder of the season.[120] Without an effective punishment in place, the only deterrent on his actions was the criminal justice system. While that may be enough, the trend of athletes avoiding serious consequences for their actions may continue. A player who receives no punishment or a small punishment is less likely to see punishment as a threat to their wellbeing. This makes punishment less deterrent.

For DUIs, the threat of criminal punishment alone is not enough to deter players, but higher league-mandated punishments *in addition to* potential criminal punishment could create a greater deterrent effect. For example, Demarcus Robinson's coach stated that he would "let the legal process take place," and allow the league to impose any discipline it saw fit.[121] As of February 2025, the league had not publicly disciplined Robinson. If leagues implement automatic minimum punishments for particular civil or criminal

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[116] James Best, *How the NFL Has Handled Players Accused of DUI in Fatal Car Accidents*, NBC BAY AREA (updated Nov. 3, 2021, at 16:25), https://www.nbcbayarea.com/ [https://perma.cc/EM4P-6GCX].

[117] *Id.*

[118] *Id.*

[119] Charns, *supra* note 55. Ruggs is serving a three- to ten-year sentence for the DUI resulting in death.

[120] *Rams WR Demarcus Robinson charged with misdemeanor DUI*, ESPN (Jan. 9, 2025, at 19:13 ET), https://www.espn.com/ [https://perma.cc/P2SG-AM8S].

[121] *Id.*

convictions and for affirmative investigative discoveries, then athletes will face higher likelihoods of punishment for their bad actions.

Imposing additional league punishments on top of criminal punishments raises the question of different punishment standards for different members of society. The average citizen would be subject to the same fines, punishments, or jail time as an athlete. Most individuals would not be subject to *additional* punishments on top of those imposed by the criminal justice system, so why should athletes? This dynamic makes athletes a more heavily regulated group.

However, while the average citizen is less likely to face additional punishment on top of criminal punishment for minor offenses—like a victimless DUI or another misdemeanor—they are still subject to the social consequences of their actions. For individuals with transportation-related jobs, such as long-haul truck drivers, delivery drivers, or school bus drivers, a DUI could be a career ending offense *in addition to* the punishment from the criminal justice system. Athletes are no different. They must deal with the potential personal consequences of their actions, especially when their employer has outlined standards that those athletes must follow.

To create a stronger certainty of punishment, leagues should implement minimum punishment standards for those actions that do or could have victims: stalking, harassment, threatening behavior, cruelty to animals, theft, robbery, and DUI. Many league policies on personal conduct mention these actions. However, none require minimum punishments.[122]

B. SEVERITY OF PUNISHMENT AS A METHOD OF DETERRENCE

Once leagues establish that certain violations will result in punishment, leagues can then increase the severity of those punishments to better deter bad conduct. For violations that harm victims, leagues could impose minimum suspensions, like those already in place for sexual assault. Additionally, leagues could implement minimum suspensions on athletes whose conduct could have direct victims, such as DUIs. If an investigation uncovers an athlete has committed one of these violations, the athlete would automatically receive the minimum suspension. Other, lesser violations can maintain an "as needed" punishment standard, including fines, public apologies, or some type of service.

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[122] *Personal Conduct Policy: League Policies for Players*, *supra* note 19, at 1–2.

When using fines for punishment, it is imperative that they are proportionately implemented across player salaries. Leagues should abandon their policies of flat fines for conduct violations and instead calculate fines for off-court conduct as a percentage of a player's salary. This would prevent players with higher salaries from acting with impunity while also protecting younger or less lucrative players from being disproportionately penalized for the same conduct.

While automatic minimum suspensions can remain standardized by conduct, automatic minimum fines should be standardized by percentage of salary. This scheme will create a greater deterrent effect than what is currently in place by increasing the severity of the punishment. A combination of increased certainty and increased severity in the sports industry would affect athletes' bottom lines and ensure maximum impact. If athletes can maintain the discipline necessary to be athletes, their punishments for violating league social norms should match the severity of their conduct, regardless of their contract status.

C. TRANSPARENCY AS A METHOD OF DETERRENCE AND ACCOUNTABILITY

When laying down these punishments, leagues must address competing interests. The league wants to punish the athlete enough to ensure they will not commit the violation again, but they also have to justify the punishment to the PA. Keeping athletes on the field increases revenue for team owners, but letting them off the hook can give the league negative publicity. Leagues want to ensure that the rules are clearly laid out for players to understand while also ensuring there is enough discretion to punish players when necessary (such as in the Shane Pinto case). And finally, leagues have to deal with backlash from fans when athletes are punished excessively or not punished enough, which could hurt league revenue through a loss of ticket and merchandise sales. Balancing all of these interests makes the job of creating rules, investigating violations, and laying down punishments in a way that pleases all parties nearly impossible under the current method.

After implementing more certain and more severe punishments, leagues should implement a transparent investigation and reporting process to deter athletes from committing violations and to balance competing league and public interests. Under this method, after an investigation provides enough evidence to justify punishing the athlete, the league would release a report to the public—similarly to how the NWSL released its investigation—briefly detailing the player's actions, the rule or rules those actions violated, the league

investigation process, the punishment standard, and the ultimate punishment. Publication would only occur after a player has exhausted their appeals to ensure no chance that the athlete is later cleared of wrongdoing.

While increasing the severity and certainty of punishment could serve as a method of deterrence by impacting an athlete's income, being transparent can lead to an even stronger deterrent effect. Even if an athlete does not receive a severe suspension or fine for their actions, the transparency itself is a very certain punishment, while not necessarily being a serious one outside of normative social influence (for example compared to a prison sentence).

Leagues should not only implement minimum standard punishments for certain violations but should also publish the results of any internal investigations that led to those punishments. Through transparency, the public can review this information year-over-year, allowing comparison of league policy to punishments implemented, as well as holding the league accountable when its actions do not line up with that policy. Finally, such transparency would allow the public to understand mitigating or alleviating factors that justified the increase or decrease in the punishment imposed.

1. *TRANSPARENCY AS PUNISHMENT*

Even if leagues implement minimum punishment standards and make those standards proportional to player salaries, there will only be a limited deterrent effect because leagues are unlikely to publicize player actions that lead to punishment.[123] Currently, the only way an athlete's violations become public knowledge is if their actions become public record, the media reports on their actions, or the league *chooses* to release the information. There is no requirement that the league release the information. Public record reporting on criminal charges is also rare—in incidents of rape, physical assault, or stalking by an intimate partner, only 30% of such incidents involve the police at all, much less a police report.[124]

If leagues implemented a transparency requirement for investigations into off-court conduct, that in itself would serve as a form of public shaming that could have a greater deterrent effect than just a fine or suspension. Such stigma would serve as an

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[123] Robinson & Darley, *supra* note 41, at 463 (suggesting that a robber who faces only a small chance of going to prison likely won't care if the sentence is two years or ten years).

[124] Lisa Broidy, et. al, *Deterring Future Incidents of Intimate Partner Violence: Does Type of Formal Intervention Matter?*, 22 VIOLENCE AGAINST WOMEN 1113, 1114 (2016).

informal sanction.[125] Several athletes have been ostracized for their actions. The public now associates their names with their bad actions, not their athletic feats: Pete Rose (gambling),[126] Lance Armstrong (doping),[127] Tonya Harding (conspiracy),[128] and Conor McGregor (sexual assault).[129] None went to prison for their actions. However, they faced a variety of consequences: some were subsequently shunned, some were banned from their respective sport, and others were stripped of sponsorships. In these cases, the athlete's normative social influence came from their fans, fellow athletes, and the staff around them. The opinions of these individuals were important to their standing in the sports community. When only the highest league officials know about an athlete's bad actions, there is little change to that normative social influence. However, when that information becomes public, the athlete may have a harder time competing, receiving sponsorships, or gaining support from fans. For individuals who thrive on the relationships they build with their teams and fans, "the influences of social group sanctions and internalized norms are the most powerful determinants of conduct," and such a loss from acting outside of the norm could be devastating for their athletic careers.[130]

Whenever an athlete's bad conduct is publicized, "it reminds us of the norm prohibiting the offender's conduct and confirms its condemnable nature."[131] By publicizing the actions, the league "casts a bright light on the exact location of a boundary that previously might have been obscure to the community."[132] In Shane Pinto's case, the NHL could have made a statement about its anti-proxy betting stance. An NHL statement could have informed fans

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[125] Robinson & Darley, *supra* note 41, at 469.

[126] Edward Sutelan, *Pete Rose's gambling scandal, explained: Why MLB's hits king was banned for betting on baseball*, THE SPORTING NEWS (May 14, 2025, at 06:27 MST), https://www.sportingnews.com/ [https://perma.cc/YR92-F34B].

[127] William Fotheringham, *Timeline: Lance Armstrong's journey from deity to disgrace*, THE GUARDIAN (Mar. 8, 2015, at 20:50 EDT), https://www.theguardian.com/ [https://perma.cc/3AQ4-EDVN].

[128] Julie Evensen & Teresa Mahoney, *Tonya Harding, Nancy Kerrigan story broke 30 years ago*, THE OREGONIAN (Jan. 4, 2024, at 06:31), https://www.oregonlive.com/ [https://perma.cc/UD3D-DERR].

[129] Aoife Walsh, *'People want nothing to do with him': How Ireland turned away from Conor McGregor*, BBC (Dec. 1, 2024), https://www.bbc.com/ [https://perma.cc/8UQ2-9TNR].

[130] Robinson & Darley, *supra* note 41, at 471.

[131] *Id.* at 472.

[132] *Id.*

of a little-known government law and strengthened the league's position against illegal gambling. Teams and leagues can highlight the exact boundary of the rules by using violations as an example, rather than relying on the rigid rules that do not always conform to the situation at hand.

In the business context, targeted transparency serves as a form of conduct regulation when companies may not otherwise adhere to socially acceptable behavior; targeted transparency would serve the same purpose for athletes.[133] To use an example featured in the article *Targeted Transparency as Regulation*, a governing body can make a rule that companies cannot pollute.[134] Then through mandatory disclosure, the company must show the extent of their actual pollution.[135] By forcing the company to reveal their bad actions, they will not only face punishment for breaking the rules but also may suffer social sphere penalties: other companies may not want to work with a known polluter because of bad publicity and customers may not want to support a company that harms the environment. This mandatory disclosure can "provoke a public reaction that will, in turn, change the behavior of the discloser" or, in this case, change the behavior of the athlete whose actions the league chooses to disclose.[136] Athlete violations of social norms can result in severe consequences outside of league-imposed punishments. Sponsors may drop the athlete from their contracts because of negative public perception. Other players may lose respect for the individual, making it difficult for them to mesh with their team or contributing to harsher treatment from opposing players. And fans, the ultimate revenue driver for teams, may no longer show support for the player by refusing to buy merchandise or by protesting the team's decision to keep the player employed.[137]

To this last point, there have been recent instances of athletes committing violations or controversial acts and receiving public support in the aftermath. Boston Red Sox outfielder Jarren Duran uttered a homophobic slur toward a heckling fan during an at-bat in

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[133] Margaret Kwoka & Bridget DuPey, *Targeted Transparency as Regulation*, 48 FLA. STATE UNIV. L. REV. 385, 404 (2021).

[134] *Id.*

[135] *Id.*

[136] *Id.* at 405.

[137] *See* Rob Oller, *Cleveland Browns fans vent forced-upon frustration by cheering Deshaun Watson injury*, THE COLUMBUS DISPATCH (Oct. 22, 2024, at 09:19 ET), https://www.dispatch.com/ [https://perma.cc/FH3K-8UZT] (highlighting the anger of Cleveland Browns fans after the team picked up quarterback Deshaun Watson, who was under investigation after accusations of serial sex offenses).

the 2024 season.[138] The umpire's microphone picked up his words and broadcast the slur across television airwaves.[139] His actions were hastily punished (unpaid two-game suspension) and he quickly apologized for his comment.[140] However, in the immediate aftermath of his punishment, Duran's jersey was the highest selling in the entire league on the online MLB shop, a trend visible with other athletes who have made their anti-LGBTQ+ opinions clear.[141] When an athlete commits a violation that some could interpret as a controversial political topic, the league runs a risk of increased support for that athlete from fans who agree with their actions. Some viewed Duran's words as a stand against the LGBTQ+ community and showed their support for that stance by purchasing merchandise emblazoned with his name.

2. *TRANSPARENCY AS A METHOD OF CLARITY FOR CHANGING RULES*

League rules are constantly changing, as are the punishments that attach to violations of those rules. Leagues must give notice to players about those changing rules, especially since codes of conduct are not always publicly available. In Shane Pinto's case, the NHL never communicated its own rules about proxy betting, likely assuming that Pinto would be aware of the illegality of such actions in the United States. However, other factors may have contributed to Pinto's lack of knowledge, such as his age, his hefty professional athlete salary, and his new Canadian home with the Ottawa Senators, the latter of which changed his primary betting landscape and ultimately led him to proxy bet.

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[138] Ian Browne, *Duran issues apology after directing homophobic slur at fan*, MLB (Aug. 12, 2024), https://www.mlb.com/ [https://perma.cc/7NJ6-A2ZV]. While this is an example of an on-field violation, it is used here to illustrate the possibility of fans supporting an athlete who they believe aligns with their particular political or social viewpoint.

[139] *Id.*

[140] *Id.*

[141] Ryan Morik, *Red Sox's Jarren Duran has top-rated jersey on MLB shop after anti-gay slur*, FOX NEWS (Aug. 14, 2024, at 14:59 EDT), https://www.foxnews.com/ [https://perma.cc/99GJ-6S4N]. The article also mentions Ivan Provorov (NHL), who refused to wear pride-themed merchandise for religious reasons, and Harrison Butker (NFL), who made a commencement speech that was interpreted as sexist and anti-LGBTQ+. Neither of these athletes were punished by their league as their actions were not violations of any rules, unlike Duran's which violated league rules about appropriate language.

In the aftermath of Pinto's suspension, the NHL could have used the opportunity to educate other players about the rules surrounding proxy betting, creating clarification around the NHL's gambling policy: if any illegal gambling takes place, the league has the right to punish anyone involved. The league also could have taken the opportunity to update its player conduct policy, fleshing out the gambling provision to include more than just the statement that players cannot bet on NHL games. This would have created a social norm that marked the boundary of acceptability for the league, and athletes would have seen Pinto as an example of what happens when a player violates that boundary. Through transparency, rules are further clarified, and players are less likely to violate them out of ignorance, like in Pinto's case.

Transparency can also help shape new rules or change existing ones, as society's acceptance of previously banned actions develops over time. Public debate in the aftermath of a published investigation can signal to the league that norms are or are not changing, strengthening understandings about what is or is not condemnable.[142] The evolving acceptance of cannabis across the nation is an example of a changing norm for professional athletes.

Prior to 2019, most major sports leagues had rules banning their athletes from using cannabis and subjecting them to cannabis drug testing.[143] Since then, leagues have seen a monumental shift toward the acceptance of cannabis use throughout the United States. While cannabis is still banned in the NFL, athletes are not tested for the drug between April 20 and August 9, the preseason period.[144] They can still be fined if they have a positive test, but the change to the testing dates is certainly a more lenient view than the previous version of the policy.[145] In 2023, the NBA ruled that players would no longer be tested for cannabis at all.[146] MLB does not list cannabis as a banned substance and does not test players, while the NHL does test players, but does not impose a punishment for a positive test.[147] Notably, the NWSL does not test for the drug and actually allows its players to sign sponsorship deals with cannabis brands.[148]

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[142] Robinson & Darley, *supra* note 41, at 473.

[143] Shlomo Sprung, *Breaking Down the Cannabis Policies of Every Major North American Sports League*, BOARDROOM (Sep. 2, 2023), https://boardroom.tv/ [https://perma.cc/4KC2-25Q8].

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

Before implementation of these relaxed policies, transparency would have afforded leagues a better consensus of public opinion about the issue, especially after some states no longer banned cannabis. In this way, leagues can determine what actions their fans find acceptable because "every adjudication offers an opportunity to confirm the exact nature of the norm or to signal a shift or refinement of it."[149] Possible policies that can take influence from public changes include certain forms of gambling, player dress and appearance, and even the use of certain language.[150] If the league receives outcry from the public over punishment for a harmless or minor issue, the league can then reevaluate its policies and implement rules that better align with what society finds acceptable.

A player in Pinto's position may try to argue that the league should do a better job of laying out the codes of conduct if they want to later punish players for them. Pinto's punishment could almost be viewed as a retroactive one, since the NHL only established his punishment after it was clear he violated state law. Their code of conduct mentioned nothing about punishment for that form of gambling and if the league wants to establish clear lines for athlete conduct, that line should be established ahead of the athlete's punishment, rather than after.

Teams and leagues, in response, would remind athletes and staff that state and federal laws establish the baseline for codes of conduct. Team and league rules are additional requirements on top of the already existing legal standards that citizens must follow. In Pinto's case, he violated a state law by engaging in proxy betting and the NHL—rather than the state—punished him for it. Explicitly laying out all possible rules would infantilize adult professional athletes and would make personal conduct policies unreadable because of their length. Additionally, leagues have catch-all provisions for exactly these situations where a player's conduct may not align exactly with an established rule but still clearly violates acceptable standards.

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[149] Robinson & Darley, *supra* note 41, at 472.

[150] *See* Jeff Passan, *Sources: Anderson ban is for epithet, not bat flip*, ESPN (Apr. 20, 2019, at 09:27 ET), https://www.espn.com/ [https://perma.cc/2RZP-34VW] (discussing African-American MLB player Tim Anderson's one-game suspension for using the N-word during a game).

3. *TRANSPARENCY AS ACCOUNTABILITY FOR TEAMS AND LEAGUES*

Leagues can avoid public speculation over the sincerity of their actions by implementing transparency standards for league investigations. Additionally, this publication would allow leagues to better justify their actions. As policies currently stand, leagues do not justify their actions when punishing a player outside of the basic explanation that a particular rule was violated. Consider the Trevor Bauer situation. Bauer was not charged with any criminal conduct, yet MLB suspended him for two seasons. To many fans, those two facts did not add up. If the league had released the information it found in its investigation—to the extent allowed by the potential victim involved—then the league would be able to justify why it felt a two-year suspension was applicable.

Lack of transparency skews public perception of punishments. If the public does not know what the violator actually did—or, in cases where the public does learn such information, they cannot compare the individual's punishment to someone else's—then the public will never have a consensus on whether that punishment was appropriate. Leagues can remedy this situation by publicly providing the player conduct policy with the applicable minimum punishment standards for all violations.[151] By creating minimum standards, the league would naturally group punishments into categories of offenses based on the severity of the punishment. The public would then know the starting standard for the offense the athlete committed. The league could release any mitigating or aggravating factors alongside the results of their investigation, justifying an increase or decrease in punishment. Similarly to the justice system, the league would provide evidence for the finding of guilt and then inflict punishment as appropriate. This shields the league from accusations of impropriety by providing information on all investigations, giving the public the opportunity to compare violations and speak out when a punishment does not line up with precedent.

By creating a system where athletes will receive mandatory punishment through public release of their bad actions, leagues can potentially offset frustrations over athletes who were not punished severely enough in society's eyes. Concerning crimes of morality, "announcing high severity of punishment may be an important communication; more important than ensuring high probability of

[151] *See* Robinson & Darley, *supra* note 41, at 472 (deriving concept of publishing punishment statistics and levels of offense from this article.)

punishment."[152] In other words, while higher probability is generally more effective than higher severity of punishment, in the case of moral violations, high severity may be just as important to persuade the public that the league is doing its job properly when punishing athletes for their wrongdoing.

Take Ray Rice as an example. Rice, a former Baltimore Ravens running back, struck his then-fiancée in an elevator and then dragged her unconscious body into the hallway outside.[153] All of his actions were caught on camera.[154] Initially, Rice was suspended for only two games. After major public backlash for the league's leniency compared to the battery's severity, NFL Commissioner Roger Goodell imposed a six-game suspension. To justify the harsher penalty, Commissioner Goodell claimed further evidence came to light that showed Rice's dishonesty about the incident.[155] Rice disputed this and a third-party arbiter found that Rice never lied about the incident and that Commissioner Goodell had all the relevant information when he imposed the two-game suspension, only increasing the punishment to six games when the public backlash arose.[156]

Rice's situation with the NFL highlights the problem with a lack of transparency. Goodell's reasons for only imposing a two-game punishment were not made public, and neither were his reasons for increasing that punishment. The lack of transparency led to embarrassment for the league and anger from the fans on both sides. Fans who thought the initial punishment was too lenient were angry at the league's decision to increase it only after the public backlash. Fans who thought the initial punishment was appropriate were angry about its subsequent increase. The NFL looked bad, and a situation about domestic violence turned into an indictment of NFL policy. Transparency from the beginning would have prevented unnecessary litigation and unfortunate publicity. The NFL would have had to publicly justify its actions, rather than attempt to cover them up under the shield of a private investigation. Transparency punishes players but it also holds leagues accountable.

Finally, transparency ensures that the rules are applied evenly across all teams. While teams fall under the control of the league, each team is its own entity with desires to put itself above other league members. The owners of these teams want to ensure the rules

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[152] *Id.* at 473.
[153] Ray Rice, N.Y. Fed. Jud. Council 3 (2014) (Jones, Arb.).
[154] *Id.*
[155] *Id.* at 7.
[156] *Id.* at 16.

apply to the players of other teams just as much as they apply to their own players, especially when those rules can result in loss of revenue. Full transparency of league investigations and publication of punishment standards ensure that leagues are applying the rules appropriately. With thirty-plus owners in each league, accusations of unfairness are bound to occur. Transparency would help alleviate those concerns.

While there are certainly benefits to transparency, leagues may be reluctant to implement such policies. In the context of an investigation, leagues are "insiders," and "insiders have vested interests in avoiding this scrutiny, and they may overreact in trying to shield themselves from criticism" about league reactions to violations.[157] Additionally, when big-name athletes that draw crowds are the ones punished, the league can take a hit on its total revenue. The casual fan may not be drawn to a team but rather to a player. When that player cannot play due to suspension or when they have done something that violates society's social norms, then the fan may no longer purchase tickets or merchandise. Leagues have an interest in keeping this private.[158]

Ultimately, the tradeoff for league accountability is a group of players who commit fewer bad acts overall. This can lead to greater revenues streams and more players on the field when they previously may have been suspended. At the start of implementing such levels of transparency, there may be an outsized appearance of harsh punishments on players. However, in the long run, transparency for both athletes and leagues will be worth the potential criticism.

IV. CONCLUSION

As with all new regulation schemes, change takes time. The implementation of new minimum punishment standards, fine systems, and transparency after investigations would take time. Leagues would have to implement a hard start date whereby players punished prior to that date would be subject to the former system of no mandated transparency and potentially lesser punishments.

The benefits of transparency far outweigh the costs for all parties involved. Through effective deterrence, players would stay

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[157] Bibas, *supra* note 44, at 956.

[158] *E.g.*, Mike Mazzeo, *Japanese fans supporting Ohtani, Dodgers*, SPORTS BUS. J. (Oct. 25, 2024), https://www.sportsbusinessjournal.com/ [https://perma.cc/KZ92-UMRP] (showing Shohei Ohtani's influence on Japanese fans and their eagerness to pay top dollar for tickets to the 2024 World Series where Ohtani would be a star player).

on the field for longer, leading to greater pay and more lucrative contracts through their reputation as unproblematic individuals. Leagues and teams would be held accountable for their punishments of those players, creating a system of trust between the management groups and the athletes. Their revenue would remain higher and they could take advantage of their athletes' star power in marketing and promotional materials without as much fear that the athletes may commit a wrong in the near future. Finally, those impacted by an athlete's misconduct—significant others, children, pets, fans, and even strangers—would be less likely to be affected.

Minimum punishment standards and mandatory punishments for certain violations paired with the social impact of transparent investigations would create the maximum deterrent effect to keep athletes from committing wrongs. Altering punishment standards allows leagues to create stronger deterrent effects by providing punishments that proportionately affect athletes with smaller salaries and big-name players. Mandatory punishments for violations with possible victims create a leaguewide stance that certain types of conduct are especially reprehensible. Finally, publicizing the findings of investigations that led to punishment will further deter athletes if suspensions and fines would not. Social influence is a primary factor in an individual's life and can be the most effective form of deterrent.

Sports leagues have an interest in keeping their athletes in line and on the field while also keeping the public informed to ensure accountability. Such a disciplinary scheme would create a safer off-court environment for all parties involved while also ensuring leagues, teams, and players can maximize their revenues and time on the court.