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Dropping the Ball: Analyzing the Impact and Hurdles of Potential OSHA Regulation in Collision Sports

Keiran Bleich*

INTRODUCTION

The professional sports industry in the United States is big business.[1] Long gone are the days when professional athletes were forced to find offseason jobs as insurance agents or used car salesmen just to make ends meet.[2] Estimates differ, but revenue of the United States' four major professional sports leagues was valued at roughly $26 billion for 2014.[3] Some growth estimates expect this number to rise to $67.7 billion by 2017.[4] Playing professional sports is now considered a lucrative career. In March 2015, Ndamukong Suh, defensive tackle for the Detroit Lions, became a free agent and the Miami Dolphins signed him to a six-year, $114 million contract, the richest for any player ever at his position.[5] Contrast this contract with that of hockey player Derek Sanderson, who in 1972 signed a 10-year $2.65 million contract with the Philadelphia Blazers, which at the time, made him the highest paid professional athlete in the world in any sport.[6] These numbers show the legitimacy of professional sports as a full-time job and career compared to just forty years ago.

All sports carry a risk of injury, and athletes must weigh that risk against the monetary benefits playing professional sports provides. Professional collision sports, which include the National Football League (NFL) and the National Hockey League (NHL), consist of play where athletes collide with each other or the ground with a large amount of force.[7]

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* J.D. Candidate 2018, American University Washington College of Law. I would like to thank the amazing staff of the Administrative Law Review, including my editor for this piece, Jud Kempson. I would also like to thank my mother, Marta, for her unwavering support during the writing process and throughout all of law school. Finally, I am incredibly grateful to the Texas Review of Entertainment and Sports Law for giving me the opportunity to publish this piece that I worked so hard on.

1. *See* Gwen Burrow, *Not Just a Game: The Impact of Sports on the U.S. Economy*, ECON. MODELING (Jul. 9, 2013), http://www.economicmodeling.com/2013/07/09/not-just-a-game-the-impact-of-sports-on-u-s-economy/ (noting the sports industry brings in $14.3 billion in earnings each year along with 456,000 jobs).

2. *See* Lenny DiFranza, *When the Offseason Meant Job-Season*, NAT'L BASEBALL HALL OF FAME, http://baseballhall.org/discover/when-the-offseason-meant-job-season (last visited Feb. 27, 2016) (noting that before the salary boom of the 1970's many players found jobs in the offseason).

3. *See Industry Statistics Sports & Recreation Business Statistics Analysis*, PLUNKETT RES., LTD (Nov. 11, 2014), https://www.plunkettresearch.com/statistics/sports-industry/ (finding this number by adding the revenue of the four major sports league).

4. *See* Curtis Eichelberger, *Sports Revenue to Reach $67.7 Billion by 2017, PwC Report Says*, BLOOMBERG BUS. (Nov. 13, 2013), http://www.bloomberg.com/news/articles/2013-11-13/sports-revenue-to-reach-67-7-billion-by-2017-pwc-report-says (analyzing four revenue streams: gate receipts, media rights, sponsorship and merchandise for all professional and collegiate sports).

5. Dave Birkett, *Ndamukong Suh's contract details with the Dolphins,* DETROIT FREE PRESS (Mar. 11, 2015, 7:37 p.m.), http://www.freep.com/story/sports/nfl/lions/2015/03/11/ndamukong-suh-contract/70176778/.

6. *See* DEREK SANDERSON WITH KEVIN SHEA, CROSSING THE LINE, 185–86 (2012) (noting the intent was to use this large contract as a marketing ploy to increase fan interest in an expansion team).

7. Stephen G. Rice, *Medical Conditions Affecting Sports Participation*, 121 AM. ACAD. OF PEDIATRICS 841, 841 (Apr. 2008), http://pediatrics.aappublications.org/content/pediatrics/121/4/841.full.pdf.

These sports are dangerous, and the collisions they entail can cause injuries that can derail or even end a career in an instant.[8] A body of emerging scientific evidence, brought to the attention of the scientific community by Dr. Bennet Omalu,[9] shows that repeated head trauma from playing ice hockey and football causes lasting defects in the brain.[10] These defects manifest in a disease called chronic traumatic encephalopathy ("CTE").[11] In response to some doctors' growing concern of the prevalence of serious head injuries in football, former NFL players filed a class action lawsuit against the NFL for failing to take reasonable actions to protect players from the risks created by head injuries resulting from NFL play and for fraudulently concealing those risks from players.[12] This suit was settled in April 2015[13] and will provide monetary support to retired players as well as an educational fund for former players and the implementation of new safety initiatives for youth football.[14] The NHL is not without its own set of concussion problems.[15] A study by the Department of Veterans Affairs and Boston University found evidence of CTE in four deceased NHL players.[16]

There is no formal governmental oversight of U.S. professional collision sports to ensure the safety of athletes.[17] The Occupational Safety and Health Administration ("OSHA" or "Agency") would be responsible for any potential federal regulation as to the safety of collision sports.[18] OSHA maintains the mission "to assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance."[19] However, in a 2003 letter[20] (and reaffirmed in a 2008 letter),[21] OSHA interprets their enabling statute so as to not regulate

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8. *See* Jim Weber, *Mike Utley still giving thumbs up, 20 years after paralysis.* YAHOO! SPORTS (Sept. 30, 2011), http://sports.yahoo.com/nfl/blog/shutdown_corner/post/mike-utley-still-giving-thumbs-up-20-years-after-paralysis?urn=nfl,wp8345. Utley, a player for the NFL's Detroit Lions, suffered a broken neck during a game and was paralyzed, effectively ending his career. *Id.*

9. *See generally* Bennet Omalu, *Curriculum Vitae and Bibliography*, https://www.ucdmc.ucdavis.edu/pathology/our_team/faculty/OmaluB/BennetIOmaluMD,MBA,MPH,CPE,CurriculumVitaeAndTestimonies,August2015.pdf (last visited Feb. 27, 2016). Dr. Omalu is noted as an Anatomic Pathologist, Clinical Pathologist, Forensic Pathologist, Neuropathologist, Epidemiologist while currently serving as Chief Medical Examiner of San Joaquin County, California and Associate Clinical Professor of Pathology at the University of California, Davis. *Id.*

10. *See* Bennet Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 128, 128 (July 2005) (highlighting the potential long-term damage in retired NFL players subjected to repeated mild traumatic brain injury).

11. *Id.* at 131.

12. *In re Nat'l Football League Players' Concussion Inj. Litig.*, 307 F.R.D. 351, 361 (E.D. Pa. Apr. 22, 2015).

13. *See Judge Oks 65-year deal over NFL concussions; could cost $1 billion*, ESPN (Apr. 22, 2015), http://espn.go.com/nfl/story/_/id/12742265/judge-oks-65-year-deal-nfl-concussions-cost-1-billion (noting the settlement is expected to cost the NFL close to $1 billion over the course of 65 years).

14. *In re Nat'l Football League Players' Concussion Inj. Litig.*, 307 F.R.D. 351, 366-69 (E.D. Pa. 2015)

15. *See infra* Part I.B (exploring the NHL concussion lawsuit in depth)

16. LaCouture v. Nat'l Hockey League, No. 1:14-CV-2531, 2014 WL 1392180, at *32 (S.D.N.Y. filed Apr. 9, 2014) (this complaint was originally filed in the Southern District of New York but has since been transferred to the District Court of Minnesota).

17. *See* Richard E. Fairfax, *Standard Interpretation Letter*, OSHA (Sep. 12, 2008), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27301 ("Occupational Safety and Health Administration (OSHA) has no specific [applicable] standards that address protection for professional athletes playing in games").

18. *See* 29 U.S.C.A. § 653 (West 2015) (noting that OSHA's enabling statute applies to all employment in the States and United States Territories).

19. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (Dec. 29, 1970).

20. Frank Frodyma Acting Director, Directorate of Evaluation and Analysis, *Standard Interpretation Letter*, OSHA, (June 23, 2003), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24901

21. *See* Fairfax, *supra* note 17.

professional athletes.[22] OSHA only regulates the safety of those workers with an employer-employee relationship; accordingly, OSHA considers professional athletes to be independent contractors.[23]

Based on OSHA's response letter, it has been fourteen years since the Agency originally reviewed the possibility of regulating professional athletes and nine years from its reiteration of that stance.[24] With growing revenues and emerging scientific evidence of potentially deadly side effects from playing these sports, OSHA's enabling statue, the Occupational Safety and Health Act of 1970 (OSH Act), requires their regulation of professional collision sport athletes.[25] Part I of this Comment will delve deeper into the current state of safety in collision sports and the litigation arising from those injured while playing these sports. Part II will examine past instances of government regulation in professional sports. Part III will explore OSHA's stance of the distinction between employees and independent contractors as it pertains to regulation as well as analyze professional athletes through the prism of the common-law factors laid out in *Loomis Cabinet Co. v. OSHRC*. Part IV will review the logistics of possible OSHA regulation and realistic potential regulations based on OSHA guidelines, the Administrative Procedure Act (APA), and how OSHA creates new regulations. Finally, Part V will explore any potential consequences of OSHA regulation.

1. PART I–CURRENT LANDSCAPE OF SAFETY ISSUES AND LITIGATION

OSHA's 2008 citizen inquiry response letter, where the Agency reiterates its refusal to regulate professional athletes due to the lack of an employer-employee relationship,[26] allows collision sports to escape regulations even in the face of mounting scientific evidence regarding the risks. Dr. Bennet Omalu's 2005 study was the first to find and diagnose CTE in a former American football player.[27] The study found that the play of American football has a high probability of hits to the head leading to concussions and that there are up to 300,000 incidents of mild traumatic brain injury in contact sports in the United States each year.[28]

Dr. Omalu's findings have not come without controversy.[29] The NFL went so far as to have three NFL-paid doctors draft a letter to the editor of *Neurosurgery*, the journal in which Dr. Omalu's study was published, demanding the retraction of the article.[30] Making matters more complicated, doctors cannot make a confirmed diagnosis of CTE without an autopsy.[31] After his initial study, Dr. Omalu received the brains of former NFL players

22. *See id.* (noting OSHA's lack of applicable standards relating to professional athletes).

23. *Id.*

24. *Id.*

25. *See infra* Part III.A.

26. *See* Fairfax, *supra* note 17 (stating OSHA has no applicable standards to address the safety of professional athletes).

27. *See* Omalu ET AL., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 128, 131–2 (July 2005). Previous studies had been done finding evidence of CTE in retired boxers. Omalu's first study was of only a single patient; Omalu concluded the study could not itself prove a causal link between CTE and playing football. *Id.*

28. *See id* at 131. (noting these types of injures can lead to neurological disorders and CTE).

29. *See generally* Jeanne Marie Laskas, *Bennet Omalu, Concussions, and the NFL: How One Doctor Changed Football Forever*, GQ (Sep. 14, 2009), http://www.gq.com/story/nfl-players-brain-dementia-study-memory-concussions

30. *See id* (stating that the NFL's Mild Traumatic Brain Injury Committee claimed that repeated head bashing did not cause brain damage and in 2007, the co-chair of that committee denied that football-related concussions could result in brain damage, dementia, or depression).

31. *See* Bennet Omalu ET AL., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 128, 129 (Jul. 2005).; *Id* at 131–2 (noting symptoms of CTE such as headaches, irritability, dizziness, impaired memory, mental slowing, and mood disorders can be seen in patients during life but are not a confirmation of CTE).

Terry Long, Andre Waters, and Justin Strzelczyk.[32] After examination, Dr. Omalu determined that all of these players suffered from CTE.[33]

A research collective studying CTE at the Department of Veterans Affairs and Boston University School of Medicine found that eighty-seven of the ninety-one brains of former NFL player tested positive for CTE.[34] OSHA's unwillingness to comply with its enabling statute by regulating the safety of professional athletes playing collision sports when confronted with medical evidence of the dangers facing these athletes seemingly violates its general duties clause.[35]

A. THE NFL CONCUSSION LAWSUIT AND SUBSEQUENT SETTLEMENT

Bringing the frequency and devastating effects of CTE in former collision sport athletes to the attention of former players has led to significant judicial proceedings.[36] On July 19, 2011, seventy-three former professional football players filed suit against the NFL alleging the "NFL failed to take reasonable actions to protect players from chronic risks created by concussive and sub-concussive head injuries and fraudulently concealed those risks from players."[37] The complaint further alleged that the NFL had a duty to protect players by providing information and passing rules to abate the short and long-term health risks of playing professional football, including the risk of brain injuries.[38] Plaintiffs further alleged that the NFL fostered a culture that glorified violence with the type of hits that cause head injuries and encouraged players to play through head injuries.[39] Perhaps the most serious allegation was that in 1994, the NFL created the Mild Traumatic Brain Injury Committee to study the side effects of concussive and sub-concussive injuries.[40] It was also alleged that through this committee the NFL attempted to hinder making any connection between playing football and long-term brain injury despite having knowledge such a connection existed.[41]

The NFL believed they had followed all safety regulations required in the collective bargaining agreements (CBAs) controlling relations between players and teams and conse-

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32. *See* Jeanne Marie Laskas, *Bennet Omalu, Concussions, and the NFL: How One Doctor Changed Football Forever*, GQ (Sept. 14, 2009), http://www.gq.com/story/nfl-players-brain-dementia-study-memory-concussions (noting many players suffer from serve cognitive defects; Long died from drinking antifreeze; Waters died from a self-inflicted gunshot wound; and Strzelczyk died in an explosion after a paranoia-fueled car chase with police where he was convinced evil voices were out to get him).

33. *Id.*

34. *See* Jason M. Breslow, *New: 87 Deceased NFL Players Test Positive for Brain Disease*, FRONTLINE (Sept. 18, 2015), http://www.pbs.org/wgbh/frontline/article/new-87-deceased-nfl-players-test-positive-for-brain-disease/ (noting the brain bank at Boston University is the largest institution studying traumatic head injuries and in 2010 received a $1 million research grant from the NFL).

35. *See* 29 U.S.C.A. § 654 (West 2015). OSHA's general duties clause provides that employers must provide a place of employment free from *recognized hazards* likely to cause death or serious physical harm. (emphasis added). *Id.*

36. *In re Nat'l Football League Players' Concussion Inj. Litig.*, 307 F.R.D. 351, 361 (E.D. Pa. 2015). Before this group was certified for class action, many substantially similar lawsuits were filed across the country and were eventually consolidated into the class action lawsuit of over 5,000 players that is the focus of this section. *Id.*

37. *See id.*

38. *See id.* at 362. ("NFL held itself out as a guardian and authority on the issue of player safety yet failed to properly investigate, warn of, and revise league rules to minimize the risk of concussive and sub-concussive hits in NFL Football games.").

39. *Id.*

40. *See* Laskas *supra* note 29.

41. *See In re Nat'l Football League supra* note 36, at 362. Through this committee, the NFL allegedly made material misrepresentations to all relevant parties, including the public at large, about the scientifically proven link repetitive head impacts and long-term brain injury. *Id.*

quently moved to dismiss the complaint based on preemption.[42] Before a ruling on the motion to dismiss, a settlement was reached on July 7, 2014.[43] The agreed upon and preliminarily approved settlement covers all living NFL players who retired from the NFL prior to preliminary approval of the settlement.[44]

The settlement includes several important parts to assist, to the extent monetary value can, those suffering from long-term brain injuries.[45] The Monetary Award Fund is an uncapped fund that provides cash settlements of up to $5 million to former players based on the severity of their Qualifying Diagnosis.[46] It is important to note, causation requirements are waived to earn a monetary award.[47] The Baseline Assessment Program allows players to receive testing for cognitive decline.[48] Finally, the Education Fund consists of $10 million for programs to educate and prevent injuries for football players of all ages.[49]

Despite its alleged misconduct, the NFL draws significant benefits from the settlement. First, all members to the lawsuit release and dismiss with prejudice all claims against the NFL arising out of and related to head, brain, or cognitive injury as well as any injuries arising out of or relating to concussive or sub-concussive events, including any claims related to CTE.[50] Perhaps most importantly from a public relations perspective, the NFL admits no liability or wrongdoing as it relates to the specific claims made by parties to the lawsuit.[51] It is difficult to know if OSHA regulation of the NFL would have had any effect on this class action lawsuit and subsequent settlement. Had there been OSHA safety regulations in place and followed by the league, the NFL may have had a defense of following all applicable governmental regulations.[52]

B. THE NHL CONCUSSION LAWSUIT

Former NHL players have filed a class action lawsuit substantially similar to that filed by former NFL players. On April 9, 2014, Plaintiffs, all former NHL players, brought a class action complaint against the NHL seeking punitive damages and equitable relief on behalf of

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42. *See id.* at 363. The NFL claimed that the CBAs controlled the duties of the NFL and individual teams related to player safety and a ruling for preemption would require complainants resolve their claims through arbitration, as is stipulated in the CBA. *Id.*

43. *See id.* at 363–65 (noting the judge had rejected a previous settlement proposal as she determined it would not provide enough money for the care of retired players).

44. *See id.* at 365 (noting the settlement includes Representative and Derivative Claimants who are those authorized to assert the claims of deceased, legally incapacitated, or incompetent players and parents, spouses, or dependent children, who have some legal right to the income of retired players, respectively).

45. *See id.* at 365–66. A Monetary Award Fund, which provides compensation for claimants who submit proof of a qualifying diagnosis of some type of cognitive impairment, a Baseline Assessment Program that is designed to provide retired players with examinations of their neurological functioning, and an Education Fund that will educate claimants on navigating the settlement benefits and also promote education and safety in youth football. *Id.*

46. *See id.* at 366. By way of example, the lowest Qualifying Diagnosis, Level 1.5 Neurocognitive Impairment, can earn a player $1.5 million monetary award. The highest Qualifying Diagnosis level, Amyotrophic Lateral Sclerosis, can earn a player $5 million monetary award. *Id.*

47. See *id.* (noting a claimant is not required to show that playing in the NFL caused the injury to receive a cash settlement).

48. *See id.* at 368. The Baseline Assessment Program is a 10-year, $75 million program that allows any retired player with at least half a season of NFL playing experience to be tested for cognitive decline with a standardized neuropsychological examination and basic neurological examination even if the player has not started to show signs of any cognitive decline. *Id.* The results of these examinations may be used to make a qualifying diagnosis. *Id.*

49. *See id.* at 368–69.

50. *See id.* at 369 (stating any release by players has no effect on the players' current retirement benefits under their respective CBAs).

51. *Id.* at 426.

52. *See supra* Part IV.C (discussing avenues for potential OSHA regulation of collision sports).

all current and former NHL players.[53] They also seek to establish a medical monitoring program to help manage any lifelong effects suffered by current and former players.[54] The thrust of the complaint claims that the NHL "fostered and promoted an extremely physical game . . . through enclosed rink designs and lax rules for fighting, the NHL vectored a culture of extreme violence."[55] Plaintiffs additionally contend that the NHL failed to warn players of the risks of long-term negative health effects and affirmatively concealed scientific evidence about the health risks of playing in the NHL.[56] The complaint attempts to show an inherent link between violence and the NHL by citing several overtly violent incidents throughout the league's existence.[57] There are also several, somewhat damning quotes, from NHL officials talking about violence in the NHL.[58]

In addition to collisions between players and the playing area, in the NHL bare-knuckle fighting is allowed and, except in extreme cases, is not punished by federal, state, or local authorities.[59] The complaint alleges that part of the NHL's profiteering from violence was due to the fostering of "goons" or "enforcers."[60] Plaintiffs cite over a dozen studies, published as early as 1928, warning of the deleterious effects of blows to the head.[61] The NHL's inaction in the face of these published medical reports and media coverage[62] forced the early retirement of many players due to lingering effects of head trauma.[63] Plaintiffs point to the league's use of inflexible Plexiglas surrounding the rink[64] and the NHL's unwillingness to mandate both the use of helmets until 1979[65] and foam covered shoulder pads until 2010[66] as failures to implement reasonable safety measures.[67]

Based on the injuries they have suffered as a result of playing in the NHL, plaintiffs claim both negligence and intentional harm because the "NHL had and has a duty to take all reasonable steps to protect plaintiffs and the Class from the risks and consequences of head trauma."[68] Plaintiffs also contend that the changes the NHL made were purposefully ineffec-

53. LaCouture v. Nat'l Hockey League, No. 1:14-CV-2531, 2014 WL 1392180, at *1 (S.D.N.Y. filed Apr. 9, 2014).

54. *Id.* At 5.

55. *Id.* At 2.

56. *Id.* At 4–5.

57. *See id.* at 12–24. Plaintiffs cite violent incidents of fights causing significant injuries in the early days of the league, links of violence in the NHL to media and pop culture including movies and documentaries glorifying violence. *Id.*

58. *See id.* at 25. In 1988 then NHL President John Zeigler said, "Violence will always be with us in hockey" and went on to say, "The view of the 21 people who own the teams, and employ me, is that fighting is an acceptable outlet for the emotions that build up during play. Until they agree otherwise, it's here to stay." *Id.*

59. *See Official Rules 2015-2016*, NAT'L HOCKEY LEAGUE, 70–75, http://www.nhl.com/nhl/en/v3/ext/rules/2015-2016-Interactive-rulebook.pdf. Section 6 Rule 46 punishes fighting by a major penalty and referees are given wide latitude in giving additional penalties while the Commissioner may also dole out additional punishments. *Id.*

60. *See* LaCouture v. Nat'l Hockey League, No. 1:14-CV-2531, 2014 WL 1392180, at *15 (S.D.N.Y. filed Apr. 9, 2014) (noting these are players that specialize in fighting or hitting in order to protect the team's more skilled teammates).

61. See *id.* at 32 (alleging the publication of these studies had put the NHL on notice that the type of blows suffered in NHL games can lead to long-term brain injury).

62. *See id.* at 42–47 (noting several newspaper articles and documentaries written on violent incidents occurring during games).

63. *See id.* at 47–76 (citing 21 different former NHL players suffering from serious head trauma, allegedly as a result of their careers playing in the NHL).

64. *See id.* at 86–87 (noting the removal of the seamless Plexiglass in 1996 was noted by players to be like hitting a brick wall).

65. *See id.* at 77 (noting NHL players had the option of not wearing a helmet until 1979).

66. *See id.* at 88 (alleging the NHL long knew that shoulder pads with a hard plastic cap caused concussions).

67. *See id.* at 95 (contrasting Olympic and college hockey which have banned fighting, the NHL has refused to do so, even in the face of evidence that it would significantly reduce concussions).

68. *Id.* at 105–07.

tive and merely meant to mislead players as well as the public into ceasing investigation into the risks of head trauma.[69]

Unlike the NFL's concussion lawsuit, the NHL, in an internal memo to its Board of Governors, stated that the league has no desire to enter into settlement discussions with the plaintiffs.[70] Due to the risk of discovery turning up potentially harmful evidence against them, the NFL was likely more motivated to settle early in the judicial process.[71] With the continued advancements in science, the days of these types of class action suits may be far from over.[72] Given the serious nature of the issues described above by litigants of these lawsuits, OSHA regulation of these sports is needed immediately.[73]

II. PAST GOVERNMENTAL REGULATION IN SPORTS

If OSHA were to reevaluate its position and correctly regulate the safety of professional athletes, as the OSH Act requires, such regulation would have solid precedent.[74] There are instances of each branch of the government using its respective powers to drive major change in the sports world.[75]

Most recently, in 2009, the Senate Antitrust Subcommittee held hearings to examine the widely unpopular and possibly anti-competitive business practices of the College Football Bowl Championship Series (BCS).[76] The House of Representatives even introduced legislation that would block the presentation of a "national championship game" unless it was the result of a tournament-style format.[77] This flexing of legislative muscle combined with the desire of 63% of fans to ditch the BCS system[78] led to the newly installed College Football Playoff for the 2014 season.[79]

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69. *See id.* at 106 ("As a direct and proximate result of the NHL's breach of its duties, Plaintiffs and the Class have and will continue to suffer injuries.").

70. *See* Greg Wyshynski, *NHL has 'no desire' to settle concussion lawsuit, says internal memo*, YAHOO! SPORTS (Oct. 1, 2015), http://sports.yahoo.com/blogs/nhl-puck-daddy/nhl-has—no-desire—to-settle-concussion-lawsuit—says-internal-memo-165002717.html (stating that the league feels strongly about the merits of its case and that discovery will not reveal any smoking guns because of the leading role the league has taken in prevention and management of concussions among its players).

71. *See* John DeWispelaere, *NHL Concussion Litigation: What's Next After Judge Nelson Rejects the NHL's First Attempt to Dismiss Lawsuit*, HEITNER LEGAL (Apr. 16, 2015), http://heitnerlegal.com/2015/04/16/nhl-concussion-litigation-whats-next-after-judge-nelson-rejects-the-nhls-first-attempt-to-dismiss-lawsuit/.

72. *See generally* Sam Knight, *The Cost of the Header* (Oct. 2, 2014), http://www.newyorker.com/news/sporting-scene/cost-header (noting that CTE has recently been found in former soccer players and that a group of parents in California filed a class action lawsuit against soccer's governing body, FIFA, accusing them of presiding over an "epidemic" of concussions).

73. *See supra* Part I.A and I.B.

74. *See Zezima, infra* note 85 (evidencing Teddy Roosevelt's influence on the safety of football dating all the way back to 1905).

75. *See infra* notes 77–89 (showing examples of changes spurred by Congress, the Judiciary, and the President).

76. *See* Patrick Gavin, *Congress Ponders the BCS System*, POLITICO (July 7, 2009, 5:29 p.m.), http://www.politico.com/story/2009/07/congress-ponders-the-bcs-system-024655. The BCS system used a combination of rankings and computers to determine which teams would play for the college football national championship. *Id.* Many smaller universities and athletic departments complained the system gave them no chance at competing for a national championship given the system's inherent bias toward schools and teams from the six biggest athletic conferences. *Id.*

77. *Fans Don't Want Congress Poking In*, ESPN (Dec. 29, 2009), http://espn.go.com/ncf/news/story?id=4779279.

78. *Id.*

79. *See* Heather Dinich, *Playoff Plan to Run Through 2025*, ESPN (June 27, 2012), http://espn.go.com/college-football/story/_/id/8099187/ncaa-presidents-approve-four-team-college-football-playoff-beginning-2014. The new playoff system utilizes a selection committee to pick the four best college football teams in the nation who then play one another to determine a true national champion. *Id.*

Government driving change in sports is not limited to Congress' broad regulatory authority. The Judiciary has also been involved in major changes regarding the safety of sports. The famous tort case *Hackbart v. Cincinnati Bengals, Inc.*[80] found that a normally tortious action is not acceptable just because it took place during the course of a professional football game, where there is an increased propensity for violence.[81] The Tenth Circuit Court made it clear that intentional actions outside the reasonable guidelines and general customs of the game were not protected simply because of football's dangerous or violent nature.[82]

Before the existence of OSHA, the executive branch took on the task of regulating football during the sport's infancy. In 1905, President Theodore Roosevelt summoned coaches from leading football universities and officials of the game to the White House.[83] The President's aim was to modify the rules of the game in order to make it safer.[84] Early 20th-century football was extremely dangerous resulting in forty-five deaths between 1900 and 1905 because of injuries suffered while playing the game.[85] The purpose of the White House meeting was to "eliminate the brutal features" of the game.[86] The meeting spurred the creation of a committee after the 1905 season; which instituted new rules that morphed the game into its now recognizable form.[87] This instance of executive intervention helped completely reinvent a popular sport in the interest of safety.[88] If OSHA were to reevaluate its stance on regulation of professional athletes and regulate, as the OSH Act requires, it would have a solid precedent of executive branch regulation based on President Roosevelt's actions.[89]

III. THE POTENTIAL FOR OSHA REGULATION

If OSHA reconsidered its stance on the regulation of professional sports and treated professional athletes as employees, the Agency could help increase safety, as required by the OSH Act. Adherence to such standards may have prevented the costly class action lawsuits that tie up the means of litigation.[90] The constantly evolving science on the immediate and long-term negative health effects of playing collision sports, coupled with collision sports leagues' unwillingness to acknowledge these risks, and in some cases, attempts to stifle

80. *See generally* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979).

81. *See* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 520 (10th Cir. 1979) ("[T]here are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it.").

82. *Id.* at 521.

83. *See* Katie Zezima, *How Teddy Roosevelt helped save football*, WASH. POST (May 29, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/05/29/teddy-roosevelt-helped-save-football-with-a-white-house-meeting-in-1905/ (noting President Roosevelt was a football fan himself and several prominent universities suspended their football programs due to its brutality).

84. *See id.* Football at that time was more akin to current day rugby where forward passes were not allowed and large masses, or "scrums" of players trying to get possession of the ball were a common place of injury. *Id.*

85. *See id.* Many of the deaths were a result of internal injuries, broken necks, concussions or broken backs suffered during play. Even Roosevelt's own son suffered a head wound while playing football at Harvard. *Id.*

86. *Id.*

87. *See id.* (stating the biggest change being the introduction of the forward pass that led to fewer masses of players, where many injuries occurred). *But see id.* (claiming Roosevelt's impact on the change has been exaggerated over the years and that the rule changes were actually a result of the death of Union College halfback, Harold Moore, who died after being kicked in the head during a game in November 1905).

88. *See generally id.*

89. *See Zezima infra* note 85 (noting President Roosevelt's aim was to make football safer).

90. *See Judge Oks 65-year deal over NFL concussions; could cost $1 billion*, ESPN (Apr. 22, 2015), http://espn.go.com/nfl/story/_/id/12742265/judge-oks-65-year-deal-nfl-concussions-cost-1-billion. (noting the settlement is expected to cost the NFL close to $1 billion over the course of 65 years).

further research,[91] leaves the players holding the bill.[92] Who can these athletes turn to for help when it comes to the safety of their sport and their livelihood?

Congress created OSHA by passing the OSH Act.[93] In passing the OSH Act, Congress found that injuries and illnesses suffered in the workplace hinder interstate commerce through lost production, lost wages, and the like.[94] The OSH Act applies to employees in any state or other United States territory.[95] Most relevant to the issues confronted in this Comment, the OSH Act sets out to provide safe and healthful working conditions in several ways.[96] OSHA, through the power given to it by the OSH Act, seeks to encourage employers and employees to reduce occupational safety and health hazards at places of employment by instituting new and perfecting existing programs that aim to provide safe working conditions.[97] The OSH Act calls for OSHA to conduct research in occupational health and safety and to develop innovative methods for dealing with occupational safety and health issues.[98] The OSH Act seemingly calls for the same type of research uncovered in 2005 regarding the prevalence of CTE among collision sport athletes.[99] The OSH Act speaks most relevantly to CTE in that it aims to explore ways to discover latent diseases, focusing on causal connections between these diseases and work environments through research relating to occupational health problems.[100] Using this medical research, the OSH Act seeks to provide a medical criterion that assures employees will not suffer diminished health, functional capacity, or life expectancy due to their work or work environment.[101] Current and former collision sport athletes continue to suffer from these negative impacts that the OSH Act seeks to avoid.[102] As a matter of enforcement, the OSH Act allows for the development and promulgation of occupational safety and health standards[103] and the provision of an effective enforcement program for these standards.[104] OSHA's mission is "to assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education, and assistance."[105] OSHA must meet its mission and begin regulation of collision sports as is mandated by its enabling statute so the detrimental effects of playing these sports are not felt by players who have yet to suffer from CTE.

A. THE LOOMIS ECONOMIC REALITIES TEST

Given OSHA's regulation of private employers, it is curious that OSHA is not involved in making collision sports safer, especially in light of the emerging science demonstrating the long-term negative health effects of playing collision sports.[106] In an interpretation letter dated June 23, 2003, Acting Director of the Directorate of Evaluation and

91. *See* Laskas *supra* note 30.
92. *See Judge Oks 65-year deal supra* note 90 (noting that the $1 billion settlement will have a large portion dedicated to medical expenses of former players).
93. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (Dec. 29, 1970).
94. 29 U.S.C.A. § 651(a) (West 2015).
95. 29 U.S.C.A. § 653(a) (West 2015).
96. 29 U.S.C.A. § 651(b) (West 2015).
97. 29 U.S.C.A. § 651(b)(1) (West 2015).
98. 29 U.S.C.A. § 651(b)(5) (West 2015).
99. *See* Omalu et al., *supra* note 10 (finding CTE in a former NFL player).
100. 29 U.S.C.A. § 651(b)(6) (West 2015).
101. 29 U.S.C.A. § 651(b)(7) (West 2015).
102. *See supra* notes 31–32 (listing the noticeable side effects prevalent during life by a person suffering from CTE).
103. 29 U.S.C.A. § 651(b)(9) (West 2015).
104. 29 U.S.C.A. § 651(b)(10) (West 2015).
105. *About OSHA*, OSHA, https://www.osha.gov/about.html (last visited Feb. 27, 2016).
106. *See* Omalu et al., *supra* note 10.

Analysis Frank Frodyma stated that there was no formal interpretation or directly relevant case law as to whether professional athletes are considered employees or independent contractors.[107] According to the Administrative Procedures Act ("APA"), these interpretation letters would fit the definition of an agency rule as they are a general statement interpreting the procedure or practice requirements of an agency and are not subject to public notice.[108] If OSHA would consider professional athletes employees rather than independent contractors, OSHA regulations and standards would apply to them.[109] This determination must be made on a case-by-case basis looking at the common law factor test laid out by the Ninth Circuit Court of Appeals in *Loomis Cabinet Co. v. OSHRC*.[110] Richard E. Fairfax, Director of the Directorate of Enforcement Programs, reiterated this stance in a September 12, 2008 interpretation letter stating that OSHA has no applicable standards relating to protection of professional athletes playing in games.[111] In new guidance, the Department of Labor has said that, in its view, most workers are considered employees for purposes of protection under the Fair Labor Standards Act, which includes applicability of OSHA regulations.[112] Even with this presumption of an employee label, OSHA has refused to regulate professional collision sport athletes.[113]

The *Loomis* Test arose from one employer's attempt to skirt an OSHA citation by hastily converting all of his employees into independent contractors.[114] An administrative law judge for the Occupational Safety and Health Review Commission ("Commission"),[115] and a subsequent review by the entire commission, upheld the fines, finding the workers in question were employees.[116]

Loomis uses the common law factor test laid out by the Supreme Court in *Nationwide Mutual Ins. Co. v. Darden* to determine employee or independent contractor status.[117] An employment relationship exists depending on the economic realities of the situation.[118] The

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107. Frank Frodyma, *Standard Interpretation Letter*, OSHA (June 23, 2003), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24901.

108. 5 U.S.C.A. § 551(4) (West 2015) (noting a rule means an agency statement designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency); 5 U.S.C.A. § 553(b) (West 2015) (stating public notice is not required as to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

109. *See* Frodyma, *supra* note 107 (noting that because athletes are considered independent contractors, OSHA standards do not apply to them).

110. *See id.* ("This determination must be made on a case-by-case basis after considering all of the circumstances affecting the relationship between the teams and their players and applying the common law factors.")

111. Richard E. Fairfax, Standard Interpretation Letter, OSHA (Sep. 12, 2008), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27301.

112. Deanna L. Forbush, *Beware When Designating Workers as Independent Contractors*, M. LEE SMITH PUBLISHERS, LLC, Nov. 2015, WL No. 21 Nev. Emp. L. Letter, 1.

113. *See* Fairfax *supra* note 111.

114. *See* Loomis Cabinet Co. v. Occupational Safety & Health Rev. Comm'n, 20 F.3d 938, 941 (9th Cir. 1994). Loomis Cabinet Company was cited and fined by OSHA for violations of OSHA workplace safety standards. *Id.* Two days before Loomis would have to rectify the violations, his workers formed a partnership named Eastview Cabinet Company, which contracted with Loomis to manufacture cabinets exclusively for Loomis in exchange for 75% of the net profits. *Id.* Loomis challenged his refusal to rectify the violations, saying he was not an employer and was thus was not subject to OSHA jurisdiction. *Id.*

115. *See* 29 U.S.C.A. § 651(b)(3) (West 2015); *See generally* 29 U.S.C.A. § 661 (West 2015) The Occupational Safety and Health Review Commission ("Commission") was established as part of the OSH Act to carry out adjudicatory functions under the OSH Act and allows for the appointment of administrative law judges who shall hear and make a determination on any proceeding instituted before the Commission. *Id.*

116. 20 F.3d 938, 941.

117. *Id.* at 941–42.

118. *See id.* at 942. (quoting Nationwide Mut. Ins. Co. v. Darden 503 U.S. 318, 323-24 (1992)) Applying the common law of agency to determine if a worker is an employee, the court considers the hiring party's right to control the manner and means by which the product is accomplished. *Id.* Other non-exclusive factors weighing on the analysis are: the skill required; the source of the instrumentalities and tools; location of the work; duration of the relationship between the hiring and working parties; whether the hiring party has the right to assign additional

common law economic realities test is non-exhaustive and does not give rise to a short hand formula to find whether an employer-employee relationship exists because all aspects of the relationship must be assessed with no single factor being decisive.[119] Looking at each factor of the *Loomis* Test through the lens of professional athletes, the evidence would tend to show an employer-employee relationship.[120]

1. SKILL REQUIRED

There is an unmatched level of skill required to play in the NFL or NHL as specified under the *Loomis* Test. The National Collegiate Athletic Association (NCAA) reported that in 2013–2014 there were 1,093,234 high school football players[121] and 35,393 high school men's ice hockey players.[122] The number of athletes playing these sports at the collegiate level dropped to 71,291 for football[123] and 3,976 for men's ice hockey.[124] Based on the number of picks in the NFL and NHL draft, an NCAA athlete has a 1.6% chance to be drafted into the NFL and a 6.8% chance of being drafted into the NHL.[125] With roughly 1,696 roster spots in the NFL[126] and 690 in the NHL[127] at any given time, only a fraction of those who play these sports earlier in life have the required skill level to play professionally. In *Usery v. Pilgrim Equipment Co., Inc.*, the Fifth Circuit held that workers responsible for the handling of dry-clean clothes possessed the requisite specialized skills found in employees as opposed to independent contractors.[128] The specific skills identifying these workers as employees included interactions with customers, tagging clothes, handling money, and settling accounts.[129] The Court determined that the skills necessary were valuable as that of employees as opposed to independent contractors and helped bring profits to the hiring party.[130] Similarly, the necessary specialized skills professional athletes possess bring profits to their employing teams, and as such they should be considered employees.

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projects to the hired party; extent of the hired party's discretion over the hours of the working party; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *Id.*

119. *See id.* Loomis himself conducted all contract negotiations with suppliers and customers, provided the designs and specifications of the cabinets, provided the tools and equipment, scheduled the work with clients, controlled pricing, controlled choice of materials and marketing, and provided accounting, administrative and financial services. *Id.* The workers provided only their labor; they did no advertising or soliciting, and did not attempt gain outside contracts. *Id.* The Eastview partners worked exclusively for Loomis. *Id.* Loomis participated in the hiring and firing of those at Eastview. Loomis owned the workshop, all the equipment, and controlled the conditions in the workshop. *Id.*

120. . *See infra* Parts III.A.1-9.

121. *Estimated Probability of Competing in College Athletics*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://www.ncaa.org/sites/default/files/2015%20Probability%20Chart%20Web%20PDF_draft5.pdf (last visited Feb. 27, 2016).

122. *Id.*

123. *Id.*

124. *Id.*

125. *See id.* (using approximate numbers for Draft Eligible NCAA Athletes of 15,842 for football and 884 for ice hockey).

126. Marc Lillibridge, *The Anatomy of a 53-man Roster in the NFL*, BLEACHER REP. (May 16 2013), http://bleacherreport.com/articles/1640782-the-anatomy-of-a-53-man-roster-in-the-nfl (calculating 53 roster spots for each team multiplied by 32 NFL teams).

127. *See Hockey Operations Guidelines*, NHL, http://www.nhl.com/ice/page.htm?id=26377 (last visited: Feb. 27, 2016) (calculating 23 roster spots for each team multiplied by 30 NHL teams).

128. *See* Usery v. Pilgrim Equipment Co., Inc., 527 F.2d 1308, 1310 (5th Cir. 1976).

129. *Id.* at 1314-15.

130. *Id.* at 1315.

2. LOCATION OF WORK

The location of a professional athlete's work is often in an arena, training facility, practice facility, film room, or other related facility owned or rented by his team or other teams in the league.[131] This is especially true during the playing season, where NFL teams practice three to four times a week while playing sixteen games during the regular season[132] and NHL teams practice two to three times a week while playing eighty-two regular season games.[133] In *Loomis*, the court found substantial evidence that the hiring party owned the workshop where the employees produced the cabinets in question and the hiring party had full authority to change the safety conditions in the workshop.[134] A team's dominion over the numerous locations where athletes conduct their work would parallel the situation in *Loomis* and tend to show the characteristics of an employer-employee relationship.

3. ASSIGNMENT OF ADDITIONAL PROJECTS

Professional sports teams frequently take advantage of their ability to assign additional projects and commitments to their athletes. Teams may require the attendance of athletes under contract at practices, training camps, media events, and community service activities, in addition to the games played by the team during the course of the season.[135] The athletes also have very little discretion over when and how long they work, as many obligations are mandatory and teams may monetarily fine players who do not attend.[136] Similarly in *Loomis*, the court found that the hiring party conducted all negotiations with clients as to the scope of the work and scheduled when the employees would complete the work.[137] The rigid control of the professional sports teams to assign additional projects to athletes, and subsequently punish them for non-compliance, shows the team's dominion over these athletes as employers, as was the case in *Loomis*.

4. LENGTH OF EMPLOYMENT RELATIONSHIP

The length of a relationship between an athlete and a team may vary greatly. Some players are out of a job before training camp ends.[138] In contrast, Shea Weber of the NHL's Nashville Predators signed a fourteen-year, $110 million contract in 2012, which is currently

131. *See generally* Albert Breer, *NFL stadiums go from boom to swoon in span of a decade*, NFL (July 6, 2012), http://www.nfl.com/news/story/09000d5d82a5c85c/article/nfl-stadiums-go-from-boom-to-swoon-in-span-of-a-decade (noting teams' interest in stadium facilities).

132. *2015 NFL schedule: Week-by-week look at regular-season slate*, FOX SPORTS (Apr. 21, 2015), http://www.foxsports.com/nfl/story/2015-nfl-schedule-dallas-cowboys-new-england-patriots-cincinnati-bengals-seattle-seahawks-042115 (noting the number of games in the season).

133. *See 2017-2018 Regular Season Schedule*, NAT'L HOCKEY LEAGUE, https://www.nhl.com/schedule/2017-10-4/ET (showing the number of games in the season).

134. Loomis Cabinet Co. v. Occupational Safety & Health Rev. Comm'n, 20 F.3d 938, 942 (9th Cir. 1994).

135. Tadd Haislop, NFL offseason schedule 2017: OTAs, minicamp dates for each team, Sporting News (July 5, 2017), http://www.sportingnews.com/nfl/news/nfl-offseason-schedule-2017-minicamp-otas-dates-workout-draft-training-camp/hogy3yhzcj9q1ozoxyf7sabb3 (noting the full-slate of numerous offseason obligations for NFL players).

136. *See* Mike Florio, *Cost of Kam Chancellor's holdout will soon surpass $2 million*, PRO FOOTBALL TALK (Sept. 15, 2015), http://profootballtalk.nbcsports.com/2015/09/15/cost-of-kam-chancellors-holdout-will-soon-surpass-2-million/ (noting Kam Chancellor, safety for the NFL's Seattle Seahawks, lost $1.87 million in fines, forfeitures, and lost wages while he refused to play and skipped training camp).

137. Loomis Cabinet Co. v. Occupational Safety & Health Rev. Comm'n, 20 F.3d 938, 942 (9th Cir. 1994).

138. *See Key NFL dates in 2015-16: Team roster cut-downs to 75 players is Sept. 1*, CBS SPORTS (Jul. 25, 2015), http://www.cbssports.com/nfl/eye-on-football/25250503/2015-16-nfl-calendar-roster-cut-downs-to-75-players-is-sept-1 (noting different dates where rosters must be trimmed and players must be cut from their team's roster).

the longest active contract in all of American professional sports.[139] Additionally, players may spend their entire careers with a single team through the length of several contracts, such as Nicklas Lidstrom who stayed with the NHL's Detroit Red Wings from 1991 until his retirement in 2012.[140] Compare this to the Bureau of Labor Statistics 2014 finding that the average American's tenure with an employer was 4.6 years.[141] The varying lengths of contracts that teams give to players based on their performance and subjective value to the team show evidence of an employer keeping an employee around as long as it makes sense, financially and otherwise. When determining whether there is an employer-employee relationship, the Supreme Court found that workers who have a permanent arrangement with the hiring party that continues so long as their performance is satisfactory, was a factor that tends to show that the working party is considered an employee.[142] A team's unilateral ability to sign or terminate the working relationship based on performance focuses power in the team's hands and shows evidence of an employer-employee relationship.

5. FORM OF COMPENSATION

Professional athletes are compensated bi-weekly through contracts paid out over a number of years.[143] Players may also receive a signing bonus, which is money paid up-front upon signing a contract with a team.[144] Players may also earn bonuses based on individual or team success.[145] The NHL and NFL both have salary caps, meaning teams must construct rosters under a certain dollar amount; the main difference between the two leagues is that the NHL utilizes guaranteed contracts while NFL contracts are not guaranteed and teams may cut ties with players before the end of the contract.[146] As part of its determination that an employer-employee relationship existed, *Loomis* found that the hiring party conducted all negotiations with customers and set price points for his employees' work.[147] Loomis also conducted all accounting and the employees made no effort to gain outside clients apart from those who negotiated with Loomis himself.[148] The payment of wages directly from the hiring party found in both the *Loomis* case and in the case of professional athletes tends to show an employer-employee relationship.

6. HIRING AND PAYMENT OF ASSISTANTS

Athletes have minimal involvement in the hiring and paying of assistants. The Court found that the hiring party in *Loomis* retained a great deal of power in the hiring and firing

139. *Shea Weber Current Contract*, SPORTSTRAC, http://www.spotrac.com/nhl/nashville-predators/shea-weber/ (last visited: Feb. 27, 2016).

140. *See Nicklas Lidstrom*, HOCKEY REFERENCE, http://www.hockey-reference.com/players/l/lidstni01.html (last visited: Feb. 27, 2016) (evidencing his entire NHL career spent with Detroit through several contracts).

141. *Employee Tenure Summary*, BUREAU OF LAB. STAT. (Sep. 18, 2014), http://www.bls.gov/news.release/tenure.nr0.htm.

142. *See* Nat'l. Labor Relations Board v. United Ins. Co. of Am., 390 U.S. 254, 259 (1968) (noting that the debt agents employed to collect insurance premiums could continue working for the employer as long as their collections stayed at an acceptable level).

143. *See* Kevin Draper, *Let's Take a Look at Andrew McCutchen's Paystub*, DEADSPIN (May 21, 2015), http://deadspin.com/lets-take-a-look-at-andrew-mccutchens-pay-stub-1706188663 (noting baseball star Andrew McCutchen takes home over $400,000 every two weeks based on his paystub).

144. Beverly Bird, *How Sports Signing Bonuses Work*, HOUSTON CHRONICLE, http://smallbusiness.chron.com/sports-signing-bonuses-work-18065.html (last visited Feb. 27, 2016).

145. *See* Joel Corry, *Agent's Take: Notable Players who cashed in on performance bonuses*, CBS SPORTS (Dec. 30, 2014), http://www.cbssports.com/nfl/eye-on-football/24923980/agents-take-notable-players-who-cashed-in-on-performance-bonuses (evidencing examples of players who have received large performance bonuses).

146. *See* Bird *supra* note 144.

147. Loomis Cabinet Co. v. Occupational Safety & Health Rev. Comm'n, 20 F.3d 938, 942 (9th Cir. 1994).

148. *Id.*

of the so-called "partners" that Loomis claimed were independent contractors.[149] The control wielded by the hiring party over the staffing of the workers was a key element in the Court's decision to affirm the finding by the Commission of an employer-employee relationship.[150] Much like the workers in *Loomis*, professional athletes do not play significant roles in the hiring of others within their respective organizations.

7. BUSINESS OF THE HIRING PARTY

While the NFL and NHL are their own separate entities, athletes contract with individual teams, each of which is their own individual business entity.[151] The athletes' in-game performance is part of the regular business of the hiring party; each hiring team's individual revenue stream is directly linked to game-day ticket sales, television contracts, and merchandise sales, all of which are impacted by the athletes' performance.[152] Successful teams have the opportunity to play additional games in the playoffs, which are additional opportunities for revenue.[153] The hiring party in *Loomis* controlled the accounting, advertising, administrative, and financial services for the workers while attempting to claim they were independent contractors.[154] The hiring party was clearly in the business of making cabinets and the workers provided only labor, showing clear employer-employee relationship.[155] Similarly, professional athletes "work" by playing in the games, but do not participate in other aspects of the hiring party's business such as administration, advertising, or accounting.

8. EMPLOYEE BENEFITS

Professional athletes receive many benefits from their teams on top of their negotiated salary, which tends to show an employment relationship under the *Loomis* Test. Professional athletes receive daily per diems while on road trips to cover food and additional expenses.[156] Negotiated CBAs control per diem amounts, which often increase annually.[157] While it is not required for employers outside of the professional sports context to provide their employees with reimbursement during work-related travel, it is extremely commonplace.[158] Other benefits provided by hiring parties to workers, such as vacation time,

149. *See id.* (noting the Commission found that Michael Loomis had a great deal of control over the hiring and firing of workers he claimed were independent contractors).

150. *Id.*

151. *See* Bret Schrotenboer, *To Tax or Not? The NFL's Relationship with the IRS*, USA TODAY (May 30, 2013), http://www.usatoday.com/story/sports/nfl/2013/05/29/nfl-sports-leagues-irs-tax-exemption/2370945/ (noting that the 32 NFL teams are not tax exempt and are indeed for profit entities).

152. *See id.* In the NFL, revenue earned from tickets, TV rights fees, merchandise sales, etc. is subject to federal income tax. *Id.*

153. *See* Kurt Badenhausen, *The NHL Scores With Maple Leafs Ending Playoff Drought*, FORBES (Apr. 24, 2013), http://www.forbes.com/sites/kurtbadenhausen/2013/04/24/the-nhl-scores-with-maple-leafs-ending-playoff-drought/ (noting that the Toronto Maple Leafs would stand to make about $2.5 million from their first round playoff series).

154. Loomis, 20 F.3d 938 at 942.

155. *Id.*

156. *See* Sarah McLellan, *Soaring Athlete Salaries Don't Stop Per Diem*, AZ CENT. (Aug. 17, 2014), http://www.azcentral.com/story/sports/2014/08/17/soaring-athlete-salaries-stop-per-diem/14214797/ (noting players in the NHL earned a $103.00 per diem in the 2014-2015 season and NFL players earned between $925.00 and $1,700.00, depending on experience).

157. *See id* (showing the NFL's per diem increases 10% annually and Major League Baseball's per diem is adjusted based on the Consumer Price Index for Urban Wage Earners and Clerical Workers).

158. *See* 29 C.F.R. 778.217 (noting different types of expenses undertaken by employees that may be reimbursable by employer).

enrollment in company insurance programs, and pension funds have been found to be evidence of an employer-employee relationship.[159]

9. TAX TREATMENT OF EMPLOYEES

While athletes' earnings are taxed similarly to other workers' pay, they are subject to several additional taxes.[160] Athletes must file state income tax returns in each state that has state income tax where they play games during a season.[161] Additionally, some cities charge a special athletes tax.[162] Courts have held that workers correctly reporting their tax and social security information can be considered as a factor tending to show an employer-employee relationship.[163]

B. POSSIBLE EXPLANATIONS FOR NON-REGULATION

There would be precedent if OSHA were to withdraw their interpretation letter and begin to regulate professional athletes as employees. In 1999 OSHA issued an advisory letter related to the compliance of an employee's home worksite.[164] The substance of the letter was quite controversial, causing Congressional lawmakers to ask for a reversal of the stated position.[165] After the outcry, OSHA quickly relented and the Secretary of Labor announced the letter was being withdrawn as it caused "widespread confusion and unintended consequences."[166]

OSHA reversing course on the regulation of professional athletes could ruffle the feathers of those with an economic stake in professional sports.[167] OSHA must ensure that its change in interpretation is not arbitrary or capricious in violation of § 706 of the APA.[168] In order to avoid its action being deemed arbitrary and capricious, OSHA must examine the relevant data around the regulation of professional athletes and give an explanation that includes a rational connection between the facts and its choice to regulate.[169] This test is also used for the rescissions of agency actions.[170] With the growing body of scientific evidence[171] and litigation[172] arising from the unsafe nature of collision sports, it is unlikely that a reviewing court would find that the Agency acted in an arbitrary or capricious manner if it decided to regulate professional athletes playing collision sports. The scope of review by a

159. *See* Nat'l. Labor Relations Board v. United Ins. Co. of Am., 390 U.S. 254, 259 (1968)

160. Erik Brady, *Tax season quite taxing for professional athletes*, USA TODAY SPORTS (Apr. 15, 2015), http://www.usatoday.com/story/sports/2015/04/13/tax-day-april-15-accountant-pro-athletes/25742385/.

161. . *See id.*

162. *See id.*

163. Usery v. Pilgrim Equipment Co., Inc., 527 F.2d 1308, 1315 (5th Cir. 1976).

164. *See OSHA Takes Back Advisory Opinion*, HOLLAND & HART, Jan. 2000, WL 4 No. 10 Idaho Emp. L. Letter. The letter noted that employers must exercise reasonable diligence in identifying potential hazards at an employee's home worksite and that any home worksite must comply with the provisions of the OSH Act. *Id.*

165. See *id.* Representative Frank R. Wolf, head of the House Transportation Committee, asked for a reversal of the Department of Labor's position. Wolf complained that the policy would hurt telecommuting, which has an impact on traffic congestion and pollution. *Id.*

166. See *id.* (noting the letter was withdrawn two days after being published in the Washington Post).

167. *See* Eichelberger *supra* note 4 (noting sports revenue is expected to hit $67.7 billion in 2017).

168. *See* 5 U.S.C.A. § 706(2)(A) (allowing a reviewing court to hold unlawful or set aside agency actions they find to be arbitrary or capricious).

169. *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co. 463 U.S. 29, 43 (1983) An agency rule would be arbitrary and capricious if the agency failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Id.*

170. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co. 463 U.S. 29, 44 (1983).

171. *See supra* notes 31–32 (noting the diagnosis of CTE in multiple former NFL players).

172. *See supra* Part I.A and Part I.B (referencing class action lawsuits against both the NFL and the NHL, respectively).

court is very narrow and a court may not substitute its judgment for that of OSHA.[173] With the deference given to OSHA and the support of scientific evidence, OSHA's decision to regulate would likely be upheld under the arbitrary and capricious standard necessitated by the APA.

It is curious that OSHA chooses not to bring professional athletes under its purview given that professional athletes satisfy so many aspects of the *Loomis* Test.[174] Some believe OSHA chooses not to regulate collision sports because injury rate statistics may be skewed since they include all spectator sports encompassing both contact and non-contact; the statistics also include coaches, trainers, managers, and not simply the athletes.[175]

Rodney K. Smith hypothesizes that OSHA's continued deference to collision sports leagues and reluctance to regulate may be for competency reasons.[176] While OSHA does specialize in health, safety, and workplace conditions, it may not be equipped to set standards to improve player safety in collision sports.[177] Smith notes that just one of the twenty listed OSHA experts has expertise in sports complexes, and none of the listed experts has expertise in sports generally.[178] Smith also hypothesizes that politicization inherent in OSHA's makeup as an executive agency has led to the Agency's hands-off approach when it comes to attempting to regulate the safety of collision sports and its athletes.[179]

The only high profile instance of an OSHA investigation into collision sports was in 2001, after the death of Minnesota Vikings football player Korey Stringer from an apparent heat stroke.[180] OSHA cleared the Minnesota Vikings of any wrongdoing as the team had trained all relevant personnel on heat stress while having water and first-aid on hand.[181] OSHA involvement becomes more likely after the death of a player.[182] Should a government agency created to protect private employees only become involved after a player dies on the field or ice?

IV. AVENUES FOR OSHA REGULATION

Professional athletes classified as employees under a reevaluation of the *Loomis* Test will thus fall under OSHA jurisdiction; but what could OSHA realistically do to make collision sports safer for the athletes? Looking back at the OSH Act, it was created to ensure that every worker in the Nation had safe and healthy working conditions.[183] There are two ways in which OSHA could regulate collision sports to be safer. The traditional method of promulgating and enforcing standards against collision sports teams is discussed in subpart C while the more outside-the-box method of creating advisory committees is discussed in

173. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co. 463 U.S. 29, 43 (1983).

174. . *See supra* Parts III.A.1-9.

175. *See* Daniel Engber, *Does OSHA Keep Tabs on the NFL*, SLATE (Feb. 3, 2006, 6:31 PM), http://www.slate.com/articles/news_and_politics/explainer/2006/02/does_osha_keep_tabs_on_the_nfl.html. The rate of injury or illness in spectator sports in 2004 was 2.8 per 100 full-time workers. For every 100 people working 2,000 hours a year (50 full-time weeks), there were 2.8 cases that resulted in someone missing work. *Id.*

176. Rodney K. Smith, *Solving the Concussion Problem and Saving Professional Football*, 35 T. JEFFERSON L. REV. 127, 171 (2013).

177. *Id.*

178. *Id.* at 171 n.213.

179. *See id.* (noting OSHA's decisions are scrutinized by both the President and Congress).

180. Glenn M. Wong, *SN Concussion Report: NFL Could Lose Billions in Player Lawsuits*, AOL SPORTINGNEWS (Aug. 22, 2012, 7:14 PM), http://aol.sportingnews.com/nfl/story/2012-08-22/nfl-concussion-lawsuits-money-bankrupt-players-sue-head-injuries.

181. Daniel Engber, Does OSHA Keep Tabs on the NFL, SLATE (Feb. 3, 2006, 6:31 PM), http://www.slate.com/articles/news_and_politics/explainer/2006/02/does_osha_keep_tabs_on_the_nfl.html.

182. *See* Wong *supra* note 180; *See* Engber *supra* note 181.

183. 29 U.S.C.A. § 651(b) (West 2015).

subpart D. The OSH Act imposes a number of requirements on employers.[184] However, requiring the NFL and NHL to provide an employment environment free from hazards likely to cause serious physical harm to employees is a near impossibility. The risk of harm is inherent in American football and ice hockey.[185]

Absent OSHA regulations, the NFL and NHL have recently taken it upon themselves to attempt to make their respective games safer by adding and modifying game rules and emphasizing points of safety.[186] Looking at the allegations made by former players in both the NFL and NHL concussion litigation, current adjustments of the game are too late to help those already suffering the consequences of unsafe play.[187]

A. NFL RULE SAFETY ADJUSTMENTS

In recent years the NFL has gradually implemented rules to improve the safety of its players. As early as 2005, the NFL prohibited "horse collar tackles"[188] and unnecessary roughness.[189] In 2009, the NFL began protecting "defenseless players"[190]and in 2010 protected all "defenseless players" from blows to the head delivered by an opponent's helmet, forearm, or shoulder.[191] In 2011, possibly in response to the Eric LeGrand incident,[192] the NFL moved kickoffs up five yards in an effort to cut down on returns, while eliminating the fifteen to twenty yard running start for the kicking team.[193] Perhaps most relevant to decreasing concussions, in early 2012 the NFL began using independent certified athletic trainers ("ATC Spotters") who observe the field of play during the game to identify players who may have suffered a concussion, head, or neck injury and then relay that information down to the field.[194] These rule changes seem to be partially reactionary given their timing and the increase of emerging science on the long-term risks of concussions.

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184. *See* 29 U.S.C.A. § 654(a) (West 2015). ("Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.").

185. *See* Peters, *infra* note 198 (noting that today's hockey players seem to accept the risks of concussions by continuing to play in the face of warnings).

186. *See infra* Parts IV.A and IV.B (discussing the rule changes implemented by both leagues in the last ten years).

187. *See* LaCouture v. Nat'l Hockey League, No. 1:14-CV-2531, 2014 WL 1392180, at *106 (S.D.N.Y. filed Apr. 9, 2014) (alleging what changes the NHL made were purposefully ineffective and merely meant to mislead current and former players as well as the public into ceasing investigation as to the risks of head trauma).; *See In re Nat. Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 362 (E.D. Pa. 2015) (alleging the NFL failed to revise league rules to minimize the risks of head injuries).

188. *See Evolution of the rules: from hashmarks to crackback blocks*, NATIONAL FOOTBALL LEAGUE (Aug. 2, 2013), http://www.nfl.com/news/story/0ap1000000224872/article/evolution-of-the-rules-from-hashmarks-to-crackback-blocks (making it illegal to grab the inside collar of the shoulder pads or jersey to tackle a runner).

189. *See id.* (defining unnecessary roughness as unnecessarily running, diving into, or throwing the body against a player who should not have reasonably anticipated such contact by an opponent).

190. *See 2015 Official Playing Rules of the National Football League*, NATIONAL FOOTBALL LEAGUE, 50–51, http://uaasnfl.blob.core.windows.net/live/1807/2015_nfl_rule_book_final.pdf (noting the numerous different positions and situations where a player can be considered 'defenseless').

191. *See Evolution of the rules supra* note *188* (noting that in 2010, to cut down on head injuries, a play will stop and the ball declared "dead" if a runner's helmet is dislodged).

192. *See* Mark Viera, *Rutgers Player is Paralyzed Below the Neck*, NEW YORK TIMES, (Oct. 17, 2010), http://www.nytimes.com/2010/10/18/sports/ncaafootball/18rutgers.html?_r=0. LeGrand, a Rutgers University Football player, was paralyzed below the neck while attempting to tackle a kickoff returner. *Id.*

193. *See Evolution of the rules supra* note *188*.

194. *See ATC Spotters*, NFL OPERATIONS, http://operations.nfl.com/the-game/gameday-behind-the-scenes/atc-spotters/ (last visited Feb. 27, 2016) (beginning with the 2015 season, an ATC Spotter may stop the game by contacting a designated game official and using a medical timeout if there is clear visual evidence that a player displays obvious signs of disorientation or is clearly unstable and the player is attempting to stay in the game and not be evaluated by medical staff).

B. NHL RULE SAFETY ADJUSTMENTS

The NHL has also revised its existing rules in an attempt to make the game safer. NHL Commissioner Gary Bettman has stated that the standards of discipline in the league today with respect to punishing violent, illegal hits are much more stringent than a decade ago.[195] In 2011 the rule regarding illegal hits to the head, officially called "Rule 48" in the NHL Rulebook, was changed to provide added protection for players.[196] That same year the NHL changed the rules regarding boarding.[197] The inherent speed and contact necessary in ice hockey will lead to some unavoidable concussions and players today seem to understand and accept those risks.[198] The league has yet to ban all hits to the head.[199] In contrast, the NCAA has banned all contact with the head or neck in ice hockey.[200] Even with the NHL's recent attempts to make the game safer, these changes are somewhat hard to swallow given the league did not require players to wear helmets until 1979,[201] over a decade after the NHL Players Association urged the NHL to mandate their use.[202] Even when helmets were made mandatory, players who were grandfathered into the previous rule continued to play without helmets until the 1996–1997 season.[203] The NHL is implementing a similar gradual rule change with regards to face protection visors.[204]

Perhaps the final domino to fall in the effort to increase player safety is that of sanctioned bareknuckle fighting. The NHL is the only major American sports league that allows

195. *See* Jeff Z. Klein and Stu Hackel, *In the N.H.L., a Stricter Standard for Safety's Sake*, NEW YORK TIMES (Dec. 28, 2013), http://www.nytimes.com/2013/12/29/sports/hockey/in-the-nhl-a-stricter-standard-for-safetys-sake.html ("Standards and expectations have changed over the course of time, just as the playing rules, game tactics and player training have evolved.").

196. *See* Dan Rosen, *Teams, players receive rule changes video explanation*, NATIONAL HOCKEY LEAGUE (Sep. 19, 2011), http://www.nhl.com/ice/news.htm?id=588987 (noting that a minor penalty will be assessed in all hits where the head is targeted in an intentional and/or reckless way and is the principal point of contact, whereas previously violations of this rule were punishable by a major penalty but only if the hit was from the 'blind' or lateral side).

197. *See id.* A boarding penalty will be called against a player who "checks or pushes a defenseless player in a manner that causes the player to have a potentially violent and/or dangerous impact with the boards." The onus is on the hitting player to make sure the player he is making contact with is not defenseless. *Id.*

198. Chris Peters, *NHL concussion crisis requires further rule changes*, CBS SPORTS (Feb. 26, 2013), http://www.cbssports.com/nhl/eye-on-hockey/21773717/nhl-concussion-crisis-requires-further-rule-changes.

199. *See id.* (noting this is seemingly out of a fear of breaking tradition and losing all physical aspects of the game).

200. *See id.* (pointing out that this rule is not perfect as it places a great deal of discretion with the referee, but the college game has not seen any significant decline in traditional body checking).

201. *See* Frank Fitzpatrick, *Hazardous Despite A Player's Death, Helmets Were Long Ignored*, THE INQUIRER (Jan. 13, 1988), http://articles.philly.com/1988-01-13/sports/26283417_1_billmasterton-helmets-nhl (noting slow change may have been caused by NHL team owners who believed mandatory helmet use would kill interest in the game as fans would not be able to recognize their favorite players).

202. *Id.*

203. *See No Helmet to Hang Up*, NEW YORK TIMES, (Apr. 30, 1997), http://www.nytimes.com/1997/04/30/sports/no-helmet-to-hang-up.html. The NHL allowed any player who had signed a professional contract before 1979 to continue play without a helmet. *Id.* Craig MacTavish was the last player to not wear a helmet during an NHL game. MacTavish signed a professional contract before June 1, 1979 and opted out of wearing one for the rest of his career. *Id.*

204. *See Official Rules 2015-2016*, NATIONAL HOCKEY LEAGUE, 13-14, http://www.nhl.com/nhl/en/v3/ext/rules/2015-2016-Interactive-rulebook.pdf (noting that the NHL Rulebook requires that starting in the 2013–2014 season, all players are required to attach a visor to their helmet that ensures adequate eye protection); *See* Mike Brophy, *NHL, NHLPA agree on mandatory visors*, NATIONAL HOCKEY LEAGUE (Jun 4, 2013), http://www.nhl.com/ice/news.htm?id=672983 (73% of all players already wore visors at the time of the rule change).

fighting during a game.[205] Luckily from a safety perspective, the number of fights during games is slowly dwindling.[206]

C. POSSIBLE PROMULGATION OF OSHA STANDARDS

Federal government regulation would allow for the implementation of increased safety measures without the conflict of a league, a players union, and team owners. Formulated outside of the league, these regulations would not account for the possibility of lost revenue due to the regulations. These regulations would focus solely on the safety of the athletes participating. If we assume that professional athletes are indeed under OSHA's jurisdiction and not independent contractors, what actions could, or more importantly, should OSHA take to attempt to increase safety for athletes? Looking back at the OSH Act, the first lines read: "To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act . . . by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes."[207] Enforcing current workplace safety standards against professional collision sports leagues would be troublesome. As noted above, the sports in question are so specialized that only a few thousand athletes in the world can play them at the highest level.[208] Due to the degree of skill and specialization in these sports, enforcing already promulgated standards related to the construction or manufacturing fields against collision sports leagues would simply not work.

OSHA could elect to promulgate new safety and health standards that focus on the specific inherent dangers of collision sports.[209] When presented relevant information regarding workplace safety and health from interested persons or organizations, the Secretary of Labor may determine that a rule should be promulgated to serve the objectives of the OSH Act.[210] "Interested persons" in this case could be athletes, their unions, or even their families looking out for the safety of those playing collision sports. With the growing body of science surrounding the risks of head trauma, there would not be an issue presenting a substantive amount of relevant scientific information regarding the current safety risks involved with playing collision sports.[211] After this information is presented, the OSH Act then follows the requirements of the APA on rulemaking.[212] OSHA standards relating to

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205. *See Official Rules 2015-2016*, National Hockey League, 70, http://www.nhl.com/nhl/en/v3/ext/rules/2015-2016-Interactive-rulebook.pdf. The NHL rules define a fight as when at least one player punches or attempts to punch an opponent repeatedly or when two players wrestle as to make it difficult to intervene and separate the combatants. *Id.*

206. *See NHL Fight Stats*, HOCKEYFIGHTS.COM, (2015), http://www.hockeyfights.com/stats/ (noting that the 2000-2001 season saw .56 fights per game, the last full season of 2016-17 saw that decrease to .30 fights per game); *See* Pierre LeBrun, *Why does the NHL still allow bar-knuckle fighting?*, ESPN (Dec. 10, 2015), http://espn.go.com/nhl/story/_/id/14329166/nhl-why-does-league-allow-bare-knuckle-fighting (noting that because today's NHL focuses on speed and skill rather than toughness, some pundits believe fighting will eventually become extinct).

207. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (Dec. 29, 1970).

208. *See Estimated Probability supra* note 121 (noting the low percentage of college athletes drafted to the NHL or NFL); *see* LaCouture v. National Hockey League, No. 1:14-CV-2531, 2014 WL 1392180, at *1 (S.D.N.Y. filed Apr. 9, 2014) ("Ice hockey demands levels of agility, dexterity, strength, and mental prowess like no other team sport.")

209. *See* 29 U.S.C.A. § 655 (West 2015) (noting OSHA has the power to promulgate standards under the OSH Act).

210. *See* 29 U.S.C.A. § 655(b) (West 2015).

211. *See supra* Part I (evidencing the scientific research and allegations made about the dangers of playing collision sports).

212. *Compare* 5 U.S.C.A. § 533 (West 2015) (mandating notice of proposed rule making be published in the Federal Register not less than 30 days before effective date, giving opportunity for interested persons to participate in rule making by submitting written data, views, or arguments and the right for interested persons to petition for the issuance, amendment, or repeal of a rule). with 29 U.S.C.A. § 655(b) (West 2015) (allowing 30 days from

collision sports could attempt to increase the safety of players' protective gear including helmets and other protective padding. This would potentially increase the safety for the players wearing the protective gear as well as any opponents they may collide with during the course of a game.[213] Potential OSHA standards could also include regulation of the playing surface and area. Due to the frequency of collisions with inanimate objects and the playing surface in collisions sports,[214] creating fewer chances for collisions with extremely hard, immovable objects could cut down on concussions and other injuries. Perhaps providing softer padding under NFL turf or more flexible boards around NHL rinks are just a few potential regulation ideas that could increase safety. Any new standards would have to be based in scientific evidence demonstrating their potential to increase safety, which could be difficult given OSHA's current makeup.[215]

Employers adversely affected by the newly promulgated rules may file a petition with the United States Court of Appeals in the circuit serving their primary place of business challenging the validity of the standard.[216] Evidenced by their stated refusal to settle the pending concussion lawsuit, the NHL shows their willingness to let things work through the courts.[217]

In the event OSHA decides to create new collision sport standards, the agency may enforce these standards against the leagues and their teams.[218] The Secretary of Labor has the authority to require under-oath testimony and production of evidence from pertinent witnesses during the course of his inspections.[219] Employees may also request an inspection from the Secretary of Labor if they believe a violation of a health or safety standard exists.[220] If OSHA decided to regulate by promulgating standards, these inspections could prove troublesome as professional athletes train and play in many different places all across the country during the course of a season.[221] What would constitute reasonable times to conduct inspections as reflected in the OSH Act?[222] The inspections would seemingly be most effective during the course of a game but that would lead to a logistical nightmare for both the inspectors and the employers.[223] To attempt to inspect thirty-two NFL and thirty NHL teams would be a difficult task.

If, after an inspection, the Secretary of Labor determines an employer has violated a safety and health standard promulgated pursuant to the OSH Act, he may issue a written

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publication in the Federal Register for interested persons to submit written data or comments and allowance of any interested person to file written objections to the proposed rule and requesting a public hearing. Within 60 days of the end of either the comment period or public hearing the Secretary will either adopt or reject the promulgation of a new rule).

213. *See* LaCouture, *supra* notes 66–67 (alleging that the NHL's refusal to create rules related to protective equipment was a failure to implement reasonable safety measures).

214. *See* Rice, *supra* note 7 (noting that collision sports consist of play where athletes collide with each other or with the ground with a large amount of force).

215. *See* Smith, *supra* note 188 (noting the lack of specialized sports safety knowledge possessed by OSHA regulators).

216. *See* 29 U.S.C.A. § 655(f) (West 2015) ("The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.").

217. *See* Wyshynski, *supra* note 70 (noting an internal NHL memo stated that the league has no intention to settle the pending NHL concussion lawsuit).

218. *See* 29 U.S.C.A. § 657(a) (West 2015) The OSH Act allows for the Secretary to inspect any workplace under OSHA purview for possible violations during regular working hours. *Id.*

219. *See* 29 U.S.C.A. § 657(b) Witnesses may be compelled to testify by the United States District Court and failure to obey can result in contempt of court. *Id.*

220. *See* 29 U.S.C.A. § 657(f) (allowing for inspections of potential violations that threaten physical harm or cause an imminent danger to employees in the workplace).

221. *See supra* Part III.A.2 (noting a player will have work obligations in an arena, training facilities, practice facilities, or film room both in visiting cities and the team's hometown).

222. *See* 29 U.S.C.A § 657(a) (West 2015) (noting OSHA may inspect a workplace at reasonable times).

223. *See supra* notes 143–133 (showing most games take place on weekends or late in the evening).

citation to the employer describing the nature of the violation.[224] Challenging a proposed penalty will trigger the Commission's adjudication.[225] The Commission then issues an order, affirming, modifying, or vacating the Secretary's citation or proposed penalty, and the Commission's order becomes final thirty days after issuance.[226] The employer or the Secretary of Labor may challenge the order of the Commission by filing a written petition praying that the order be modified or set aside in a United States Court of Appeals within sixty days.[227]

The play styles of these sports are changing constantly. Due to the arduous process needed to promulgate and enforce new standards under the OSH Act as outlined above, it would take an incredible amount of time and resources to draft and implement a specifically tailored set of standards for each sport that would be sufficiently safer than the rules and guidelines already implemented by each league. To keep those standards constantly updated as to new styles of play, trends in the game, and emerging science would be a nearly impossible.[228] It would be difficult for OSHA to set and maintain standards that would remarkably increase player safety from the point at which it stands now while allowing the respective leagues to maintain the integrity of their sports.[229] The NFL's new rules show positive early returns, concussions were down 36% from 2012 to 2014.[230]

D. USE OF ADVISORY COMMITTEES

Rather than utilizing OSHA and the Commission's unilateral authority to promulgate and enforce new safety standards,[231] a more nuanced method would be more effective in increasing the safety of collision sports. OSHA's efforts to increase safety in collision sports and promote a healthful work environment for professional athletes by providing for research, information, education, and training[232] should be accomplished by specific and possibly unorthodox means. Section seven of the OSH Act provides for the creation of a National Advisory Committee on Occupational Safety and Health (National Advisory Committee).[233] The National Advisory Committee shall advise, consult with, and make recommendations to the Secretary of Labor and the Secretary of Health and Human Services on matters related to the OSH Act.[234] The Secretary may also appoint numerous advisory committees consisting of no more than fifteen members to assist them in the promulgation

224. *See* 29 U.S.C.A. § 658(a) (West 2015) Each citation must be in writing and describe the nature of the violation, including a reference to which provisions of the Act, standard, rule, regulation, or order were violated. *Id.*

225. 29 U.S.C.A. § 659 (West 2015).

226. *Id.*

227. *See* 29 U.S.C.A. § 660(a)–(b) (West 2015). The court shall then have jurisdiction to affirm, modify, or set aside in whole or in part the order of the Commission and shall have the authority to enforce the order. *Id.*

228. *See ATC Spotters*, NFL OPERATIONS http://operations.nfl.com/the-game/gameday-behind-the-scenes/atc-spotters/ (noting the NFL began instituting ATC Spotters mid-season, a mere two weeks after an incident when quarterback Colt McCoy was allowed to return to the game after a concussion.); *See* Martin Avery, *Sean Avery and "The Avery Rule"*, BLEACHER REP. (Feb. 2, 2009), http://bleacherreport.com/articles/118839-the-avery-rule. The NHL instituted a new rule regarding the obstruction of a goaltender's vision the very next morning after a player attempted to use his stick to block the view of a goaltender during a 2008 playoff game. *Id.*

229. *See* Chris Peters, *NHL concussion crisis requires further rule changes*, CBS SPORTS (Feb. 26, 2013), http://www.cbssports.com/nhl/eye-on-hockey/21773717/nhl-concussion-crisis-requires-further-rule-changes. (noting that because of the speed and physicality of the game, concussions in hockey are an unavoidable fact).

230. Jon Hyman, *OSHA and Pro Sports – Are Concussions the NFL's Black Lung?*, LEXIS NEXUS LEGAL NEWSROOM LABOR AND EMP'T L. (Mar. 18, 2015), http://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/archive/2015/03/18/osha-and-pro-sports-are-concussions-the-nfl-s-black-lung.aspx.

231. *See* 29 U.S.C.A. § 655(b) (West 2015).

232. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (Dec. 29, 1970).

233. 29 U.S.C.A. § 656(a) (West 2015).

234. 29 U.S.C.A. § 656(a)(2) (West 2015).

of new standards.[235] The committee makeup shall consist of persons to represent the viewpoints of the employers and workers involved as well as a representative of a State health and safety agency.[236] The Secretary of Labor may also appoint individuals who are qualified to make a useful contribution to the committee, and may include representatives of professional organizations or professionals specializing in occupational safety or health, and representatives of standards-producing organizations.[237] The only substantive restriction on membership to the advisory committees is that no member may have an economic interest in a proposed rule other than the representatives of the employers and employees.[238]

Herein lies the most reasonable and effective solution to OSHA regulation of collision sports. Creating an advisory committee focused on the safety of athletes in each of the collision sports leagues could lead to very meaningful rule changes that make collision sports safer. Each committee could be composed of representatives from the NFL or NHL league office, representatives from the respective players unions, leading neurologists, neurotrauma doctors, and other medical professionals. Even retired or current athletes, combined with representatives of health and safety agencies or professionals specializing in occupational safety and health, could offer useful contributions to advisory committees. An advisory committee consisting of this makeup would represent the interests of both employers and employees as well as experienced medical professionals specializing in the type of injuries common to the sport in question and combine these interests with individuals experienced in the fields of occupational safety and standard setting.

As it currently stands under the OSH Act, these advisory committees may only be formed to assist in the promulgation of enforceable OSHA standards.[239] However, the goal for these newly devised advisory committees should be to suggest new rules with regards to safety for each league and to review and potentially approve any pending league rule changes relating to the safety of their respective sport.

This group of experts and interested parties coalesced into an advisory committee could make relevant and realistic suggestions as to what standards and rule changes leagues could and should implement to increase player safety.[240] Having league and player representatives would allow for the least amount of intrusion upon the games, as fans know it. These representatives would seek to preserve the identity of their respective sports while the health and occupational safety experts would provide a balance in their drive to make the sports safer. These league advisory committees should act in a sort of consultancy role, using their respective specialties to look at emerging science, trends in gameplay, and what changes are financially feasible for the leagues. Allowing these advisory committees to help effectuate rule changes at the league level would eliminate the logistical difficulties of promulgating and enforcing new, OSHA-exclusive standards for collision sports.[241] Including representatives from the leagues in the makeup of these committees would decrease the chances of litigation challenging newly promulgated standards.[242]

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235. 29 U.S.C.A. § 656(b) (West 2015).

236. *Id.*

237. *See id.* (noting that individuals serving on an advisory committee are compensated as consultants).

238. *Id.*

239. *Id.*

240. *But see* Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG 1, 36 (1989) (noting that the requirement for OSHA to appoint an equal number of representatives of labor and management limits the number of independent experts it may appoint and such a requirement "contributes to the politicized and adversarial nature of OSHA committees and limits the range of their expertise").

241. *See supra* Part IV.C (establishing the practical difficulties in the promulgation and enforcement of new OSHA standards regarding collision sports).

242. *See supra* note 227 (noting employers adversely affected by new standards may file a petition with the United States Court of Appeals challenging the validity of the standard).

A system such as this will allow OSHA to effectuate their purpose under the OSH Act without the extreme difficulties of standard enforcement.[243] The makeup of the advisory committee allows for innovative approaches for dealing with occupational safety and health problems[244] existing in collision sports by allowing leading medical professionals and experts in occupational health and safety to work together. The advisory committees could stimulate employers and employees to institute new and to perfect existing programs increasing the safety[245] of collision sports by allowing league officials and athletes to work on the same committee and hear each other's contrasting points of view. Had a committee such as this existed previously, it may have been possible for medical professionals to find a link between concussions and long-term ill effects much sooner by attempting to discover latent diseases and establishing causal connections between diseases like CTE and work in environmental conditions common among collision sport athletes.[246] The makeup of the advisory committee allows for the medical community's viewpoint on the safety of collision sports to be taken into account by providing medical criteria that may help assure that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience in the NFL or NHL.[247] These committees will have all the necessary experience to create meaningful suggestions regarding safety. With all interested parties involved, it would be difficult for the NFL and NHL to not give credence to the advisory committee's suggestions regarding safety.

In the past, critics have accused OSHA of not utilizing advisory committees to the fullest extent possible, while other federal agencies such as the EPA and FDA rely extensively on advisory committees, specifically for technical expertise.[248] In her article on the reform of OSHA, Sidney Shapiro lists a number of benefits advisory committees bring to the table including allowing for a better understanding of technical issues, identifying consensuses in the scientific community, and allowing interested experts to have a bigger role in agency decisions.[249] These benefits can lead to increased credibility in OSHA decisions, thus making opposition from the public and politicians less likely, at least from a technical standpoint.[250] While all occupational safety and health issues are inherently technical, the issues facing collision sports are especially so.[251] Collision sports require a level of skill only a few thousand people possess[252] and the styles of play are constantly evolving.[253] Utilizing an advisory committee to assist with technical interpretations and to find a consensus with regard to scientific and medical data relating to head injuries would be of the utmost importance in OSHA regulation of collision sports.

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243. *See* 29 U.S.C.A. § 651 (West 2015) (noting OSHA's thirteen purposes laid out in the OSH Act.)

244. *See* 29 U.S.C.A. § 656(b) (West 2015). (noting the many different members than can make up an advisory committee).

245. *Id.*

246. *Id.*

247. *See* 29 U.S.C.A. § 651(b)(7) (West 2015).

248. *See* Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 7–8 (1989) (noting that at the time of writing, OSHA had not appointed any rulemaking advisory committees since 1976 possibly because they did not function well and that the OSH Act mandated unreasonably short deadlines from advisory committees); *But see id.* at 45 (noting that advisory committees will probably not work for many of the issues OSHA must address).

249. *Id.* at 35.

250. *See id.* (noting that the usefulness of committees is limited to issues of science and other technical issues but does not provide that same benefit to policy questions).

251. *See* Breslow *supra* note 34 (noting that scientific studies on the issue of CTE and football are still emerging).

252. *See supra* Part III.A.1 (evidencing how few high school and college athletes have the opportunity to play collision sports professionally).

253. *See supra* note 161 (noting two prominent rule changes that were instituted quickly).

IV. CONSEQUENCES OF OSHA REGULATION

Potential government regulation of professional sports is not without its hurdles, however. Some criticism may come from the fans themselves wanting the government to stay away from their beloved sports. Regarding the discussion outlined above concerning the College Football BCS antitrust issues, a poll found that while 63% wanted to get rid of the BCS system, 48% said that federal lawmakers forcing a change was a bad idea and only 45% believed it to be a good idea.[254] With a clear majority unhappy with a certain aspect of sports but far less interested in the federal government stepping in, this may be indicative of fans' hesitancy of federal government regulation in sports. Additionally, a 2015 Gallup poll found that 49% of Americans think the government regulates business too much; while only 21% say business is regulated too little.[255] This feeling toward government regulation could cause fans to take less interest or abandon sports leagues that are subjected to governmental regulations. Lower fan interest could mean shrinking revenues for collision sports leagues. OSHA deals with industries with economic incentives to delay new regulations and the NFL and NHL are no different.[256] However, this does not tell the whole story. OSHA gets flak from both sides, on one from businesses and pro-business politicians for over-regulation, and on the other by labor advocates, unions, and pro-union politicians for under-regulation.[257]

Rodney K. Smith also notes a potential problem with OSHA regulation of professional sports. As an administrative agency of the executive branch, OSHA is politicized and their decisions are subject to scrutiny from both the President and Congress.[258] Smith points out that President Obama has not shown any outward interest in government regulation of the safety of football.[259] Not only do OSHA regulations affect the President, Congress, and various interest groups, but they may involve difficult moral or philosophical choices.[260] With the American people's lack of support for government regulation of business, it is possible that members of Congress would suffer some backlash from constituents if OSHA were to step too far in the regulation of collision sports.[261]

Looking specifically at the issues regarding the use of advisory committees, Sidney Shapiro notes that in the past, OSHA's use of advisory committees to assist their regulatory processes has created problems with accountability and coordination.[262]

CONCLUSION

The concussion and head injury issue in collision sports has reached its tipping point. It has found its way into the courts in an expensive and retrospective attempt to fix the problem. OSHA can no longer ignore the injuries happening in collision sports. OSHA must reevaluate their stance regarding professional athletes under *Loomis* and find they are employees and not independent contractors. Once professional athletes are considered under OSHA jurisdiction, rather than hold them to existing OSHA standards or attempt to

254. *Fans Don't Want Congress Poking In*, ESPN (Dec. 29, 2009), http://espn.go.com/ncf/news/story?id=4779279.

255. Andrew Dugan, *In U.S., Half Still Say Gov't Regulates Business Too Much*, GALLUP (Sept. 18, 2015), http://www.gallup.com/poll/185609/half-say-gov-regulates-business.aspx.

256. Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 6 (1989).

257. *Id.* at 11.

258. Rodney K. Smith, *Solving the Concussion Problem and Saving Professional Football*, 35 T. JEFFERSON L. REV. 127, 171 (2013).

259. *Id.*

260. *See* Shapiro, *supra* note 248, at 10–11 (1989).

261. *See* Shapiro, *supra* notes 267–268 (noting OSHA is often criticized by Congress for overregulation).

262. *See* Shapiro *supra* note 248, at 7.

promulgate completely new standards, an advisory committee should be formed for both the NFL and NHL to assist and consult with the leagues in the implementation of new safety rules and procedures based on emerging science and trends in the game.

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More than Just the Game: How Colleges and the NCAA are Violating their Student-Athletes' Rights of Publicity

Wes Gerrie

ABSTRACT

Today, the NCAA is a multi-billion dollar enterprise, by far the highest-grossing sports related organization in the world, outpacing professional leagues like the NFL, NBA, and NHL year after year. Their focus on 'big business' creates a highly commercialized environment, where the NCAA and its member institutions are netting billions of dollars in revenue. Coaches, administrators, executives and almost everyone involved are sharing in the riches that college sports generate. *Almost* everyone. The lone group that is unable to share in this markedly vast regime are the student-athletes themselves, the very assets whose talents and skills are the foundation on which this multi-billion dollar enterprise is built.

According to current NCAA bylaws and regulations there exists a zero tolerance penalty against students who receive compensation—particularly for their skill, name, image, and likeness.[1] Specifically, "a student loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual . . . accepts a promise of pay".[2] For instance, if a student were paid to teach at a local YMCA or accept money for his autograph he could be found "ineligible." This strict and rigid rule, which has affected the lives of many student-athletes, has been given life under strong judicial deference. For years the NCAA has gotten away with this scheme under an antitrust exemption because of their educational mission, promotion of amateurism, and self-proclamation as the guardian of college sports in America.

However, a challenge to the NCAA's position is growing stronger. Recent reports and public opinion have called into question the importance of these principles and whether these goals are outdated and, in fact, contrary to their aim. This growing fire has been stoked by the fact that the NCAA has become a billion dollar industry and student-athletes are asking, "where is our share?" These questions, concerns, and developments have recently eroded this judicial deference, the culmination of which is seen in the Ninth Circuit's decision in *O'Bannon v. NCAA*.[3] Here, they found the NCAA is indeed subject to the rule of reason and not exempt from schemes, which exhibit restraint on a student-athlete's trade.

Coincidentally, the courts have adapted the historical Right of Privacy to include a decidedly more modern Right of Publicity to judge whether a defendant is improperly using their skill, name, image, and likeness without consent. Specifically, by restraining a student-athletes' ability to be compensated for use of their skill, name, image, and likeness – i.e. their publicity – through endorsements and sponsorship, the NCAA is interfering with stu-

1. NCAA ACADEMIC and MEMBERSHIP AFFAIRS STAFF, 2015-16 NCAA Division I Manual, Article 12.1.2 (2015).

2. *Id.*

3. Supreme Court denied petitions by both O'Bannon and the NCAA to review the case leaving in place this 2015 decision by the U.S. Court of Appeals for the Ninth Circuit. *NCAA v. O'Bannon*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/15-1388.htm. [hereinafter *O'Bannon Supreme Court Decision*]

dent-athletes' rights. Thus, by proving an improper appropriation and violation of student-athletes' Right of Publicity there flows a restraint of trade by the NCAA for disallowing them to seek or accept compensation.

INTRODUCTION

Jordan Spieth is a twenty-two year-old, professional golfer from Dallas, Texas.[4] In 2011 Spieth elected to attend the University of Texas and played college golf for the Longhorns.[5] He was a member of the 2011 Walker Cup team and won three NCAA events. He led the Longhorns in scoring average, helping his team to a NCAA Division I National Championship.[6] Spieth was named All-Big-12, as well as both Big-12 Freshman of the Year and Player of the Year, and was a first-team All-American.[7] In 2012, midway through the first semester of his sophomore year at Texas a then 19-year-old Spieth dropped out of college and turned pro.[8]

That same day while driving to Austin, Texas to return his textbooks Spieth's agent, Jay Danzi, said "given his success, personality, potential and image he is a 'hot property' for equipment companies and other endorsement opportunities."[9] His first priority was getting a deal.[10] Less than a month later Spieth was the face of Under Armour and BioSteel before even playing his first professional event.[11] Just over a year later Under Armour ripped up that deal and gave the now 21-year-old a new 10-year contract worth a reported $200 million.[12] Currently, he also has deals with AT&T, Titleist, Rolex, Perfect Sense, NetJets, and Superstroke to use his image to sell and promote products, all of which netted him a reported $20 million per year.[13]

This is but one example of the high value of an athlete's identity, image, and likeness.[14] Turn on the TV, read a magazine, or look up at a billboard and it is easy to see sports are a big business, and college sports are no exception. The NCAA March Madness Basketball Tournament alone has broadcast rights worth $771 million per year,[15] the merchandise

4. Team Spieth, *About Jordan: Getting to Know PGA Tour Pro Jourdan Spieth*, JORDAN SPIETH GOLF, http://www.jordanspiethgolf.com/about-jordan-spieth (last visited Mar. 6, 2017).

5. *Id.*

6. *Men's Golf Freshman All-American Jordan Spieth to Appear in First Major at U.S. Open,* TEXAS SPORTS: MEN'S GOLF (June 12, 2012), http://www.texassports.com/news/2012/6/12/061212aaa_726.aspx (last visited Mar. 6, 2017).

7. *Id.*

8. Team Spieth, *supra* note 4.

9. *Dallas Golfer Jordan Spieth to Leave Longhorns to Turn Pro*, DALLAS NEWS: SPORTSDAY (Dec. 2012), http://sportsday.dallasnews.com/other-sports/golfheadlines/2012/12/14/dallas-golfer-jordan-spieth-to-leave-longhorns-to-turn-pro.

10. *Id.*

11. *See*, Darren Heitner, *PGA Tour Golfer Jordan Spieth Striking Gold On-And-Off The Course*, FORBES (Sept. 18, 2013), http://www.forbes.com/sites/darrenheitner/2013/09/18/pga-tour-golfer-jordan-spieth-striking-gold-on-and-off-the-course/#2715e4857a0b47adfbe16cf2; *See also id.*

12. Cork, Gaines, *Under Armour Hit the Jackpot on its Jordan Spieth Bet*, BUSINESS INSIDER (June 22, 2015), http://www.businessinsider.com/under-armour-jordan-spieth-2015-6.

13. Heitner, *supra* note 11.

14. Morgan Campbell, *Draft Day: Drake Embraces Andrew Wiggins, but Will Brands?*, TORONTO STAR (April 2, 2014), http://www.thestar.com/business/2014/04/02/draft_day_drake_embraces_andrew_wiggins_but_will_brands.html (*E.g.* Spieth is not the first, or the last case study. Adidas was reportedly interested in signing now NBA superstar and former Kansas University Jayhawk, Andrew Wiggins, to a $180 million dollar shoe deal the minute he decided to leave Kansas and turn professional, before he was even drafted let alone played a game). .

15. NCAA Press Release, *CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement*, NCAA (April 22, 2010), http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement.

industry is worth $4 billion,[16] and events themselves, with 80,000 seat stadiums and ticket prices between $130 - $2,750, are frequently sold out.[17] Yet, it is the players who not only play to win the games, but also who make the whole enterprise possible. For example, during the 2014-2015 season, Duke University's men's basketball team brought in $27,000,243.[18] Of that, Duke's star player—current Philadelphia 76er—Jahlil Okafor's identity, celebrity, and star status was worth $2,605,405, nearly ten percent of their total revenue for the season.[19] Such statistics are surprisingly common, as the success of most colleges is directly attributable to those student-athletes who gain near celebrity status, and make attending, buying, and watching the sporting events worthwhile.[20]

These players' identity, personality, and likeness have immense value. However, under current NCAA rules, regulations, and bylaws, they receive roughly $30,000 for room, board, books, and tuition in the form of a scholarship.[21] Yet, unlike the ordinary student, they are specifically and expressly barred from being compensated for *anything* beyond their scholarship.[22] When student-athletes try to use their own identity to make money they are suspended,[23] banished,[24] or even retroactively will have their names removed from trophies and record books.[25] These players are not committing crimes; they are simply trying to earn money from their extraordinary talent and abilities while the demand exists.[26] College sports have undoubtedly become a successful commercial endeavour, but the NCAA's archaic amateurism rules prevent student-athletes from sharing or even taking part in the wealth it generates.

This Note will demonstrate that schools' current practice of barring student-athletes from using their own identity and likeness, while the schools profit off of that very same thing, is a violation of the student-athletes' Right of Publicity and deserves no deference by the judicial system. Section I begins with a background of the NCAA, the 'big' business' of college sports in America, and a brief overview of current practices within the NCAA that impact the student-athlete of today.

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16. Max Rogers, *Texas and Kentucky Top College Rankings in the $4.6 Billion Licensing Industry*, BLEACHER REPORT (Aug. 8, 2012), http://bleacherreport.com/articles/1290567-texas-and-kentucky-top-college-rankings-in-the-46-billion-licensing-industry.

17. Sreekar Jasthi, *March Madness? Top NCAA Players Worth $488,000*, NERD WALLET (Mar. 3, 2015), http://www.nerdwallet.com/blog/cities/data-studies/ncaa-players-worth-2015-march-madness/.

18. *Id.*

19. 2,605,405/27,000,243 = 9.649%.

20. *See* Richard Vedder and Matthew Denhart, *The Real March Madness*, THE WALL STREET JOURNAL, (Mar. 20, 2009), http://www.wsj.com/articles/SB123751289953291279.

21. Jay Weiner and Steve Berkowitz, *USA Today Analysis Finds $120K Value in Men's Basketball Scholarship*, USA TODAY (Mar. 30, 2011), http://usatoday30.usatoday.com/sports/college/mensbasketball/2011-03-29-scholarship-worth-final-four_N.htm; *Scholarships*, NCAA, http://www.ncaa.org/student-athletes/future/scholarships.

22. *See* NCAA Academic and Membership Affairs Staff, 2015-16 NCAA Division I Manual, Article 12.0 (The National Collegiate Athletic Association, 2015).

23. *E.g.* Paul Newsberry, *Georgia's Todd Gurley Suspended 4 Games by NCAA*, YAHOO! SPORTS (Oct. 29, 2014), http://sports.yahoo.com/news/georgias-todd-gurley-suspended-4-133220180—ncaaf.html. *E.g.* George Schroeder, *Analysis: The Johnny Manziel Autograph Case*, USA TODAY (Aug. 16, 2013), http://www.usatoday.com/story/sports/ncaaf/sec/2013/08/15/johnny-manziel-texas-am-ncaa-investigation-autographs-for-money/2662257/.

24. *E.g.* Adam Schefter, *NFL Upholds Terrelle Pryor's Ban*, ESPN (Sept. 30, 2011), http://espn.go.com/nfl/story/_/id/7040047/nfl-upholds-terrelle-pryor-5-game-ban-cites-integrity.

25. *E.g.* Chris Huston, *Former USC Running Back Reggie Bush Returned His Heisman Trophy*, CBS SPORTS (Aug. 15, 2012), http://www.cbssports.com/collegefootball/eye-on-college-football/19803877/former-usc-running-back-reggie-bush-returned-his-heisman-trophy.

26. *See* Darren Rovell and Justine Gubar, *Sources: Two More Manziel Signings*, ESPN (Aug. 13, 2013), http://espn.go.com/espn/otl/story/_/id/9562044/texas-aggies-qb-johnny-manziel-signed-two-more-sessions-sources. During the summer of 2013 Manziel was investigated and suspended for signing 4,400 pieces of memorabilia and during one particular session was paid $7,500 for signing 300 items. Although a lot of money, it is actually a fraction of market value and pales in comparison to the money the NCAA made licensing Manziel's identity.

Section II illustrates that any restraint on a student-athletes ability to receive compensation for their likeness is a violation of the Right of Publicity. The Right of Publicity developed from the Right of Privacy and is a relatively new ideology in the world of Intellectual Property law. The NCAA bylaws and rules take value away from a student-athlete's identity, thus depriving them of the use of their identity for commercial gain.

Having found that the NCAA restrictions violate a student-athlete's Right of Publicity, Section III applies a rule of reason analysis to determine if this restriction is a necessary and reasonable function of the NCAA. This analysis involves an inquiry into reasonableness: whether there exists legitimate anti-competitive effects and, if so, whether they are reasonable in light of the pro-competitive goals and missions the NCAA claims to have. Without a strong justification for the current restraints on student-athletes, there exists the opportunity for litigation. The final step is finding a viable, less restrictive alternative. In reality, simply lifting the restriction on student-athlete compensation is a realistic, simple, and more agreeable alternative to the NCAA restrictions. Under this alternative, member institutions of the NCAA would not have to directly compensate their student-athletes, but they also could not improperly restrain a student-athlete.

I. HISTORY, PURPOSE AND BACKGROUND OF THE NCAA

A. HISTORY AND ROLE OF THE NCAA

American colleges have been competing in intercollegiate sports for nearly 150 years and, by all accounts, began in 1889 in a game akin to soccer between Princeton and Rutgers.[27] This sport was extremely dangerous – by the end of the 1905 "college football" season there were eighteen deaths and nearly 150 serious injuries that season alone.[28] In addition to health and safety concerns schools were free to hire non-student 'ringers' to compete on their teams and even coerce players away from rival schools.[29]College sports were at a moment of crisis. To address this, President Theodore Roosevelt, a former student-athlete himself, called a contingent of college presidents to the White House to discuss regulating college sports.[30]In 1906, 62 member schools formed the Intercollegiate Athletic Association ("IAA"), dedicated to player safety and fairness.[31]By 1910 the IAA changed its name to the National Collegiate Athletic Association ("NCAA") and expanded its rulemaking power to include eligibility and amateurism.[32]

For the first fifty years, the NCAA had no real authority and no power to enforce any of these newfound eligibility and amateurism goals.[33] This began to change in 1921 when the NCAA sought to strengthen its authority by restricting eligibility for college sports to

27. *See* Joseph N. Crowley, *In the Arena: The NCAA's First Century* (National Collegiate Athletic Association, 1st ed. 2006).

28. W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 215 (2006); Taylor Branch, *The Shame of College Sports*, THE ATLANTIC MONTHLY, Oct. 2011, at 84-85. Turn of the century college football saw no need for such things as football helmets, mouthpieces, or faceguards, and provided players with little to no "padding."

29. *See* Joseph N. Crowley, *In the Arena: The NCAA's First Century* (National Collegiate Athletic Association, 1st ed. 2006).

30. *See* Kay Hawes, *The NCAA Century Series-Part I: 1900-39* (National Collegiate Athletic Association, 1999).

31. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

32. Kay Hawes, *The NCAA Century Series-Part I: 1900-39* (National Collegiate Athletic Association, 1999); Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

33. Branch, *supra* note 28.

athletes who received no compensation whatsoever.[34] However, there was a lack of compliance, as the 1929 Carnegie Report found 81 out of 112 member institutions provided some improper compensation.[35]

This changed upon the advent of two major decisions – the 1948 Sanity Code and the 1951 development of a centralized command. The "Sanity Code" prohibited schools from giving athletes financial aid based on athletic ability beyond the financial aid available to ordinary students.[36] Then, the NCAA hired its first executive director, Walter Byers, who took control of intercollegiate athletics.[37]He created a centralized command, and a new compliance committee that had the authority to terminate a college's NCAA membership.[38] The culmination of these changes occurred in 1956 when the NCAA departed from the Sanity Code and started allowing scholarships based on athletic ability, but capped the scholarship at full "grant in aid. . .[for] tuition and fees, room and board, and required course-related books."[39]

Today, the NCAA has grown to include 1,200 member colleges and affiliate organizations across North America.[40] Furthermore, the NCAA has strengthened it's stance on amateurism and eligibility as the self-proclaimed guardians of amateurism in America under the purpose of amateurism and protection of their student-athletes.[41] This ideology has led to the current bylaws where student-athletes are prohibited from receiving any pay based on their athletic ability, name, image, or likeness.[42]

B. THE BUSINESS OF COLLEGE ATHLETICS

Despite being a not-for-profit organization, the NCAA is a massive money-making machine. In the 2014 fiscal year alone the NCAA reported $989 million in revenue and $665 million in net assets.[43]Of this massive financial windfall about $681 million came from multimedia, marketing, and licensing, all of which use student-athletes' likeness.[44] Even more staggering is the distribution of revenue with a mere 26% going towards scholarships and 5% to "academic enhancement" or the academic-support of student-athletes.[45] Additionally, the NCAA has a $10.8 billion contract with CBS and Turner Sports for the rights to broadcast March Madness, and a $7.3 billion deal with ESPN to broadcast the College Football Playoffs.[46]

Clearly, the NCAA is financially strong and their member institutions and conferences not only receive shares of the NCAA's revenue streams, but also profit from their own programs and student-athletes directly. Regional conferences have begun to license their

34. *Id.*

35. *Id.*

36. Daniel E. Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivisit?* 86 OR. L. REV. 329, 333 (2007).

37. *Id.* at 333.

38. *Id.*

39. *Id.*

40. *See* Membership, NCAA, http://www.ncaa.org/about/who-we-are/membership.

41. *See* Amateurism, NCAA, http://www.ncaa.org/Amateurism.

42. NCAA Academic and Membership Affairs Staff, 2015-16 NCAA Division I Manual, Article 12.1.2(a), 12.5.2.1(a) (The National Collegiate Athletic Association, 2015).

43. Steve Berkowitz, *NCAA Nearly Topped $1 Billion in Revenue in 2014*, USA TODAY (March 11, 2015), http://www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386/.

44. *Id.*

45. 2013-14 Division I Revenue Distribution Plan at 3.

46. *Accord* NCAA Press Release, *CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement*, NCAA (April 22, 2010), http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement. Frank Pallotta, *ESPN's $7.3 Billion College Football Playoff Gamble Pays Off*, CNN MONEY (Jan. 13, 2015), http://money.cnn.com/2015/01/12/media/espn-college-football-playoff-pays-off/.

own multimedia, and have even negotiated their own television deals and networks. Most recently, in the summer of 2008, the Southeastern Conference ("SEC") signed a 15-year $2 billion deal with ESPN to exclusively televise SEC sporting events on a new SEC Network channel.[47] This meant each school would receive $20.9 million per year, not including the distributions received directly from the NCAA, the revenue sharing for bowl games, or the direct to school dollars associated with their educational mission.[48]

Moreover, schools with successful athletic programs receive significant revenue directly via ticket sales, licensing, concession, alumni donations, and increasing enrollment. Currently, the University of Oregon Ducks has the highest total annual revenue of all schools at $196,030,398.[49] Of this, $26,625,906 came from ticket sales, $35,580,734 from licensing the Oregon brand and its student-athletes names, images, and likeness', and, $1,715,099 from "student fees."[50]

This massive financial and athletic success trickles down to the individuals charged with running the schools (i.e. school administrators, coaches, and directors).[51] In 2012 the University of Texas Longhorns, the second highest revenue generating school,[52] spent $53.5 million on coaches and athletic department staff salaries.[53] On a macro-scale, the average Division 1 NCAA coach makes $1.64 million, and 71 college football coaches and 39 college basketball coaches make over $1 million per season.[54]

C. THE MODERN STUDENT-ATHLETE

While the NCAA, conferences, colleges, and staff members all benefit greatly from the college sports enterprise, student-athletes who make the whole system worthwhile, simply do not. The average value of a student-athlete at a top 25 ranked school is $487,617[55] and they are essentially performing the equivalent of two jobs.[56] Today, the average student-athlete spends 43.3 hours per week on athletics,[57] and 37.3 hours on academics.[58] Their summer breaks are 10 days, instead of 10 weeks, and any optional activities are effectively mandatory if they wish to keep their spot on the team.[59] Roughly 70% of NCAA athletes report spending as much time in the off-season working on sports-related activities as they

47. *ESPN Signs 15-Year Deal with SEC*, ESPN (Aug. 25, 2008), http://espn.go.com/college-sports/news/story?id=3553033.

48. Jon Solomon, *SEC Announces $20.9 Million Average Payout per School*, CBS SPORTS (May 30, 2014), http://www.cbssports.com/collegefootball/writer/jon-solomon/24577128/sec-announces-209-million-average-payout-per-school.

49. Steve Berkowitz, *NCAA Finances*, USA TODAY, http://sports.usatoday.com/ncaa/finances/.

50. *Id.*

51. *See Id.*

52. *Id.*;(Texas generates $161,035,187 of total revenue, but unlike most other schools, the bulk of that comes from not only licensing, but ticket sales totaling $53,655,400.)

53. *See* Cork Gaines, *Texas Longhorns: How the Richest School in College Sports Makes and Spends its Millions*, BUSINESS INSIDER (Sept. 17, 2013), http://www.businessinsider.com/texas-longhorns-how-the-richest-school-in-college-sports-makes-and-spends-its-millions-2013-9.

54. Steve Berkowitz, *Nick Saban, NCAA Salaries*, USA TODAY, http://sports.usatoday.com/ncaa/salaries/; Steve Berkowitz, *John Calipari, NCAA Salaries*, USA TODAY, http://sports.usatoday.com/ncaa/salaries/mens-basketball/coach/.

55. Merely $19,719 less than the minimum salary for a professional NBA player. *See* Sreekar Jasthi, *March Madness? Top NCAA Players Worth $488,000*, NERD WALLET (Mar. 3, 2015), http://www.nerdwallet.com/blog/cities/data-studies/ncaa-players-worth-2015-march-madness/.

56. *See* Nikki Chavanelle, *A Day in the Life of a Division I Athlete*, THE DAILY CAMPUS, March 5, 2015, at 1.

57. National Collegiate Athletic Association Division 1 Results from the NCAA GOALS Study on the Student-Athlete Experience (2011) at 17.

58. *Id.* at 18.

59. *See* Jabari Howard, *The Life of a Student Athlete*, THE HUFFINGTON POST (April 10, 2013), http://www.huffingtonpost.com/uloop/the-life-of-a-student-ath_b_2963409.html.

do during the season.[60] For example, ordinary students have a week long Spring Break to unwind before returning to their studies. The University of Michigan Wolverine football players were also given a Spring Break, in Florida no less; however, it consisted of a mandatory, intense week of practice, all in the name of football and away from the distractions of school.[61]

In exchange for this commitment, the student-athletes are given what equates to an obligatory voucher. Currently, there are more than 460,000 student-athletes, but only 53% of them receive some level of financial aid for athletics.[62] The average NCAA athletic scholarship is between $10,409 and $14,270 annually,[63] and is not guaranteed.[64] These scholarships can only be used towards cost of tuition and fees, room and board, books and supplies, and transportation to class.[65] Overall, these limitations force most student-athletes to take a vow of poverty, with 85% of student-athletes falling below the poverty line,[66]and suffer through an annual shortfall due to out-of-pocket expenses.[67]

Due to these limits, many student athletes find themselves stuck between a rock and a hard place, where they try to circumvent the rules, each time leading to new examples of what student-athletes cannot do with their name, image, and likeness. Take, for example, the case of Olympic skier and former college football player Jeremy Bloom. Bloom was an All-American receiver and kick returner for the Colorado University Buffaloes, but after competing in the 2006 Winter Olympics the NCAA declared him permanently ineligible for accepting money associated with the U.S. Ski Team.[68]Another example, is the case of highly touted baseball recruit Aaron Adair who was not allowed to play in the NCAA because he received compensation when he used his name and image to promote an inspirational book he and his family co-authored about surviving childhood cancer.[69]These rules produce a strangle-hold control on an individual's name, image, and likeness, and are strongly enforced with a near zero tolerance policy.[70]

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60. *See Id.*

61. Andrea Adelson, *Jim Harbaugh: Florida practices 'very beneficial' for Wolverines*, ESPN (Mar. 5, 2016), http://espn.go.com/college-football/story/_/id/14904843/michigan-wolverines-coach-jim-harbaugh-says-florida-trip-all-positives.

62. NCAA Recruiting Facts, August 2014, https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf.

63. *See* Bill Pennington, *Expectations Lose to Reality of Sports Scholarships*, THE NEW YORK TIMES, Mar. 10, 2008; Average Athletic Scholarship per Varsity Athlete, Scholarship Stats, http://www.scholarshipstats.com/average-per-athlete.html (last visited Feb. 21, 2017).

64. *See* Lynn O'Shaughnessy, *The Truth about Sports Scholarships*, CBS MONEYWATCH (June 2, 2009), http://www.cbsnews.com/news/the-truth-about-sports-scholarships/.

65. *See* Scholarships, NCAA, www.ncaa.org/student-athletes/future/scholarships.

66. Ramogi Huma and Ellen J. Staurowsky, *The Price of Poverty in Big Time College Sport*, 19 (National College Players Association, 2011).

67. *Id.* Optically, it may seem like students receive free apparel, sports equipment, and scholarships, but in reality they by no means receive a "free ride." The average annual scholarship shortfall is $3,222 and 86% of the student-athlete came from poverty.

68. *See generally* Laura Freedman, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673 (2003).

69. *See* Jennie Carlson, *Cancer Survivor Adair Finds Life after Baseball*, OKLAHOMAN NEWS (July 14, 2003), http://newsok.com/cancer-survivor-adair-finds-life-after-baseball/article/1937220/?page=1. *See also* Jeremy Bernfeld, *Who Can Profit off a College Athlete's Image? Not the Athlete*, NPR (May 24, 2014), http://onlyagame.wbur.org/2014/05/24/image-ncaa-athlete-profit (Jenny Pinkston, a heptathlete for Wichita State University, attempted to earn walking around money by modeling athletic wear online – given NCAA ban).

70. NCAA Academic and Membership Affairs Staff, 2015-16 NCAA Division I Manual, Article 12.1.2, 12.5.2.1 (The National Collegiate Athletic Association, 2015).

II. STUDENT ATHLETE'S RIGHT OF PUBLICITY

The restraint on trade of controlling all aspects of a student's name, image, and likeness is best seen through the context of intellectual property. Just like a screenplay, a book, or a movie, an individual's name, image, and likeness can be famous, and fame is always valued.[71] The Right of Publicity protects an athlete's proprietary interest in the commercial value of his or her identity from being exploited by others.[72] Thus, the crux of publicity is the commercial value of human identity and the control over that commercial use.[73] To truly understand how current NCAA practices infringe on that control, it is important to understand the history, context, and developments of the Right of Publicity and why it is so important for athletes.[74]

A. HISTORY AND CONTEXT

It may seem like second nature, natural even, for people to assume they do, or should own and control information and identity markers about themselves as their own property. Even when information about themselves is in the hands of others (such as banks, doctors . . . even the NCAA), individuals perceive they will have a protectable interest in that information as their own.[75] However, although the law often protects the interests of individuals against wrongful uses or disclosures of said information, the rationale for this protection has not historically come from the idea that people have a property right in their personal information.[76] The Constitution provides protection against unauthorized intrusions, the Fifth Amendment protects against compulsions to reveal personal private information, and the Fourth Amendment protects against prodding into one's personal life.[77] But none of these are grounded on a belief individuals have a property right to their own information.

For example, individuals have no legal right to stop firms from marketing their personal data to other firms (if they gave consent), nor can they stop the government from selling their drivers license data.[78] Thus, no matter how strong the presumption is that one owns his or her own personal information, it is clear that the existence of some protectable interest in personal information was not related to any form of property law.[79] However, in modern times, this legal framework has rapidly and dramatically changed with the advent of the right of privacy, in the context of intellectual property.

In 1820, *Yovatt v. Winyard* stood for the idea that personal secrets and private information were protected under property rights.[80] It brought together privacy, plagiarism, trademark, etc., all under the umbrella of property.[81] These concepts were later separated in 1890 when Samuel Warren and Louis Brandeis of the Harvard Law Review published "The Right to Privacy."[82] This article demonstrated that there existed a separate right to privacy, as proven by decisions granting relief on the grounds of invasion of privacy, breach of

71. *See* Jonathan L. Faber, *Indiana: A Celebrity-Friendly Jurisdiction*, 43 RES GESTAE, 1-5 (Mar. 2000).

72. James A. Johnson, *O'Bannon – What is the Right of Publicity*, NYSBA JOURNAL, 37-38 (Sept. 2014).

73. *See id.*

74. *See* Jonathan L. Faber, *Indiana: A Celebrity-Friendly Jurisdiction*, 43 RES GESTAE, 1-5 (Mar. 2000).

75. Paula Samuelson, *Privacy as Intellectual Property?* 52 STAN. L. REV. 1125, 1130 (2000).

76. *See* Paul M. Schwartz and Joel R. Reidenberg, *Data Privacy Law: A Study of United States Data Protection* (Lexis Law Pub. 1996) at Chapter 5.

77. U.S. CONST. amends. IV,V.

78. *See, e.g.* Reno v. Condon, 528 U.S. 141 (2000).

79. *See* Paula Samuelson, *Privacy as Intellectual Property?* 52 STAN. L. REV. 1125, 1131 (2000).

80. Mary Chlopecki, *The Property Rights Origins of Privacy Rights*, Foundation for Economic Education (Aug. 1, 1992), http://fee.org/freeman/the-property-rights-origins-of-privacy-rights/.

81. *See* Morris L. Ernst and Alan U. Schwartz, *Privacy: The Right to Be Let Alone* (New York: Macmillan, 1962), at 6-12.

82. *See* Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

confidence, and defamation.[83]In conjunction with William L. Prosser's article "Privacy," these two articles clarified the courts' understanding of privacy laws and divided the concept into the modern day tort causes of action for (1) Intrusion, (2) Public Disclosure of Private Facts, (3) False Light, and (4) Appropriation of Identity taught in Intellectual Property courses across the country.[84]

B. TRANSFORMATION INTO THE RIGHT OF PUBLICITY

It is this fourth cause of action, Appropriation of Identity, which split-off and became known as the Right of Publicity.[85]Although its origins may come from the law of privacy the Right of Publicity goes beyond mere intrusion or protection of peace of mind and creates a right to exploit, control, and find value in one's identity.[86]The case which coined the phrase "Right of Publicity," *Haelan Laboratories v. Topps Chewing Gum*, was the first case to recognize such a right.[87] It recognized the value and property rights in an athlete's image, and by doing so moved the Right of Publicity out of Privacy/Tort Law and into its own unique section of property rights.[88] The manipulation of one's image in order to provide additional revenue streams was nothing new. However, the development of the Right of Publicity in the 20th Century, beginning with *Haelen Laboratories*, allowed for not only commercialization, but also control of that potential commercialization.[89]

New York was the first state to enact a Right of Publicity law, with the New York Civil Right Law in 1903, which prohibited the use of the name, portrait, or picture of any living person without prior consent for advertising purposes or for the purposes of trade.[90]Currently, there are twenty-two states that recognize the Right of Publicity via statute,[91]thirty-eight states that have some form of common law precedent evoking such a right,[92]and even the few states whom have neither,[93] no state has explicitly rejected such an interest.[94] Although the parameters and specifics of this right vary from state to state, all states have sought to protect the economic value indicia of identity through finding 1) the use of a plaintiff's identity, 2) identity is identifiable, 3) there is an advantage or benefit being limited, and 4) there is a subsequent harm to the value of that identity.[95]

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83. *See generally* Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See also* Mary Chlopecki, *The Property Rights Origins of Privacy Rights*, Foundation for Economic Education (Aug. 1, 1992), http://fee.org/freeman/the-property-rights-origins-of-privacy-rights/.

84. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 388-89 (1960) (dividing tort privacy into four distinct torts).

85. *See* Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).

86. J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM. VLA J.L. & ARTS 129, 131 (1999) ("The right of publicity is not a kind of trademark. It is not just a species of copyright. And it is not just another kind of privacy right. It is none of these things. . .").

87. *See* Michael Marrero, *A Primer and History on NCAA Athletes' Right of Publicity*, LAW 360 (July 16, 2013), https://www.law360.com/articles/456776/a-primer-on-ncaa-athletes-right-of-publicity.

88. *Haelan Laboratories*, 202 F.2d at 868.

89. Michael Marrero, *A Primer and History on NCAA Athletes' Right of Publicity*, LAW 360 (July 16, 2013), https://www.law360.com/articles/456776/a-primer-on-ncaa-athletes-right-of-publicity.

90. Tara B. Mulrooney, *A Critical Examination of New York's Right of Publicity Claim*, 74 ST.JOHN'S L.REV. 1139, 1149-1150. *See* N.Y. C.L.S. CIV R § 50 (2000).

91. Alabama, Arizona, California, Florida, Hawaii, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. Weston Theodore Anson, *Right of Publicity: Analysis*, Valuation and the Law (ABA Book of Publishing, 2015), Chapter 1.

92. *Id.* at 1-5.

93. *Id.*

94. *Id.*

95. *See generally* Abdul-Jabbar v. General Motors Co., 85 F.3d 407, 413-414 (9th Cir. 1996); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1991).

C. CURRENT NCAA REGULATIONS VIOLATE A STUDENT-ATHLETE'S RIGHT OF PUBLICITY

The Ninth Circuit's binding decision in *O'Bannon v. NCAA*, upholding the application of antitrust laws towards the NCAA, has several implications and consequences for student-athletes and their ability to control and use their own identity.[96] The court's inability to find a less restrictive alternative and holding that the NCAA could retain rules preventing compensation for use of names, images, and likenesses posed an issue towards the student-athletes goal of fuller control of his or her identity rights.[97] However, this was largely upheld under an application of antitrust laws, and not under the aforementioned Right of Publicity.[98] Additionally, by upholding and preserving the NCAA as no longer exempt and is indeed subject to restraint of trade laws one can perform a full Right of Publicity analysis to determine if current NCAA policies and practices are unlawful by illegally restraining trade.[99]

D. USE OF STUDENT-ATHLETE'S IDENTITY

When it comes to the Right of Publicity, courts around the country have failed to find a clear and uniform definition for "identity," despite this vast history.[100] Instead, the courts have relied on a constant stream of examples from case law, each example slowly developing what exactly "identity" means.[101] After *Haelan Laboratories* the focus was on an individual's name or likeness, but has evolved and expanded to cover everything indicia of identity.[102] Due to the evolution of what identity is exactly, courts have largely made this a broad provision, with any appropriation of name, image, voice, or other form of likeness able to satisfy this element.[103]

When it comes to student-athletes, there are numerous examples of the NCAA and its member institutions using student-athlete's identities. The NCAA is televising its student-athletes performances and using their likeness in commercial broadcasts for NCAA events daily.[104]Additionally, the member institutions are using student-athletes likeness on everything from billboards to posters, from game tickets to the matches themselves.[105] One need

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96. O'Bannon Supreme Court Decision, *supra* note 2 and accompanying text.

97. *See O'Bannon v. NCAA*, 802 F.3d 1049, 1074-1077 (9th Cir. 2015), *cert. denied*, 2016 U.S. LEXIS 5140 (U.S., Oct. 3, 2016).

98. *See generally O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

99. *Id.* This is especially true considering cases like *NCAA v. Jenkins* and *Davis v. Electronic Arts* which dealt with the right of publicity more expressly, were ultimately settled before a proper analysis was provided or stopped at a First Amendment application.

100. *See* Vladimir P. Belo, *The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM. ENT. L.J. 133, 139 (1996).

101. *Id.*

102. *See Ali v. Playgirl, Inc.*, 447 F.Supp. 723, 726 (1978).

103. *See, e.g. Wendt v. Host Intern Inc.*, 125 F.3d 806, 811 (1997) (identity extends to plaintiff's status as a character on a television show); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (1974) (one's likeness must not emulate the individual's physical identity and thus can be a distinct racecar); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (1988) (identity includes voice); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834-835 (1983) (name and nicknames are acceptable forms of identity); *Zacchini v. Scripps-Howard Broadcasting Co.*, 97 S.Ct. 2849, 2857 (1977) (identity extends to actual unique performances); *Cher v. Forum International, LTD.*, 692 F.2d 634, 638 (1982) (if individual is recognized by first name alone, first name is sufficient to count as identity).

104. *See, e.g.* Rihanna Daily, Rihanna – March Madness 2015 Trailer (American Oxygen) – HD, YOUTUBE (April 4, 2015), https://www.youtube.com/watch?v=MYM6Qa7PJjA; Athletics Partner France, NCAA Commercial Spot: Going Pro in Something Other Than Sport (Bourse Sportive USA), YOUTUBE (Jan.29, 2013), https://www.youtube.com/watch?v=CXeDUFTaU1Y.

105. *See, e.g.*, Jim Kleinpeter, *LSU Using Billboards to Announce National Signing Day Additions*, THE TIMES-PICAYUNE (Jan. 30, 2016), http://www.nola.com/lsu/index.ssf/2016/01/lsu_billboards_national_signin.html; *Duke*

only turn on a television sports network or visit any college town and the examples of the use of student-athletes' identities is plentiful.

More importantly, the NCAA Bylaws themselves prohibit student-athletes from using their own identities.[106] For example, NCAA Bylaws 12.5.2.1(a) enumerates "name or picture" (i.e. likeness) and 12.1.2 expressly lists "athletics skill," as forms of identity for which student-athletes cannot receive pay.[107] Thus, the NCAA takes advantage of student-athletes through its prohibitions and limitations on what a student-athlete can or cannot do with his or her likeness.[108]

E. STUDENT-ATHLETES ARE IDENTIFIABLE

One of the most crucial elements of the Right of Publicity is the fact that, not only does the identity have to be used, but the identity must also be identifiable.[109] However, the courts have never required the identity be that of a celebrity or of someone famous in order to be considered identifiable.[110] On the contrary, courts have taken "identifiable" to mean that the identity is recognized to be the plaintiff by more than an insignificant number of people who know the plaintiff.[111]

On and off the field, players are not only identified by his or her name and face, but also by his or her style of play and the number on the jersey.[112] A player's jersey and number is something unique, and can become so linked to a player it becomes part of his or her identity.[113] An individual's identity does not need to be part of his or her physical person and can be virtually any extension of his or her likeness, so long as an audience can recognize that extension as part of his or her persona.[114] For example, if a fan were to see a student-athlete wearing school colors with the identifying number, the fan would instantly recognize the player. Thus, when commentators, analysts, or even fans choose to use a player's number instead of his or her name while giving play-by-play or a description of the event, they are expressly identifying an individual.

2016-2017 Men's Basketball Poster, DUKE UNIVERSITY STORES (2016), http://www.shopdukestores.duke.edu/ePOS/store=106&item_number=67595&form=shared3/gm/detail.html&design=106; *ACC Basketball Tournament – Championship*, GETTY IMAGES (Mar. 14, 2015), http://www.gettyimages.com/detail/news-photo/detailed-view-of-tickets-for-the-championship-game-with-news-photo/466253098.

106. NCAA ACAD. AND MEMBERSHIP AFFAIRS STAFF, 2015-16 NCAA DIVISION I MANUAL, Articles 12.1.2, 12.5.2.1 (2015).

107. *Id.*

108. *See, e.g.*, *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9th Cir. 2013).

109. *See* Michael Marrero, *A Primer and History on NCAA Athletes' Right of Publicity*, LAW 360 (July 16, 2013), http://www.law360.com/articles/456776/a-primer-on-ncaa-athletes-right-of-publicity.

110. *See* Newcombe v. Adolf Coors Co., 157 F.3d 686, 692-93 (9th Cir. 1998). *See also*, *Wendt*, 125 F.3d at 810.

111. Michael Marrero, *A Primer and History on NCAA Athletes' Right of Publicity*, LAW 360 (July 16, 2013), http://www.law360.com/articles/456776/a-primer-on-ncaa-athletes-right-of-publicity.

112. Leslie E. Wong, *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right Of Publicity*, 42 TEX. TECH L. REV. 1069, 1082 (2010) (*citing* Vladimir P. Belo, *The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM. ENT. & L.J. 133, 145 (1996)). *See, e.g.*, Newcombe, 157 F.3d at 692 (recognizing a pitcher's stance as part of the athlete's identity).

113. In not only professional sports, but college sports as well players who are a part of a special team or obtain prominence either socially or in sports itself have their jerseys retired as a "symbolic gesture" of what their identity as meant to the program. *See* David L. Andrews, *Michael Jordan, Inc.: Corporate Sport, Media Culture, and Late Modern America* (State University of New York Press, Albany 2001) at 198 (Michael Jordan and his numerous commercial endeavors are constantly labeled with the number twenty-three without revealing so much as an image, name, or other identifying marker such that the number has become forever linked with Michael Jordan the person).

114. *E.g. Motschenbacher*, 498 F.2d at 821 (likeness extending too unique race car); Carson, 698 F.2d at 831 (likeness extending to unique catch phrase).

The NCAA has a contrary viewpoint. It has never recognized a player's jersey as part of his or her identity; going so far as to ban the sale of jerseys with players' names on the back.[115] Further, the language of the Bylaws prohibits the players' from using "name or picture," "athletic skill," and "likeness," but fails to mention anything about a jersey or number.[116] However, it need not matter what the plaintiff considers to be identifiable, the question is whether the identity is identifiable to those who know the student-athlete.[117] Additionally, even though the NCAA says they do not recognize a jersey as part of a student-athlete's identity, its actions say otherwise. The NCAA's authenticated websites and programs routinely identify players by his or her jerseys and numbers.[118]

Perhaps the most obvious and related example of identifiability comes from a chance encounter.[119] The entire *O'Bannon* movement began when Ed O'Bannon watched his son play an Electronic Arts NCAA college basketball video game.[120] The game included O'Bannon's 1995 UCLA Bruin championship team, and featured a number thirty-one, left-handed, power forward, who was six-foot eight-inches, two-hundred twenty-two pounds, and bald.[121] Even though his name was never used in the game, everyone in the room identified the character as O'Bannon and asked him if he was getting paid for it,[122] a clear instance of identifiability.

Frequently, star athletes reach a certain celebrity status long before they even get to college, let alone to university.[123] These small subsets of student-athletes are undoubtedly recognized by the general public.[124] Even players who never attain that level of fame are recognizable as themselves through the various aforementioned uses and indicators of their identity.[125] In conclusion, a student-athlete's name, face, uniform, and jersey number are key indicators of a student-athlete's identity, all of which make them identifiable.

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115. Marc Tracy, *Days of Selling Popular College Players' Jerseys Seem Numbered,* NEW YORK TIMES (Aug. 5, 2015), https://www.nytimes.com/2015/08/06/sports/ncaafootball/days-of-selling-popular-college-players-jerseys-seem-numbered.html?_r=0.

116. NCAA ACAD. AND MEMBERSHIP AFFAIRS STAFF, 2015-16 NCAA DIVISION I MANUAL, Articles 12.1.2, 12.5.2.1 (2015).

117. *Cf.* Agnant v. Shakur, 30 F. Supp. 2d 420, 426 (S.D.N.Y. 1998) (establishing the concept "of and concerning" a plaintiff).

118. *See, e.g.,* Jay Bilas (@JayBilas), TWITTER (Aug. 6, 2013, 5:31 PM), https://twitter.com/JayBilas/status/364861369734029312?ref_src=twsrc%5Etfw (picture of Tyran Mathieu jerseys for sale in the NCAA online store); Jay Bilas (@JayBilas), TWITTER (Aug. 6, 2013, 5:11 PM), https://twitter.com/JayBilas/status/364856249071845377?ref_src=twsrc%5Etfw (picture of Evertt Golson jerseys for sale in the NCAA online store); Jay Bilas (@JayBilas), TWITTER (Aug. 6, 2013, 3:03 PM), https://twitter.com/JayBilas/status/364824072145747968?ref_src=twsrc%5Etfw (picture of Nerlens Noel jerseys for sale in the NCAA online store); Jay Bilas (@JayBilas), TWITTER (Aug. 6, 2013, 2:06 PM), https://twitter.com/JayBilas/status/364809647498088448?ref_src=twsrc%5Etfw (picture of Johnny Manziel jerseys for sale in the NCAA online store).

119. *See O'Bannon v. NCAA*, 7 F.Supp.3d 955, 965 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049, 1074-1077 (9th Cir. 2015), *cert. denied*, 2016 U.S. LEXIS 5140 (U.S., Oct. 3, 2016).

120. *See Id.*

121. Steve Fainaru and Tom Farrey, *Game Changer*, ESPN (July 27, 2014), http://espn.go.com/espn/otl/story/_/id/11255945/washington-attorney-michael-hausfeld-most-powerful-man-sports; *See generally, O'Bannon v. NCAA*, 7 F.Supp.3d 955 (N.D. Cal. 2014).

122. *Id.*

123. *See, e.g.* Michael J. LeBrecht II, *LeBron James's SI Covers*, SPORTS ILLUSTRATED (Feb. 18, 2002) http://www.si.com/nba/photos/2007/06/07lebron-james-si-covers/1; Amanda Younger, *Kansas' Andrew Wiggins on Cover of Sports Illustrated*, SPORTS ILLUSTRATED (Oct. 9, 2013) http://www.si.com/college-basketball/one-and-one/2013/10/09/andrew-wiggins-sports-illustrated.

124. *Id.*

125. *See NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 102-106 (1984).

F. USE OF STUDENT-ATHLETE'S IDENTITY TO NCAA'S ADVANTAGE

Once a plaintiff has identified the actual use of his or her identity, and that the use is sufficiently recognizable, the plaintiff must also establish a level of commercial value to the identity.[126] This means a student-athlete must show his or her likeness can be used for some commercial gain.[127]

1. COMMERCIAL GAIN

Historically, this element has been defined in statutes that limit use to commercial or advertising usage.[128] However, subsequent case law and scholarly literature have identified an infringing defendant can benefit in numerous other ways and have no such confinement expanding the definition to "some benefit, commercial or otherwise."[129] Therefore, a benefit or advantage the defendant receives, or even prevents, is a violation of this element.[130]

Currently, the NCAA has some of the largest television deals in the history of sports. Most recently, the NCAA and CBS renewed an exclusive agreement for live broadcast of the NCAA Men's Basketball tournament for the next fourteen years for $10.8 billion.[131] This contract mentions giving back a portion of the revenue generated to student-athletes via programs and distribution to member schools, yet it never once mentions direct student-athlete compensation.[132] These mega deals do not even include the vast and growing market for university athletic merchandise in which replica jerseys are now national best sellers.[133]

Not only is there a direct commercial gain acquired by the NCAA, but it's ban on student-athletes use of his or her identity for any form of compensation inhibits any commercial value of his or her likeness. As of 2015, only approximately 3% of student-athletes enter the professional ranks in a given sport[134] and can use this platform for good-will and

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126. Leslie E. Wong, *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right Of Publicity*, 42 TEX. TECH L. REV. 1069, 1086 (2010).

127. *See Prima v. Darden Restaurants, Inc.*,78 F.Supp.2d 337, 337 (D.N.J. 2000); *Hart v. Electronic Arts Inc.*, 717 F.3d 141, 171-172 (3d Cir. 2013).

128. *E.g.* N.Y. C.L.S. CIV R § 50 (2000).

129. *White*, 971 F.2d at 1397.

130. *Id.*

131. NCAA Press Release, *CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement*, NCAA (April 22, 2010), http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement.

132. *Id.*; *See also* Leslie E. Wong, Our Blood, *Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right Of Publicity*, 42 TEX. TECH L. REV. 1069, 1087 (2010) (*citing* Vladimir P. Belo, *The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM. ENT. L.J. 133, 134 (1996).

133. *See* Darren Rovell, *NCAA President: No Pay for Players on Jersey Sales*, CNBC (Dec. 22, 2011), http://www.cnbc.com/id/45768248.; Nick Baumgardner, *Michael Jordan Welcomes Michigan as First Ever Jordan Brand Football Client*, MICHIGAN LIVE (Aug. 13, 2015), http://www.mlive.com/wolverines/index.ssf/2015/08/michael_jordan_welcomes_michig.html; Marina Nazario, *11 College Teams That Rake in Tons of Cash from Nike, Under Armour, and Adidas*, BUSINESS INSIDER (Sept. 22, 2015), http://www.businessinsider.com/biggest-ncaa-athletic-apparel-contracts-2015-9 (Most recently, Nike and the University of Michigan Wolverines signed a 15-year $169 million dollar contract, the largest in the history of college sports, for Michigan to exclusively wear the Jordan brand.); *See also*, Chris Littmann, *Meet the 2015 NCAA Tournament Brand Bracket*, SPORTING NEWS (Mar. 16, 2015), http://www.sportingnews.com/ncaa-basketball-news/4638829-ncaa-tournament-2015-bracket-nike-adidas-under-armour-russell-jordan (During the 2015 NCAA Men's Basketball Tournament, forty-six of the sixty-eight teams had contracts with Nike, eleven with Adidas, and six with Under Armour, each generating millions in revenue simply for the exclusive right of student-athletes to wear their brand.)

134. *Estimated Probability of Competing in Professional Athletics*, NCAA, http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics (last updated Apr. 25, 2016).

charity[135], as well as to create other revenue streams.[136] The other 97% will never get the chance.[137] In fact, even those who have storied careers at the college ranks, but for whatever reason do not make it in the professional arena, will likely never be able to cash in on their collegiate success.[138] Therefore, under the current NCAA Bylaws, a student-athlete is barred from receiving any advantage or benefit for his or her identity at the height of their notoriety.

2. LACK OF CONSENT

The strongest defense the NCAA has to a Right of Publicity cause of action is disproving the lack of consent element by finding that student-athletes consented to the use his or her identity. Even if the NCAA were proven to use or prohibit identity for commerciality, if it were able to prove student-athletes consented, there would be no violation.[139] The NCAA argument would be that the National Letter of Intent ("NLI") and the Statement of Financial Aid, together, create a contract in which a student-athlete agrees to maintain eligibility.[140] The key component of remaining eligible is adhering to the NCAA rules, thereby contractually binding the student to the NCAA Manual, which prohibits the use of likeness for any commercial purpose.[141] Additionally, there exists an argument that there is a more direct consent via a Student-Athlete Statement (more commonly known as Form 08-3a).[142] Part IV of Form 08-3a, which all student-athletes must sign, reiterates NCAA Bylaw 12.5.1.1.1 authorizing "[the] NCAA to use [a student-athlete's] name or picture to generally promote[.]"[143] In summary, once a student signs an NLI, Statement of Financial Aid, and Student-Athlete Statement and thereby consents, the NCAA, along with third parties acting on its behalf, may use the likeness of a student-athlete, yet if the student-athlete were to do the same thing, he or she would lose his or her eligibility.[144]

This argument fails for two reasons. First, the language used is so broad and sweeping such that there exists no express consent to any use of his or her likeness in a specific manner. Form 08-3a is so broad in scope and so sweeping in application, that it would be unreasonable to think an incoming student-athlete could be signing away his or her rights to

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135. *See* Ellen Vossekuil, *10 Charities Started by Athletes*, YAHOO! SPORTS (Jan. 8, 2013), http://sports.yahoo.com/news/10-charities-started-athletes-182300443—nfl.html (list of charities started by professional athletes).

136. *See, e.g.*, Tennis star Maria Sharapova's name and likeness was used to create her own candy company. SUGARPOVA, http://www.sugarpova.com/ (last visited Feb. 5, 2016). *See generally* Daniel Bukszpan, *Professional Athletes Who Started Their Own Small Businesses*, CNBC (June 24, 2013), http://www.cnbc.com/2013/06/24/Professional-athletes-who-started-their-own-small-businesses.html.

137. *Supra* note 132.

138. *See, e.g.*, Chris Mahr, *Ex-West Virginia Cult Hero Kevin Pittsnogle Talks Life after Basketball*, YAHOO! SPORTS (March 26, 2013), http://sports.yahoo.com/blogs/ncaab-the-dagger/ex-west-virginia-cult-hero-kevin-pittsnogle-talks-140937252—ncaab.html. *See also* O'Bannon, 7 F. Supp. 3d at 965 (the Ninth Circuit affirmatively and expressly stated "[t]here is real money at issue here").

139. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 419 (1960) (dividing tort privacy into four distinct torts) ("Chief among the available defenses [for a right of publicity claim] is the plaintiff's consent to the invasion, which will bar his recovery").

140. National Letter of Intent, NCAA, available at http://www.nationalletter.org/aboutTheNli/index.html; *See also*, National Letter of Intent, Binding Agreement FAQs, http://www.nationalletter.org/frequentlyAskedQuestions/bindingAgreement.html.

141. *See generally* NCAA ACAD. AND MEMBERSHIP AFFAIRS STAFF, 2015-16 NCAA DIVISION I MANUAL, Article 12 (2015).

142. *E.g.*, Student-Athlete Statement – Division I, NCAA: Liberty University (2010-2011), http://www.liberty.edu/media/1912/compliance/newformsdec2010/currentflames/compliance/SA%20Statement%20Form.pdf.

143. *Id.*

144. Leslie E. Wong, *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right Of Publicity*, 42 Tex. Tech L. Rev. 1069, 1089 (2010).

virtually anything.[145] Within these contracts the student-athletes never expressly consent to any specific use of his or her likeness in any particular manner.[146] In practice, there have similarly been numerous types of provisions, particularly those that economically restrict a signee, which have been entirely unenforceable because they were too broad and ambiguous.[147] The courts will not rewrite a contract if it is too broad, but will simply not enforce it, thus eliminating any consent, implied or otherwise.[148]

Second, these contractual agreements are unenforceable on the grounds of unconscionability.[149] A contract is deemed to be unconscionable and therefore unenforceable "when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms" because "it is hardly likely his consent, or even an objective manifestation of his consent, was ever given to all the terms."[150] Here, this ideology can be applied to the NCAA and its NLI, Statement of Financial Aid, and Form 08-3a because the student is left with "no meaningful choice" as the college on the other side of the bargaining table essentially says "[s]ign this, or you will never play."[151] The student, who is usually still a minor coming out of high school spends a couple of seconds flipping through hundreds of papers before signing an agreement he or she will likely never understand, let alone comprehend.[152] Ultimately, when a court finds these contracts to be unconscionable, they may be considered void entirely, or more likely, the court may refuse to enforce the violating provisions, eliminating any supposed consent.[153]

G. LOSS OF VALUE OF STUDENT-ATHLETES' IDENTITY AND RESULTING HARM

Finally, a Right of Publicity cause of action will require the student-athlete to show a loss of value to his or her identity. The courts have generally found this to be a make-weight element as any economic harm will be sufficient.[154] Having just previously established that student-athletes have a significant commercial value considering the NCAA is benefiting from said value, there is clearly a harm that results from a student-athlete not being able to share in that wealth.[155] Additionally, by signing away the ability to receive compensation for

145. *See generally* NCAA ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, 2015-16 NCAA Division I Manual (2015); *E.g. Student-Athlete Statement – Division I, supra* note 141.

146. *E.g. Student-Athlete Statement – Division I, supra* note 143.

147. This is a very common occurrence with non-compete clauses, and indemnity clauses. *See, e.g.*, H&R Block v. E. Enter., 606 F.3d 1285, 1290 (11th Cir. 2010); Advance Tech. Consultants, Inc. v. Roadtrac, LLC., 551 S.E.2d 735, 736-37 (Ga. Ct. App. 2001); Hartman v. W.H. Odell and Assoc., Inc., 450 S.E.2d 912, 920 (N.C. Ct. App. 1994).

148. *Hartman*, 450 S.E.2d at 920.

149. Complaint at 23, *O'Bannon v. NCAA*, 7 F.Supp.3d 955 (N.D. Cal. 2014) (No. 09 Civ. 3329).

150. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

151. Complaint at 23, *O'Bannon v. NCAA*, *supra* note 142, (Most college athletes are not lucky enough to receive multiple scholarship offers and even if they are all of them have the same prohibitions and "take-it-or-leave-it" ideology considering the only remaining alternatives would be too quite the sport or turn professional; thus, there is a perception of no alternatives).

152. The average age of an incoming college freshman is just approximately eighteen years old. John H. Pryor et al., *The American Freshman: Forty Year Trends*, UNIVERSITY OF CALIFORNIA, LOS ANGELES COOPERATIVE INSTITUTIONAL RESEARCH PROGRAM 9 (2007). *E.g.*, NCAA ACAD. AND MEMBERSHIP AFFAIRS STAFF, 2015-16 NCAA DIVISION I MANUAL (2015) (the current NCAA Division I Manual is 419 pages long).

153. *See Williams*, 350 F.2d at 449.

154. *See Motschenbacher*, 498 F.2d at 824 (where appropriation of identity has occurred the injury simply needs to be economic or material).

155. The loss would be equal to the market value of their license between the NCAA and the licensee. Richard T. Karcher, *The Use of the Players' Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims*, 111 PENN ST. L. REV. 557, 579 (2007) ("Market incentives and efficiencies are achieved when. . .producers compete for the right to use the players' identities and the players negotiate licensing fees based upon what the market will bear for such use").

their likeness, student-athletes are directly losing the economic opportunity to partake in endorsement deals, sponsorships, and even charity work to increase his or her goodwill in the community.[156] When the NCAA created these rules in 1956, the amount of revenue generated by student-athletes was a small fraction of today's revenue.[157] Hence, the value of a student-athlete's scholarship is disproportionate to the revenue the student-athlete could potentially realize.[158]

III. DEVELOPING TREND OF RESTRAINT OF TRADE IN COLLEGE SPORTS

Having found that current NCAA practices and policies violate a student-athlete's Right of Publicity, the next step in the analysis requires an inquiry into whether the restrictions themselves are reasonable and required as a practice of business.[159] In "big business," some policies may be unethical, immoral, and unfair, but found to be reasonable and a necessary function of business.[160] Without these rules, it may be found that the business and enterprise (the NCAA here) would unreasonably suffer and the policy and practice may stand. Here, even though NCAA bylaws clearly violate a student-athlete's Right of Publicity, an analysis of whether this violation is a reasonable limitation in order for the NCAA to function is required.

A. O'BANNON, ANTI-TRUST, AND THE INQUIRY INTO REASONABLENESS

Traditionally, the NCAA has been exempt from a Rule of Reason analysis via a blanket exemption of all eligibility concerns related to antitrust laws.[161] However, the courts have slowly eroded this exemption, culminating in *O'Bannon* where the Ninth Circuit affirmatively declared that the NCAA and its "rules are not exempt from antitrust scrutiny."[162] Thus, under this new standard, a full Rule of Reason analysis can be conducted. The first step involves balancing the pro-competitive effects with the anti-competitive effects of the NCAA rules banning student-athletes from receiving compensation for their likeness.[163]

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156. NCAA ACAD. AND MEMBERSHIP AFFAIRS STAFF, 2015-16 NCAA DIVISION I MANUAL, Articles 12.5.2.1(a), 12.5.2.1(b), 12.5.1.1, 12.5.2.4 (2015).

157. *See* Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 333 (2007).

158. *Compare* average athletic scholarship of $10,409 and $14,270 annually *with* NCAA generated $989 million. *See also*, *O'Bannon*, 802 F.3d at 1067-1068 (the Ninth Circuit affirmatively found plaintiffs were actually injured (harmed) for not receiving compensation for use of their likeness in the EA Sports video games).

159. *See* U.S. Department of Justice and the Federal Trade Commission, Anti-Trust Guidelines for the Licensing of Intellectual Property, 3.4, 4.2 (Apr. 6, 1995). *See also* U.S. Department of Justice and the Federal Trade Commission, Antitrust Guidelines for Collaborations among Competitors, 24 (2000).

160. For example, professional drafts (i.e. the NBA Draft) and its draft eligibility rules have long been found to be archaic and even a restraint of trade, however they are a necessary function of the leagues and without them they would fold. *See, e.g.* Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004); Haywood v. NBA, 401 U.S. 1204 (1971).

161. *Smith v. NCAA*, 139 F.3d 180, 184 (3d Cir. 1998).

162. *O'Bannon*, 802 F.3d at 1053 ("The NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules"). Unsurprisingly, the Supreme Court refused to hear the case. They hear only 1% of petitioned cases, *O'Bannon* presented issues they haven't considered since *NCAA v. Board of Regents of the University of Oklahoma* in the 80s, at the time of denial were one justice short, and there are higher profile NCAA cases coming down the pipeline that are much riper for Supreme Court review. However, their refusal leaves in place the Ninth Circuit's finding that the NCAA is subject to anti-trust scrutiny and certain rules limiting compensation are anti-competitive. Steve Berkowitz and A.J. Perez, *Supreme Court Will Not Consider the Ed O'Bannon Antitrust Case Against NCAA*, USA TODAY, http://www.usatoday.com/story/sports/college/2016/10/03/supreme-court-ed-obannon-ncaa-antitrust-case/91462090/; Joe Nocera, *O'Bannon Ruling Stands, but N.C.A.A.'s Status Quo May Yet Collapse*, THE NEW YORK TIMES, http://www.nytimes.com/2016/10/04/sports/ncaa-obannon-case-ruling-supreme-court.html?_r=0.

163. *See Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *Standard Oil Company of New Jersey v. United States*, 221 U.S. 1 (1910) (balancing as the first step to the rule of reason).

Upon finding that anti-competitive effects outweigh any pro-competitive benefits, one must find a less restrictive alternative, which, if found, will mean the restraint is unreasonable.[164]

B. PRO-COMPETITIVE EFFECTS V. ANTI-COMPETITIVE EFFECTS

1. PRO-COMPETITIVE EFFECTS

Since the first antitrust suit was conducted against it, the NCAA has proferred four pro-competitive purposes for its rules and restrictions prohibiting student-athletes from receiving compensation for the use of their name, image, and likeness: 1) Preserving "amateurism" in college sports; 2) promoting competitive balance; 3) integrating academics and athletics; 4) increasing output in the college market.[165] *O'Bannon* was quick to dismiss points 2, 3, and 4.[166] In fact, on appeal, the NCAA only argued amateurism.[167] The Ninth Circuit agreed that amateurism is a concrete pro-competitive effect because it increases the college sports appeal to consumers.[168] This decision was consistent with the Supreme Court's own description of college sports as "a particular brand of.[sports,]" rich in tradition, which may otherwise not be available.[169]

2. ANTI-COMPETITIVE EFFECTS

The *O'Bannon* court brought to light three anti-competitive effects as a result of the NCAA rules.[170] The first is the most obvious: absent the NCAA compensation rules, the licensors would negotiate directly with student-athletes and create a potential new revenue stream.[171] These businesses would not be held back by the NCAA, would obtain a greater sense of realism with endorsements, and the student-athletes would be paid.[172] The second anti-competitive effect is a decrease in output in the college market.[173] The court hypothesized that athletes would be more likely to attend college, stay longer, and obtain a true higher education if they knew they could earn some income while in school.[174] Lastly, the Ninth Circuit underscored that the rules prohibiting compensation for use of name, image, and likeness are a price-fixing agreement.[175] They have the anti-competitive effect of fixing one factor of the exchange between schools and recruits, which eliminates competition among schools with respect to that factor.[176] This means one of the major forms of competition between schools is eliminated from the recruiting process.[177]

Therefore, when balancing the sole pro-competitive effect with the more plentiful anti-competitive effects, the NCAA rules, which *O'Bannon* supports, are more restrictive than

164. *County of Tuolumne v. Sonora Community Hospital*, 236 F.3d. 1148, 1159 (9th Cir. 2001).
165. *O'Bannon*, 802 F.3d at 1058.
166. They focused on the NCAA purported mission of higher education and the opportunity for said education would still be available even if there was some form of compensation; thus, disproving justifications two through four. Additionally, they further agreed with the district court which found economists have studied the NCAA for years and nearly all of them have concluded NCAA compensation rules have no effect on competitive balance and have no effect on output, in fact, they may even be a hindrance and deterrent. *O'Bannon*, 802 F.3d at 1073.
167. *Id.* 1072. This was actually a pivotal and landmark moment as for centuries the NCAA has always used those four justifications for its rules, even if courts have questioned their validity.
168. *Id.* at 1073.
169. *NCAA*, 468 U.S. at 101.
170. *O'Bannon, supra* note 3.
171. *See O'Bannon*, 802 F.3d at 1067.
172. *See Id.* at 1067-1068.
173. *Id.* at 1070.
174. *See Id.* at 1070, 1073.
175. *Id.* at 1057.
176. *O'Bannon*, 802 F.3d at 1071.
177. *Id.*

necessary to maintain amateurism.[178] Thus, we turn to the final inquiry – are there reasonable alternatives to the current NCAA rules and practices?

C. RECLAIMING THEIR RIGHTS – DIRECT COMPENSATION AS A LESS RESTRICTIVE ALTERNATIVE

The third and final step in a Rule of Reason analysis is whether there exists a substantially less restrictive alternative to the NCAA's current rules.[179] This is where the 2015 *O'Bannon* decision favoured the NCAA, since the district court judge's finding that a viable alternative of a $5,000 per year, per student-athlete deferred compensation award, was deemed to be erroneous.[180] This $5,000 decision was struck down because an alternative must be "virtually as effective" in serving the sole pro-competitive purpose of amateurism and "without significantly increased cost."[181] The Ninth Circuit found it obviously more costly because schools would have to pay each student-athlete $5,000 per year and that not paying athletes is "precisely what makes them amateurs."[182] While I agree with this analysis, I believe that there may be a simpler, more logical solution that satisfies the legal requirements of a less restrictive alternative – just let Nike do it.

Not just Nike, but Under Armour, adidas, Russell, even the local used car dealer. Anyone who wants to pay college athletes to be in commercials, make local appearances, sign autographs, or license his or her name should be allowed to do so.[183] Lifting the restriction and striking it from the rulebook is the most obvious "less restrictive alternative" that even some conferences are beginning to support.[184] Although *O'Bannon* struck down the district court's alternative, it also strongly disagreed with the NCAA's opinion in the *Board of Regents of the University of Oklahoma* specific language which included "athletes must not be paid."[185] "The court did not strike down the unlawfulness of [alternatives]. They just said the relief was not necessarily a less-restrictive restraint. . . . [T]hey have opened it up to propose [new] reforms."[186] Lifting and abandoning the prohibitions on student-athletes' use of his or her own name, image, and likeness is that reform.

1. "VIRTUALLY AS EFFECTIVE"

For an alternative to be viable, it must first be "virtually as effective" in serving the legitimate and concrete pro-competitive purpose of amateurism.[187] Under *O'Bannon*, "not paying athletes is precisely what makes them amateurs,"[188] but that sentiment is entirely not true. In 1956, when these prohibitions came to exist, it was much easier to hide compensation.[189] Nowadays, the ideal of what an amateur is has drastically changed. Olympians,

178. *Id.* at 1074.
179. *See County of Tuolumne*, 236 F.3d. at 1159.
180. *See O'Bannon*, 802 F.3d at 1076-1079.
181. *County of Tuolumne*, 236 F.3d. at 1159.
182. *O'Bannon*, 802 F.3d at 1076.
183. *See* Andrew Sharp, *Adam Silver, College Basketball, and Two Problems With One Solution*, GRANTLAND (Mar. 18, 2014), http://grantland.com/the-triangle/adam-silver-college-basketball-and-two-problems-with-one-solution/.
184. *See* Andrew Sharp, *The Pac-12 and the Smartest Way to Pay College Athletes*, GRANTLAND (Sept. 16, 2015), http://grantland.com/the-triangle/the-pac-12-and-the-smartest-way-to-pay-college-athletes/.
185. *O'Bannon*, 802 F.3d at 1062. (*quoting* NCAA, 468 U.S. at 102).
186. Telephone Interview with O'Bannon Attorney Michael Hausfeld, CBS SPORTS (Sept. 30, 2015).
187. *County of Tuolumne*, 236 F.3d. at 1159.
188. O'Bannon v. NCAA, 802 F.3d 1049, 1076 (9th Cir. 2015).
189. *See generally* Andy Schwarz, *The NCAA Has Always Paid Players; Now It's Just Harder to Pretend They Don't*, DEADSPIN (Aug. 29, 2015), http://deadspin.com/the-ncaa-has-always-paid-players-now-its-just-harder-t-1727419062.

considered the ultimate "amateur" athletes are allowed to accept endorsement deals, and even compensation from their respective governments, for great performance.[190] Additionally, colleges themselves are providing scholarships that have obvious financial value, thus it is not unreasonable to view these as a method of compensation.[191] If there is still doubt, shoe companies engage in fierce competition by flying high school stars to the Bahamas each year to showcase their skills in the hopes of one day getting their endorsement.[192] The idea of a "pure amateur" does not exist, and the idea of what being an amateur is must be aligned with today's realities and culture.[193] There is a lot of area in between strict amateurism and "pay for play."[194] Athletes should be allowed to operate freely in that area, just like every other student.[195]

Not only would lifting the prohibitions safeguard amateurism, but it would also dramatically improve college output while not affecting the educational mission. *O'Bannon* made it clear that the NCAA has an educational mission and stated "if anything . . . abandoning the compensation rules might be the best way to 'widen' recruits' range of choices; athletes might well be more likely to attend college, and stay there longer."[196] There are countless professional athletes who wished they stayed in college but were enticed by the immediate pay, or those who have directly declared that they would have stayed in school had the compensation prohibitions been abandoned.[197] Hence, by simply removing the restraint, the NCAA can actually further its proposed justifications.

2. "WITHOUT SIGNIFICANTLY INCREASED COST"

Under the proposed reform, there would be no increase in cost. The colleges would not have to pay the athletes, nor would they have to put compensation in a deferred trust. They would simply allow third party businesses to do it for them. Alternatives like full cost of attendance, $5,000 per year deferred compensation, and simply paying the athletes like employees are not practical, as paying eighty football and fifteen basketball student-athletes would be nearly impossible for all but a few colleges.[198] This alternative would continue to

190. Adam Taylor, *Here's How Much Olympic Athletes Really Get Paid*, BUSINESS INSIDER (July 19, 2012), http://www.businessinsider.com/heres-how-much-olympic-athletes-really-get-paid-2012-7.

191. *See* Jay Weiner and Steve Berkowitz, *USA Analysis finds $120K Value in Men's Basketball Scholarship*, USA TODAY (Mar. 30, 2011), http://usatoday30.usatoday.com/sports/college/mensbasketball/2011-03-29-scholarship-worth-final-four_N.htm.

192. *See, e.g. Nike Reveals EYBL Select Team Roster for Bahamas Event*, USA TODAY (Aug. 12, 2015), http://usatodayhss.com/2015/nike-reveals-eybl-select-team-roster-for-bahamas-event.

193. *See,* Schwarz, *supra* note 187.

194. *Id.*

195. For example, if a college art student sold a painting to her professor, not only is there not punishment for such an act (unlike a student-athlete), but no one would consider her to be a "professional".

196. *See* O'Bannon, 802 F.3d at 1073.

197. *E.g.* Former Missouri receiver T.J. Moe believes if athletes could promote themselves and make money far less would complain and leave school. T.J. Moe (@TJMoe28), TWITTER (March 26, 2014, 7:02 PM), https://twitter.com/TJMoe28/status/448958288059564032?ref_src=twsrc%5Etfw; .J. Moe (@TJMoe28), TWITTER (March 26, 2014, 7:05 PM), https://twitter.com/TJMoe28/status/448958920074092544?ref_src=twsrc%5Etfw; .J. Moe (@TJMoe28), TWITTER (March 26, 2014, 7:08 PM), https://twitter.com/TJMoe28/status/448959830867202048?ref_src=twsrc%5Etfw.; *E.g.* Nate Fitch, agent for Cleveland Browns Quarterback and formed Texas A&M Aggie, said Manziel would "absolutely" have stayed in school if he could have made money. Telephone Interview with Nate Finch, CBS SPORTS (Dec. 12, 2014); *See also* current Charlotte Hornet and former University of North Carolina Tarheel, Marvin Williams said he left after one season because his family was "very poor" and he knew he could make millions. He has said he did not really want to leave and "[i]f college athletes were compensated, I do not think I ever would have left college" *Paying College Athletes: An Idea that's Gaining Traction*, THE CHARLOTTE OBSERVER, Oct. 11, 2014, http://www.charlotteobserver.com/sports/spt-columns-blogs/scott-fowler/article9201047.html.

198. *See* Andrew Sharp, *Adam Silver, College Basketball, and Two Problems With One Solution*, GRANTLAND (Mar. 18, 2014), http://grantland.com/the-triangle/adam-silver-college-basketball-and-two-problems-with-one-solu

maintain the competitive balance existing in college sports and would have no significant increased cost.

CONCLUSION

It is not immoral for the NCAA to make money off of athletics. There is nothing evil or sinister occurring within the NCAA. Players are not mistreated any more than are other employees of billion-dollar enterprises. For the most part, the intentions of the NCAA, on its face, are good. But it is profoundly immoral for the NCAA to impose barriers to athlete compensation for his or her own identity and likeness. It is a violation of a student-athletes Right of Publicity to continue to restrict his or her ability to receive compensation outside of the university realm.[199]

If a physically attractive student with aspirations of becoming a professional model were to pose wearing his or her school's colors and receive compensation for a car magazine, there is no limit on the amount of money that student might receive.[200] Suppose an art student paints the next Mona Lisa, there are no restrictions on the profits that student might receive from galleries, teaching classes, or gallery openings.[201] Yet if a football player is approached by his local YMCA to teach underprivileged youths the importance of physical fitness and was compensated with gas fare, it is against the NCAA rules and the player would be punished.[202] The NCAA says these student-athletes are like all the other students on campus, but in reality they are the only constituency whose right to use their identity and skill is restricted.[203]

This Note demonstrates that under its current philosophies, ideologies, and practices, the NCAA is unlawfully restraining an athletes' trade. It does so through policies that prohibit student-athletes from using his or her name, image, or likeness to receive pay untethered from financial aid and scholarship, which violates his or her Right of Publicity. The NCAA claims it places these restrictions on student-athletes for their own protection and for the good of amateur sports.[204] However, this Note validates and demonstrates that these restrictions are unreasonable and fly in the face of the binding precedent from *O'Bannon*.[205]

In conclusion, by removing the violations of a student-athletes' Right of Publicity the NCAA could change the environment of college sports forever without really touching the landscape at all. The NCAA can leverage capitalism and existing free-markets to improve the lives of student-athletes and set a positive trajectory for the future of college sports.

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tion/. *E.g.* Boston College voted against the cost-of-attendance measure as they could not afford to offer its athletes the full stipend. Jon Solomon, *Cost for Attendance Results: The Chase to Pay College Players*, CBS SPORTS (Aug. 20, 2015), http://www.cbssports.com/collegefootball/writer/jon-solomon/25275500/cost-of-attendance-results-the-chase-to-legally-pay-college-players.

199. RESTATEMENT (SECOND) OF TORTS § 652C (Am. Law. Inst. 1975).

200. Analogous to Courtney Simpson, former Arizona State Cheerleader, who was paid to perform in a pornographic film wearing her official cheerleading uniform. After the film was out for years ASU wrote a cease and desist letter leading to a settlement where the school name was blurred, but the colors still remain. *See* AVN, *Gimme an X! Courtney Simpson Goes from Poms Poms to Porn Star*, ADULT VIDEO NETWORK (April 2, 2006), http://business.avn.com/articles/Gimme-an-X-Courtney-Simpson-Goes-from-Pom-Poms-to-Porn-Star-44940.html.

201. *See, e.g. Paying College Athletes: An Idea that's Gaining Traction*, THE CHARLOTTE OBSERVER, Oct. 11, 2014, http://www.charlotteobserver.com/sports/spt-columns-blogs/scott-fowler/article9201047.html (Jay Bilas analogizing the double standard to his daughter's paintings at Duke being sold with no repercussion).

202. *See* NCAA ACADEMIC AND MEMBERSHIP AFFAIRS STAFF, *supra* note 143.

203. *Id.*

204. *See* Amateurism, *supra* note 41.

205. O'Bannon Supreme Court Decision, *supra* note 2 and accompanying text

"Girls will be Boys, and Boys will be Girls": The Emergence of the Transgender Athlete and a Defensive Game Plan for High Schools that want to Keep their Playing Fields Level — For Athletes of Both Genders

Ray D. Hacke

I. Disclaimer

To avoid confusion, this article uses the terms "man," "woman," "boy," "girl," "male," and "female" according to their traditional definitions. The author recognizes that transgender males define themselves as female and transgender females define themselves as male, and individuals who consider themselves "allies" of transgender persons honor those self-definitions. The author intends no disrespect to transgender persons by his use of traditional definitions.

II. Introduction

In the 1990 film *Kindergarten Cop*, an impish little boy delights in greeting unsuspecting adults by proudly broadcasting the extent of his carnal knowledge: "Boys have a penis; girls have a vagina."[1] In one scene a police detective visits the boy's kindergarten classroom, where the detective's fellow police officer, the title character, has been posing as a teacher while working undercover.[2] When the boy incites his classmates' laughter by blindsiding the detective with his oft-repeated tidbit about human anatomy, the detective, smirking wryly, tells her fellow officer, "You taught them the basics. That's important."[3]

For high school sports programs across the United States, distinguishing boys from girls is no longer so basic.[4] This is due to the emergence of the "transgender" athlete, whose "gender identity" – the perception and/or expression of whatever gender the athlete asserts himself or herself to be – may or may not match the athlete's anatomy, depending on whether the athlete has undergone sex reassignment surgery, and/or the gender listed on the athlete's birth certificate and other legal records.[5] As of this writing, fifteen states, either by law or through their high school athletic associations' bylaws, currently require high schools – at least public ones, if not all participating schools – to let students compete on athletic

1. *Kindergarten Cop* (Universal Pictures 1990) (motion picture).
2. *Id.*
3. *Id.*
4. Although this article specifically concerns high school sports programs, most of the statutes and legal principles discussed here are also applicable to elementary school, junior high, and college sports.
5. Dr. Pat Griffin and Helen J. Carroll, National Center for Lesbian Rights, *On the Team: Equal Opportunity for Transgender Student Athletes* 1, 47 (2010) (hereinafter Griffin and Carroll, *On the Team*) [defining gender identity as "(o)ne's inner concept of self as male or female or both or neither" and noting that some individuals assigned one gender at birth "choose to live socially as the other gender"].

teams or in athletic contests based on their gender identity.[6] The transgender community deems these states "inclusive": Athletes in these states need not undergo gender reassignment surgery, hormone therapy, or any other medical intervention to compete against athletes of the gender with which they identify.[7] In these states, to quote The Kinks' hit song *Lola*, "Girls will be boys, and boys will be girls, it's a mixed-up, jumbled-up, shook-up world."[8]

Among the other thirty-five states, twenty deal with transgender athletes on a case-by-case basis and twelve have no policy concerning transgender athletes at all.[9] Those states that deal with transgender athletes on a case-by-case basis vary in their approaches:

- Alaska, Connecticut, Georgia, Kansas, Pennsylvania, and Wisconsin let individual schools and school districts decide whether to let transgender athletes compete on teams that match the athletes' gender identity rather than their biological gender.[10] In Alaska, if a school or district has no written policy in place concerning transgender athletes, the gender on the athlete's birth certificate is the determining factor.[11] Schools in Kansas and Wisconsin must notify their respective state athletic associations of their decisions, and Kansas' association may overrule a school's decision if a dispute arises concerning an eligibility determination.[12] Georgia does not let boys compete on girls' teams and also does not let schools challenge other schools' determinations of athletes' gender.[13]
- Illinois has a more complicated approach: When an athlete's proclaimed gender identity does not match the gender listed on the athlete's birth certificate or school registration card, the athlete's school must present to the Illinois High School Association ("IHSA") information concerning (1) the athlete's birth certificate and/or school records, (2) any medical documentation concerning hormonal treatments, sex-reassignment, surgery, counseling, or other treatment that the athlete has undergone, and (3) any physical advantages the athlete might have if permitted to play for a team associated with the opposite gender.[14] The IHSA then rules based on the advice of an established group of medical personnel.[15]
- Iowa has separate associations governing girls' and boys' sports.[16] The boys' association lets girls who identify as male compete on boys' teams "as long as [the girls] consistently identif[y] as a male at school, home, and socially."[17] The girls' association has a virtually identical rule concerning males who identify as female,

6. Trans*Athlete, *K-12 Policies for Transgender Student Athletes* (viewed online on June 8, 2016 at http://www.transathlete.com/#!k-12/c4w2) (hereinafter *K-12 Policies*).

7. *Id.*

8. The Kinks, *Lola*, in *Lola Versus the Powerman and the Moneygoround, Part One*, (Morgan Studios 1970) (album).

9. *K-12 Policies*.

10. *Id.*

11. *Id.*

12. *Id.*; *see also* Kansas High School Athletic Association Transgender Policy for Transgendered Student Participation (viewed online on Nov. 26, 2016 at http://media.wix.com/ugd/2bc3fc_9a092ec75179475a8aa591c4dc939d9a.pdf_) and Wisconsin Interscholastic Athletic Association Transgender Participation Policy (viewed online on Nov. 22, 2016 at http://media.wix.com/ugd/2bc3fc_95ec28cdb3ee4df89ee624229b9caa48.pdf).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* [quoting Iowa High School Athletic Association Transgender Statement, p. 2 (under the heading "Guidelines for Inclusion and Respectful Treatment of Transgender Student-Athletes"].

but provides an exception that allows schools to exclude males from participating on girls' teams consistent with state law.[18]

- Maine gives student athletes the freedom to choose which teams they want to play for subject to an approval process that considers competitive balance and safety for other student athletes.[19] Maine's governing body has a Gender Identity Equity Committee that must approve a transgender athlete's request to compete on a team associated with the athlete's gender identity "unless it is convinced that the student's claim to be transgender is not bona fide or that allowing the student to compete on a single-sex team consistent with his or her gender identity would likely give the student athlete an unfair advantage or pose an unacceptable risk of physical injury to other student athletes."[20]
- Missouri requires athletes to undergo hormone treatments before participating on teams that do not match their biological gender.[21] Girls seeking to play on boys' teams must obtain treatment to increase their testosterone levels, while boys who wish to play on girls' teams must receive treatments to suppress their testosterone levels.[22] Oklahoma and Nebraska also have rules and/or guidelines centering around medical therapy or gender reassignment surgery.[23]
- New Jersey and New Mexico both require that student athletes either provide an official record demonstrating legal recognition of their gender identity or proof that they have transitioned, or are transitioning, to their reassigned sex.[24]
- Oregon lets girls who identify as male participate on boys' teams regardless of whether they are taking hormone treatments, but once they decide to do so, they are excluded from competing on girls' teams for the remainder of their high school careers.[25] Girls who are receiving testosterone treatments may only compete on boys' teams.[26] Boys, meanwhile, are ineligible to compete on girls' teams unless they have completed at least one year of hormone treatments.[27] Idaho has rules that are similar, but not identical, to Oregon's.[28]
- Ohio gives boys who wish to play on girls' teams two options: Complete at least one year of hormone treatments related to gender transition or demonstrate, via sound medical evidence, that they do not possess physical advantages over biological females in the same age group.[29] Such advantages include, but are not means limited to, bone structure, muscle mass, and high testosterone levels.[30] Girls can compete on boys' teams without undergoing medically prescribed testosterone treatments.[31] Girls who have begun such treatments may compete on boys' teams but must submit to regular testing of their hormone levels.[32]

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18. Iowa Girls High School Athletic Union Transgender Statement [citing Iowa Code § 216.9 (viewed online on Nov. 22, 2016 at http://ighsau.org/2014/08/22/transgender-statement/)].
19. *K-12 Policies*; *see also* Maine Principals' Association 2013-2014 Handbook, p. 21 (hereinafter MPA Handbook) (viewed online on Nov. 22, 2016 at http://media.wix.com/ugd/2bc3fc_3a66b1ce818149b3ae23bb108ccf8921.pdf).
20. MPA Handbook, p. 21, ¶ 2.b.
21. *K-12 Policies*.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

Surprisingly, only four states – Alabama, Kentucky, North Carolina, and Texas – still restrict participation in sports based on the gender listed on athletes' birth certificates.[33] The transgender community considers these states "discriminatory."[34]

Foremost among the fifteen "inclusive" states is California, which enacted Assembly Bill 1266 into law in July 2013.[35] Assembly Bill 1266 amended § 221.5 of California's Education Code to include paragraph (f), which states (emphasis added):

> A pupil shall be permitted to participate in sex-segregated school programs, activities and facilities, *including athletic teams and competitions*, consistent with his or her gender identity, irrespective of the gender listed on the pupil's records.[36]

Under Cal. Educ. Code § 221.5(f), a boy claiming to identify as female has "the right to try out for the girls' basketball team, potentially taking away an opportunity from a girl who might otherwise make the team."[37] So far, at least two transgender athletes, both biological males who consider themselves female, have taken advantage of § 221.5(f).[38] Pat (née Patrick) Cordova-Goff – who, despite wearing long hair and makeup, resembles former major league baseball player Jose Canseco due to his bulging arms and barrel chest – hit .588 with five home runs and 12 RBI, all team highs, in 11 games for Azusa High's softball team in 2014,[39] according to the high school sports website MaxPreps.com ("MaxPreps").[40] Anry (née Henry) Fuentes played soccer for Denair High during the 2015-16 season,[41] scoring at least one goal and assisting on at least one more in three games, according to MaxPreps.[42][43]

Cordova-Goff and Fuentes are not the only biologically male transgender high school athletes to have success competing against biological girls. In 2017 Andraya Yearwood, a sprinter for Connecticut's Cromwell High, placed first in the 100 meters and the 200 at Connecticut's state meet for mid-sized schools.[44] In 2016 Nattaphon Wangyot, a sprinter for Alaska's Haines High, earned all-state honors in girls' track and field by placing third in the 200 meters and fifth in the 100 at Alaska's state meet.[45] Wangyot at least claimed to have taken female hormones and other drugs to suppress his body's testosterone levels.[46]

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33. *Id.*

34. *Id.*

35. Cal. Assembly 1266, 2013-2014 Reg. Sess. 1 (Feb. 22, 2013).

36. *Id.* (emphasis added).

37. Pacific Justice Institute, *New Bill Would Allow Boys to Play on Girls Teams, Share "Facilities"* (Jan. 9, 2012) [written concerning AB 266, the California Assembly's first attempt to amend Educ. Code § 221.5].

38. Fred Robledo, Melissa Masatani, and Zen Vuong, *Transgender Student to Play on Azusa High School Softball Team*, San Gabriel Valley Tribune (Feb. 13, 2014) (viewed online on June 8, 2016 at http://www.sgvtribune.com/sports/20140213/transgender-student-to-play-on-azusa-high-school-softball-team).

39. Hereinafter, unless noted, all sports teams and athletes competed at the high school varsity level.

40. *See* http://www.maxpreps.com/high-schools/azusa-aztecs-(azusa,ca)/softball-spring-14/stats.htm.

41. *No League of Their Own: Transgender Athletes* (Fusion August 7, 2016) (TV broad.) (hereinafter *No League*).

42. *See* http://www.maxpreps.com/athlete/anry-fuentes/Rc0S8-IvEeW-8KA2nzwbTA/gendersport/girls-soccer-stats.htm#year=15-16.

43. Cordova-Goff and Fuentes' statistical totals on MaxPreps appeared to be incomplete as of this writing, so their statistical totals could be even higher.

44. Jeff Jacobs, *As We Rightfully Applaud Yearwood, We Must Acknowledge Many Questions Remain*, Hartford Courant (June 1, 2017) (viewed online on July 24, 2017 at http://www.courant.com/sports/hc-jacobs-column-yearwood-transgender-0531-20170530-column.html) (hereinafter Jacobs, *Many Questions Remain*);

45. *Rivals Cry Foul After Losing to Transgender Athlete*, Yahoo! Sports (viewed online on June 6, 2016 at https://au.sports.yahoo.com/a/31775203/nattaphon-wangyot-rivals-cry-foul-after-losing-out-to-transgender-athlete/#page1) (hereinafter *Rivals Cry Foul*).

46. Ben Rohrbach, *Transgender Track Athlete Makes History as Controversy Swirls Around Her*, USA Today High School Sports, June 2, 2016 (viewed online on Sept. 5, 2016 at http://usatodayhss.com/2016/transgender-track-athlete-makes-history-as-controversy-stirs-around-her/)

Yearwood, however, did not undergo any sort of hormonal treatment or otherwise begin transitioning from male to female.[47] It is worth noting that had Yearwood and Wangyot competed as boys, neither would have placed as high as they did at their respective state meets.[48]

Then there is the unique case of Mack Beggs, a wrestler for Trinity High in Euless, Texas: Biologically female, Beggs took testosterone – widely known as a performance-enhancing drug, which is why it's on the World Anti-Doping Association's list of prohibited substances[49] – for two years to become more like the male she identifies as.[50] Beggs wanted to compete as a boy.[51] Because Texas classifies athletes strictly according to the gender listed on their birth certificates,[52] however, Beggs had to compete as a girl. Beggs went 56-0 against female competition en route to winning Texas's Class 6A state 110-pound title.[53] While Beggs did not take testosterone to gain an advantage over her female competitors and provided testing results showing that her testosterone levels were in the range required for her to compete as a girl,[54] Beggs undeniably had a strength advantage she might not otherwise have had but for the testosterone.[55]

If transgender advocates succeed in enacting their agenda in relation to education, laws requiring states to permit athletes to compete as members of their chosen gender will become the norm nationwide. On May 9, 2016, the U.S. Department of Education's Office of Civil Rights (the "OCR") issued a controversial national directive (the "Obama Directive") ordering every public school in the nation to allow transgender students to use bathrooms, locker rooms, and shower facilities, and play on sports teams, which are consistent with the students' proclaimed gender identity.[56] President Obama asserted that Title IX provided the basis for the order.[57] Title IX, of course, is the federal law requiring schools that receive federal funding to provide girls and women – ones with actual female body

47. Jacobs, *Many Questions Remain* (viewed online on July 24, 2017 at http://www.courant.com/sports/hc-jacobs-column-yearwood-transgender-0531-20170530-column.html).

48. Jacobs, *Many Questions Remain* (viewed online on July 24, 2017 at http://www.courant.com/sports/hc-jacobs-column-yearwood-transgender-0531-20170530-column.html); *Rivals Cry Foul* (viewed online on June 6, 2016 at https://au.sports.yahoo.com/a/31775203/nattaphon-wangyot-rivals-cry-foul-after-losing-out-to-transgender-athlete/#page1).

49. *The World Anti-Doping Code International Standard Prohibited List*, p. 2, World Anti-Doping Agency (Jan. 2017).

50. Kent Babb, *Transgender Wrestler Mack Beggs Identifies As Male. He Just Won the Texas State Girls Title*, Washington Post (Feb. 25, 2017) (hereinafter Babb, *Transgender Wrestler*) (viewed online on July 24, 2017 at https://www.washingtonpost.com/sports/highschools/meet-the-texas-wrestler-who-won-a-girls-state-title-his-name-is-mack/2017/02/25/982bd61c-fb6f-11e6-be05-1a3817ac21a5_story.html?utm_term=.35e4697d6b49).

51. *Mack Beggs: 'Change the Laws and Then Watch Me Wrestle the Boys'*, ESPN.com (March 6, 2017) (viewed online on July 24, 2017 at http://www.espn.com/espn/otl/story/_/id/18802987/mack-beggs-transgender-wrestler-change-laws-watch-wrestle-boys).

52. *K-12 Policies.*

53. *Texas Bill Could Sideline Transgender Wrestler Mack Beggs*, Associated Press (May 12, 2017) (viewed online on July 24, 2017 at http://usatodayhss.com/2017/mack-beggs-transgender-wrestler-texas-bill-title-defense).

54. Cam Smith, *Joe Rogan Lashes Out at Transgender Texas Wrestling Champ Mack Beggs, Foes Offer Support*, USA Today (Feb. 27, 2017) (viewed online on July 24, 2017 at http://usatodayhss.com/2017/joe-rogan-lashes-out-at-transgender-texas-wrestling-champ-mack-beggs-while-foes-offer-support).

55. Babb, *Transgender Wrestler* (viewed online on July 24, 2017 at https://www.washingtonpost.com/sports/highschools/meet-the-texas-wrestler-who-won-a-girls-state-title-his-name-is-mack/2017/02/25/982bd61c-fb6f-11e6-be05-1a3817ac21a5_story.html?utm_term=.35e4697d6b49) [noting that "coaches noticed an unmistakable strength advantage that had not been there even a year earlier"].

56. Todd Starnes, *Starnes: We Must Defy Obama's Transgender Decree – No Matter the Cost*, FoxNews.com (May 13, 2016) (viewed online on August 25, 2016 at http://www.foxnews.com/opinion/2016/05/13/starnes-must-defy-obamas-transgender-decree-no-matter-cost.html); *see also* Ltr. From U.S. Dept. of Educ., Office of Civil Rights, *Dear Colleague Letter on Transgender Students* 1 (May 13, 2016) (hereinafter OCR Ltr.) (viewed online on Sept. 15, 2016 at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf).

57. *Id.*

parts that they have either had or naturally developed since birth – with the same opportunity to compete in scholastic sports that their male counterparts have.[58] President Trump rescinded the Obama Directive soon after taking office,[59] and a federal district court in Texas has held that the OCR based the Obama Directive on a complete misreading of Title IX: The court held that "Title IX 'is not ambiguous' about sex being defined as 'the biological and anatomical differences between male and female students as determined *at their birth*.'"[60] Indeed, the intent of a statute is determined at the time of its enactment,[61] and when Title IX was enacted in 1972, "virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females[.]"[62] The Supreme Court itself recognized just one year later that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth[.]"[63]

All of the above begs the question: Does the law really require that schools eliminate sex-segregated sports programs – or at least bend the time-honored, normally accepted definitions of terms such as "boy" and "girl" – to accommodate transgender athletes, even in transgender-friendly states? To answer this question, this article will examine whether the U.S. Constitution's Equal Protection Clause, Title IX, and state law require that schools permit transgender athletes to use bathrooms and locker rooms and play on sports teams of their choosing – even when including such athletes denies opportunities to, or endangers, actual girls. The purpose of exploring these issues is to provide high schools that wish to maintain separate athletic programs for girls and boys with a defensive game plan that lets them do so.

III. THE EQUAL PROTECTION CLAUSE

Section 1 of the U.S. Constitution's Fourteenth Amendment, aka the Equal Protection Clause (the "EPC"), prohibits states from denying to anyone within their jurisdiction equal protection of the law.[64] The EPC applies whenever a state, or one of its agencies, takes any action that treats distinct classes of similarly situated persons differently.[65] State actors include high school athletic associations – which, while not officially agencies of state governments, are usually "[so] overborne by the pervasive entwinement of public institutions and public officials in [their] composition and workings [that] there is no substantial reason to claim unfairness in applying constitutional standards to [them]."[66]

The Supreme Court has held that gender-based classifications are permissible under the EPC so long as they (1) serve important governmental objectives, (2) are substantially related to achievement of those objectives,[67] and (3) reflect reasoned judgments rather than

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58. *See* http://www.titlenine.com/category/who+are+we/title+ix-+what+is+it-.do (viewed online on August 25, 2016).

59. Jeremy W. Peters, Jo Becker, and Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, New York Times (Feb. 22, 2017) (viewed online on July 24, 2017 at https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html).

60. Paul J. Weber, *Judge In Texas Temporarily Blocks Obama's Transgender Rules*, Associated Press (August 22, 2016) (emphasis added) (viewed online on August 25, 2016 at https://www.yahoo.com/news/texas-judge-temporarily-blocks-obamas-transgender-directive-133042969.html).

61. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

62. *G.G. ex rel. Grimm v. Gloucester County Sch. Bd.*, 822 F.3d 709, 712 (4th Cir. 2016) (hereinafter *G.G.*) (Niemayer, J., dissenting).

63. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (hereinafter *Frontiero*).

64. U.S. Const. amend. XIV, § 1.

65. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974).

66. *Brentwood Academy v. Tennessee Secondary Sch. Athletic Assn.*, 531 U.S. 288, 289 (2001); *see also Clark v. Arizona Interscholastic Assn.*, 695 F.2d 1126, 1128 (9th Cir. 1982) [citing cases from multiple jurisdictions asserting that high school athletic associations "are so intertwined with the state that their actions are considered state action"].

67. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

prejudice.[68] While courts view gender-based classifications as inherently suspect, to some degree, due to their potential to "relegat[e] the entire class of females to inferior status without regard to the actual capabilities of its female members,"[69] laws pass muster under the EPC if they are aimed at (1) remedying invidious discrimination, (2) enabling women to receive opportunities that have previously been denied them, and (3) empowering them to overcome obstacles they face with regard to advancing their status.[70] This is especially true in the context of high school sports, where maintaining separate teams for boys and girls clearly addresses "the goal of redressing past discrimination and providing equal opportunities for women."[71]

A. PHYSIOLOGICAL AND PSYCHOLOGICAL DIFFERENCES BETWEEN CISGENDER AND TRANSGENDER ATHLETES DO EXIST AND SHOULD BE ACCOUNTED FOR IN EQUAL PROTECTION ANALYSES.

The EPC does not require "*things which are different in fact . . . to be treated in law as though they are the same.*"[72] This is especially true where a law was enacted to protect women and girls from harms that they suffer uniquely or disproportionately.[73] Indeed, the Supreme Court has consistently held that a statute does not violate the EPC when it "realistically reflects the fact that the sexes are not similarly situated in certain circumstances."[74]

If one thing is clear about transgender athletes, it is that they are different in fact from their "cisgender" counterparts – i.e., those whose gender identity matches their biological sex.[75] From a physiological standpoint, a boy who considers himself a girl and wishes to be treated as such is differently situated from an actual girl, and vice versa. In fact, there is a medical term for the cognitive dissonance that occurs when a transgender person's biological sex does not match the person's perception of himself or herself as a member of the opposite sex: "gender dysphoria," formerly known as "gender identity disorder."[76] Although some medical professionals deny that gender dysphoria is a mental illness,[77] at least one prominent psychiatrist, Dr. Paul McHugh of the Johns Hopkins University School of Medicine, has openly declared that it is.[78] Dr. McHugh, who has studied transgenderism

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68. *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 737 (R.I. 1992) (hereinafter Kleczek).

69. *Frontiero*, 411 U.S. at 686-87.

70. *Kahn v. Shevin*, 416 U.S. 351, 353-55 (1974) [upholding a Florida tax law that was "reasonably designed to further the state policy of cushioning the impact of spousal loss on the sex for which that loss imposes a disproportionately heavy burden" due to the fact that while widowed men can typically continue working after the death of a spouse, widowed women often find themselves "suddenly forced into a job market with which (they are) unfamiliar, and in which, because of (their) former economic dependency, (they) will have fewer skills to offer")]; *see also Michael M. v. Super. Ct.*, 450 U.S. 464, 469 (1981) and Weinberger v. Wiesenfeld, 420 U.S. 636, 653 (1975) [stating that statutes which "provide for the special problems of women" are valid under the EPC].

71. *Clark v. Arizona Interscholastic Assn.*, 695 F.2d 1126, 1132 (1982) (hereinafter *Clark*).

72. *Michael M.*, 450 U.S. at 469 (emphasis in the original) [quoting *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966)].

73. *Id.* at 469-70 [holding that a statute making it a crime for males to engage in illicit sexual intercourse with under-aged females passed constitutional muster, even though it did not protect under-aged males and females equally, because the statute's purpose to protect underaged females from illegitimate teenage pregnancies].

74. *Id.* at 469 (emphasis in the original) [quoting *Parham v. Hughes*, 441 U.S. 347, 354 (1979)].

75. *The True Meaning of the Word 'Cisgender,'* Advocate.com (viewed online on Sept. 1, 2016 at http://www.advocate.com/transgender/2015/07/31/true-meaning-word-cisgender).

76. *See* http://www.webmd.com/mental-health/gender-dysphoria (viewed online on Sept. 8, 2016).

77. *Id.*

78. Michael W. Chapman, *Johns Hopkins Psychiatrist: Transgender is 'Mental Disorder'; Sex Change 'Biologcally Impossible'*, CNSNews.com (June 2, 2015) (hereinafter Chapman, *Transgender is 'Mental Disorder'*) (viewed online at http://www.cnsnews.com/news/article/michael-w-chapman/johns-hopkins-psychiatrist-transgender-mental-disorder-sex-change on Sept. 8, 2015).

and sex-reassignment surgery for 40 years,[79] and Dr. Lawrence Mayer, a scholar-in-residence in Johns Hopkins' psychiatry department, have published a report analyzing more than 200 peer-reviewed studies indicating that "the belief that gender identity is an innate, fixed human property independent of biological sex – so that a person might be 'a man trapped in a woman's body' or 'a woman trapped in a man's body' – is not supported by scientific evidence."[80]

Dr. McHugh is not alone in his assessment. The American College of Pediatrics (the "ACP") has stated as follows:

> *A person's belief that he or she is something they are not is, at best, a sign of confused thinking.* When an otherwise healthy biological boy believes he is a girl, or an otherwise healthy biological girl believes she is a boy, an objective psychological problem exists that lies in the mind[,] not the body, and it should be treated as such. These children suffer from gender dysphoria. Gender dysphoria (GD), formerly listed as Gender Identity Disorder (GID), is a recognized mental disorder in the most recent edition of the Diagnostic and Statistical Manual of the American Psychiatric Association . . .[81]

Transgender advocates have accused Dr. McHugh of cherry-picking portions of the studies he reviewed to support an agenda of hatred toward transgender persons.[82] It should also be noted that some medical professionals believe that the stress, anxiety, and depression associated with gender dysphoria, not the dysphoria itself, are what really need to be treated – and that bringing the person's body in line with his or her self-perception through hormone therapy, gender reassignment surgery, and/or other forms of treatment will accomplish that.[83] Still, given that gender dysphoria is a recognized medical disorder, the Obama Directive is essentially demanding that public schools nationwide indulge transgender persons' delusions at the expense of denying actual girls and boys their rightful places on their respective sports teams.

B. PHYSIOLOGICAL DIFFERENCES BETWEEN BIOLOGICAL BOYS AND GIRLS PLACE GIRLS AT A COMPETITIVE DISADVANTAGE AND PUT THEM IN HARM'S WAY.

Courts should remain mindful that physiological differences between the sexes do exist. In fact, several courts have ruled that due to those physiological differences, the EPC does not require that schools let boys compete on girls' sports teams even though (1) the

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79. Michael W. Chapman, *Johns Hopkins Psychiatrist: Support of Transgenderism and Sex-Change Surgery is 'Collaborating With Madness'*, CNSNews.com (June 2, 2016) (viewed online on Sept. 8, 2016 at http://cnsnews.com/blog/michael-w-chapman/johns-hopkins-psychiatrist-support-transgenderism-and-sex-change-surgery).

80. Louis DeBroux, *'Born This Way'? New Study Debunks LGBT Claims*, The Patriot Post (Aug. 25, 2016) (viewed online on Sept. 8, 2016 at https://patriotpost.us/articles/44470).

81. *Gender Identity Harms Children*, American College of Pediatricians (updated August 17, 2016) (viewed online on Sept. 18, 2016 at https://www.acpeds.org/the-college-speaks/position-statements/gender-ideology-harms-children).

82. Mari Brighe, *Clinging to a Dangerous Past: Dr. Paul McHugh's Selective Reading of Transgender Medical Literature*, The TransAdvocate (June 15, 2014) (viewed online on Nov. 22, 2016 at http://transadvocate.com/clinging-to-a-dangerous-past-dr-paul-mchughs-selective-reading-of-transgender-medical-literature_n_13842.htm).

83. *Id.* [stating that "the opinions of Dr. McHugh fly in the face of accepted medical practice" and that "(t)he American Medical Association, the American Psychological Association, the American College of Obstetrics and Gynecology, the American Psychiatric Society, the American Public Health Association, and the World Professional Association for Transgender Health have all adopted positions supporting the necessity of transition-related care, including hormonal and surgical intervention . . ."]; *see also* http://www.webmd.com/mental-health/gender-dysphoria (viewed online on Nov. 22, 2016) [stating that "(t)he mismatch between body and internal sense of gender is not a mental illness. Instead, what needs to be addressed are the stress, anxiety, and depression that go along with it"].

boys' schools do not offer comparable teams and (2) girls have been allowed to compete on boys' teams.[84]

The biggest reason why courts have allowed girls to compete on boys' teams, but not vice versa, is that gender-based classifications "are based on the realization that distinguishing between boys and girls in interscholastic sports will help promote safety, increase competition within each classification, and provide more athletic opportunities for both boys and girls."[85] Boys generally tend to be bigger, taller, stronger, and faster than girls, can jump higher, and strike balls with greater force – all of which gives boys an advantage over girls in sports that schools have traditionally reserved exclusively for girls, such as field hockey and volleyball.[86]

From a safety standpoint, the only conceivable way to compensate for the strength differential between girls and boys is to create classes of teams where boys' advantages of size and strength are eliminated.[87] Football, a typically all-male sport, provides the best example of how such classes could work: Some colleges – Princeton University, for instance – have had teams for players who weigh 172 pounds or less,[88] and many high school, elementary school, and youth football programs place players onto teams based on their age and/or weight.[89] However, fielding varsity, junior varsity, and/or freshman teams in multiple classes would be impractical for schools for several reasons, not the least of which is budget concerns.[90] One reason is that it would be difficult to devise a system of measurement that would place girls in classes where they are on a physical par with boys because "any rating of players could only be done on a very subjective basis and would not be practical."[91] To illustrate: Female track and field athletes might be considered elite when compared to other females, but their running times or jumping or throwing marks often pale in comparison to those of their male counterparts.[92] In sports like basketball or soccer, a tall, strong, fast, athletic girl who dominates against other girls would likely be seriously outclassed when competing against boys.[93]

A class system that groups boys and girls together would also require state athletic associations to revamp their rules to account for variables between boys' and girls' sports

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84. *See*, e.g., *Clark*, 695 F.2d at 1131; *see also Petrie v. Illinois High Sch. Athletic Assn.*, 394 N.E.2d 855, 861 (Ill. 1979) (hereinafter *Petrie*) ["The classification of public high school athletic teams upon the basis of gender in sports such as volleyball is itself based on the innate physical differences between the sexes"].

85. *Kleczek*, 612 A.2d at 739.

86. *Petrie*, 394 N.E.2d at 861; *see also Gomes v. Rhode Island Interscholastic League*, 469 F. Supp. 659, 662 (D.R.I. 1979) (hereinafter *Gomes*) [noting an expert's testimony that "(b)ecause of men's greater muscle bulk, longer limbs, and greater height, males could generally propel a volleyball with more force and better control"] and Rick Reilly, *Not Your Average Skirt Chaser*, Sports Illustrated (Nov. 21, 2001) (hereinafter Reilly, *Skirt Chaser*) (viewed online on Sept. 3, 2016 at http://www.si.com/vault/2001/11/26/314458/not-your-average-skirt-chaser) [noting that a 6-foot-5, 205-pound male field hockey player "has a slap shot that nearly separated a few girls from their sports bras"].

87. *Petrie*, 394 N.E.2d at 861-62.

88. Phil Taylor, *Losing Isn't Everything*, Sports Illustrated (Oct. 1, 2012) (viewed online on Nov. 27, 2016 at http://www.si.com/vault/2012/10/01/106238749/losing-isnt-everything) [concerning Princeton's "sprint" football team].

89. *Petrie*, 394 N.E.2d at 861-62; *see also* http://www.popwarner.com/football/footballstructure.htm (viewed online on Nov. 27, 2016) [concerning ages and weight classes in Pop Warner football].

90. *Petrie*, 394 N.E.2d at 862 [stating "that public institutions have a limited amount of funds and it is common knowledge that many school districts are extremely pressed to maintain their present programs. The extra expense of having this number of squads is obvious"].

91. *Id.*

92. *Id.* at 861 [stating that "in the high school track season previous to the trial, none of the girls' State record holders in track and field would have qualified in any event for the boys' state track and field meet" (quotations omitted)].

93. *Hoover v. Meiklejohn*, 430 F. Supp. 164, 166 (D. Colo. 1977) (hereinafter *Hoover*) ["(A)pplying the formula of force equals mass times acceleration, a collision between a male and a female of equal weights, running at full speed, would tend to be to the disadvantage of the female"].

that may have impacted individual athletes' success when sports were segregated by sex. For instance, female discus throwers use a smaller discus than boys.[94] In girls' volleyball, the net is several inches lower than in boys' volleyball,[95] and dimensions for diamonds in girls' softball are smaller than those in boys' baseball.[96] Girls' basketball teams use a smaller ball than their male counterparts,[97] and although the nets they shoot at are equally high off the ground, at least one prominent college women's coach has suggested that nets should be lower in the girls' game to make the girls' game as high-scoring as the boys'.[98] Boys' and girls' lacrosse are played with slightly different equipment under radically different rules – the chief one being that the boys' game allows checking (i.e., body-to-body hits), while the girls' game does not.[99] Any creation of a class system of co-ed sports that would accommodate transgender athletes thus stands to negate any benefits to female athletes that the current system of sex-segregated sports has engendered.[100]

From a competitive standpoint, if males were permitted to compete with girls for positions on a girls' sports team, "due to average physiological differences, males would displace females to a substantial extent . . . Thus, athletic opportunities for women would be diminished."[101] Put another way, "[a]t the high school level, the average male is objectively more physically capable than the average female. Open competition would, in all probability, relegate the majority of females to second-class positions as benchwarmers or spectators."[102] It thus stands to reason that letting boys – even ones who claim to be girls – compete on girls' teams would violate the EPC because actual girls would be denied athletic opportunities that were created just for them. This is especially true given that such boys would be competing with biological girls, who already have relatively few opportunities to compete in sports beyond high school, for college athletic scholarships.[103]

Not every state recognizes physiological differences between boys and girls as a valid reason to keep boys from participating in girls' sports, or vice versa. In Massachusetts, for instance, preventing boys from joining girls' sports teams violates the state's Equal Rights Amendment.[104] Furthermore, many transgender athletes would argue that physiological differences are not an issue anyway because athletes, regardless of gender, come in all shapes and sizes and have various abilities that give one athlete a competitive advantage over the

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94. *Petrie,* 394 N.E.2d at 863.

95. *Gomes*, 469 F. Supp. at 661.

96. Zach Schonbrun, *Idea to Lower Rim for Women's Basketball Stirs Talk*, N.Y. Times (Oct. 25, 2012) (hereinafter Schonbrun, *Idea to Lower Rim*) (viewed online on Nov. 27, 2016 at http://www.nytimes.com/2012/10/26/sports/ncaabasketball/geno-auriemma-of-uconn-proposes-lower-rim-for-womens-basketball.html).

97. *See* http://www.answers.com/Q/What_is_the_Differences_between_girls_basketball_and_boys_basketball (viewed online on Nov. 27, 2016) [noting that high school girls' basketball teams use a 20-ounce ball that is 9.07 to 9.23 inches in diameter and boys' teams use a 22-ounce ball that is 9.39 to 9.55 inches in diameter].

98. Schonbrun, *Idea to Lower Rim* [describing University of Connecticut women's basketball coach Geno Auriemma's assertion that fans are less interested in women's basketball than men's because women's teams "were not scoring with the ease and regularity that they should"].

99. Preston Williams, *Varsity Letter: For Boys and Girls, Lacrosse is Two Games With One Ball*, Washington Post (May 28, 2009) (viewed online on Nov. 30, 2016 at http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052603359.html).

100. *Petrie,* 394 N.E.2d at 862 [stating that a class system would be "inconsistent with a system of full competition which boys have had for years and girls are seeking to achieve"].

101. *Clark*, 695 F.2d at 1131.

102. *Gomes*, 469 F. Supp. at 662.

103. Betsey Stevenson, *Title IX and the Evolution of High School Sports*, 25 Contemporary Economic Pol'y No. 4 486, 487 (Oct. 2007) [noting that more than 7 million students compete in high school athletics each year, compared to approximately 400,000 at the collegiate level; of that approximately 400,000, less than half (170,526) were female].

104. Christopher Marquis, *An Equal Playing Field: The Potential Conflict Between Title IX and the Massachusetts Equal Rights Amendment*, B.C.J.L. & Soc. Just. 77, 78 n. 6 (2014) [citing Mass. Const. pt. 1, art. I and *Atty. Gen. v. Mass. Interscholastic Athletic Assn.*, 393 N.E.2d 284, 290 (Mass. 1979)]; *see also* Reilly, *Skirt Chaser.*

other.[105] Anry Fuentes, the boy who played for Denair (Calif.) High's girls' soccer team in 2015, said that if "a girl on the other team felt I was stronger than her because I'm physically male, I'd tell her, 'It's not even gender – it's body type.'"[106] At least one court, in a case involving a girl seeking to play soccer on a boys' team, has stated that "the range of [physical] differences among individuals in both sexes is greater than the average differences between the sexes."[107] That court also held that "[t]he failure to establish any physical criteria to protect small or weak males destroys the credibility of the reasoning urged in support of the sex classification."[108]

Transgender athletes who have undergone hormone therapy treatments – which seek to decrease testosterone levels and increase estrogen levels in males who wish to become female and vice versa in females who wish to become male – argue that such treatments adversely impact their bodies, thereby negating any perceived physical advantages they might have.[109] Dr. Joshua Safer, a Boston-based endocrinologist, asserts that when a male undergoes hormone treatments to become female, his muscle mass shrinks to female proportions.[110] Chloe Anderson, a college volleyball player who transitioned from male to female, says that after he began receiving hormone treatments, his arms became weaker, he hit and served the ball with less power, he could not run as fast, and "I struggled a lot to recalibrate my body."[111] Joanna Harper, a transgender male-turned-female and former distance runner who is now a gender and sport consultant with the International Olympic Committee, compares her post-transition body to "a large car with a small engine competing against small cars with small engines."[112]

Taking Safer, Anderson, and Harper at their respective words, it remains apparent that even though some states disregard the physiological differences between boys and girls – or at least treat them as trivial – the reality is that such differences can, and often do, disadvantage and endanger girls on the athletic field. Boys cannot reasonably be expected to restrain themselves, or give less than full effort, when facing girls in athletic competition, any more than they can when facing other boys.[113] This may understandably render girls fearful of facing boys who are significantly taller, heavier, and stronger than they are, strike balls with more force than they do, and in some cases, have played more violent contact sports with other boys.[114] While such fears are not entirely unfounded,[115] they would not tip the EPC's scales in favor of schools that wish to maintain separate athletic programs for boys and girls: Transgender athletes would argue that such fears constitute prejudice, and though "[p]rivate biases may be outside the reach of the law . . . the law cannot, directly, or indirectly, give

105. *No League.*
106. *Id.*
107. *Hoover*, 430 F. Supp. at 169.
108. *Id.*
109. *No League.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *See Knight v. Jewett*, 3 Cal. 4th 296 (Cal. 1992) [a case involving a female touch football player who was injured in a collision with a male opponent while battling to catch a pass; specifically, see p. 318: "(I)n the heat of an active sporting event . . . a participant's normal energetic conduct often includes accidentally careless behavior. The courts have concluded that participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant only on the basis of his or her ordinary careless conduct"].
114. Reilly, *Skirt Chaser* (viewed online on Sept. 3, 2016 at http://www.si.com/vault/2001/11/26/314458/not-your-average-skirt-chaser).
115. *Id.* [concerning a female field hockey player who doubled over after being struck in the pelvic region by a male player's slap shot]; *see also* Marquis, B.C.J.L. & Soc. Just. at 77-78 [concerning a female goalkeeper who suffered a concussion after colliding with a male forward in 2010 Massachusetts field hockey match].

them effect."[116] What would tip the scales in schools' favor is that sex-segregated athletic programs do not violate the EPC because they account for, and eliminate, the very real dangers that biologically female athletes would frequently face if required to compete against biological males.[117]

Having boys on a girls' team can rob girls of the satisfaction that comes with victory: "When you win, people think it's only because of the boys on your team," a female field hockey player told nationally renowned sportswriter Rick Reilly in 2001. "It's so defeating."[118] It is worth noting that some female athletes can defeat, and have defeated, biological males in certain sports.[119] Still, this does not mean that female athletes should have to compete against males, especially when the presence of biological males in girls' high school sports undermines the "legitimate and important government interest" in "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes."[120] This is especially true given that "mixed-sex teams would probably be dominated by males."[121]

Based on the foregoing, then, when deciding EPC cases concerning transgender athletes, courts should continue to factor physiological differences between the sexes into their analyses.

C. ALLOWING TRANSGENDER ATHLETES TO USE OPPOSITE-SEX LOCKER ROOMS MIGHT PROTECT TRANSGENDER ATHLETES, BUT NOT THEIR CISGENDER COUNTERPARTS.

As important as on-field issues are to EPC analyses, off-field issues are equally important – particularly those involving locker rooms and other places where athletes undress and shower before and/or after games. Place even the most effeminate boy in a girls' locker room, and girls will be keenly aware that a boy is in their midst – if not because they are unwillingly exposed to his genitalia, then because they are uncomfortable being in a state of undress in the boy's presence, especially when they have not consented to undress in front of him.[122] High school girls are insecure enough about other girls seeing them fully or partially naked.[123] Forcing girls to be naked in front of a boy, even one who claims to be and acts like a girl, would expose them to serious psychological harm, especially in a world where boys are increasingly objectifying girls' bodies and subjecting girls to sexual bullying and harassment at an alarming rate.[124] Allowing an "intact" biological boy – one who has not undergone gender reassignment surgery, and thus still has a penis – to undress in a girls'

116. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1981) [holding that no matter how prevalent racial prejudice may be in mainstream U.S. society, it could serve as justification for a court prohibiting an African-American man from adopting his white stepdaughter]

117. *Clark*, 695 F.2d at 1130 [citing *Petrie*, 394 N.E.2d at 862, and quoting *Schlesinger v. Ballard*, 419 U.S. 498, 505 (1975) and *Frontiero*, 411 U.S. at 684, to support the proposition that segregating sports programs based on innate differences between the sexes did not violate the EPC as long as such classifications are not based on archaic generalizations or paternalistic attitudes].

118. Reilly, *Skirt Chaser*.

119. *Rivals Cry Foul* (viewed online on June 6, 2016 at https://au.sports.yahoo.com/a/31775203/nattaphon-wangyot-rivals-cry-foul-after-losing-out-to-transgender-athlete/#page1) [noting that although Nattaphon Wangyot did place in his events at the Alaska state girls' track and field championships, he did not place first].

120. *Clark*, 695 F.2d at 1131 [citing *Petrie*, 394 N.E. 2nd at 862].

121. *Hoover*, 430 F. Supp. at 170.

122. Kelsey Harkness, *Why These High School Girls Don't Want 'Student A' in Their Locker Room*, The Stream (Dec. 9, 2015) (viewed online on Sept. 16, 2016 at https://stream.org/high-school-girls-dont-want-transgender-student-locker-room/).

123. *Id.*

124. *Sex Before Kissing: How 15-Year-Old Girls Are Dealing With Porn-Addicted Boys, Fight the New Drug* (April 16, 2016) (viewed online on Sept. 16, 2016 at http://fightthenewdrug.org/sex-before-kissing-15-year-old-girls-dealing-with-boys/).

locker room actually undermines the concept of "equal protection": The boy may be protected, but the girls are not.[125]

The same is true of allowing even the most masculine-looking biologically female athlete to dress and/or shower in a boys' locker room. Never mind that the girl will be in a room full of hormonal teenage boys who will find it nearly impossible to ignore her distinctively female anatomy. Even boys who accept her presence among them and try to respect her privacy would find it difficult to think of her as "just one of the guys."[126] Like their female counterparts, teenage boys going through puberty can struggle to feel comfortable with their changing bodies, and changing in front of girls can heighten their insecurities.[127] Furthermore, a boy may not wish to pull down his pants in front of a girl for fear she may accuse him of rape, sexual assault, or sexual harassment.[128] "[M]ales' privacy rights in single-sex spaces should be upheld just as the same rights for women should be upheld in situations where women have complained of male transgendered exhibitionists."[129]

"Superficially, the maintenance of separate sports teams suggests the possibility of denial of equal protection of the laws, but sound reason dictates that 'separate but equal' in the realm of sports competition, unlike racial discrimination, is justifiable and should be allowed to stand . . . ."[130] Ultimately, if the dangers and competitive disadvantages that biological girls typically face when they have to compete against biological boys are not enough to convince courts that public high schools should continue to maintain separate teams for boys and girls, the lack of equal opportunities for biological girls should.[131]

IV. TITLE IX

"The statute known as Title IX, 20 U.S.C. § 1681, is widely recognized as a source of vast expansion of athletic opportunities for women in the nation's schools and universities[.]"[132] Although Title IX does not mention interscholastic sports specifically, the statute does state that "[n]o person in the United States shall, on the basis of sex, *be excluded from participation in*, the benefits of, or be subjected to discrimination under any education program or *activity* receiving Federal financial assistance."[133] "Regulations promulgated under the statute assure that Title IX covers such educational activities as high school athletics."[134]

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125. Michael E. Miller, *A Transgender Teen Used the Girls' Locker Room. Now Her Community is Up in Arms*, The Washington Post (Sept. 2, 2015) (viewed online on Sept. 16, 2015 at https://www.washingtonpost.com/news/morning-mix/wp/2015/09/02/a-transgender-teen-used-the-girls-locker-room-now-her-community-is-up-in-arms/).

126. *Just One of the Guys* (Columbia Pictures 1985) (motion picture) [telling the story of a high school girl who poses as a boy at a rival school to win a journalism competition; the girl gains access to boys' restrooms and locker rooms and has to keep her anatomy concealed in order to not blow her cover].

127. Dr. Keith Ablow, *All Wrong – In California, Girls Can Use Urinals in the Boys' Restroom*, FoxNews.com (Jan. 14, 2014) (viewed online on Sept. 18, 2016 at http://www.foxnews.com/opinion/2014/01/14/all-wrong-in-california-girls-can-use-urinals-in-boys-restroom.html).

128. Chris Ricketts, *The Transgender Threat to Boys and Men*, American Thinker (April 29, 2016) (viewed online on Sept. 18, 2016 at http://www.americanthinker.com/articles/2016/04/the_transgender_threat_to_boys_and_men_.html).

129. *Id.*

130. *Ritacco v. Norwin Sch. Dist.*, 361 F. Supp. 930, 932 (W.D. Pa. 1973) (hereinafter *Ritacco*).

131. *See Gomes*, 469 F. Supp. at 664 ["Providing women with separate and exclusive athletic teams in sports previously dominated by men appears a legitimate and narrowly drawn attempt to rectify past discrimination]; *see also* Carly Holtzman, *Mother of Girl Who Lost to Transgender Athlete Speaks Out – and She's Furious*, TheBlaze.com (June 7, 2016) (viewed online on Sept. 6, 2016 at http://www.theblaze.com/stories/2016/06/07/mother-of-girl-who-lost-race-to-transgender-athlete-speaks-out-and-shes-furious/) [quoting Jennifer VanPelt, the mother of a runner who lost to Nattaphon Wangyot at Alaska's state track and field meet: "Today it's one transgender athlete. Tomorrow it could be half the field"].

132. *Mansourian v. Regents of the Univ. of Calif., Univ. of Calif. at Davis*, 594 F.3d 1095, 1099 (9th Cir. 2010) (hereinafter *Mansourian*).

133. *Id.* at 1101 (emphasis added) [quoting 20 U.S.C. § 1681(a)].

134. *Gomes*, 469 F. Supp. at 660 [citing 45 C.F.R. § 86.41].

When a statute does not define a term, courts typically construe the term in accordance with its ordinary and natural meaning.[135] Title IX provides no definition of the term "women" – in fact, the statute does not even mention the word "women."[136] The statute merely states that no educational institution receiving federal funding shall discriminate "against any person in the United States . . . on the basis of sex."[137] Title IX provides no definition of the word "sex," either.[138] This was especially problematic in *G.G. v. Gloucester County Sch. Bd.*, in which the Fourth Circuit ruled that a Virginia school district's exclusion of a biologically female transgender student from a boys' locker room violated Title IX.[139] (*G.G.*, it should be noted, is no longer valid law in the Fourth Circuit, as the appellate court vacated the preliminary injunction entered for the plaintiff after the Supreme Court denied certiorari in 2017 in light of the Trump Administration's rescission of the Obama Directive.)[140] While transgender persons and other individuals "do currently discuss sex and gender as decoupled concepts relatively frequently . . . it's fairly obvious that" in 1972, when Congress enacted Title IX, "the lawmakers of the time were not thinking of sex and gender as decoupled concepts in need of explicit definitions."[141]

Courts thus interpret Title IX's provisions "through relevant law interpreting parallel language in Title VII . . . [which] prohibits discrimination by an employer" based on sex, among other factors.[142] "Courts have interpreted the word 'sex'" in Title VII "narrowly to mean biological sex."[143] "Based on this interpretation of Title VII, courts also interpret the meaning of 'sex' within Title IX to mean biological sex, not sexual orientation or gender identity."[144]

A. TITLE IX WAS CREATED TO ADVANCE OPPORTUNITIES FOR WOMEN, NOT BIOLOGICAL MEN WHO CLAIM TO BE WOMEN.

To ascertain Congress' intent with regard to the construction of Title IX, then, courts must look to Title IX's legislative history.[145] Title IX's legislative history indicates that Congress enacted the statute as a "response to significant concerns about discrimination against women in education."[146] Title IX's primary sponsor, Sen. Birch Bayh of Indiana, "stated that Title IX was specifically enacted to 'provide for the *women* of America something that was rightfully theirs – an equal chance to attend the schools of their choice, to

135. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

136. *See* 20 U.S.C. § 1681.

137. *Id.*

138. *Id.*; *see also* Jae Alexis Lee, *How Does Title IX Define Gender?*, Quora.com (viewed online on Sept. 15, 2016 at https://www.quora.com/How-does-title-IX-define-gender).

139. MacLeod, *Bathroom Policy* (viewed online on Sept. 18, 2016 at http://www.dailypress.com/news/glouces ter-county/dp-nws-mid-grimm-supreme-court-20160607-story.html); *see also G.G.*, 822 F.3d 709, stay and recall of mandate granted, 136 S. Ct. 2442 (2017).

140. *G.G. v. Gloucester County Sch. Bd.*, 853 F.3d 729 (4th Cir. 2017); *see also* Amy Howe, *Justices Send Transgender Bathroom Case Back to Lower Courts, No Action on Same-Sex Marriage Cake Case*, SCOTUSblog (March 6, 2017) (viewed online on July 24, 2017 at http://www.scotusblog.com/2017/03/justices-send-transgender-bathroom-case-back-lower-courts/).

141. Lee, *How Does Title IX Define Gender?* Quora.com (viewed online on Sept. 15, 2016 at https://www. quora.com/How-does-title-IX-define-gender).

142. Leena D. Phadke, *When Women Aren't Women and Men Aren't Men: The Problem of Transgender Sex Discrimination Under Title IX*, 54 Kan. L. Rev. 837, 839 (April 2006) [quoting 42 U.S.C. § 2000e-2(a) (2000)].

143. *Id.* [citing *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (hereinafter *Holloway*), and Patricia A. Cain, *Stories From The Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 Denv. U. L. Rev. 1321, 1355 (1998) (stating that "the court's holding in *Holloway* declared, without serious question, that there can only be two sexes – male and female")]

144. *Id.* at 840.

145. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 n. 26 (1982) (hereinafter *Bell*).

146. *Neal v. Bd. of Trustees of Calif. State Univs.*, 198 F.3d 763, 766 (9th Cir. 1999) (hereinafter *Neal*).

develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.'"[147] "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, *are an authoritative guide* to the statute's construction[.]"[148] Furthermore, while words, and combinations thereof, may reasonably be interpreted multiple ways, "particularly in matters as complex as legislative enactments,"[149] "[m]ultiple accepted meanings do not exist *merely because a statute's 'authors did not have the forethought to contradict any creative contortion that may later be constructed to expand or prune its scope.'*"[150] In other words, courts should not interpret Title IX in a way that would undermine its purpose of advancing educational opportunities for women and girls – or, to be more accurate, biological women and girls – including and especially athletic opportunities.[151]

1. FOR TITLE IX'S PURPOSES, "SEX" MEANS "BIOLOGICAL SEX."

So, then, how should schools classify transgender athletes for purposes of Title IX? Should they treat males who claim to be female as female, and vice versa, regardless of whether they have undergone hormone treatments or sex reassignment surgery? Transgender advocates would argue that they should.[152] The best-known case specifically involving a transgender athlete suing for the right to compete as a member of the athlete's chosen gender, *Richards v. U.S. Tennis Association*,[153] was brought not under Title IX, but New York's State Human Rights Law. In *Richards*, a tennis player who was born male but had undergone sex reassignment surgery to become female sued for, and won, the right to compete in the U.S. Open's 35-and-over women's singles bracket.[154] In granting an injunction allowing the player to compete as a woman, the court found the U.S. Tennis Association's demand that the player take a sex determination test to be "grossly unfair, discriminatory, and inequitable."[155] The court also held that "[t]he only justification for using a sex determination test in athletic competition is to prevent fraud, i.e., men masquerading as women, competing as women."[156]

While some courts might find *Richards* instructive, justice for high school athletes would be better served by analyzing the transgender issue through the lens of Title VII – which, as stated above, serves as a guideline for Title IX cases.[157] "The dominant interpretation of Title VII examines its legislative history, which suggests that Congress did not intend for its prohibition of sex discrimination to include a prohibition of transgender sex discrimination."[158] In a seminal case concerning Title VII's applicability to individuals who have undergone sex reassignment surgery, the Ninth Circuit held that "a transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII. This court refuses to extend the coverage of Title

147. *Id.* [quoting 118 Cong. Rec. 5808 (1972)].

148. *Id.* (emphasis added) [quoting *Bell*, 456 U.S. at 526-27].

149. *U.S. v. Sherbondy*, 865 F.2d 996, 1000 (9th Cir. 1988).

150. *Calix v. Lynch*, 784 F.3d 1000, 1005 (5th Cir. 2015) (emphasis added) [quoting *Moore v. Hannon Food Services, Inc.*, 317 F.3d 489, 497 (5th Cir. 2003)].

151. *Neal*, 198 F.3d at 767 [noting that Title IX's drafters understood that "(m)ale athletes had been given an enormous head start in the race for athletic resources, and Title IX would prompt universities to level the proverbial playing field"].

152. *See K-12 Policies* [defining "inclusive" to mean "no medical hormones or surgery required" and "discriminatory" to mean "requires birth certificate or surgery and hormone wait period"].

153. *Richards v. U.S. Tennis Assn.*, 400 N.Y.S.2d 267, 268 (N.Y. Sup. 1977) (hereinafter *Richards*).

154. *Id.* at 273.

155. *Id.* at 272.

156. *Id.*

157. Phadke, 54 Kan. L. Rev. at 842.

158. *Id.* at 842-43.

VII to situations that Congress clearly did not contemplate."[159] Another federal appellate court held as follows:

> The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be male, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.[160]

At least one court has held "that discrimination based on a claimant's failure to meet sex stereotypes violates Title VII even when it involves transgender individuals."[161] Under this lone court's view, if an employer discriminates against an individual because he or she refuses to dress, talk, or otherwise behave in a manner that conforms with expectations of the individual's biological gender, the individual may sue the employer under Title VII for sex stereotyping and gender discrimination.[162] However, as stated above, "[i]t is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning."[163] "Courts have [thus] interpreted the word 'sex' narrowly to typically mean biological sex[.]"[164] Under this construction of the word "sex," "any discrimination based on an individual's sexual orientation or gender identity would not violate Title VII because as such, it would not constitute discrimination based on a person's biological sex, but rather because of a quality related to sex."[165] Applying this principle to Title IX, a school does not unlawfully discriminate against a boy who claims to be a girl by treating him as a boy, and vice versa.

2. FORCING GIRLS TO COMPETE AGAINST BOYS FOR ATHLETIC OPPORTUNITIES VIOLATES TITLE IX.

The Ninth Circuit has held that forcing women to compete against men for spots on the same athletic team undermines Title IX's purpose. In *Mansourian v. Regents of the Univ. of Calif., Univ. of Calif. at Davis* (hereinafter *Mansourian*), four female wrestlers sued the University of California at Davis ("UCD") for kicking them off the university's wrestling team, then giving them a chance to rejoin if they defeated male counterparts in their respective weight classes using men's collegiate wrestling rules.[166] Before their dismissal, the female wrestlers had only wrestled against other women using international freestyle rules.[167] Whether they proved unable to physically compete with the men or simply refused to out of discomfort, lack of knowledge and/or practice of men's collegiate rules, etc., the female wrestlers lost scholarships and academic credit due to their inability to participate.[168] In holding that UCD's exclusion of the female wrestlers violated Title IX, the Ninth Circuit stated that "[b]y requiring women to prevail against men, the university changed the condi-

159. *Holloway*, 566 F.2d at 664.
160. *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (hereinafter *Ulane*).
161. Phadke, 54 Kan. L. Rev. at 844-47 [citing *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004)].
162. *Smith*, 378 F.3d at 572 [citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)].
163. *Ulane*, 742 F.2d at 1085.
164. Phadke, 54 Kan. L. Rev. at 839
165. *Id.* at 840.
166. *Mansourian*, 594 F.3d at 1099.
167. *Id.* at 1099-1100.
168. *Id.*

tions under which women could participate in varsity wrestling in a manner that foreseeably concluded their future participation."[169]

B. DENYING TRANSGENDER ATHLETES THE CHANCE TO COMPETE ON TEAMS THAT MATCH THEIR GENDER IDENTITY WOULD NOT DENY THEM AN EQUAL OPPORTUNITY TO COMPETE.

In *O'Connor v. Bd. of Educ. of Sch. Dist. 23* (hereinafter *O'Connor*), the Supreme Court held that "without a gender-based classification in competitive contact sports, *there would be a substantial risk that boys participating in the girls' programs would dominate those programs and deny girls an equal opportunity to participate in interscholastic events*[.]"[170] "[C]ontact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact."[171] *O'Connor* involved a female junior high basketball player whose basketball skills greatly exceeded those of other girls her age or older, and were at least equal to those of many boys her age or older.[172] Because of this, the player sought – and won – an injunction from her local federal district court permitting her to try out for one of her school's boys teams and to compete against boys in interscholastic competition if she made the team.[173] The player's school district successfully appealed the lower court's ruling and was granted a stay of the injunction.[174]

In denying the player's motion to vacate the stay, the Supreme Court held that only where (1) a school operates or sponsors a team for one sex in a particular sport but does not operate or sponsor a team from the opposite sex, and (2) athletic opportunities for members of the excluded sex have previously been limited, must the school permit members of the excluded sex to try out for the team offered.[175] Because the school district had offered the female basketball player an equal opportunity to participate in interscholastic athletic competition not only by fielding girls' basketball teams, but also by devoting equal time, money, personnel, and facilities to the girls' teams at the player's school, the district had complied with Title IX.[176] *O'Connor* thus illustrates that schools do not deny equal opportunities to athletes of either gender – and thus violate Title IX – by requiring them to compete on teams set apart based on biological gender.[177]

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169. *Id.* at 1108 n. 16.

170. *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1308 (1980) (hereinafter *O'Connor*) (emphasis added).

171. *Id.* [quoting 45 C.F.R. § 86.41(b) (1979)].

172. *Id.* at 1302-03.

173. *Id.*

174. *Id.* at 1303-04.

175. *Id.* at 1308 [quoting 45 C.F.R. § 86.41(b) (1979)].

176. *Id.* at 1306 [stating that if a gender-based classification "is reasonable in substantially all of its applications . . . the general rule (cannot) be said to be unconstitutional simply because it appears arbitrary in an individual case"]; see also *Hoover*, 430 F. Supp. at 170 ["The standard should be one of comparability, not absolute equality"].

177. *O'Connor*, 449 U.S. at 1306 ["(T)he question whether the discrimination is justified cannot depend entirely on whether the girls' program will offer (the player) opportunities that are equal in all respects to the advantages she would gain from the higher level of competition in the boys' program. The answer must depend on whether it is permissible for the (school district) to structure (its) athletic programs by using sex as one criterion for eligibility"].

C. COURTS SHOULD NOT INTERPRET TITLE IX IN A WAY THAT UNDERMINES ITS PURPOSE.

It should be noted here that the OCR was created to regulate federally funded schools with respect to athletic opportunities under Title IX.[178] It was the OCR that issued the now-rescinded Obama Directive.[179] "It is well established that the federal courts are to defer substantially to an agency's interpretation of its own regulations."[180] However, a court has no obligation to show substantial deference to an agency's interpretation of a statute or regulation when it conflicts with a prior, consistently held interpretation.[181] Courts should thus treat as invalid any agency's interpretation of Title IX that disadvantages biological girls and undermines the statute's remedial purposes.[182] OCR's interpretation of Title IX, as set forth in the Obama Directive, did just that: Whereas the term "sex" in Title IX is to be construed consistently with the meaning prescribed in Title VII, and courts have consistently determined that term to mean "biological sex,"[183] the Obama Directive asserts that the term also includes "gender identity."[184] If a male athlete's mere claim that he is female, or vice versa, is to take precedent over – or at least be given equal weight with – biology, then there are no such things as males or females for Title IX's purposes, and the term "sex" is rendered meaningless.

Taken together, *Mansourian* and *O'Connor* show that interpreting Title IX to require that high schools permit transgender athletes to compete on whichever athletic teams match their self-proclaimed gender identity would, in fact, disadvantage biological women and undermine Title IX's remedial purposes. As *Mansourian* illustrates, high schools may violate Title IX by requiring biological girls to compete with biological boys for spots on an athletic team that were once reserved exclusively for girls: "By requiring women to prevail against men, the university changed the conditions under which women could participate in varsity wrestling in a manner that foreseeably precluded their future participation."[185] As long as a school provides athletic teams for persons of both genders that are roughly equal in terms of the time, money, personnel, and facilities devoted to each team, the equal opportunity requirement is met.[186]

Requiring sex-segregated teams to include persons whose self-proclaimed "gender identity" does not match their biological gender "would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment."[187] Courts should thus uphold Title IX's purpose of expanding athletic opportunities for women by not letting men who claim to be women deny them such opportunities.[188]

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178. *Neal*, 198 F.3d at 770 [quoting *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993)].

179. OCR Ltr. at pp. 1-8.

180. *Neal*, 198 F.3d at 770.

181. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994).

182. *Neal*, 198 F.3d at 768 [quoting *Cohen v. Brown Univ.*, 101 F.3d 155, 174 (1st Cir. 1996)].

183. Phadke, 54 Kan. L. Rev. at 842-43.

184. Emma Margolin, Transgender Students Protected Under Title IX, DOE Says, MSNBC.com (April 30, 2014) (viewed online on Nov. 28, 2016 at http://www.msnbc.com/msnbc/transgender-students-protected-under-title-ix) [quoting the Obama Directive's statement that "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity . . ."].

185. *Mansourian*, 594 F.3d at 1108.

186. *Id.*; *see also Hoover*, 430 F. Supp. at 170.

187. *Neal*, 198 F.3d at 770.

188. *Id.* at 766 [quoting *Bell*, 456 U.S. at 526-27].

V. STATE LAWS CONCERNING TRANSGENDER ATHLETES

Since the Supreme Court issued its landmark decision in *McCulloch v. Maryland* in 1819, "it has been settled that state law that conflicts with federal law is 'without effect.'"[189] Under the U.S. Constitution's Supremacy Clause, "Congress has the power to preempt state law."[190] "Even without an express provision for preemption . . . state law must yield to a congressional act in at least two circumstances."[191] "When Congress intends federal law to 'occupy the field,' state law in that area is preempted."[192] "And even if Congress has not occupied the field, *state law is naturally preempted to the extent of any conflict with a federal statute.*"[193]

California actually has two laws requiring public high schools to let transgender athletes compete on teams, or in events, based on their self-proclaimed gender identity:[194] Besides Educ. Code § 221.5(f), cited *supra*, there is the Unruh Civil Rights Act (the "Unruh Act"), which prohibits business establishments from discriminating based on "gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[195] The term "business establishment" is to be construed broadly:

> The word 'business' embraces everything about which one can be employed, and it is often synonymous with 'calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain.' The word 'establishment,' as broadly defined, includes not only a fixed location, such as the 'place where one is permanently fixed for residence or business,' but also *a permanent 'commercial force or organization'* . . .[196]

Public schools qualify as business establishments under the Unruh Act.[197] So, for that matter, would the California Interscholastic Federation and the regional sections that oversee high school sports on its behalf (collectively the "CIF"): Though no court has declared the CIF to be a business establishment, the CIF organizes and conducts high school sports events throughout the state on an annual basis and generates revenue from the sales of tickets, event programs, T-shirts, and concessions, which would almost certainly qualify the CIF as "a permanent force or organization."[198] The CIF's status as a non-profit organization would not exempt it from the Unruh Act's provisions.[199] Private religious schools, however,

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189. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) [citing *McCulloch v. Maryland*, 17 U.S. 316 (1819), and quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)].

190. *Crosby v. Natl. Foreign Trade Council*, 530 U.S. 363, 372 (2000) (hereinafter *Crosby*) [citing U.S. Const. Art. VI, cl. 2].

191. *Id.*

192. *Id.*

193. *Id.* (emphasis added).

194. Although this portion of the article specifically discusses laws in California, the legal principles discussed apply in all other U.S. states, districts, and territories that have similar laws, rules, and regulations concerning transgender student-athletes.

195. *See* Cal. Civ. Code § 51(e)(4) [incorporating by reference Gov. Code § 12926(p) and, by extension, Pen. Code § 422.56(c), which is incorporated by reference into Gov. Code § 12926(p) and whose language is quoted in the sentence preceding this note]; see also Gov. Code § 11135(a) and Educ. Code §§ 200, 201 and 220.

196. *Hart v. Cult Awareness Network*, 13 Cal. App. 4th 777, 786 (Cal. App. 2nd Dist. 1982) (hereinafter *Hart*) (emphasis added) [quoting *Burks v. Poppy Construction Co.*, 57 Cal.2d 463, 468-69 (1962)].

197. *Sullivan v. Vallejo City Sch. Dist.*, 731 F. Supp. 947, 953 (E.D. Cal. 1990)

198. *Id.* at 952 [quoting *Isbister v. Boys Club of Santa Cruz, Inc.*, 40 Cal. 3d 72, 76 (Cal. 1985) (hereinafter *Isbister*) (stating that in enacting the Unruh Act, the California Legislature intended for the statute to apply to "*all private and public organizations* . . . that may reasonably be found to constitute business establishments of every type (sic) whatsoever" (emphasis in the original; internal quotations omitted))].

199. *Id.* [citing *Isbister* and *O'Connor v. Village Green Owners Assn.*, 33 Cal. 3d 790 (Cal. 1983)].

are not subject to the Unruh Act,[200] which is inapplicable where it conflicts with the First Amendment.[201] In other words, private schools that wish to adhere to the biblical teaching "that at the beginning the Creator 'made them male and female' "[202] are free to do so.

The state laws discussed *supra* have put California's public high schools in a legal bind: If they do not let transgender athletes compete for spots on teams that match their gender identity, they could be sued for violating Educ. Code § 221.5(f), the Unruh Act, the Equal Protection Clause, and Title IX. If they do let transgender athletes to compete on teams that match their gender identity and thus displace biological boys or girls who would otherwise have earned spots on those teams, they could be subject to lawsuits on the same grounds.

VI. HIGH SCHOOLS' DEFENSIVE GAME PLAN

Other than lobby their federal and state legislators for changes in existing law, there does not seem to be much that high schools can do to wriggle out of the proverbial "rock and a hard place" that transgender athletes have placed them between. However, schools need not sit back and wait to be sued to assert their right to maintain a level playing field for all of their athletes by maintaining separate athletic programs for boys and girls.

For starters, high schools can maintain the status quo. As stated *supra*, Title IX was enacted to advance educational opportunities for girls.[203] By ensuring that spots on athletic teams established for girls actually go to girls, schools can do just that. A boy who wants to play on a girls' team, or vice versa, is not "excluded from participation in [or] denied the benefits of . . . [an] education program or activity receiving Federal financial assistance" if the school has teams available for persons of his biological gender,[204] especially given Title IX's purpose of remedying discrimination toward girls.[205]

High schools with the resources to do so can also bring suit against an appropriate state official on behalf of their athletic teams. An organization "has standing to bring suit on behalf of its members when its members *would have standing to sue in their own right*, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit."[206] A girl who loses a spot on a school athletic team to a biological male would certainly have standing to bring suit against her school and/or its district for discriminating against her under Title IX, and a school that has been put in a position whereby it is forced to violate Title IX should be able to bring such a suit on the girl's behalf. The best defense might be a good offense in such a circumstance.

Should a high school he sued by a transgender athlete, however, a school seeking to preserve its sex-segregated sports programs can and should assert the following defenses:

□ *Equal Protection Clause:* As stated above, the EPC does not require *"things which are different in fact . . . to be treated in law as though they are the same."*[207] Psycho-

200. *Doe v. California Lutheran High Sch. Assn.*, 170 Cal. App. 4th 828, 839 (Cal. App. 4th Dist. 2009) [quoting 81 Ops. Cal. Atty. Gen. 189 (1998): "(A) private nonprofit religious school has as its 'overall purpose and function' the education of children in keeping with its religious beliefs. The 'inculcation of a specific set of values,' with programs 'designed to teach the moral principles to which the (school) subscribes,' prevents such a school from being considered a 'business establishment' whose . . . practices would be subject to the (Unruh) Act"].

201. *Hart*, 13 Cal. App. 4th at 792.

202. Matt. 19:4; *see also* Gen. 1:27 and 5:2.

203. *Neal*, 198 F.3d at 766.

204. 20 U.S.C. § 1681.

205. *Neal*, 198 F.3d at 766.

206. *Alabama Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1268 (2015) (emphasis in the original) [quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000)].

207. *Michael M.*, 450 U.S. at 469 (emphasis in the original).

logically and biologically, transgender athletes are distinguishable from their cisgender counterparts: Cisgenders are what they claim to be and come by their body parts naturally,[208] whereas transgenders claim to be the opposite of what they are and must medically alter their bodies if they wish, at least externally, to look like the gender to which they claim to belong.[209] Scientifically, males who claim to be female are still male, and vice versa.[210] Accordingly, schools, as state actors subject to the EPC, are free to treat transgender males as female and vice versa for purposes of team placement and determining which locker rooms they should use.

Given that "distinguishing between boys and girls in interscholastic sports will help promote safety, increase competition within each classification, and provide more athletic opportunities for both boys and girls,"[211] schools can assert the government interest in achieving those goals. For one thing, the presence of transgender athletes on sports teams that do not match their biological gender poses physical and/or psychological dangers to their cisgender teammates, both in the locker room and on the field; schools should not be forced to harm one group to accommodate the other. Remember, the EPC entitles both boys and girls to "equal protection," not "special protection." Furthermore, it is theoretically possible for a girls' team to be populated largely with boys who claim to be transgender,[212] which would deny equal athletic opportunities to biological girls and thus undermine the goal of "redressing past discrimination and providing equal opportunities for women."[213] Even if maintaining sex-segregated sports programs is not the only way to achieve that goal, it is almost certainly the best way:

> "We deem the preservation, fostering, and promotion of interscholastic athletic competition for both boys and girls to be a matter of compelling governmental interest. Both because of past disparity of opportunity and because of innate differences, boys and girls are not similarly situated as they enter into most athletic endeavors. Although classification of teams based on gender is not an absolute necessity to achieve those governmental interests, we are persuaded that the combination of problems which we believe to be likely to arise from attempts to do so through other classifications, creates a substantial element of necessity."[214]

Schools that wish to accommodate athletes who claim to be transgender are also within their rights to require proof of the athletes' transgender bona fides so as to prevent fraud – i.e., athletes, males in particular, claiming to be transgender in order to gain a competitive advantage.[215] Most, if not all, transgender athletes deny that anyone would claim to be transgender to obtain an easier path to athletic glory due to the bullying, harassment, and

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208. *Frontiero*, 411 U.S. at 686.

209. Chapman, *Transgender is 'Mental Disorder'* [quoting Dr. McHugh, who said, "'Sex change' is biologically impossible. People who undergo sex-reassignment surgery do not go from men to women or vice versa. Rather, they become feminized men or masculinized women"].

210. *Id.*; *see also* Matt Walsh, *You Are Born a Man or a Woman. You Don't Get to Choose*, TheMattWalshBlog.com (Sept. 24, 2014) (hereinafter Walsh, *You Are Born a Man or a Woman*) (viewed online on Nov. 29, 2016 at http://themattwalshblog.com/2014/09/24/man-or-woman/) [describing transgender mixed martial arts fighter Fallon Fox – who was born male but fights against women – as "a grown adult male who . . . beat a woman to a bloody pulp in front of a cheering crowd"].

211. *Kleczek*, 612 A.2d at 739.

212. *O'Connor*, 449 U.S. at 1307.

213. *Clark*, 695 F.2d at 1131 [citing *Petrie*, 394 N.E. 2nd at 862].

214. *Petrie*, 394 N.E.2d at 863; *see also O'Connor*, 449 U.S. at 1307 ["Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to participate in scholastic events"].

215. *Richards*, 400 N.Y.S.2d at 272.

other types of persecution the person would face for doing so.[216] However, an athlete who is desperate enough could be willing to pay that price, especially if it means being hailed as a groundbreaker and offered college scholarships for doing so.[217] Schools are thus permitted under the EPC to condition participation on an opposite-gender team by requiring that a transgender athlete (1) provide legal and/or medical evidence of his or her transgender status, (2) undergo hormone treatments or sex reassignment surgery before permitting them to compete on an opposite-gender team, and/or (3) compete as a member of his or her approved gender for the remainder of his or her high school career – all of which are approaches taken in various states.[218]

Transgender athletes may argue that conditioning participation on opposite-gender teams is discriminatory[219] and, furthermore, that requesting proof of their transgender bona fides violates privacy interests protected by their federal and state constitutions.[220] However, "[u]nlike the general population, student athletes undergo frequent physical examinations, reveal their bodily and medical conditions to coaches and trainers, and often dress and undress in same-sex locker rooms. In so doing, they normally and reasonably forgo a measure of their privacy in exchange for the personal and professional benefits of extracurricular athletics."[221] In other words, transgender athletes give up their reasonable expectation of privacy by voluntarily participating in interscholastic athletics.[222] This is especially true since disclosure of their transgender status is necessary from a practical standpoint in order to gain approval to compete for an opposite-sex team. Other legitimate legal objectives, such as ensuring equality of opportunity for both boys and girls and ensuring the physical and psychological safety of other athletes, also outweigh the transgender athlete's already diminished expectation of privacy.[223]

The bottom line: All the EPC requires is that whatever opportunities schools provide for their students to compete in interscholastic athletics must be open to all on equal terms.[224] Maintaining sex-segregated sports programs, and limiting participation in those programs to persons of a specific biological gender, accomplishes that goal.[225]

- *Title IX:* By ensuring that as many biological girls and boys as possible have the chance to compete in interscholastic athletic competition, schools comply with the letter, spirit, and intent of Title IX.[226] Neither boys nor girls are denied equal athletic opportunities under Title IX by being required to try out for, and participate on, teams set apart exclusively for persons of their gender.[227] However, by permitting transgender males to compete on teams set apart for biological girls, schools change the conditions under which girls may

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216. *No League* [featuring Caitlyn Jenner – who, as Bruce Jenner, won the men's decathlon at the 1976 Olympic Games in Montreal and is the most prominent current or former athlete who identifies as transgender – and transgender duathlete Chris Mosier, a biological female, who deny that men would seek to compete as women in order to gain a competitive advantage].

217. *Transgender Track Star Stirs Controversy Competing in Alaska's Girls' State Meet Championships*, CBS New York (June 8, 2016) (viewed online on Sept. 16, 2016 at http://newyork.cbslocal.com/2016/06/08/transgender-nattaphon-wangyot-alaska-track/); *see also* Walsh, *You Are Born a Man or a Woman* [stating that as Fallon Fox "gloated about his physical dominance over (his) outmatched female" opponent in a mixed martial arts bout, "media outlets and advocacy groups hailed him as a pioneer"].

218. *K-12 Policies.*

219. *Id.*

220. *See*, e.g., *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1191-97 (C.D. Cal. 2007) [noting that minor students in California have privacy rights concerning their sexual orientation that are protected under both the federal and state constitutions; the same would likely be equally applicable to one's gender identity].

221. *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 9 (Cal. 1994).

222. *Id.*

223. *Kleczek*, 612 A.2d at 739.

224. *Hoover*, 430 F. Supp. at 171.

225. *Clark*, 695 F.2d at 1131.

226. *O'Connor*, 449 U.S. at 1306, and *Neal*, 198 F.3d at 766.

227. *O'Connor*, 449 U.S. at 1306.

participate in a manner that effectively denies biological girls the opportunity to participate in interscholastic athletics.[228] In other words, a girl who loses a spot on a girls' team to a transgender male loses out on the very type of educational opportunity that Title IX was enacted to provide to her.[229] This would not only undermine Title IX's purpose, it "would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed Title IX's enactment."[230] To ensure true equality of athletic opportunities under Title IX, then, a school should continue to maintain separate athletic programs for boys and girls and limit participation in those programs to persons of the gender specified.

- *State law:* Where state law forces schools to violate federal law, state law must yield.[231] Title IX is a federal law enacted for the purpose of "eliminat[ing] discrimination on the basis of sex in education programs and activities receiving federal financial assistance."[232] If a school has to violate Title IX, a federal law, to accommodate a transgender athlete under state law, then Title IX's very language and purpose would be rendered meaningless. Schools are thus free to disregard state law in such circumstances.[233]

VII. CONCLUSION

Public high schools do not deny transgender athletes the opportunity to compete in interscholastic athletics – and thereby violate the law – by requiring transgender athletes to compete on teams associated with their biological gender or placing conditions on their participation on an opposite-gender team, such as obtaining hormone treatments or sex reassignment surgery.[234] There are valid, legally recognized reasons to classify transgender athletes according to their anatomy, rather than the gender they claim to be, for purposes of their placement on teams. Ultimately, schools can take comfort in the knowledge that the world of high school athletics is not as "mixed-up, jumbled-up, shook-up" as transgender advocates make it out to be.[235] "The basics" of human anatomy have not changed, and schools can thus treat transgender athletes accordingly.[236]

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228. *Mansourian*, 594 F.3d at 1108 n. 16.

229. *Neal*, 198 F.3d at 767.

230. *Id.* at 770.

231. *Crosby*, 530 U.S. at 372 ["(S)tate law is naturally preempted to the extent of any conflict with a federal statute"].

232. *O'Connor*, 449 U.S. at 1307 n. 5.

233. *See*, e.g., Cal. Civ. Code § 51(c) [stating that the Unruh Act "shall not be construed to confer any right or privilege on a person *that is conditioned or limited by law* or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation or to persons regardless of their genetic information" (emphasis added)].

234. *Gomes*, 469 F. Supp. 2d at 665 [stating that just because a public high school denied a boy the opportunity to play volleyball for the school's girls' volleyball team, and did not have a boys' team for him to compete on, did not mean that the school had denied him the opportunity to compete in interscholastic athletics].

235. The Kinks, *Lola*, in *Lola Versus the Powerman and the Moneygoround, Part One*, (Morgan Studios 1970) (album).

236. *Kindergarten Cop* (Universal Pictures 1990) (motion picture).

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